

# Children's right to identity in South Africa

96<sup>th</sup> pre-session ■ Combined Third, Fourth, Fifth and Sixth Periodic Report ■ CRC/C/ZAF/3-6

## 1 Creation of identity

### Birth registration:

- A total of 1,087,526 births were registered in South Africa in 2021; of these 949,757 (87.3%) were births that occurred and were registered in 2021 (current birth registrations), while 137,769 (12.7%) were births that occurred in previous years but were registered in 2021.<sup>1</sup>

- Several laws provide the legal basis for birth registration: the Constitution of South Africa (1996) states in Section 28 that 'every child has the right to a name and a nationality';<sup>2</sup> the Births and Deaths Registration Act (BDRA) (1992);<sup>3</sup> the Regulations of the Births and Deaths Registration Act (2014);<sup>4</sup> Standard Operating Procedures (SOPs), Directives and Departmental Circulars are used in practice to instruct local offices on implementation of the law.

- The birth registration process requires a parent, guardian or any other person legally responsible for the child to register the child within 30 days of their birth (Section 3 of the Regulations). However, the Regulations require strictly the biological parents to register the birth, and where parents are unavailable but not deceased, registration is thus impossible for children living with grandmothers or other caregivers.

- Birth registration is free of charge, but the regulations make provision for a fee to be paid for late registrations of birth (registrations after 30 days of the birth). Other charges also become payable for late registrations, such as the requirement for DNA paternity testing for children born to a foreign and a citizen parent.<sup>5</sup> Results are only accepted from five listed laboratories.<sup>6</sup>

- Obstacles to birth registration:

- *Geographical barriers:* Although the Department of Home Affairs (DHA) does reach out to people in rural areas through mobile registration units, some people living in these areas still encounter difficulties to register the birth of their children within the 30 days period. This time is too short for them to gather all the necessary documents and travel to the DHA to register the birth.<sup>7</sup>

- *Legislation, SOPs and practices not aligned with Constitution:* Several Court cases, some of which have reached the Constitutional Court, have found the BDRA and its regulations unconstitutional. In *CCL v The Director-General of Home Affairs*, the court found section 10 to be unconstitutional in as far as it discriminates against unmarried fathers and their children, by preventing them from registering births without the presence of a mother. Such cases include mothers have died, abandoned, or who are undocumented themselves.<sup>8</sup> The Courts have also found that the regulations are unconstitutional in so far as it requires parents to have legal status and documentation to register a birth.<sup>9</sup> Parliament has been given the opportunity to amend its laws, regulations, SOPs, and circulars, but has not, and so there is little change in practice.

- *Lack of parents' valid ID documents:* The requirement for of parents' valid identity documents (IDs) or valid passport and valid permit/visa is the main weakness of the current birth registration system and prevents children's access to birth registration and government services, such as education and health care.<sup>10</sup> Despite the court judgments above, DHA has not altered its SOPs and still refuses to register some children, whose parents do not have a valid South African ID, or a valid passport and valid permit at the time of registration.<sup>11</sup>

- *Any South African citizen without an ID document or whose ID / entry in the National Population Register is blocked:* These are unable to register the birth of their child. CCL, in collaboration with various other organisations and applicants, are in the process of litigation<sup>12</sup> to challenge the constitutionality of this 'ID blocking' practice a phenomenon in which a person who is thought to have a duplicate ID or is suspected of ID fraud, or is related to such a person, is marked and blocked on the on the electronic biometric system linked to

the National Population Register (NPR). All services linked to the NPR are then also suspended, such as banking, and social grants become inaccessible, presenting risks to the survival and development of children. Without due processes, these people remain invisible for years and the children born during this time remain unregistered.

- *Foreign children with asylum-seeking or refugee parents and children of undocumented or irregular migrants:* These are at increased risk of their birth not being registered because of the entrenched barriers to documentation that this category of people face. The renewal of asylum seeker and refugee documents is notoriously difficult and fraught with corruption. The lack of a low skill visa for SADC migrants lead to many migrant workers remaining in the country unlawfully. These parents are prevented from registering the births of their children. A handwritten birth certificate is issued to the children of foreign parents. This document enables the parents to obtain citizenship documents from the country of citizenship. Refugees and asylum seekers do not approach their Embassies, but their children are issued with asylum-seeker or refugee documents on the strength of the handwritten document. Hence, the vital importance of the birth certificate. Where parents face barriers to documentation, their children do too.

