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**A PRACTICAL GUIDE: DOCUMENTATION OF CHILDREN  
IN SOUTH AFRICA, INCLUDING UNACCOMPANIED AND  
SEPARATED MIGRANT CHILDREN**

# Documentation of Children in South Africa: Including Unaccompanied and Separated Migrant Children: A PRACTICAL GUIDE

This Practical Guide for Documentation of children, including migrant and displaced children in South Africa was developed by Lawyers for Human Rights (LHR) and Save the Children South Africa (SCSA). This guide includes crucial contributions made by the Documentation Task Team (DSD, UNICEF and IOM) of the National Steering Committee on Care and Protection of Unaccompanied and Separated Migrant Children (USMC). LHR and SCSA would like to thank all those involved in the putting together of this guide, and we would like to acknowledge the contributions and efforts of the following institutions and individuals:

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# PREFACE: NOTE ON THE PREPARATION OF THIS GUIDE

**“Children are the soul of our society. If we fail them, then we have failed as a society.”- Judge Halima Salduker in *S v Presiding Officer of the Children’s Court: District of Krugersdorp* 2012 (6) SA 45 (GSJ)**

This guide was developed to enable **child protection actors** (i.e., social workers, caseworkers, social service professionals, community development workers, and community actors) and community-based justice actors (e.g., community legal counsellors and paralegals) to navigate the legal framework relevant to the documentation of children in South Africa, including **unaccompanied and separated migrant children**. A specific focus is drawn on this category of children in recognition of the prevalence of lack of documentation amongst these children and the limited pathways to durable documentation or legal status for them in South Africa.

## Children's rights are entrenched in the Bill of Rights in the Constitution of South Africa.

These rights apply to all children in South Africa and include; the right to education, the right to health care, the right to social assistance, and the right to be protected from maltreatment, abuse or degradation. However, to secure these rights, children need to be documented. Lack of documentation not only deprives children of their rights but also impacts all areas of their life.

Undocumented children may be excluded from school trips, cannot travel or participate in extramural activities, cannot take a book out at the library and cannot buy a cell phone. They are also exposed to significant child protection issues such as arrest and detention, child labour, child marriage or human trafficking and face an increased risk of statelessness.

In 2015, the National Steering Committee on Unaccompanied and Separated Migrant Children was established to address the unique challenges of this category of children in South Africa. The national steering committee is chaired by the National Department of Social Development (DSD) and comprises of other key government departments such as; the Department of Home Affairs (DHA), the Department of Basic Education (DBE), the Department of International Relations and Cooperation (DIRCO), the Department of Justice and Constitutional Development (DoJCD) and the Department of Health (DoH). The steering committee also works in collaboration with a variety of non-governmental organisations and international institutions known collectively as the National Interagency Working Group (NIAWG) on Unaccompanied and Separated Migrant Children, comprised of; Lawyers for Human Rights (LHR), Save the Children South Africa (SCSA), Centre for Child Law (CCL), the United Nations High Commissioner for Refugees (UNHCR), the International Organisation for Migration (IOM) and the United Nations Children Education Fund (UNICEF), among others.

In recognition of the prevalence of lack of documentation amongst unaccompanied and separated migrant children and the critical role of documentation in the protection of vulnerable children, the National Steering Committee instituted an Undocumented Children Task Team in 2019 with the following objectives:

1. to identify the cases of undocumented children within the child-care system in South Africa;
2. to map and categorise the common documentation issues encountered by undocumented children; and
3. to provide an analysis of the possible legal

pathways to documentation or legal status under each category.

In pursuance of these objectives, the Undocumented Children Task Team resolved to conduct a pilot project in Gauteng Province that would develop into a national project. The pilot project was carried out between 2019 and 2020. 250 cases of undocumented children got identified from data collected from social workers in the province. The analysis revealed that:

1. lack of documentation affects both South African children and migrant children alike;
2. lack of documentation gets exacerbated by barriers to birth registration which include; the prohibitive cost of compulsory DNA tests, undocumented parents who cannot meet the documentation requirement for birth registration, inordinate delays in the finalisation of late registration of birth processes; and
3. lack of documentation is common amongst the following categories of children:
  - children of undocumented South African citizen parents;
  - children of one non-citizen parent and one citizen parent;
  - children of irregular migrants;
  - children of refugees or asylum seekers;
  - children who are orphaned, abandoned or foundlings; and
  - **unaccompanied and separated migrant children.**
4. legal pathways to documentation or legal status in South Africa include the following:
  - citizenship status – 170/250 cases analysed in the pilot project involved undocumented children with a claim to South African citizenship;
  - refugee status – 15/250 cases analysed in the pilot project involved undocumented children with a claim for asylum or refugee status in South Africa; and
  - immigration status – 65/250 cases analysed in the pilot project involved undocumented children who could apply for permanent residence in South Africa.

**Ethical disclaimer:** to protect the confidentiality and identity of the children, the DSD file reference and not the names of the children were used to capture the data and statistical overview.

We believe **every child** deserves a future and their lives, voices and future potential should be fiercely protected at all costs.



Save the Children



# ACRONYMS

**ACRWC** African Charter  
on the Rights and  
Welfare of the Child

**LHR** Lawyers for Human  
Rights

**BID** Best Interests  
Determination

**LRB** Late Registration of  
Birth

**CCL** Centre for  
Child Law

**NGO** Non-governmental  
organisation

**CPO** Child Protection  
Organisation

**SACA** South African Citizenship  
Act

**CPS** Child Protection System

**SCSA** Save the Children South  
Africa

**CYCCs** Child and Youth Care  
Centres

**SAPS** South African Police  
Service

**UNCRC** United Nations  
Convention on the Rights  
of the Child

**SOP** Standard Operating  
Procedure

**DHA** Department of Home  
Affairs

**USMC** Unaccompanied and  
Separated Migrant  
Children

**DSD** Department of Social  
Development

**UNHCR** United Nations High  
Commissioner for  
Refugees

**ID** Identity Document

**UNICEF** United Nations  
Children's Fund

**IOM** International  
Organisation Migration

**VFS** Visa Facilitation Centre

**ISS** International Social  
Services



# INTRODUCTION

It is important to note that every child born in South Africa is entitled to birth registration regardless of whether or not their parents are South African citizens and whether or not they have documented parents. The birth certificate does not necessarily confer South African citizenship; however, it records important details such as birthplace and parentage that enable the child to claim citizenship either in their country of birth or any other country.

A birth certificate is also helpful (and in some cases mandatory) in an application for citizenship, refugee or immigration status. The documentation process of the child thus begins with birth registration.

## OVERVIEW

**CHAPTER 1** Defines some legal concepts relevant to the documentation of children in South Africa that will be used in the guide.

**CHAPTER 2** Outlines the key national, regional and international laws and principles relevant to the documentation of children in South Africa to be referenced in the guide.

**CHAPTER 3** Provides step-by-step guidance on the three main legal pathways to documentation and legal status in South Africa, beginning with birth registration.

**CHAPTER 4** Explores the Children's Court processes relevant to the documentation, care and protection of vulnerable children in South Africa.

**CHAPTER 5** Gives an overview of some positive developments in law and policy that have encouraged greater inclusion and access to rights for undocumented children in South Africa.

**CHAPTER 6** Includes a variety of case studies and proposed solutions to demonstrate the practical application of the guide to common documentation issues.

## THREE LEGAL PATHWAYS TO DOCUMENTATION AND LEGAL STATUS IN SOUTH AFRICA

1

Citizenship  
Status

2

Refugee  
Status

3

Immigration  
Status



**WHEN ASSISTING AN UNDOCUMENTED CHILD TO OBTAIN DOCUMENTATION OR LEGAL STATUS, YOU NEED TO GATHER AS MUCH INFORMATION AS POSSIBLE. THESE STARTING STEPS ARE HELPFUL:**

STEP 01

**CONDUCT AN INTERVIEW ON DOCUMENTATION HISTORY OF THE CHILD**

**ASK**

1. child's place of birth;
2. parents place of birth and nationality;
3. if the parents are deceased or alive;
4. if the child is in the care of the parents, legal guardian or relative;
5. if the child has a travel history or any links to any other country; and
6. what documentary evidence is available to assist in the documentation of the child e.g., parents' documentation, birth certificate, ID and passport.

At this stage, it is also recommended that any persons (e.g., friends, church members, community members and relatives) who might have knowledge of the child's history are contacted and interviewed; and the information is recorded.

STEP 02

**ASSESS THE RELEVANT CITIZENSHIP AND IMMIGRATION LAW**

If the child has any links to any other country (e.g., was born in another country or has lived in another country) - you can research the Citizenship Act or Constitution of that specific country to see if the child could be a citizen of that country. In South Africa, the Constitution and the following laws are relevant:

1. Birth and Deaths Registration Act - deals with birth certificates
2. Identification Act - deals with Identity Documents.
3. South African Citizenship Act - deals with the acquisition of citizenship;
4. Immigration Act - deals with immigration permits for non-citizens; and
5. Refugees Act – deals with refugee or asylum seeker permits/ visas for those with asylum claims.

STEP 03

**CONFIRM CITIZENSHIP OR IMMIGRATION STATUS OF THE CHILD WITH COMPETENT AUTHORITIES**

Contact the embassy, consulate or foreign mission of the country the child has links to, to see if they can confirm the citizenship of the child and can assist with the documentation of the child. If the child is a South African citizen, you can verify this with the Department of Home Affairs.

**NB.: IT IS NOT ADVISABLE TO CONTACT THE EMBASSY, CONSULATE OR FOREIGN MISSION OF THE COUNTRY THE CHILD HAS LINKS TO IF THE CHILD IS A REFUGEE OR MAY HAVE AN ASYLUM CLAIM.**

# LEGAL CONCEPTS

## CITIZENSHIP

This guide uses the terms “citizenship” and “nationality” interchangeably to refer to the legal link between a person and the state. This legal link provides the person certain rights and benefits: the right to enter and leave the country, the right to reside in the country, the right to vote or to be elected to public office, access to diplomatic protection, etc.

## CITIZEN AND NON-CITIZEN

This guide uses the term “citizen” to refer to a person who is a South African citizen, and the term “non-citizen” to refer to a person who is not a South African citizen (also see Migrant).

## STATELESSNESS

The internationally accepted definition of statelessness is found in Article 1 of the UN Convention on the Status of Stateless Persons, 1954, which states that a stateless person is a person who is not recognised as a national by any state under the operation of its laws. Statelessness is the opposite of citizenship.

## AT RISK OF STATELESSNESS

This term describes a person who is not stateless but may become so or whose statelessness may become evident over time due to certain risk factors, e.g., lack of birth registration/identity documentation, lack of birth records, irregular migration, children who have been abandoned or orphaned, or links to more than one country.

## STATELESSNESS DETERMINATION PROCEDURE

This refers to a mechanism to identify stateless people so as to provide them with the appropriate protection, e.g., documentation and rights. South Africa is yet to establish such a procedure (also see Refugee Status Determination procedure).

## UNDOCUMENTED

This term refers to both citizens and non-citizens. It means that you do not have any government-issued proof of identity (e.g., birth certificate, ID, passport, refugee status certificate, asylum seeker visa, or immigration permit). This can be for various reasons, e.g.,

1. the documents are lost or destroyed;
2. the documents are expired; or

3. the relevant authorities refuse to issue documents to you.

## MIGRANT

This guide uses this term to refer to a person who moves to South Africa away from their country of origin or citizenship, temporarily or permanently. Migrants move for a variety of reasons; to join family, to look for a job, to study, or to seek protection as refugees (also see Asylum Seeker and Refugee).

## IRREGULAR MIGRANT

In this guide this term refers to a migrant who does not have lawful immigration status in South Africa or who entered the country without following proper immigration procedures. This term should not be confused with “undocumented person” and is preferred to the colloquial term “illegal immigrant”.

## LEGAL STATUS

In this guide, legal status refers to citizenship status, refugee status, or immigration status.

## CITIZENSHIP STATUS

See “Citizen”

## REFUGEE STATUS

This term refers to the protection afforded to migrants recognised as refugees in South Africa.

## ASYLUM SEEKER

This term describes a migrant who has fled persecution, violence, war or conflict in their country of origin or citizenship and has crossed an international border to seek protection in another country.

## ASYLUM SEEKER VISA

This is a visa issued to an asylum seeker who has submitted an application for refugee status in South Africa. This visa allows the holder to live, work or study in South Africa while the application is being processed. It is subject to renewal.

## REFUGEE STATUS DETERMINATION

This refers to the procedure to process an application for refugee status.

## REFUGEE

If the application for refugee status is successfully

processed, the asylum seeker becomes a recognised refugee with refugee status in South Africa.

### REFUGEE STATUS CERTIFICATE

This is a certificate issued to a refugee in South Africa as formal recognition of their refugee status. This certificate allows the holder to live, work or study in South Africa. It is subject to renewal but it gets issued for a longer term than an asylum seeker visa.

### IMMIGRATION STATUS

This term refers to the protection afforded to migrants who have successfully applied for a visa or permit under the Immigration Act in South Africa, e.g., a work visa, a study visa, a relative's visa, or a permanent residence permit.

