



LAWYERS FOR HUMAN RIGHTS

**Towards Universal Birth Registration in South Africa: A Briefing Paper**

**Drafted by Lawyers for Human Rights**

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## Introduction

Birth registration refers to the permanent and official recording of a child's existence by an administrative branch of the state. Birth registration is a human right. It represents the starting point for the recognition of a person's legal existence and is thus the key to the realisation of nearly all other fundamental rights and practical needs. Amongst these are the right to a nationality, education, healthcare and protection from child labour and trafficking.

Human rights are universal. They are afforded to all human beings without discrimination. Birth registration ought to occur, without discrimination, as a result of birth on a state's territory. Children born to asylum-seekers, refugees and undocumented foreigners hold this right equally to children of citizens.

South Africa has made a clear commitment to these principles through ratification of the relevant human rights treaties, as well as through constitutional and other legal standards (outlined below). To be sure that we honour this commitment, it is important that all children born on the territory are issued with a birth certificate without discrimination as to their or their parents' legal status in this country.

We have noted, through our work, that uncertainty and inconsistency exist on the Department of Home Affairs' ("DHA" or "the Department") policy in this regard. Applicants are routinely turned away when applying for their children's birth certificates due to failure to produce a passport or a South African ID document. The practical result is that asylum-seekers, refugees and undocumented persons are prevented from accessing birth certificates for their children. These children are at high risk of statelessness. Without a birth certificate, they can access neither the nationality of their parents nor the provisions of South African law which may offer citizenship if they are otherwise stateless or if they remain in the country until age eighteen.<sup>1</sup>

In this Briefing Paper we aim to provide a situation report as well as some suggestions as to how the challenge of universal birth registration in South Africa could be addressed.

## Situation Report

Our experience is that complete **denial of access** has occurred in instances where:

- *A child is born outside of a registered clinic:* In these circumstances, a clinic card is not always available to prove birth in the territory, making the task birth registration

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<sup>1</sup> See the Citizenship Act of South Africa, section 2 and section 4 (as amended in South African Citizenship Amendment Act, No. 17 of 2010).

impossible. The current policy appears to require that parents produce a clinic card as proof of birth in the territory.

- *The parents of the child are undocumented*: Some form of government-issued identification is required for birth registration. In addition, undocumented parents are often threatened with arrest at DHA offices as illegal foreigners.

In brief, **confusion as to procedure** arises in the following circumstances:

- *Maternity certificates versus clinic cards*: Officials are uncertain as to whether a clinic card is sufficient proof of birth in the Republic or whether a maternity certificate is also required. Some clinics do not issue maternity certificates. While some DHA officials accept only a clinic card, others insist that birth registration is not possible without an endorsed maternity certificate (despite the fact that these are not uniformly distributed).
- *Asylum-seeker permits*: We have experienced high levels of xenophobia in response to asylum-seekers, particularly Zimbabweans, who approach DHA in search of a birth certificate. Officials in some offices refuse to accept asylum seeker permits as proof of parents' identities.
- *Expired asylum papers*: While some parents with expired asylum seeker permits have been able to obtain birth certificates for their children, others have been turned away.
- *Removed permits and fines*: Uncertainty exists as to how to deal with an asylum-seeker whose permit has been removed (as is the Refugee Receptions practice in cases where a permit has expired) and who has been issued instead with a fine.
- *Refugee permits and refugee IDs*: We have received reports from documented refugees who have been unable to register their children at local DHA offices. This concern has been reported to us, in particular, by the Somali communities in Rustenberg, Mthatha and Polokwane. DHA offices have demanded that the Somali parents produce South African IDs before their children will be assisted in birth certification. This is despite the fact that the parents in all cases are recognised refugees with valid refugee permits and/or refugee IDs issued by the South African government, and despite the fact that they have all documentation required to prove birth of their children on the territory.

## Recommended Solutions

### **a. A Department of Home Affairs Policy Directive**

We strongly recommend that the Department issue a policy directive to all of its offices on the issue of birth certificates for children of foreign-nationals. This directive should provide clear instructions as to what is required for foreign-national parents to access birth certificates for their children born on the territory. A directive would allow the Department to create a policy which is inclusive of the needs of these groups and which moves South Africa closer to universal birth registration. Furthermore, it will have a wide impact in reducing instances of statelessness among the migrant population.

Particular attention should be paid to the following groups:

i. *Children of undocumented parent(s):*

It seems that the Department's primary concern in requiring parents to have some form of ID is to verify that the mother/father listed on the clinic card and/or maternity certificate is the same person that is standing before them trying to register the child's birth.

Undocumented persons are thus, for obvious reasons, excluded for lack of ability to prove that they are the persons listed on the clinic card as the parents of the child.