- *Unaccompanied and separated children:* A joint submission by several NGOs to the Human Rights Council, as part of the Universal Periodic Review, reveals some problematic practices regarding the record and types of birth certificates issued.<sup>13</sup> Indeed, DHA only provides a hand-written birth certificate to foreign children born in South Africa, meaning that the birth is not entered into South Africa's National Population Register, nor is it captured digitally. As of 2022, organisations have received reports that DHA is therefore not able to re-issue hand-written birth certificates when these are lost or damaged, leaving many children unable to replace birth certificates, especially when parents have passed away or disappeared. Ultimately, these children are denied proof of the key elements of nationality and are at increased risk of statelessness.<sup>14</sup> Unaccompanied and separated migrant children, when family reunification has failed, are also at severe risk of statelessness in South Africa, because of the lack of a permit which could facilitate the long-term stay in alternative care in South Africa. Having entered the alternative care system, legislation does not require government officials to obtain a passport and an immigration visa for such a child, a crucial step in establishing and preserving the identity of such children. Social workers are required to gather information and do family tracing, and such details are recorded in their reports. However, once it is found that they cannot be repatriated and reunited with family, often no further steps are taken to establish nationality and acquire legal status, leaving them at extreme risk of statelessness, particularly when they turn 18 years of age and become susceptible to arrest and indefinite detention. Most importantly, even if a child does acquire a passport, South African law does not make provisions for a stable long-term immigration visa, which may lead to citizenship for such children if their stay turns out to be indefinite, or if they are stateless. Thus, even though there are existing provisions and SOPs for this group of children, challenges remain.

- *Abandoned or orphaned children:* In 2021, there were 541,000 orphans in South Africa, including those having been abandoned.<sup>15</sup> The Centre for Child Law receives queries from social workers, who report facing barriers when attempting to register the births of such children, because the department requires them to go further to find the parents, even further than required by the Court that finds the child to be abandoned. This wide discretion is the source of much uncertainty and often, administrative injustice. There are further reports of DHA failing to register children, whose parents are unknown or who are foundlings.<sup>16</sup> No legal provision directly requires that such children be presumed to be born in South Africa and that they should be assumed to be South African, leaving them at risk of statelessness.<sup>17</sup> This valid ID document requirement perpetuates generational risks of statelessness and is contrary to the Constitution, to the child's right to a nationality and undermines the protection against statelessness, as provided for in the South African Citizenship Act (Section



- *Children born out of wedlock*: Information about fathers remains an important challenge. In 2021, no reliable information on fathers could be provided due to a high proportion of births registered without the details of fathers (over 60%).<sup>19</sup> Previously, the law required children born out of wedlock to be registered by and under the surname of the mother. The father's details and surname could be added only with the consent of the mother. This led to challenges for fathers, who needed to register the births of the children when the mother was either dead, or unavailable, leading to such children not being registered at all. In September 2021, the Constitutional Court declared this provision unconstitutional, meaning unmarried fathers could now have their children registered without the mother being present, and have their information and surname be recorded in the birth certificate of their children at the DHA.<sup>20</sup> It could end discrimination against unmarried fathers and would allow children to have access to their full legal identity, including their family relations. However, DHA has not affected this legal change in their legislation, regulations, nor SOPs, and it is not being implemented in practice. In practice, fathers are asked for DNA proof of paternity, which is very expensive and takes very long due to backlog. This is a potentially unconstitutional practice, yet to be determined by the courts.

#### Children at risk of statelessness / stateless children:

- South Africa's *Citizenship Act* makes provision for an important safeguard against statelessness. Section 2(2) states that a stateless child born in South Africa shall acquire South African citizenship by birth. However, there are no regulations, nor forms, which facilitate the application. In a 2016 Court judgement in *DGLR v Minister of Home Affairs*, the Department was ordered to promulgate regulations. There is no progress on this matter. Stateless children born in South Africa thus have no recourse.
- Children who are stateless but who were not born in South Africa, also have no recourse / pathway to citizenship, because there is no law which grants them residence and a pathway to citizenship.
- No statelessness determination procedure exists which would aid in both of these categories to identify and assist stateless children.

#### Potential considerations:

- *What is being done to ensure that legislation, regulations, directives, circulars and SOPs are brought in line with the court judgments?*
- *What is being done to ensure that other ways of proving the paternity of unmarried fathers are accepted for the purpose of birth registration, such as a presumption of paternity based on customary practises and the provision of affidavits by both parents, instead of DNA paternity results?*
- *What is being undertaken to ensure that the lack of a or both parents' ID document will no longer remain an obstacle to birth registration?*
- *What is being undertaken to ensure that the right of all children born on South African territory can be registered, irrespective of their or their parents' migratory status?*
- *What is being undertaken to ensure the creation and preservation of the identity and family relations of abandoned children and children born of mothers under 18?*
- *What is being done to ensure that the identity of the founding child is established and recorded and to ensure birth registration and the acquisition of citizenship.*
- *What is being done to establish a statelessness determination procedure for children in South Africa?*
- *What is the country undertaking to ensure that the time period to register the births of children born in rural areas is adapted and/or to ensure that access to DHA's procedures are facilitated?*

## 2 Modification of identity

#### Multiplicity of caregivers:

- Child care in South Africa is characterised by a multiplicity of caregivers. Many children do not live with their biological parents, either by agreement with the parents or because of the child's removal following a Court decision. Less than one third (30%) of South African children live with both their parents, while the vast majority of Indian and White children (86% and 79% respectively) live with both biological parents. More than one in five of all South African children do not live with either parent: 45% live with their mothers but not their fathers; 18% do not have either of their biological parents

living with them.<sup>21</sup> Children who do not live with their parents are not necessarily orphaned. The typical family structure is not the nuclear one, there are various forms of caregiving arrangements.<sup>22</sup> Parents who live apart from their children often still provide financial support. There are different grounds for this situation: migration, HIV, poverty, housing and educational opportunities, low marriage and cohabitation rates, as well as customary care arrangements.<sup>23</sup> These kinds of non-nuclear family structures may have an impact on the identity of the children in terms of their right to family relations, as the child may lose contact with his or her parents. It may also affect their ability to obtain documentation because the parents are required to be present for the application.