### IMMIGRATION VISA PERMIT

A temporary residence visa or permanent residence permit issued to a migrant in terms of the Immigration Act. It allows non-citizens to live, work or study in South Africa depending on the specific conditions of the visa or permit. Temporary residence visas are subject to renewal.

### LEGAL IDENTITY

Legal identity is defined as the fundamental characteristics of a person's identity, e.g., your legal name, sex, date of birth, or place of birth (you can prove legal status through a birth certificate, identity document or passport, as well as a citizenship certificate, asylum seeker visa, refugee status certificate, or immigration visa or permit).

### BIRTH REGISTRATION

Birth registration is the recording of the birth of a child in an official government registry. The Department of Home Affairs is responsible for birth registration in South Africa.

### BIRTH CERTIFICATE

An official document issued by the Department of Home Affairs upon completing the birth registration process. It is a child's first legal proof of identity and contains the following details: the child's legal name, date of birth and place of birth and the parent(s) names, date of birth, place of birth and citizenship.

### IDENTITY DOCUMENT (ID)

A compulsory document issued by the Department of Home Affairs to citizens and permanent residents who are 16 years and older. Refugees are also issued with an identity document through the Refugee Reception Office.

### PASSPORT

A document issued to citizens by the Department of Home Affairs that allows the holder to travel outside the borders of South Africa and to return.

### CHILD

A child is defined as a person below the age of 18 years old.

### ABANDONED CHILD

According to the Children's Act, an abandoned child is a child who has been deserted by the parent, guardian or caregiver - or who has had no contact with the parent, guardian or caregiver for a period of at least three months.

### ORPHANED CHILD

According to the Children's Act, an orphaned child is a child who has no surviving parent caring for them.

### FOUNDLING CHILD

A foundling is a child who has been found abandoned in the country and whose place of birth or parentage is unknown (N.B.: the difference between an **Abandoned child** and a **Foundling child**, is that the place of birth or parentage of an Abandoned child may be known).

### UNACCOMPANIED CHILDREN

Children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. (General Comment No. 6 (2005) on the Treatment of Unaccompanied and Separated Children).

### SEPARATED CHILDREN


Children who have been separated from both parents or previous legal or customary primary caregiver, but not necessarily from their relatives and, it may include children accompanied by other adult family members. (General Comment No. 6 (2005) on the Treatment of Unaccompanied and Separated Children)

### NATIONAL REFERRAL MECHANISM

In this context, it is a co-operative framework through which state and non-state actors fulfil their obligations to protect and promote the human rights of cross-border migrants by coordinating efforts in a strategic partnership with civil society, with a view of referring cross-border migrants to appropriate service providers.

### SMUGGLING OF MIGRANTS

The procurement to obtain, directly or indirectly, a financial or another material benefit of the illegal entry or stay of a person into a state of which the person is not a national or a permanent resident. (Smuggling of Migrants Protocol, 2000).



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# LEGAL FRAMEWORK

The legal framework dealing with documentation and legal status for children in South Africa is based on the following key national, regional and international laws and principles that are applicable in South Africa.

## 2.1: NATIONAL LAW

### Constitution of the Republic of South Africa 1996 ("Constitution"):

Section 28 of the Constitution guarantees the rights of all children in South Africa, irrespective of their documentation or legal status. Section 28(a) states that, "every child has the right to a name and a nationality from birth". This entails the right to a legal identity, the right to be registered at birth, and to be protected from statelessness.

### Birth and Deaths Registration Act 51 of 1992 ("BDRA"):

The BDRA gives effect to Sec 28(a) of the Constitution and provides for the registration of all children born in South Africa, whether to South African citizen parents or non-citizen parents.

### South African Citizenship Act 88 of 1995 ("SACA"):

The SACA governs the acquisition and loss of South African citizenship. It states that South African citizenship is acquired by birth, by descent or by naturalisation.

### South African Refugees Act 130 of 1998 ("Refugees Act"):

The Refugees Act applies to all migrants who enter South Africa with the wish to apply for refugee status. It defines the standard that such applicants must meet to be granted protection and refugee status in the country.

### South African Immigration Act 13 of 2002 ("Immigration Act"):

The Immigration Act sets out the conditions under which migrants (who have no claim to citizenship status or refugee status) can enter the country, stay in the country and leave the country.

### Children's Act 38 of 2005 ("Children's Act"):

The Children's Act governs matters relating to the care, protection and well-being of children in

South Africa, regardless of their documentation or legal status. It further makes provision for the establishment of Children's Courts and processes to ensure that children in need of care and protection are provided with adequate care.

## 2.2: REGIONAL LAW

### African Charter on the Rights and Welfare of the Child 1999 ("ACRWC"):

The principal legal instrument for the protection and promotion of children's rights in Africa is the ACRWC. Like the Constitution - the ACRWC guarantees the right to legal identity, the right to birth registration and to be protected from statelessness. (See Article 6 and General Comment 6 of the African Committee of Experts on the Rights and Welfare of the Child General Comment on the interpretation of Article 6).

### African Charter on Human and People's Rights 1981 (ACHPR):

The ACHPR does not contain a direct or specific provision on the right to a nationality. However, the African Commission on Human and People's Rights have declared that the right to a nationality is implied in Article 5 (i.e., the right to human dignity and recognition of legal status) and essential to the enjoyment of other fundamental rights and freedoms under the Charter. This was re-affirmed in Resolution 234 on the Right to a Nationality (2013).

### African Union Convention Governing the Specific Aspect of Refugee Problems in Africa 1969 ("OAU Refugees Convention"):

The OAU Refugees Convention is the primary document that addresses matters of refugees and asylum seekers at the regional level.

## 2.3: INTERNATIONAL LAW

### Universal Declaration of Human Rights 1948 ("UDHR"):

The UDHR is the foundation for international human rights law. Article 15 unequivocally states

that: “Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”

**United Nations Convention on the Rights of the Child 1989 (“UNCRC”):**

The UNCRC provides for the civil, political-economic, social, health and cultural rights of children at an international level. Like the Constitution and the ACERWC, the UNCRC guarantees the right to legal identity, the right to birth registration and to be protected from statelessness (See Articles 7 and 8).

**United Nations Convention Relating to the Status of Refugees 1951 (1951 Convention) and the United Nations Protocol Relating to the Status of Refugees 1967 (1967 Protocol):**

The 1951 Convention is the centrepiece of international refugee protection, providing the most comprehensive codification of the rights of refugees at an international level. It is read together with the 1976 Protocol, which confirms its universal coverage.

**2.4: LEGAL PRINCIPLES OF CHILD RIGHTS**

There are four cardinal legal principles of child rights. These principles are universal and serve as a yardstick for measuring all actions, laws and policies (by public or private actors) that affect children. They assist in guaranteeing a “child-sensitive” approach when dealing with matters that affect children:

- 1. Non-discrimination and equality:** All children are entitled to the same rights without discrimination of any kind irrespective of the child's (or child's parents' or legal guardians') race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, fortune, birth or other statuses. (Section 9 and 10 of the Constitution, Article 3 ACRWC and Article 2 UNCRC).
- 2. Best interests:** All matters concerning a child/children must take into account the best interest of the affected child/children, i.e., the best interest of the child outweighs all other competing interests. (Section 28(2) of the Constitution, Article 4(1) ACRWC and Article 31 UNCRC).
- 3. Participation and inclusion:** All children have the right to express their views in all matters affecting them and for those views to be given due weight/consideration per the age and maturity of the child. This principle reflects the position of a child as an active participant in the promotion, protection and monitoring of their rights. Participation ensures that

children are engaged actors rather than passive beneficiaries in the fulfilment of their rights. It also ensures children are capable of accessing their rights and have a voice, as well as a stake, in the protection of their rights and welfare. (Section 9 and 10 of the Constitution, Article 4(2) and 7 ACRWC and Article 12(1) UNCRC)

- 4. Survival and development:** All children have the right to life, survival and development – the term “development” is interpreted widely beyond just physical health – it includes mental, emotional, cognitive, social and cultural development. (Section 11 and the socio-economic rights in the Constitution, Article 5 ACRWC and Article 6(2) UNCRC).



Picture 1: South African Birth Certificate



Picture 2: Handwritten Birth Certificate



# PATHWAYS TO DOCUMENTATION AND LEGAL STATUS FOR CHILDREN IN SOUTH AFRICA

## 3.1. BIRTH REGISTRATION

**Applicable law: Births and Deaths Registration Act, 51 of 1992 (“BDRA”)**

The BDRA (and its regulations) regulates the registration of births and deaths in South Africa. It applies to all South African citizens and to non-citizens who reside in South Africa.

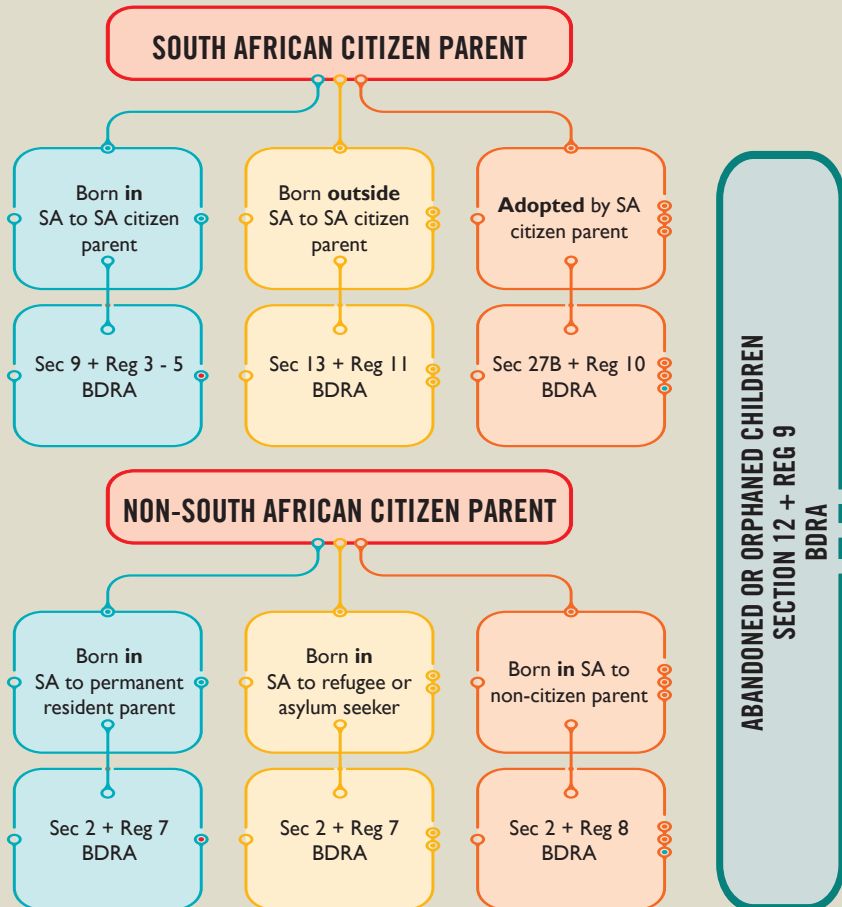


Figure A: Birth Registration under the Birth and Deaths Registration Act



## What is birth registration and why is it important?

Birth registration is the process of recording the birth of a child in an official government registry. The Department of Home Affairs is responsible for birth registration in South Africa.

An official document known as a **birth certificate** gets issued as proof of registration upon completion of the process.

Birth registration is a human right that enables children to secure other human rights such as;

1. the right to education - children without birth certificates get turned away from schools, not permitted to write examinations or denied examination results;
2. the right to healthcare - children without birth certificates often struggle to access healthcare services, including vital vaccinations and immunisations;
3. the right to social assistance - children without birth certificates cannot access child support grants, disability grants or other social relief packages; and
4. the right to citizenship - a birth certificate does not confer citizenship, but it records details like place of birth and parentage that enable the child to claim citizenship either in their country of birth or any other country.

Children without birth certificates may not be able to claim citizenship anywhere and could become **stateless**.

## Who is entitled to birth registration in South Africa?

Section 28 of the Constitution of South Africa states that:

*“Every child has the right to a name and a nationality from birth.”*

This means every child born in South Africa is entitled to birth registration regardless of whether or not their parents are South African citizens and whether or not their parents are documented.

The UN Convention on the Rights of the Child (UNCRC, Article 7) and the African Charter on the Rights and Welfare of the Child (ACRWC, Article 6) also recognise the right to birth registration for all children and oblige state parties (including South

Africa) to fulfil this right

Note: if the child has citizenship in another country that is not South Africa, that country may also issue a birth certificate recognising their citizenship; this often gets done through an embassy or consulate.

## What does a birth certificate look like?

The birth certificate sets out the child's legal name, date of birth and place of birth and the parent(s) names, date of birth, place of birth and citizenship.

Prior to 2013, South Africa issued abridged or “short” birth certificates with only the child's details and unabridged or “long” birth certificates which included both the child's and parent(s) details. Only unabridged birth certificates are issued now.