We suggest that persons who present at DHA to register their child's birth without any form of identity document may be given the alternative of providing an affidavit and/or witnesses to attest to their identity. Perhaps special forms can be issued to undocumented parents at South African clinics and hospitals immediately after birth, capturing the parent(s) fingerprints and the child's footprint. This can then be confirmed against applicants' biometric data at DHA upon applying for a birth certificate.

It should be noted that requiring parents to have government-issued identity documents in order to obtain a birth certificate may force more inappropriate applicants to enter the already overburdened asylum system, as it may be the only way they can access documentation. It may also increase reliance on fraudulently obtained identification documents.

Undocumented persons should be exempted from arrest at DHA while seeking documentation for their children. All local DHA offices should be notified that it is unacceptable practice to threaten or arrest illegal foreign-nationals who are merely trying to register their children's births.

ii. *Children born to foreign-nationals outside of registered clinics:*

Parents whose child was born in South Africa but outside a registered hospital or clinic may foreseeably present with an affidavit by themselves and/or by one or more witnesses to the birth, which could serve as proof of birth within the territory. This has been reported to be the typical requirement for children born at home to South African citizens. If concerns exist, additional requirements such as witness testimony can bolster claims to birth on the territory.

iii. *Children of parent(s) with expired permits or fines for expired permit(s):*

These persons should be assisted in the registration of their child. In many instances, the fine or expired permit is the only government-issued document which the applicant has in order to prove his identity.

*iv. Children of asylum seekers and recognised refugees:*

Refugees and asylum seekers (with s24 or s22 permits<sup>2</sup>) should uniformly be issued with birth certificates for their children born on the territory, as long as they can provide the proper documentation depending on the child's age and the Department's requirements (in line with those for citizen children).

**b. Involvement of the Department of Health**

In order for the Department of Health (DoH) to facilitate the process of universal birth registration, there must be clarity and agreement on the requirements that DHA places on foreigners for birth registration. The DoH will then be in a position to align their practices to ensure parents can meet the requirements for birth certification at DHA.

For example, should DHA require a maternity certificate, this document must be issued to new mothers at all clinics and hospitals nation-wide. Furthermore, should DHA wish to enforce the rule that this document must be validated by a hospital stamp, Department of Health should ensure that all clinics and hospitals follow this practice. These processes should be uniform and consistent and there should be a mandated monitoring of the process to ensure compliance.

**c. Involvement of Department of Social Development**

Under the Births and Deaths Registration Act, a children's court proceeding must occur and a social worker must assist in registering the birth of children who are abandoned or orphaned. This provision applies for such children regardless of whether they are born in South Africa and who their parents are. A birth certificate is required for such children to enter the foster care or adoption system and thus is crucial in securing the child's future.

We have experienced through LHR's direct legal services that great challenges remain in implementing this legislation at the local level. We have observed that when a "foreign child" is concerned, confusion and burden-shifting appears to be the norm at government departments. The result is that no government department takes any responsibility and these children remain undocumented and uncared for

Social workers are often the only voice for children who are orphaned or abandoned. Without intervention, "foreign" orphans and abandoned children languish in shelters until they reach adulthood when sympathy is no longer written into the law and a children's court proceeding is not possible. For these reasons, we think DSD should be included in the formulation and issuance of a joint directive on birth registration for children of foreigners.

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<sup>2</sup> See Refugees Act, No. 130 of 1998.

#### d. Awareness-raising

We undertake to work in partnership with DHA and the DoH in promotion of the right to birth registration. We are able to put together a draft version of a pamphlet outlining clearly the Department's policy on birth registration of children born to foreign parents in South Africa for the Department to finalise and issue. We hope that such a document could be officially endorsed by the insignia of DHA as a symbol of its participation in and support of this process.

This pamphlet may be distributed amongst outpatients at hospitals and clinics, at shelters and churches frequented by immigrants as well as at the Refugee Reception Offices. Community-based organizations will also be issued with this media, to distribute among their constituents.

### The Law

The above recommendations are necessitated by our obligations under international law, the Constitution and South African legislation.

#### a. International Law

The primary international instruments dealing with the issue of birth registration are the United Nations Convention on the Rights of the Child,<sup>3</sup> the Covenant on Civil and Political Rights<sup>4</sup> and the African Charter on the Rights and Welfare of the Child (hereafter 'ARC').<sup>5</sup> South Africa is signatory to each of these and thus is bound to uphold their provisions.

The conventions make clear that *all* children, regardless of their nationality, race, legal or other status, are entitled to a name, a nationality and immediate birth registration. Article 24(1) of the CCPR explicitly states that "every child" has the right to the protection which his status as minor grants him "without any discrimination as to... national or social origin." The ARC defines a child as anyone below 18 years of age *without exception*. The right of the child to immediate birth registration thus applies universally to *all* children regardless of their nationality. The immediacy of the right and the universality of its formulation combine to create an indisputable obligation on states to facilitate birth registration (a) in the country of birth and (b) for *all* children born in the territory.