SEE SA CITIZEN BIRTH CERTIFICATE AND HANDWRITTEN BIRTH CERTIFICATE FOR NON-SA CITIZEN ON PAGE 12 - PICTURE 1 AND 2

Note: if the child is a South African citizen - they are issued a birth certificate with an ID number, and their details are entered into the National Population Register (See Sec 5(2) BDRA). If the child is a non-citizen, they are issued a handwritten birth certificate without an ID number, and their details are therefore not recorded in the National Population Register (See Sec 5(3) BDRA). The handwritten birth certificate is less secure considering that it cannot be re-issued if lost, damaged or destroyed.

## Who must initiate the birth registration process (i.e., give notice of birth)?

### Registration by parents:

The Birth and Deaths Registration Act (BDRA) states that notice of birth must be given by both parents of the child where possible, although one parent is also fine.

### Registration by adoptive parents:

If the child has been adopted and their birth has not been registered, then notice of birth must be given by the adoptive parents. However, if the child's birth was registered prior to adoption, then the adoptive parents must apply to have the adoption recorded in the birth register.

The adoptive parents must submit the following

supporting documents:

1. Children's Court adoption order; and
2. a certified copy of the child's original birth certificate .

#### Registration by social worker:

If the child has been orphaned or abandoned and their birth has not been registered, then notice of birth must be given by a social worker after conducting a **Children's Court inquiry** (See Chapter 4 on Children's Court and Child Protection Processes).

The social worker must submit the following supporting documents:

1. Children's Court order and the social workers report presented to the Children's Court;
2. a certified copy of the ID or passport and visa/permit of the social worker;
3. a certified copy of the ID or passport and visa/permit of the child's parents (if available); and
4. a certified copy of the death certificate of the parents of the child (if available).

Note: if an orphaned or abandoned child is in the care of any other relative who is not the parent(s), e.g., a grandparent, the notice of birth must still be given by a social worker. The relatives can assist the social worker in the birth registration process by providing all information and documentation necessary for the registration of the child. In the event of a parent being traced after the registration has taken place, then it is possible to submit an application to correct or add to the details already captured in the birth certificate .

#### **When should birth registration be initiated, and what is the process?**

The BDRA stipulates that notice of birth must be given to the Department of Home Affairs within 30 days of the child's birth. If the birth is registered after this period, late registration of birth ("LRB") is permitted - but there are additional requirements to be met. (See page 17, **Figure B**).

Notice of birth is given by completing a prescribed form (referred to as a DHA-24). It must be accompanied by proof of birth which is also on a prescribed form (either a DH24/PB for children born in health care facilities or a DHA24/PBA for children born at home). If the child was born in a health care facility, the proof of birth form must be completed, stamped and signed at the facility. It is advisable that

this be done soon after the child's birth, but it is possible to go back to the facility and request the form any time afterwards. If the child was born at home, the proof of birth form is completed by someone who witnessed the birth of the child.

#### **DHA and DoH joint circular dated 25 October 2016 on proof of birth forms:**

The circular states that it is the joint responsibility of DHA and DoH officials to ensure that every child born in a health care facility receives the proof of birth form, ideally before leaving the facility. Further, the circular states that the proof of birth form is important as it is a requirement for birth registration.

#### **What is the procedure if a South African citizen is born outside South Africa?**

The applicant must conduct a **foreign birth registration**. The same requirements for birth registration in South African must be met, including the following:

1. notice of birth given at the Department of Home Affairs in South Africa or the South African embassy, mission or consulate abroad;
2. birth certificate issued in the country of birth (the Department of Home Affairs will verify the authenticity of the birth certificate) and
3. documentary proof of the South African parent's South African citizenship (the parents might also be required to complete a determination of citizenship form known as a DHA-529).

#### **What happens after the notice of birth is given?**

The Department of Home Affairs may request an interview with a screening committee before the application is approved. The screening committee will interview the applicants and submit recommendations on whether the application must be approved or not.

The following may happen after the notice of birth is given:

1. the application is approved, and a birth certificate is issued and collected by the applicant from the local office or
2. the application is rejected, and the applicant must be informed why in writing (the rejection

can be challenged through an internal appeal or review with the help of a lawyer).

The first birth certificate is issued free of charge, but if the certificate is lost, damaged or destroyed, it can be re-issued at a fee.

It is also possible to apply for rectification of errors or amendments to details on the birth certificate.

### **DHA Circular No. 5 of 2014 on DNA testing for birth registration:**

The circular states that DNA testing is a requirement in the following cases:

1. For birth registration of children born to unmarried parents;
  - if both parents are South African citizens, no DNA test is required; or
  - if one parent is a non-South African citizen, no DNA test is required if the birth is registered within 30 days of the birth of the child unless an official of the department has “reasonable suspicion” regarding the paternity of the child.
2. For an application for the insertion of an unmarried father;
  - if the father is a South African citizen, no DNA test is required; or
  - if the father is a non-South African citizen, a DNA test is required.
3. For an application for the alteration of particulars of the registered father of a child born to unmarried parents - a DNA test is required regardless of the citizenship status of the father;

Process:

- obtain DNA test referral letter from the nearest DHA local office
- book an appointment at one of the listed centres of the National Health Laboratory Services (the DNA test fee is R750 per person); and
- submit results with an application for birth registration (results must not be older than 3 months).

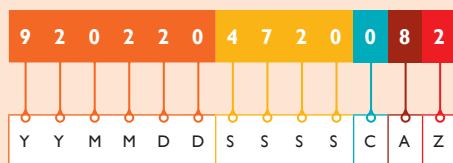
### **When can you apply for an identity document (“ID”)?**

An identity document (“ID”) is a compulsory document issued by the Department of Home Affairs under the Identification Act 68 of 1997 to citizens and permanent residents that are 16 years and older. (Note: refugees can also apply for IDs at Refugee Reception Offices under the Refugees Act).

South African citizens and permanent residents are issued IDs in the form of a “green book”, and the ID number is formulated as follows:

1. the first six digits represent your date of birth; for example, 890518 is 18 May 1989 (the format is “YYMMDD”);
2. the next four digits (SSSS) define your gender – females are assigned numbers ranging between 0000-4999 and males from 5000-9999; and
3. the next digit shows if you are a South African citizen – 0 – or a permanent resident – 1.

### **South African ID Number**



The first 6 digits are based on date of birth  
**20 Feb 1992**

The second 4 digits are used to define gender  
**Female: 0000 - 4999 or Male: 5000 - 9999**

This digit is used to classify citizenship  
**SA citizen: 0 or Permanent resident: 1**

The last digit is used as a checksum digit to  
**verify the ID number**

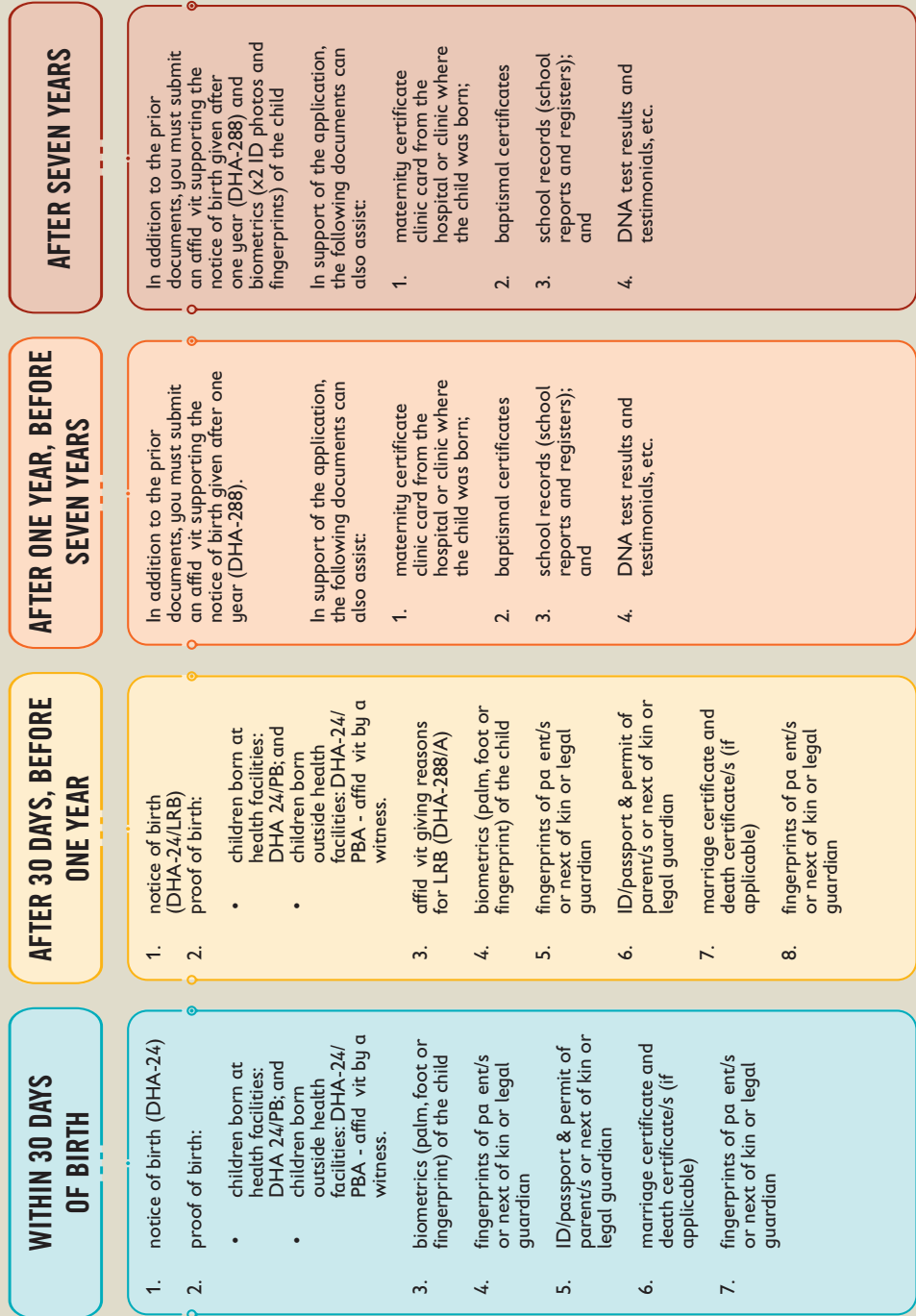


Figure B: Requirements for Birth Registration under the Regulations

Note: South African citizens born in South Africa can now apply for a Smart ID Card instead of the “green book”. The requirements for an ID application include the following:

1. application form (DHA-9 available at the office)
2. certified copy of the birth certificate and naturalisation certificate, permanent residence certificate or refugee status certificate (which ever is applicable);
3. certified copy of parents’ identity documents;
4. two identical colour ID photos; and
5. fingerprints to be taken at the office and imprinted on the application form.

The first ID is issued free of charge, but if it is lost, damaged or destroyed, it can be re-issued at an extra cost. A temporary ID can be issued at a fee while you wait for your ID.

#### Case law:

The right to birth registration has been interpreted in various judgments. Some useful judgments are summarised below.

*Hadebe v Minister of Home Affairs [2007] JOL 18906 (D) - the mother of a child turned to the High Court following failure by the government to amend the details of her child's birth certificate. The court found that Sec 28 (1)(a) imposes a duty on DHA to ensure the registration of births:*

The court stated that it is clear that if a child has, as is provided in Sec 28(1)(a) of the Constitution, the “**right to a name from birth**”, the official of the state who is charged with doing those things that enable his or her name to be recorded must have a correlative duty to facilitate the registration of that name in the records of the state. The court further stated that it is certainly not part of the function of the official to place technical difficulties in the way of such registration.

*SS Moyo v Minister of Home Affairs (2011) Case No: 44424/09 NGHC 6 June 2011 – citizenship can be determined from the contents of a birth certificate, e.g., place of birth or parentage – the court confirmed that a parent's details could be added to the birth certificate even if the parent is deceased:*

This application on behalf of a minor child (Steven Moyo) to be declared a South African citizen

in terms of Sec 2 (1)(b) of SACA. His mother was an asylum seeker from Zimbabwe, and his father was a South African citizen, and they were unmarried. Steven sought to claim South African citizenship based on his father's citizenship, but his father died before his birth was registered. DHA refused to include the father's details in Steven's birth certificate because it insisted that according to the regulations pertaining to birth registration of children born to unmarried parents, the father must present himself in person and acknowledge paternity in writing to be included on the birth certificate. Therefore, Steven could not claim South African citizenship. Based on evidence confirming his father's paternity, i.e., that he lived together with Steven's mother in a spousal relationship and a positive DNA test result, the court ordered DHA to add Steven's father's details to his birth certificate and to confirm his South African citizenship.

*Menzile Naki and another v Director General: Department of Home Affairs and Another (4996/2016) [2018] ZAECHGHC 90 – confirms that undocumented mothers must be allowed to register the births of their children:*

Mr Naki (a South African citizen) and his partner (a DRC citizen) had a child together in South Africa. They are unmarried. Mr Naki's partner's documentation had expired just before giving birth, and she had not been able to travel to renew it. Nonetheless, they approached DHA to register the child under Mr Naki but, DHA refused to do so due to the mother's lack of valid documentation. Regulations 3(3), 4(3) and 5(3) to BDRA state that valid documentation of the parents is compulsory for birth registration. LRC, on behalf of Mr Naki, subsequently approached the High Court to have the regulations declared unconstitutional and the High Court agreed that the regulations were unconstitutional. The High Court found that the requirement for valid documentation should not be so strict, and DHA should only request that valid documentation be submitted “where available”.

*Centre for Child Law v Minister of Home Affairs (2020) – further confirms the right of unmarried fathers to register the births of their children on an equal basis as mothers and married fathers:*

Mr Naki (a South African citizen) and his partner (a DRC citizen) had a child together in South Africa. They are unmarried. Mr Naki's partner's documentation had expired just before giving birth,

and she had not been able to travel to renew it. Nonetheless, they approached DHA to register the child under Mr Naki but, DHA refused to do so due to the mother's lack of valid documentation. Section 10 and Regulation 12(1) to BDRA state that in the case of a child born to unmarried parents, only the mother can give notice of birth. LHR and CCL further sought to have Sec 10 of the BDRA declared unconstitutional to the extent that it prevents unmarried fathers from registering the births of their children if the mother is unable, unwilling or unavailable to do so. This leaves many children at risk of statelessness even if the father can assist with their registration. It also constitutes unfair discrimination against unmarried fathers. The High Court ruled that Sec 10 is unconstitutional

and referred the order of constitutional invalidity to the Constitutional Court for confirmation

3.2. CITIZENSHIP STATUS

Applicable law: South African Citizenship Act, 88 of 1995 (SACA)

The SACA (and its regulations) stipulates who is entitled to South African citizenship and how South African citizenship is acquired.

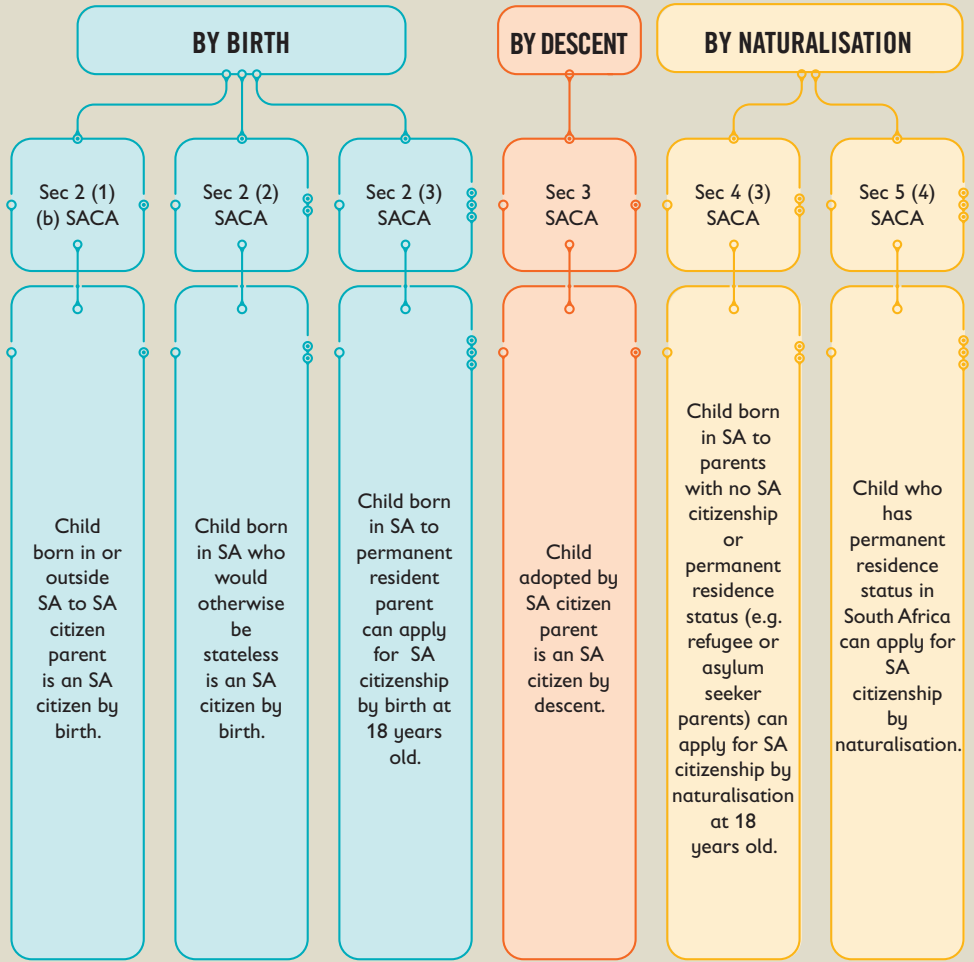


Figure C: Acquisition of Citizenship under the South African Citizenship Act

As demonstrated in **Figure C** (Page 19), there are three ways to acquire South African citizenship: by birth, by descent or by naturalisation.

### 3.2.1. SOUTH AFRICAN CITIZENSHIP: CITIZENSHIP BY BIRTH (A)

**Section 2(1)(b) of SACA provides that a child born in or outside South Africa to at least one South African citizen parent is a South African citizen by birth.**

The acquisition of citizenship under this section is automatic (meaning that it does not require an application).

The section does not mention birth registration - however, birth registration is necessary to ensure that the child's details are recorded in the National Population Register; if the child is a South African citizen, they get issued a birth certificate with an ID number and their details are entered into the National Population Register (See Sec 5(2) BDRA). The birth certificate will allow the child to apply for other official enabling documents such as an ID or passport as they age.

#### Requirements:

1. born in or outside South Africa;
2. one or both parents are South African citizens at the time of birth; or
3. birth registration and birth certificate .

#### Strategy:

1. conduct birth registration process at DHA if necessary (note relevant processes for **late registration of birth** or **foreign birth registration**);
2. submit an application for ID at DHA if the child is 16 years old and above; and
3. if the parents are unmarried and one parent is a non-citizen, it may be necessary to conduct a DNA test with the South African citizen parent to prove a biological link.

#### Case law:

*Chisuse v Minister of Home Affairs (2020) ZACC 20* – confirms that children born to a South African citizen(s) outside South Africa are South African citizens:

The Constitutional Court confirmed that children

born to a South African citizen parent outside of South Africa are automatically South African citizens by birth under Sec 2(1)(b) of SACA. The case concerned five (5) people who were born outside of South Africa during Apartheid and while their parents were in exile. The judgment looks at the importance of citizenship in South Africa, given its colonial and Apartheid past. It also looks at the meaning of citizenship beyond legal terms and its importance to a person's dignity. The Constitutional Court stated that citizenship is not merely a matter of legal status, **"it goes to the core of a person's identity and their sense of belonging in a community."**

*Breytenbach NO v Minister of Home Affairs (2016) ZAGPPHC 470* – confirms that a child born to at least one South African parent is entitled to citizenship in terms of Sec 2(1)(b) SACA. Further confirms that birth registration is not a prerequisite for citizenship but one cannot practically access their citizenship without completing the birth registration process and obtaining a birth certificate .

This was an application launched by a curator ad litem (Ms Breytenbach) on behalf of a minor child (Nicolas Lwazi Msomi) for Nicolas to be declared a South African citizen in terms of Sec 2(1)(b) of SACA. Nicolas' mother was a Zambian citizen and his father was a South African citizen. Nicolas was issued a birth certificate which was later cancelled in 2010 because the mother had failed to prove Nicolas was born in South Africa and DHA had no proof of registration (DHA had nonetheless issued him an abridged birth certificate in 2006 and 2008, and an unabridged birth certificate in 2008). Nicolas' father was absent in Nicolas' life but his details appeared on the birth certificate and on a maintenance order. After the birth certificate was cancelled, Nicolas managed to obtain a proof of birth form from Tembisa Hospital to prove that he was indeed born in South Africa. The court declared that Nicolas is a South African citizen in terms of Sec 2(1)(b) and ordered DHA to issue him a birth certificate and compelled his father to assist with the birth registration process by providing his identity documents.

### 3.2.2. SOUTH AFRICAN CITIZENSHIP: CITIZENSHIP BY BIRTH (B)

**Section 2(2) of SACA provides that a child born in South Africa with no other citizenship or right to claim citizenship in any other**



**country (i.e., stateless) is a South African citizen by birth.**

South Africa is one of the few African countries with this specific provision in its citizenship laws to protect children from statelessness. Statelessness, equal to lack of documentation, can have harmful consequences for children and often results in a denial of basic human rights and services such as access to school, health care services and social assistance.

To secure citizenship under this section - it is advisable to submit an application to DHA in the form of an affidavit or a statement of facts relating to the child's statelessness and accompanied by the relevant documentary evidence.

However, due to a lack of domestic laws on statelessness or a **Statelessness Determination Mechanism**, it can be complex and hard to determine eligibility. Furthermore, it is difficult to implement this provision in practice because DHA has not drafted regulations that can guide the applicants and administrators on the application process that need to be followed (including the provision of application forms if needed).

#### Requirements:

1. born in South Africa;
2. no citizenship in any other country i.e., stateless; or
3. birth registration and birth certificate .

#### Strategy:

1. conduct birth registration process at DHA if necessary;
2. conduct informal statelessness determination process by following these steps:
  - have an interview on documentation history of child;
  - assess the relevant citizenship and immigration law; and
  - confirm citizenship or immigration status of a child with competent authorities.
3. submit an application for citizenship to DHA in the form of an affidavit or a statement of facts relating to the child's statelessness and accompanied by the relevant documentary

evidence, e.g., birth certificate , parents' documentation, confirmation of non-recognition of citizenship from the embassy, consulate, or foreign mission of any country that the child may have links to; or

4. alternatively, compile all relevant documents and refer the case to a lawyer.

#### Case law:

The interpretation of Sec 2(2) SACA was dealt with by our courts in the case summarised below.

*Minister of Home Affairs v DGLR (2016) Unreported judgment Case No: 1051/2015 (SCA) – confirms that children who would otherwise be stateless, and are born in South Africa are entitled to citizenship and DHA ordered to draft regulations for the implementation of Sec 2 (2). Further confirms that it is not in the best interests of a child to be rendered stateless, nor to remain stateless:*

This case concerns a child who was born in South Africa to Cuban parents who had permanent residence in South Africa. Her birth was registered, and she was issued a birth certificate . Her parents believed she would obtain Cuban citizenship because they were Cuban, but when they approached the Cuban embassy, they discovered that this would not be possible because the parents had lived outside Cuba for an extended period, they were now deemed "permanent emigrants" and lost the right to pass on their citizenship to their child. Her parents attempted to apply for South African citizenship under Sec 2(2) SACA because their child was stateless. DHA refused to grant the child South African citizenship on the basis that Cuba ought to have granted her citizenship or that she would be eligible to apply for permanent residency based on her parents' status. LHR successfully challenged this refusal in the High Court. The court declared that the child was entitled to South African citizenship by birth under Sec 2(2) SACA and ordered DHA to draft regulations guidelines for the application process under this provision by March 2018.

(Note: at the time of publishing this guide, the DHA had still not drafted the regulations).

### 3.2.3. SOUTH AFRICAN CITIZENSHIP: CITIZENSHIP BY BIRTH (C)

**Section 2(3) of SACA provides that a child born in South Africa to a permanent resident parent can apply for South African citizenship by birth at 18 years old.**

The SACA has been amended several times over the years, the most recent being the 2010 amendment (effective from 2013). Prior to the 2010 amendment, children born in South Africa to permanent residents' parents qualified for citizenship at birth. However, following the amendment, children born in South Africa to permanent residents' parents only become eligible for citizenship at 18 years old.

Note: before the child turns 18 years old, they can apply for permanent residence status based on their parents' status under Sec 26(c) or 27(g) of the Immigration Act. It is advisable to apply soon after the child's birth is registered to ensure that the child is documented and has legal status in the interim.

#### Requirements:

1. born in South Africa;
2. one or both parents have permanent residence status in South Africa at the time the child is born;
3. birth registration and birth certificate or
4. the child has lived in South Africa from date of birth to the date of turning 18 years old.

#### Strategy:

1. conduct birth registration process at DHA (note the relevant process for children of permanent residents);
2. submit an application for citizenship on affidavit at DHA attaching documentary evidence, e.g., birth certificate, baptismal certificate, school records, testimonials, or parents' permanent residents permits; and
3. alternatively, compile all relevant documentation and refer the case to a lawyer.

#### Case law:

*Mulowayi v Minister of Home Affairs (2019) ZACC 01 - children born in South Africa to parents who are not South African citizens but who are permanent residents in South Africa at the time of the child's birth - qualify for citizenship when they reach 18 years old under latest*

*amended SACA:*

Mr and Mrs Mulowayi were refugees from the Democratic Republic of Congo who arrived in South Africa around 2002. In 2011 they were granted permanent residence status. They had three children, all born in South Africa after 2011 and after being granted permanent residency. The two older children were recognised as South African citizens by birth because of the previous version of SACA that automatically granted citizenship at birth to children of permanent residents born in South Africa. SACA was amended in 2010 (effective from 2013) to state that children of permanent residents born in South Africa only become eligible for citizenship upon becoming a major at 18 years old. This meant the family's youngest child born in 2017 did not automatically qualify for citizenship at birth like his siblings, and he would only qualify for citizenship at 18 years old.