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<sup>3</sup> See Article 7(1).

<sup>4</sup> See Article 24.

<sup>5</sup> See Article 6.

## **b. Local Legal Mechanisms**

### **i. The Constitution**

Section 28 of the Bill of Rights, is formulated broadly to relate to “all children.” The rights of the child, listed at Article 28, include the right to “a name and a nationality from birth.”<sup>6</sup> As elaborated upon below, the implementation of the right to a nationality is directly linked with the right to registration at birth.

### **ii. The South African Births and Deaths Registration Amendment Act (No. 18 of 2010)**

Section 9(1) of the amended Births and Deaths Registration Act deals with ‘Notice of Birth:’

“( I) In the case of any child born alive, anyone of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.”

Section 2 of the same act provides that the Act applies to South African citizens but also includes “*persons who are not South African citizens but who sojourn permanently or temporarily in the Republic, for whatever purpose.*”

### **iii. The South African Citizenship Act (No. 88 of 1995), as amended by Act No. 17 of 2010.**

In order to access nearly all provisions of citizenship in South Africa, a birth must be registered in accordance with the Births and Deaths Registration Act.

## **The Importance of Universal Birth Registration**

### **a. The Right to a Nationality – Meeting a Burden of Proof**

The right to nationality cannot be realised without meeting a state’s administrative requirements for burden of proof.

A birth certificate reflects the names of one’s parents, serving as proof of nationality for countries which offer citizenship by descent. It reflects the place of birth, serving as proof of nationality in countries which offer citizenship by birth on the territory. The link between nationality and birth certification is thus irrefutable; birth registration is the main legal mechanism that is used to prove a child's nationality.

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<sup>6</sup> Section 28(1)(a) of the Final Constitution of South Africa (1996).

NICEF Goodwill Ambassador Harry Belafonte, in urging African states to redouble their efforts to register births, said that, “to deny children their legal documentation, their names, [and] their identity is to jeopardize their very lives and to deny them a future as citizens.”<sup>7</sup> His statement emphasizes the point that an unregistered child may not meet the burdens of proof which are required by citizenship laws and administrative practices throughout the world.

This danger is exacerbated for children born abroad to migrants, asylum-seekers and refugees. Should they travel to their parents’ country of origin, they will be unable to prove their link with that country, particularly if their parents are deceased or undocumented.

DHA reports that 20% of births in South Africa continue to go unregistered. Late birth registration is thus still necessary. However, LBR imposes extremely high burdens of proof upon applicants, requiring the presence of parents, parents’ documentation, letters from schools, affidavits, and more. Similar requirements exist in other African nations. Where the bar for proving citizenship is set so high, there is a risk that a large number of applicants will be unable to meet it. This is particularly true in socioeconomic settings across the African continent, where family breakdown is common and levels of documentation and life expectancy are low. Mass migration in Africa only exacerbates these problems and increases the risk of statelessness for many migrants.

For these reasons, it is of utmost importance that access to birth registration immediately following birth is facilitated at all costs.

## **b. Related Rights and Services**

Because it is directly linked to the right to a nationality, birth registration is often a prerequisite for the successful implementation of all rights which flow from citizenship.

For example, a birth certificate is in practice required to access education in South Africa (for citizen and non-citizen children alike). In addition, without proof of birth date, children are often prevented from accessing the rights which flow from their status as minors. Birth certificates proving one’s age protect against abuse such as early marriage, child labour, premature enlistment in the armed forces or, if accused of a crime, prosecution as an adult.

In adulthood, unregistered persons encounter numerous difficulties, including inability enter and exit any country freely, risk of indefinite detention and repeated arrest, inability to find work in the formal sector, a denial of access to banking services and civil registries and inability to pursue university and post-graduate studies.

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<sup>7</sup> Belafonte, Harry (23 February, 2004). Press Release: Belafonte Urges West Africa to redouble birth registration efforts. DAKAR. Accessed online at: [http://www.unicef.org/media/media\\_19351.html](http://www.unicef.org/media/media_19351.html)



## Conclusion

South Africa has made a clear commitment to universal birth registration as a human right. In the realization of this right, birth registration cannot be limited to children born to South African or passport-bearing parents in registered clinics or hospitals.

We recommend the development and clear communication of a policy which includes and protects undocumented persons, refugees and asylum-seekers – no matter their legal status. In turn, we undertake to assist the DHA in the formulation of this policy and the dissemination of information to the persons affected. This policy and its successful implementation will help protect children born on our soil from statelessness and from the barriers to the socio-economic, civil and political rights that flow from a lack of documentation.