### 3.2.4. SOUTH AFRICAN CITIZENSHIP: CITIZENSHIP BY DESCENT

**Section 3 of SACA provides that a child adopted by a South African citizen parent is a South African citizen of descent.**

The acquisition of citizenship under this section is automatic (meaning that it does not require an application).

An adopted child is regarded as the biological child of the adoptive parents and must therefore be entitled to obtain the citizenship of their adoptive parents. If the child's birth has not been registered at the time of adoption, then birth registration must be conducted by the adoptive parents. If the child's birth has already been registered at the time of adoption, then the adoptive parents must apply to record the adoption on the birth register. The adoptive parents can also conduct the relevant process to change the ID number and surname of the child, if necessary.

#### Requirements:

1. the adoptive parent(s) is South African citizen(s);
2. Children's Court adoption order; and
3. birth registration and birth certificate.

#### Strategy:

1. conduct the adoption process in terms of

- Sec 245 of the Children's Act and obtain Children's Court adoption order;
- 2. conduct birth registration process at DHA (note the relevant process for registration by adoptive parents and application to record the adoption in the birth register); and
- 3. submit an application for ID at DHA if a child is 16 years old and above. See Section on “**Identity Documents in South Africa**” (Page 16,18 and 19).

### 3.2.5. SOUTH AFRICAN CITIZENSHIP: CITIZENSHIP BY NATURALISATION (A)

**Section 4(3) of SACA provides that a child born in South Africa to parents with no citizenship or permanent residence status qualifies to apply for South African citizenship by naturalization at 18 years old.**

This section allows children born in South Africa to parents with no South African citizenship or permanent residence (e.g., refugees, asylum seekers or regular and irregular migrants, undocumented and stateless migrants) to apply for South African citizenship by naturalisation at 18 years old.

However, it is hard to implement this provision in practice because DHA has not drafted regulations that can guide applicants and administrators on the application process to be followed (including the provision of application forms if needed).

#### Requirements:

1. born in South Africa;
2. parents are not South African citizens nor permanent residents in South Africa at the time of the child's birth;
3. birth registration and birth certificate or
4. the child has lived in South Africa from date of birth to the date of turning 18 years old.

#### Strategy:

1. conduct birth registration process at DHA (note the relevant process for children of refugees, asylum seekers and non-citizens in general);
2. submit an application for naturalisation in terms of Sec 4(3) of the SACA once the child is 18 years old and above. Attach the following supporting documents:
  - affidavit or statement of facts;

- birth certificate
- parents' documentation (if available); or
- proof of living in South Africa from date of birth to the date of turning 18 years old - can include but not limited to, school records (e.g., CEMIS report from the provincial Department of Education, or a letter from the school principal confirming attendance from Grade X – Grade Y), baptismal certificate, testimonials from teachers/community leaders/relatives, school reports, and attendance registers; or

3. alternatively, compile all relevant documents and refer the case to a lawyer.

#### Case law:

Two main court judgments that have dealt with the interpretation of this provision.

*Minister of Home Affairs v Mariam Ali (2018) ZASCA 169 SCA – confirms that children born before and after 2013 who meet the four requirements of Section 4(3) qualify for citizenship by naturalisation. DHA ordered to draft regulations for the implementation of Sec 4(3) and to accept applications on affidavit until the regulations are published:*

The case concerns the right to obtain citizenship by naturalisation of five (5) children born in South Africa - whose parents are not South African citizens and were not permanent residents at the time of their respective children's births. The DHA had refused to receive and grant the applications for citizenship by naturalisation because:

1. DHA had not drafted regulations to guide the process (e.g., a designated form to be filled in by applicants and a list of supporting documents); and
2. the six children were born between 1996 and 1998, and DHA claimed that this provision only applies to children born from 2013 (this is because the SACA was amended in 2010, and the amendments which included this new section were only effective from 2013).

The court held that the section applies to all children born before and after 2013 who satisfy the requirement. The court further ordered DHA to draft regulations guidelines for the application process under this provision by November 2019. The court further ordered DHA to accept the applications on affidavit until regulations are

published, and further that the section applies to all children born before and after 2013 who satisfy the requirement (at the time of publication, DHA had still not published the regulations).

*Minister of Home Affairs v Jose (2020) ZASCA 152 SCA – applications for citizenship by naturalisation under Sec 4(3) SACA are non-discretionary, and once an applicant satisfies the four requirements, they qualify for South African citizenship.*

The case concerns two brothers who were born in South Africa. Their parents are Angolan citizens who fled Angola in 1995 and sought asylum in South Africa. The brothers were born in 1996 and 1997 - had their births registered, and have lived in South Africa their whole lives and have never been to Angola. The family was granted refugee status in 1997 until 2014 - when their status got withdrawn due to the “**Angolan cessation**”. The DHA refused to receive or grant their applications for citizenship by naturalisation because the DHA had not made regulations to guide the process. The High Court ruled that the DHA must immediately grant the brothers citizenship because they met the four (4) requirements of Sec 4(3) of SACA. The Supreme Court of Appeal confirmed this decision and reaffirmed that applications for citizenship by naturalisation under Sec 4(3) are non-discretionary.

### **What is the “Angolan Cessation”?**

**In 2012, the UNHCR recommended that due to the end of the civil war and political instability in Angola, Angolans no longer needed international protection or refugee status. Following this recommendation, the South African government announced a cessation of refugee status for Angolan refugees in South Africa. Many Angolans initially fled to South Africa in the late 1990s and early 2000s, which meant at the time of the cessation, they had been living in South Africa for an average of 18 years or more. After the cessation was announced, several of them returned to Angola with the assistance of UNHCR and the government. However, a group of approximately 2 000 decided to remain in South Africa, having lived in the country for a long period and had children who were born and raised in South Africa - and consider it home.**

### **3.2.6. SOUTH AFRICAN CITIZENSHIP: CITIZENSHIP BY NATURALISATION (B)**

**Section 5(4) of SACA provides that a child who has permanent residence status in South Africa qualifies to apply for South African citizenship by Naturalization.**

This provision applies to all persons, including children, who are permanent residents in South Africa and have lived in the country for a prescribed number of years (currently 5 years or more) and therefore become eligible to apply for South African citizenship by naturalisation.

#### Requirements:

1. the child has permanent residence status in South Africa;
2. the child has lived in South Africa for five years or more; or
3. the child must have assistance to make the application, e.g., a responsible parent or legal guardian (or social worker if abandoned or orphaned).

#### Strategy:

1. submit an application for verification or proof of permanent residence status through the Visa Facilitation Center (VFS) (an administrative fee of R100 is applicable);
2. submit a request to SAPS for a police criminal record check (or “police clearance”) – it must be 6 months valid at the date of application;
3. submit application for naturalisation with documentary evidence:
  - permanent residence certificate and verification
  - police clearance;
  - proof of language proficiency and language test form; and
  - attend induction and naturalisation ceremony – must sign Declaration of Allegiance; or
4. alternatively, compile all relevant documents and refer the case to a lawyer.

### 3.2.7. SOUTH AFRICAN CITIZENSHIP: CERTIFICATE OF CITIZENSHIP IN CASE OF DOUBT

**Section 15 of SACA allows a child who may have a claim to South African citizenship but has no documentary evidence or very little documentary evidence to support the claim to request the Minister to issue a certificate of South African citizenship in case of doubt.**

This section of SACA is for children (or individuals) who can claim South African citizenship but have no documentary evidence or very little documentary evidence (e.g., birth certificate or Identity Document) to support the claim. It can be used in cases of abandoned or orphaned children; or foundlings whose origins and parentage is often unknown.

Upon receiving the request, the Minister may issue a certificate of citizenship in case of doubt - that describes the person to whom it relates to as a South African citizen by birth, by descent or by naturalisation.

#### Requirements:

1. claim to South African citizenship; or
2. no documentary evidence or very little documentary evidence to support the claim.

#### Strategy:

1. send a letter to the Minister of Home Affairs, requesting that a citizenship certificate in case of doubt be issued for the child in question;
2. set out the child's claim to South African citizenship and efforts made to secure the relevant documentary evidence; or
3. alternatively, compile all the available documents and refer the case to a lawyer.

#### Case Law:

*LZ Mathobela v Minister of Home Affairs* (Case No: 98386/18) NGHC 12 June 2019:

Love was born in 1992 in South Africa to migrant parents. She knew little of her parent's documentation status save for the fact that they travelled from Zimbabwe. Her mother passed away shortly after they arrived in South Africa after Love's birth. Her father was a truck driver who

travelled back and forth within Southern Africa. He eventually relocated Love to Botswana to continue schooling. Love was then told of her father's passing whilst in Botswana. She travelled to South Africa, where he was buried in Soweto. Love attempted obtaining proof of birth and was informed she required two witnesses to her birth but, she only had one. The DHA told her to bring her mother's ID document which, she did not have. This made registering her birth a difficult , and as a result, she remained unregistered in both Zimbabwe and South Africa - making her stateless. In 2013, Scalabrini Centre of Cape Town sought the assistance of LHR to litigate Love's matter in court following a lack of response from the DHA. LHR had submitted an application for citizenship by naturalisation (in terms of Sec 4(3) of SACA) and, alternatively, an application for citizenship in case of doubt (in terms of Sec 15 of SACA) because there was doubt as to whether or not she was a citizen, and she lacked sufficient documentary evidence.



3.3. REFUGEE STATUS

Applicable law: South African Refugees Act 130 of 1998 (the Refugees Act)

The Refugees Act (and its regulations) applies to all migrants who enter South Africa with the wish to apply for refugee status. It defines the standard that such applicants must meet to be granted protection and refugee status in the country.

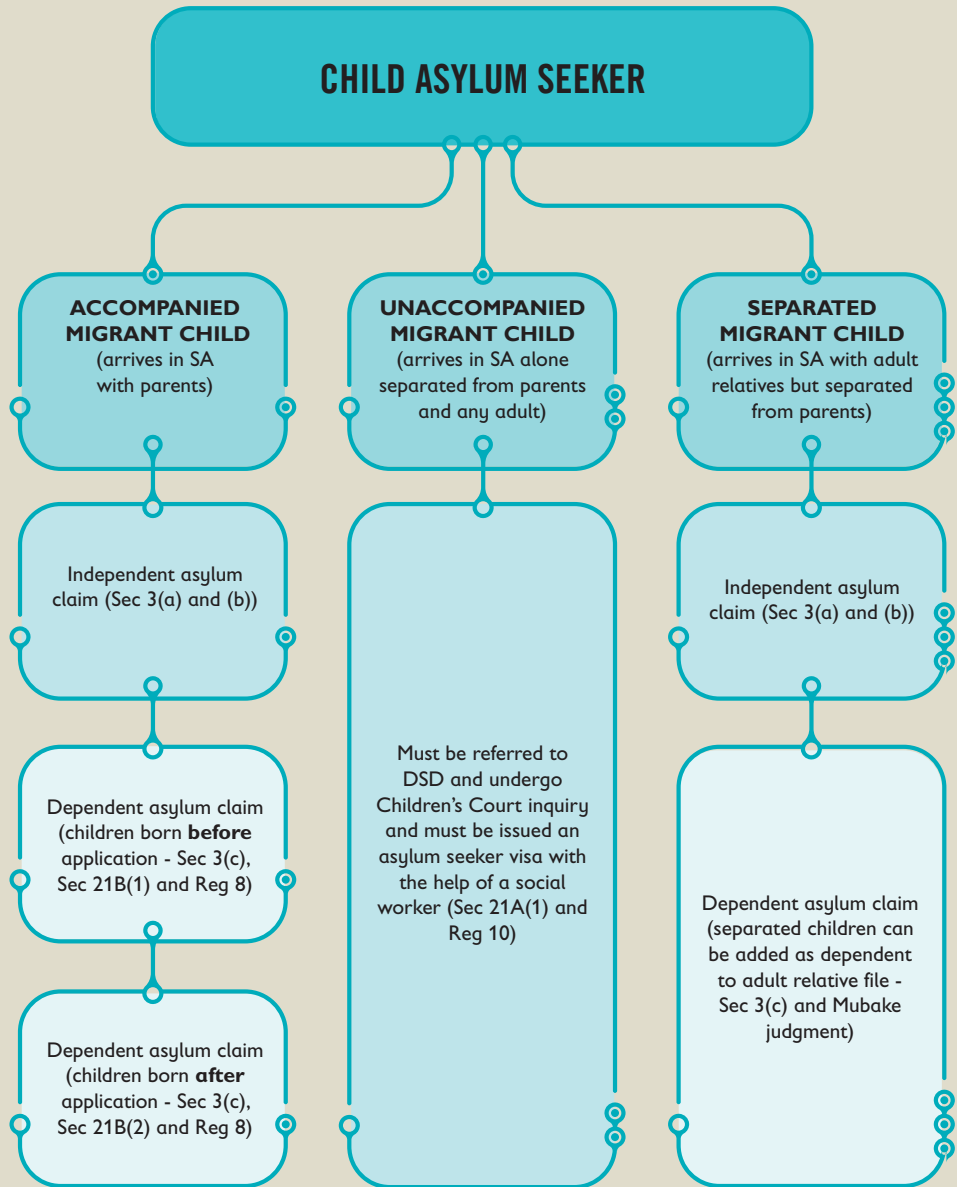


Figure D: Child Asylum Claims under the Refugees Act

Although the definition or concept of an “asylum seeker” or “refugee” applies to all people regardless of age - it is commonly interpreted in the context of adults. It is important to note that children may also be asylum seekers or refugees and can submit an application for refugee status in South Africa if they meet the standard defined in the Refugees Act.

**In terms of Sec 3 of the Refugees Act, an asylum seeker qualifies for refugee status in South Africa if the asylum seeker:**

1. owing to a well-founded fear of being persecuted for reasons of; race, tribe, religion, nationality, political opinion or membership of a particular social group, has been forced to flee their country of origin or citizenship;
2. owing to violence, war or conflict in their country of origin or citizenship, has been forced to flee that country to seek refuge elsewhere; or
3. is a dependent of a person contemplated in paragraph (1) or (2).

We will distinguish between the three categories of child asylum seekers in **figure D** (Page 26).

### **3.3.1. ACCOMPANIED MIGRANT CHILDREN**

An “accompanied migrant child”, in this guide, is a child who arrives in South Africa in the company of their parents or legal guardians.

An accompanied migrant child can submit an independent asylum claim if they have personally suffered persecution or experienced violence, war or conflict in their country of origin or citizenship as defined in Sec 3 (a) and (b) of the Refugees Act. In this scenario, the parent or legal guardian must provide guidance and assistance to the child in presenting their claim.

An accompanied child can also submit a claim as a dependent of an asylum seeker or refugee (a “dependent asylum claim”) as defined in Sec 3 (c) of the Refugees Act. This process is also known as “family joining” or “family unification” and takes place as follows:

1. if the child is born before the application for refugee status is submitted, the adult applicant must include the details of the child in the

application in order to have the child added to their file (See Sec 21B(1) and Reg 8 of the Refugees Act); or

2. if the child is born after the application for refugee status is submitted, the adult applicant must conduct birth registration for the child and submit the birth certificate to the Refugee Reception Office in order to have the child added as a dependent on their file (See Sec 21B(2) and Reg 8 of the Refugees Act).

A “family joining” or “family unification” form is completed and submitted - with supporting documents, e.g., a birth certificate or DNA test. A hearing will take place, and if the process is successful, the child is issued an asylum seeker visa or refugee status.

*Scalabrini Center Cape Town v Minister of Home Affairs unreported judgment WCHC Case No 5242/2016* – the High Court ordered the DHA to ensure adequate policies for dependents of asylum seekers and refugees to be documented within a reasonable time. As a result, the DHA published a document called the “**Standard Operating Procedure: Refugee Family Unification**” that confirms the “family joining” process.

### **3.3.2. SEPARATED MIGRANT CHILDREN**

A “separated migrant child” is a child who arrives in South Africa in the company of an adult relative but has been separated from their parents or legal guardians.

A separated migrant child can submit an independent asylum claim if they meet the requirements of Sec 3(a) or (b) of the Refugees Act. The adult relative in this scenario must provide guidance and assistance to the child in presenting their claim.

A separated migrant child can also submit a claim as a dependent of an adult relative who is an asylum seeker or refugee. This has been confirmed by our courts in the judgment below.

*Mubake v Minister of Home Affairs (2016)2 SA 220 (GP)* – court extended the definition of “dependent” under Sec 3(c) of Refugees Act to include separated children in the care of a refugee or asylum seeker who is a relative:

The case concerns seven children from the Democratic Republic of Congo. They were all



orphans and asylum seekers because their parents had either been killed during the political conflict in DRC or had abandoned them. They were in the care of aunts or uncles who were also asylum seekers or refugees in South Africa. The DHA had refused to join the children to the files of their aunts or uncles on grounds that they wanted formal proof of guardianship (i.e., a Children's Court order) because these were not their biological parents. The High Court ordered that the children be joined to their relatives' asylum files and that the DHA did not have to wait for formal proof of guardianship beforehand. The High Court reasoned that the initial permit issued is a temporary permit to ensure that the children are documented and that the process to obtain a Children's Court order could follow after a permanent permit is issued. That would counter against leaving the child undocumented and untraceable until they acquire a permit. Undocumented children are at an enormous disadvantage because they cannot apply for social assistance. This is despite South Africa having ratified both the CRC and ACRWC - which stipulate that every child has the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right.

Note: in reality, the DHA still insists on proof of guardianship but does not take into account the difficulty related to applications for guardianship by asylum seekers or refugees. Section 24 of the Children's Act states that a person with an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child. Section 25 further states that guardianship applications by non-South African citizens are considered "inter country adoptions". This makes guardianship almost impossible for asylum seekers and refugees. Alternatively, the relative may try to obtain:

1. a foster care order; or
2. a care and contact order.

Get this done through a **Children's Court inquiry** (see Chapter 4 on Children's Court and Child Protection Processes).

What happens when a child who has been registered as a dependent turns 18 years old?

A dependent under the Refugees Act is defined as "an unmarried minor child". So a dependent

may lose their dependency if they get married or become a major when they turn 18 years old. According to Sec 21B(3A) and Sec 21B(3), read with Reg 11 of the Refugees Act, the child is "de-linked" from the adult applicants file and required to submit their own application within six months. If they fail to do so, they may be deemed "illegal foreigners" under the Immigration Act and be at risk of arrest and deportation.

### 3.3.3. UNACCOMPANIED MIGRANT CHILDREN

An "unaccompanied migrant child" is a child who arrives alone in South Africa and has been separated from both their parents or legal guardians and any adult relatives.

An unaccompanied migrant child can submit an asylum claim if they meet the requirements of Sec 3 (a) or (b) of the Refugees.

The child must be referred to the Department of Social Development to undergo a Children's Court inquiry and must be issued an asylum seeker visa with the assistance of a social worker or any other representative appointed by the Children's Court. (See Chapter 4 on Children's Court and Child Protection Processes).

### 3.4. IMMIGRATION STATUS

#### Applicable law: South African Immigration Act 13 of 2002 (Immigration Act)

The Immigration Act sets out the conditions under which migrants (who have no claim to citizenship status or refugee status) can enter the country, stay in the country and leave the country.

**Section 31(2)(b) of the Immigration Act allows a person to submit an application to the Minister for permanent residence by exemption when "special circumstances" exist.**

Children who do not qualify for citizenship status or refugee status - are left with a final option of immigration status under the Immigration Act. However, the Immigration Act is very restrictive and caters mostly to children who qualify to claim immigration status as a dependent under a parent or legal guardian. For example:

1. relatives visa – a relatives visa may be issued to a child of a South African citizen or permanent resident; or
2. permanent residence permit – a permanent residence permit may be issued to a child of a South African citizen or permanent resident.

Some children may also qualify for a study visa if they have received an offer of acceptance to a school or learning institution in South Africa.

While these options exist, in reality, there are several barriers for undocumented children to obtain immigration status under the Immigration Act; including the following:

1. a passport is a requirement for a visa application;
2. it is compulsory to submit certain applications in the country of origin or citizenship, and it may be impossible for the child to travel to the country;
3. the application process can be costly due to administration fees, and the cost of acquiring supporting documentation like police clearances or medical and radiological reports; and
4. the parents or legal guardians must also provide financial assurances or proof of financial means, which renders the process inaccessible to poor families.

There is currently no specific provision in the Immigration Act that caters to children who cannot apply under a parent or legal guardian (e.g. **unaccompanied or separated migrant children**) except for Sec 31(2)(b) of the Immigration Act.

Requirements:

1. must be able to prove “special circumstances”, e.g., no other pathway to documentation and risk of statelessness (must include comprehensive motivation for the exemption);
2. must provide any other information that would assist the Minister in making an informed decision when considering an exemption;
3. typically, applications for permits or visas under the Immigration Act require a passport – this is something an undocumented child will not have, but the DHA Form 48 permits you to apply for a waiver of prescribed requirements that the applicant cannot meet; and

4. application fee of R1 350.

Strategy:

1. conduct consultation and draft comprehensive motivation for the exemption, including the life story of the child and highlight the “special circumstances”;
2. compile relevant supporting documents e.g.,
  - any birth records if available (baptismal certificat , clinic cards, immunization cards);
  - school records (e.g., CEMIS report from the provincial Department of Education or a letter from the school principal confirming attendance from Grade X – Grade Y);
  - any parents/family members documentation if available; and
  - other helpful documents include; baptismal certificat , testimonials from teachers/community leaders/ relatives, school reports and attendance registers);
3. complete online application form through the Visa Facilitation Centre (VFS) website and pay the application fee of R 1 350 to schedule an appointment online and once the application is submitted, a reference number will be issued and can be used to track the application on the VFS website (<https://www.vfsglobal.com/dha/southafrica/prp-exemptions.html>); or
4. alternatively, compile all the available documents and refer the case to a lawyer.

If successful, the child will be granted permanent residence status and issued a permanent residence status. However, it is worth noting that this process also has its limitations:

1. it is fairly complex and requires legal expertise;
2. it can be costly due to administration fees, and the cost of acquiring supporting documentation like police clearances or medical and radiological reports; and
3. it is a lengthy process and uncertain process as it depends entirely on the discretion of the Minister.

**What is the difference between permanent residence and citizenship?**

Permanent residents have most of the same rights and responsibilities as South African citizens except for political rights, e.g., to vote or run for

public office . Permanent residence is also not as “permanent” as citizenship and can be withdrawn. However, one can eventually apply for citizenship by naturalization under Sec 5 of SACA after living in the country on a permanent resident permit for a prescribed number of years. Unlike an asylum seeker, visa or a refugee certificate - a permanent residence permit does not need to be renewed.



# CHILDREN'S COURT AND CHILD PROTECTION PROCESS

## What is a Children's Court?

A Children's Court is a special court that deals with issues affecting children. It includes matters concerning the care, protection and well-being of a child. Every Magistrate's Court in South Africa is a Children's Court.

**In terms of Sec 44 of the Children's Act, the Children's Court has jurisdiction over all children in South Africa, irrespective of whether or not the child is documented and regardless of the child's citizenship, refugee or immigration status. The Children's Act similarly applies to all children in South Africa.**

This was confirmed by the High Court in the matter of *NS v Presiding Officer of the Children's Court Johannesburg* (2184/18) [2018] ZAGPJHC 59 (6 February 2018). The High Court reviewed and set aside the decision of the Presiding Officer of the Children's Court in Johannesburg to refuse to deal with an adoption application on the basis that the child was an undocumented Zimbabwean citizen (the child was in South Africa on a visitor's visa that had expired). The High Court stated that it was irrelevant whether the child is foreign and whether the child is "legally or illegally" in the country.

## With what matters can a Children's Court assist?

The Children's Court can assist with a variety of matters under the Children's Act, including:

1. the paternity of a child and confirmation of parental rights and responsibilities for an unmarried father;
2. the support or maintenance of a child;
3. care or contact with a child;

4. the maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in this regard;
5. the formalisation of relations between a child and a caregiver through foster care, guardianship or adoption; and
6. care and protection of a child.

The Children's Court has the power to make various court orders including the following:

1. an order instructing an organ of state (such as the DHA) to assist a child in obtaining access to a public service to which the child is entitled;
2. an order instructing a person who failed to fulfil a statutory duty towards a child to appear before the court and to give reasons for the failure; and
3. an order convicting a person for non-compliance with, or refusal, or failure to obey a court order by the Children's Court.

(See Sec 45 and Sec 46 of the Children's Act for a list of specific matters dealt with in the Children's Court and examples of court orders it can make).

## Who can bring a matter before the Children's Court?

Any person acting in the interests of a child can approach the Children's Court by taking the following steps:

1. approach the Magistrate Court nearest to you;
2. ask for the Children's Court section of the court and inform the clerk that you wish to enrol a matter (concerning a child) as an interested party;
3. ask to complete a "Form 2", i.e., the form that gets completed when bringing a matter

to Children's Court in terms of Sec 53 of the Children's Act – this form must include details of the child, details of the person lodging the matter and details of the nature of the matter; plus any supporting affidavits or documentary evidence.

#### Children's Court inquiry:

The following groups of children are deemed children "in need of care and protection" under Sec 150 of the Children's Act:

1. orphaned children;
2. abandoned children;
3. unaccompanied and separated children; and
4. a child who is a victim of trafficking

These children are considered in need of care and protection mainly because they are not in the care of parents or legal guardians and therefore vulnerable to maltreatment or abuse.

To secure the safety and well-being of the children, they must be referred for a Children's Court inquiry through the Department of Social Development.

The report of the designated social worker must include:

1. an assessment of the developmental and other needs of the child;
2. a family assessment, including details of any efforts for family tracing or family reunification that have been considered or attempted; and
3. a permanency plan aimed at securing stability in the child's life.

The documentation of a child is critical to their development and stability and therefore the designated social worker must also consider any need for documentation or legal status for the child in the report. This includes:

1. birth registration of an orphaned or abandoned child;
2. application for refugee status for an asylum seeker migrant child who is unaccompanied or separated; or
3. application for immigration status for a migrant child who is not an asylum seeker.

The Children's Court order provides the child with safety and ability to access basic rights - such as basic education, shelter and healthcare but it does not confer legal status. As such - documentation or legal status issues need resolving before the child turns 18 years old and loses the protection of the Children's Court.



## ACTION

## COMMENTS

### STEP 1

A child identified as a child in need of care and protection – refer the child to DSD or a designated child protection agency, or local South African Police Services (SAPS). (Sec 150 of Children's Act)

### STEP 2

The matter is referred to a designated social worker for investigation on whether or not the child is in need of care and protection. (Sec 155 of Children's Act)

Investigation to be conducted within 90 days.

An age assessment may be conducted if age is unknown or in doubt to confirm that the child is under 18 years old and therefore entitled to the protection of the Children's Court (Sec 48 of Children's Act)

### STEP 3

Pending the investigation, the child may be removed and placed in temporary safe care either;

1. with a court order if the child is at risk but no immediate danger; or
2. without a court order if the child is in immediate danger.

If the child is removed without a court order the clerk of the Children's Court must be notified of the matter no later than the next court day.

(Sec 152 of Sec 151 of Children's Act)

### STEP 4

At the end of the investigation the designated social worker must file a report with reasons and recommendations for review by the Children's Court. The report may find that

1. the child is not in need of care and protection; or
2. the child is in need of care and protection and must be brought before the Children's Court.

(Sec 155 of Children's Act)

### STEP 5

If the Children's Court confirms that the child is in need of care and protection it may make any order that is in the **best interests of the child** including placing the child:

1. in foster care with a foster parent or cluster foster care scheme;
2. in a child and youth care centre; or
3. in temporary safe care.

(Sec 156 of Children's Act)

Children's Court order lapses after two years and can be extended for two years at a time. (Sec 159 of Children's Act)



# STAKEHOLDER REFERRAL PROTOCOL FOR USMC IN SA



The following Children are the Children that can be referred using the Referral Route map as they are considered to be vulnerable children in need of Care and protection.

## 3 STATELESS

The UN Convention Relating to the Status of Stateless Persons defines a stateless person (including children) as a person who is not considered a national (citizen) by any State under the operation of its laws. Stateless children may or may not have a birth certificate

## 4 UNDOCUMENTED

An undocumented child is a child who does not have documentation in the form of a birth certificate and/or ID passport/permit. An undocumented child is not stateless, unless they are also not recognised as a citizen by any country in the world.

## 1 UNACCOMPANIED

Unaccompanied children are children who have been separated from both parents and other relatives and who are not being cared for by an adult who, by law or custom, is responsible for doing so.

## 2 SEPARATED

Separated children are children who have been separated from both parents or their previous legal or customary caregiver, but not necessarily from other relatives.

## 5 MIGRANT

A migrant child in South Africa is a child who is not a citizen of the Republic of South Africa and includes stateless children.

**THE FOUR KEY PRINCIPLES OF CHILD RIGHTS IN INTERNATIONAL LAW (UNCRC) AND SOUTH AFRICAN LAW (WHICH SHOULD ALWAYS BE UPHELD BY GOVERNMENTS) ARE:**

- Non-discrimination/equality
- The best interests of the child
- Survival and development
- Child participation.

If any of these category of children is identified in the community alone they should be referred using the referral route map that is at the back of this page.

### KEY ORGANISATIONS TO WORK WITH

- Department of social development
- South African Police service
- Save the children South Africa
- Future families
- Lawyers for human rights
- CORMSA
- UNHCR
- UNICEF
- IOM

### NO DISTINCTION OR DISCRIMINATION MAY BE MADE BETWEEN ANY OF THE ABOVE CATEGORIES OF CHILDREN AND DOCUMENTED SOUTH AFRICAN CITIZEN CHILDREN.

According to the High Court of South Africa: "The Children's Act does not exclude non-nationals (whether legally or illegally in the country) from its ambit. Nor does it exclude them from the jurisdiction of the children's court".

### CHILDREN IN NEED OF CARE AND PROTECTION

A child in need of care and protection may not be detained nor deported. A Children's Court enquiry should be initiated, a social worker must be appointed and the child's safety must be assured at all times.

#### IDENTIFICATION

Anyone can identify an unaccompanied & separated child.

#### ASYLUM CLAIM

If a child has asylum claim, Social Worker to support the child through the DHA asylum/refugee processes.

If the family is in RSA, Social Worker or DSD in the province where the family resides conducts family assessment. Social Worker verifies the information with community members or school if applicable. If reunification is not possible with the first family, other family members are assessed. Social Worker or CPO confirms with both the family and the child if willing to be reunified

#### REFERRAL

Contact DSD Social Worker / Social Worker from Designated CPO  
If DSD/Designated Social Workers is not reachable, contact SAPS or other partners for support such as the Inter-Agency Working Group members.

#### FAMILY TRACING

- While the child is placed in Temporary Safe Care:
- Social Worker or CPO ensures that the Child's Court Enquiry is opened.
- A child is provided with personal identifying documents as soon as possible.
- DSD or CPO requests a family tracing from ISS focal person.

#### REPATRIATION

- If the Children's Court decides to repatriate a child back to the country of origin for alternative care:
- DSD through ISS requests the country of origin to arrange suitable alternative care for a child in the country of origin.
- Once arrangements are made, DSD escorts a child to the border post/airport or pre-determined place.
- Upon arrival in the country of origin, responsible authorities escort the child to alternative care location.

#### CASE DOCUMENTATION

- DSD Social Worker:
- Receives & registers a child into database.
- Assesses the child within 72 hours.
- Makes arrangements with local Place of temporary Safe Care.
- Provides information about options in South Africa and counselling.
- Investigates the child's situation within 90 working days and compiles an assessment in preparation for the Children's Court.

If assessment show possible exposure to trauma refer/provide the child with/for MHPPS

#### TEMPORARY SAFE CARE PLACEMENT

- Social Worker of CPO places a child at the Temporary Place of Safe Care where her/his basic needs are fulfilled
- A child's access to services, including education and psychosocial care, should be guaranteed.
- Social Worker ensures that a child has a road to health care chart.
- Social Worker or CPO assesses the child and develops Individual Care

#### CASE MANAGEMENT

Case Manager makes recommendation for the Children's court to make a decision on the best interest determination based on child & family situation.

#### ALTERNATIVE CARE OPTIONS

- If the Children's Court decides that family reunification is not in the best interest of the child, alternative care arrangements to be made. This includes:
- Foster Care
- Private Place of Safety
- Cluster Foster Care
- Supervised independent living
- Child & Youth Care Centre



# CHILDREN'S RIGHTS

Children's rights are entrenched in the Bill of Rights in the Constitution of South Africa. These rights apply to all children in South Africa and include; the right to education, the right to health care, and the right to social assistance. However, to secure these rights, children need to be documented. Nonetheless, there have been certain developments in South African laws and policies that have encouraged greater inclusion - and access to rights for undocumented children.

**1. Right to education:** Section 29 of the Constitution states that everyone has the right to basic education. Previously, a birth certificate and ID (or a visa or permit) were compulsory for the admission of a learner to school in terms of the Schools Admission Policy under the South African Schools Act 84 of 1996. This effectively meant that children with no form of identity documentation could not go to school. On 12 December 2019, the High Court in *Centre for Child Law and Others v Minister of Basic Education and Others (2840/2017) [2019] ZACGHC 126* declared these provisions unconstitutional - and ruled that the right to education as entrenched in the Constitution applies to all children in South Africa regardless of documentation or legal status. This includes:

- the right to be admitted to a school;
- the right to participate in school activities and programmes, including nutrition programmes; and
- the right to write exams and receive exam results.

**DBE circular 1 of 2020 on the admission of learners requires all schools to comply with the High Court judgment and admit all learners regardless of documentation or legal status. Schools are forbidden to send children away due to lack of a birth certificate, ID, passport, permit or visa.**

**2. Right to health care:** Section 27(1)(a) of the Constitution states that everyone has the right to have access to health care services, and Sec 27(3) states that no one may be refused emergency medical treatment. South African citizens, asylum seekers and refugees, temporary and permanent residents, therefore all have the right to access health care services in South Africa. Primary health care services are provided free of charge, but higher levels of care are subject to a fee that is determined by a means-test, i.e., depending on the patient's income. The means-test applies to South African citizens, asylum seekers and refugees, temporary and permanent residents, and undocumented SADC residents – anyone who does not fall under these categories will have to pay total fees. It is also worth noting that Sec 4 of the South African National Health Act 61 of 2003 states that pregnant and breastfeeding women and children below six years old are entitled to free health care services (including termination of pregnancy). The provision of these services is regardless of documentation or legal status.

**DOH circular dated 19 September 2007 on hospital fees assessment of asylum seekers and refugees (with or without a visa or permit):**

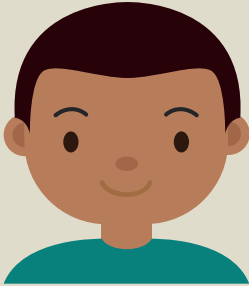
**The circular confirms that asylum seekers and refugees (with or without visas or permits) can access the same basic health services as South African citizens and can access Antiretroviral Treatment for HIV.**

**3. Right to social assistance:** Section 27(1)(c) of the Constitution states that everyone has the right to have access to social security, including appropriate social assistance. In *Khosa and Others v Minister of Social Development and Others;*

Mahlaule and Others v Minister of Social Development and Others CCT 13/03, (CCT 12/03) [2004] ZACC 11 provisions of the Social Assistance Act 13 of 2004 that excluded non-South African citizens from applying for some social assistance grants were declared unconstitutional. Recognised refugees and permanent residents are now eligible to benefit from all social assistance grants (except the war veteran grant). This includes the child support grant, the care dependency grant, the foster care grant, and the disability grant. However, an applicant for a grant is still required to submit some form of identity documentation, e.g., birth certificate, ID, visa, or permit (or proof of application for the relevant documentation). For example, since 2009, the South African Social Security Agency (SASSA) has imposed a three-month restriction on child support grants for children who are yet to receive birth certificates. If the applicant fails to provide a birth certificate or proof of application, then the grant will be terminated.



# CASE STUDIES



**CASE STUDY 1:** Peter's mother is a Zimbabwean citizen with an expired visitor's visa. She approached the Vereeniging DHA local office to register the birth of her child who is 5 years old and was born in a hospital in Vereeniging. She got told that she must register the birth in Zimbabwe because she is a foreigner. She mentioned that the child's father is a South African citizen but they are not married and not on speaking terms. She got instructed to obtain a paternity test to prove that he is the father of the child, and the test will cost R750.00 for each person, but she cannot afford this amount.

## Applicable law:

1. Constitution: Section 28 of the Constitution confirms that every child born in South Africa has the right to birth registration;
2. BDRA: Section 9 of the BDRA confirms that one or both parents of the child can give notice of birth and conduct the birth registration of the child; and
3. SACA: Section 2(1)(b) states that if one of the parents is a South African citizen, the child is automatically a South African citizen.

## Solution:

1. Conduct birth registration: follow late registration of birth process since the child is now 5 years old. Compile the following

documents:

- proof of birth from the hospital or clinic where the child was born (DHA-24/PB) – the notice of birth form and affidavit for late registration of birth (DHA/288) will be provided at the DHA office (DHA-24);
- mother's documents: passport, expired visa, any Zimbabwean documents (whatever is available);
- father's documents: South African birth certificate (if available) and identity documents;
- other helpful documents: maternity certificate/clinic card, baptismal certificates school records, testimonials; and
- DNA test requirement: remember that **DHA Circular No. 5 of 2014 on DNA testing for birth registration** states that if the child's parents are unmarried, one parent is a non-citizen, and it is a late registration of birth - DNA testing is compulsory;

2. citizenship status: the child must be issued a birth certificate with an ID number because he is a South African citizen. He will use that ID number to apply for an identity document when he turns 16 years old; and
3. Children's Court processes: if there are any issues encountered during the process, remember that the child is also protected by the Children's Court which can be approached for an order in terms of Sec 45 or Sec 46 of the Children's Act on the following:

- if the hospital refuses to give them a proof of birth form, the Children's Court can order the hospital to do so;
- if the DHA refuses to assist with the birth registration, the Children's Court

- can order the DHA to do so;
- if the family cannot afford the DNA test fees (i.e., R750 per person), the Children's Court may waive the fees or grant an order confirming the paternity of the father (Sec 21 Children's Act); or
- if the father refuses to assist with the birth registration, the Children's Court may make an order compelling him to produce his documents and to accompany the child to the DHA if it is necessary to do so.



**CASE STUDY 2:** Hope is an abandoned child living in a CYCC in terms of an order of the Children's Court. No confirmable information is available on Hope's birth or parentage, but the person who found Hope and dropped him off at SAPS informed the police officer that she was a friend of Hope's mother - his mother was from Angola and Hope was born at Germiston Hospital in Johannesburg. His actual age is unknown, but according to an age estimation done during the Children's Court inquiry, he is an estimated 6 years old. Hope has no recollection of his parents, and all family tracing efforts have failed. The social worker liaised with the DHA to ascertain if the child could obtain documentation and legal status in South Africa, but the DHA said they are unable to register the child's birth since it is unclear if he was born in South Africa, and they cannot grant him citizenship since it is unclear if his parents were South African citizens.

#### Applicable law:

1. Constitution: Section 28 of the Constitution confirms that every child born in South Africa has the right to birth registration;
2. BDRA: Section 12 of the BDRA confirms that in the case of an orphaned or abandoned child, a social worker must conduct the birth

registration of the child; and

3. SACA: Section 2(2) states that if a child is born in South Africa and would otherwise be stateless, then the child is entitled to South African citizenship.

#### Solution:

1. conduct birth registration: follow late registration of birth process since the child is now 6 years old. Compile the following documents:
  - proof of birth from Germiston Hospital (DHA-24/PB) – the notice of birth form and affidavit for late registration of birth (DHA/288) will be provided at the DHA office (DHA-24)
  - Children's Court order and the social workers report presented to the Children's Court;
  - a certified copy of the ID or passport and visa/permit of the social worker;
  - a certified copy of the ID or passport and visa/permit of the child's parents (if available);
  - a certified copy of the death certificate of the parents of the child (if available); and
  - other helpful documents: maternity certificate/clinic card, baptismal certificates school records, testimonials – any further information from Hope's mother's friend may also be helpful;
2. citizenship status: the child can claim South African citizenship by virtue because he was born in South Africa and would otherwise be stateless. Contact the Angolan embassy or consulate to verify whether or not he can claim Angolan citizenship; and
3. Children's Court processes: if there are any issues encountered during the process, remember that the child is also protected by the Children's Court and can be approached for an order in terms of Sec 45 or Sec 46 of the Children's Act on the following:
  - if the hospital refuses to give them a proof of birth form, the Children's Court can order the hospital to do so;
  - if the DHA refuses to assist with the birth registration, the Children's Court can order the DHA to do so; or

- if DHA refuses to assist with confirmation of the child's citizenship status, the Children's Court can order the DHA to do so.



**CASE STUDY 3:** Mali is 18 years old, and she has a birth certificate that shows that she was born in a hospital in Durban. Her mother and father were asylum seekers from Ethiopia, but they died two years ago in a car accident. Mali provides you with her birth certificate and an asylum seeker permit number that belonged to her father. She has no documents belonging to her mother. When her parents passed away, Mali was being taken care of by an uncle. Mali has never been to Ethiopia and has never left South Africa. She has attended South Africans schools and speaks isiZulu. Mali considers herself South African.

#### Applicable law:

1. Constitution: Section 28 of the Constitution confirms that every child born in South Africa has the right to birth registration;
2. BDRA: Section 9 of the BDRA confirms that one or both parents of the child can give notice of birth and conduct the birth registration of the child (Reg 7 and 8 make provision for the birth registration of a child born to refugees, asylum seekers and non-citizens); and
3. SACA: Section 4(3) provides that a child born in South Africa to parents with no citizenship or permanent residence status qualifies to apply for South African citizenship by naturalization at 18 years old.

#### Solution:

1. Conduct birth registration: remember Sec 4(3) of SACA requires that the child's birth MUST be registered first. If it is clear that the child was born in South Africa, but does not

have a birth certificate, then it is necessary to begin with birth registration. In this case, Mali already has a birth certificate

2. citizenship status: Mali can claim South African citizenship because she was born in South Africa, her parents were asylum seekers, and she is now 18 years old. Mali needs to submit an application to the DHA with the following supporting documents:

- affidavit or statement of facts;
- birth certificate
- parents' documentation (if available); and
- proof of living in South Africa from date of birth to the date of turning 18 years old - can include but not limited to; school records (e.g., CEMIS report from the provincial Department of Education, or a letter from the school principal confirming attendance from Grade X – Grade Y), baptismal certificate, testimonials from teachers/community leaders/relatives, school reports and attendance registers; and

3. Children's Court processes: because Mali is now 18 years old, she no longer falls under the jurisdiction of the Children's Court or the Children's Act. If Mali needs to take her matter to court, she can still approach the High Court with the assistance of a lawyer.



**CASE STUDY 4:** Caleb fled DRC following a raid in his home in which his mother was killed by a rebel group who had been raiding their area. Caleb has never known his father. He is, however, aware that he has an aunt in Johannesburg who is a refugee. Caleb and two of his siblings are assisted (financially) by a neighbour to travel to South Africa to go and live with the aunt. They arrive in South Africa by truck and without any

documents. Caleb and his siblings live on the street in Musina until a police officer takes him and his siblings to the local DSD offices. The children are then deemed in need of care and protection, and they are placed in care. The social worker tries to trace their aunt, but she is nowhere to be found.

#### Applicable law:

1. Constitution: Section 28 of the Constitution confirms that every child has the right to be protected from maltreatment, neglect, abuse or degradation;
2. Children's Act: Section 150 states that abandoned children (including unaccompanied and separated migrant children) are children in need of care and protection; and
3. Refugees Act: Section 3 makes provision for migrant children to make an individual or dependent application for refugee status in South Africa. Section 21A(1) (and Reg 10) specifically provides for unaccompanied migrant children to receive assistance in applying for refugee status through a Children's Court inquiry.

#### Solution:

1. Children's Court processes: because the children are alone and the aunt cannot be traced, the children could be classified as "unaccompanied migrant children". The DSD Guidelines stipulate that unaccompanied migrant children are assumed to need care and protection and their safety and well-being must therefore be secured through a Children's Court inquiry;
2. Refugee status: Caleb can apply for refugee status through two possible channels. Either:
  - through an individual claim based on the circumstances that forced him to leave DRC; or
  - through a dependent claim under his aunt if she is found and able to obtain proof of guardianship (see the "family joining" and Mubake case); or
3. Children's Court processes: if there are any issues encountered during the process, remember that the child is also protected by the Children's Court, which can be approached for an order in terms of Sec 45 or Sec 46 of the Children's Act if the DHA refuses to assist with the asylum application.



**CASE STUDY 5:** Raquelle was born in Mozambique and moved to South Africa with her parents when she was 2 years old, but when she was 16 years old both her parents died in a car accident. She was then referred to social workers by her neighbours and was placed in a CYCC after going through a Children's Court inquiry. During the inquiry, it became clear that Raquelle had been left alone in South Africa with no other relatives. Efforts for family tracing in Mozambique were also unsuccessful. Raquelle further indicated that she wanted to remain in South Africa as she considered South Africa home - she speaks the local languages and attends school in South Africa, and her friends live here. She has no recollection of Mozambique and knows no relatives there as her parents never returned there since they moved to South Africa. She does not know what documents her parents used in South Africa - all she has in her possession is her birth certificate from Mozambique.

#### Applicable law:

1. Constitution: Section 28 of the Constitution confirms that every child has the right to be protected from maltreatment, neglect, abuse or degradation;
2. Children's Act: Section 150 states that orphaned children are children in need of care and protection; and
3. Immigration Act: Section 31(2)(b) allows a person to submit an application for permanent residence by exemption when "special circumstances" exist.

#### Solution:

1. Children's Court processes: because Raquelle is orphaned and alone in South Africa, she is a child in need of care and protection and her safety and well-being must be secured through a Children's Court inquiry;



2. immigration status: Raquelle can apply for permanent residence by an exemption – this is a measure of last resort because she has no claim to South African citizenship and does not have an asylum claim. Raquelle needs to submit an application to the DHA with the following supporting documents:

- affidavit or statement of facts highlighting “special circumstances” - these can include the fact that she is a vulnerable orphaned child, she has no other pathways to documentation or legal status in South Africa (risk of statelessness), and it would not be in her best interest to repatriate her to Mozambique as she has no family or support there and considers South Africa her home;
- birth certificate (if available);
- parents’ documentation (if available);
- proof of living in South Africa can include but not be limited to; school records (e.g. CEMIS report from the provincial Department of Education);
- typically, applications for permits or visas under the Immigration Act require a passport – this is something an undocumented child will not have, but the DHA Form 48 permits you to apply for a waiver of prescribed requirements that the applicant cannot meet; and
- complete online application form through the Visa Facilitation Centre (VFS) website and pay the application fee of R 1 350 to schedule an appointment online and once the application is submitted, a reference number will be issued and can be used to track the application on the VFS website (<https://www.vfsglobal.com/dha/southafrica/prp-exemptions.html>); and

3. Children’s Court processes: if there are any issues encountered during the process, remember that the child also protected by the Children’s Court and can be approached for an order in terms of Sec 45 or Sec 46 of the Children’s Act if the DHA refuses to assist with the permanent residence application.





# CONTACT US

**For pro bono legal assistance or advice regarding an undocumented child, contact one of the following organisations:**

## **LAWYERS FOR HUMAN RIGHTS**

### **PRETORIA OFFICE (National Office)**

Address: 357 Visagie Street, Pretoria Central

Tel: +27 12 320 2943 or 064 647 4719 | E-mail: [info@lhr.org.za](mailto:info@lhr.org.za)

### **JOHANNESBURG OFFICE**

Address: 4th Floor South Point Corner Building, 87 De Korte Street, Braamfontein

Tel: +27 11 339 1960 or 066 076 8845

### **DURBAN OFFICE**

Address: Room S104 Diakonia Centre, 20 Diakonia Avenue, Albert Park, Durban

Tel: +27 31 301 0531 or 078 315 1269

### **MUSINA OFFICE**

Address: 18 Watson Avenue, Musina

Tel: +27 15 534 2203 or 076 766 7782

### **CAPE TOWN OFFICE**

Address: 295 Lower Main Road, Observatory, Cape Town

Tel: +27 21 424 8561

LAWYERS FOR  
HUMAN RIGHTS

## **CENTRE FOR CHILD LAW**

Address: 299 Soutpansberg Road, Corner Van Der Merwe Street, Rietondale, Pretoria

Tel: +27 12 333 5610



CENTRE FOR  
CHILD LAW

## **LEGAL RESOURCES CENTER**

### **DURBAN OFFICE**

Address: 11th Floor, Aquasky Towers, 275 Anton Lembede Street, Durban, 400

Tel: +27 31 301 7572 | Fax: +27 31 304 2823

LRC

Legal Resources Centre

## JOHANNESBURG OFFICE

Address: 2nd Floor West Wing, Women's Jail, Constitution Hill, 1 Kotze Street, Braamfontein, Johannesburg  
Tel: +27 11 038 9709 | Fax: +27 11 838 4876

## CAPE TOWN OFFICE

Address: Aintree Office Park Block D, Ground Floor, cnr Doncaster Road and Loch Road, Kenilworth, Cape Town  
Tel: +27 21 879 2398 | Fax: +27 21 423 0935

## MAKHANDA (GRAHAMSTOWN) OFFICE

Address: 116 High Street, Grahamstown (Makhanda), 6139  
Tel: +27 46 622 9230 | Fax: +27 46 622 3933

## SCALABRINI CENTRE

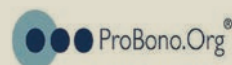
Address: 47 Commercial Street, Cape Town  
Tel: +27 21 465 6433 | Email: [info@scalabrini.org.za](mailto:info@scalabrini.org.za)



## LAWRENCE HOUSE

Address: 25 Regent Road, Woodstock Tel: +27 21 448 1144 | Email: [lawrencehouse@scalabrini.org.za](mailto:lawrencehouse@scalabrini.org.za)

## PROBONO.ORG



## DURBAN OFFICE

Address: 303 Anton Lembede Street (Entrance on Durban Club Place), Suite 701, 7th Floor, Durban Club Chambers  
Tel: +27 31 301 6178 | Fax: +27 31 301 6941

## JOHANNESBURG OFFICE

Address: 1st Floor West Wing, Women's Jail, Constitution Hill, 1 Kotze Street, Braamfontein  
Tel: +27 11 339 6080 | Fax: +27 86 512 2222

## CAPE TOWN OFFICE

Address: Suite 200, 57 Strand Street, Cape Town  
Tel: +27 87 806 6070/1/2 | Fax: +27 86 665 6740

## UNIVERSITY OF CAPE TOWN LAW CLINIC

Address: UCT, 3rd Floor, Kramer Law School Building, 1 Stanley Road, Rondebosch, Cape Town  
Tel: +27 21 650 3775



## UCT REFUGEE RIGHTS UNIT

Address: UCT Middle Campus, Law Faculty, Rondebosch, Level 3 room 3.05  
Tel: +27 21 650 5581 | Email: [refugeelawclinic@uct.ac.za](mailto:refugeelawclinic@uct.ac.za)

## UNIVERSITY OF NELSON MANDELA LAW CLINIC

## NMU REFUGEE RIGHTS CENTER

Address: Nelson Mandela University, Gqeberha (Port Elizabeth)  
Tel: +27 (0) 41 504 1111 | Fax: +27 (0) 41 504 2574 / 2731 | E-mail: [info@mandela.ac.za](mailto:info@mandela.ac.za)



## **SAVE THE CHILDREN SOUTH AFRICA**

Address: 3rd Floor, Festival Office Park 353 Festival Street, Hatfield Pretoria 0028, South Africa  
Tel: 012 430 7772/5 | website: [www.savethechildren.org.za](http://www.savethechildren.org.za) | [info@savethechildren.org.za](mailto:info@savethechildren.org.za)

## **LAWYERS FOR HUMAN RIGHTS (NATIONAL OFFICE)**

Address: 4th Floor, Heerengracht Building, 357 Visagie Street, Pretoria, South Africa  
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