#### Alternative care – foster care:

- Whenever possible, children are placed with a family with a similar cultural, religious and linguistic background (Section 184 of the [Children's Act](#)). After two years of placement, the Court may order that the placement may be extended until the child turns 18, in those cases in which the child has been abandoned, the biological parents are dead, or if there is no aim to reunify the child with his or her biological parents (Section 186 of the Children's Act). This order can also be extended once the child has turned 18 years of age to allow them to finish their schooling while in care (Sections 159(3) and 176(2) of the Children's Act).
- In accordance with Section 187 of the Children's Act, when a placement is ordered with a view to reunification, the order must provide the conditions for the social worker to facilitate such reunification.
- There is no mention of the preservation of sibling relations while in care in the Children's Act.

#### Adoption:

- Adoption is regulated in Chapter 15 of the Children's Act. In 2021, 834 domestic adoptions and 139 intercountry adoptions took place.<sup>24</sup>
- According to the National Child Care and Protection Policy of the Department of Social Development (DSD) (2019), adoption is an integral element of the child care and protection system and recognised as a permanent care option.<sup>25</sup>
- A post-adoption agreement may be concluded between the biological parents or guardian and the adoptive parents to arrange communication and the provision of information, including medical information (Section 234 of the Children's Act).
- In accordance with Section 245 of the Children's Act and Section 10 of Regulations of the Births and Deaths Registration Act (2014), the adoption and any change to the surname of the child should be recorded in the births register. A new identity number is issued, together with a corresponding birth certificate recording the names of the adoptive parents.
- The original adoption documents are, in terms of the Children's Act, persevered by the Register for Adoptions and this ensures that adoptees can in future access information about their birth families.

#### Child-headed households:

- In accordance with the Children's Act (Section 137), a child-headed household is a household where there are adults, who may be too sick or too old to effectively head the household, and thus the role of caregiver is supported by a child over the age of 16, under the supervision of an adult person designated by the Court. Other definitions do only refer to a household in which all members are younger than 18 years.
- To date, there is no accurate data available on the number of child-headed households, although it is a reality in South Africa for children, who have lost their parents through death or abandonment. The DSD recognises this type of care as a legitimate form of care, where no other adult can take care of them. Children in child headed households will face heightened risk of statelessness and of being undocumented if social workers do not assist them to access such documents.

#### Potential considerations:

- *What is being undertaken to ensure the preservation of the identity and family relations of children who do not live with their biological parents or who are part of child-headed homes?*
- *What is being done to ensure that the child maintains contact with his or her parents and siblings when he or she is placed in alternative care or lives elsewhere?*
- *What efforts in practice are made to ensure that siblings are not separated when removed from the family environment and that support is available to promote family reunification?*



# 3

## Falsification of identity

### Trafficking:

- The *Prevention and Combatting of Trafficking in Persons Act* (2003) prohibits trafficking and forced labour.
- The *Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007* (CLAA) also criminalises the sex trafficking of children and adults and prescribes penalties of up to life in prison.
- Despite this prohibition, trafficking happens in South Africa resulting in forced labour, sex trafficking and also child marriage.<sup>26</sup> There is no reliable and updated data on trafficking on children in South Africa. Only limited cases are reported to the police and successfully prosecuted.<sup>27</sup>
- According to the 2022 Trafficking in Persons report from the US Department of State, for the past two years, DHA has not provided vulnerable migrant populations with proper immigration documentation, which increased vulnerabilities for trafficking. Undocumented children, including many child trafficking victims from Mozambique, the Democratic Republic of the Congo and Zimbabwe, are unable to access education and government services, which increases their vulnerability to trafficking.
- A significant challenge is the official complicity and corruption within the government, which facilitates trafficking. Despite the government's effort to prosecute, condemn and investigate, civil society continues to report corruption, particularly among the DSD, DHA, the South African Police Service (SAPS) and Directorate for Priority Crime Investigation (DPCI).

### Child labour:

- 2.2 million of the 11.4 million children aged 7–17 years in South Africa were engaged in economic activities in 2019.<sup>28</sup> The proportion of children exposed to at least one hazardous working condition decreased from 34.2% in 2015 to 33.5% in 2019. Compared to other population groups, black African children were more likely to be involved in child labour.
- The worst forms of child labour, in which children are involved, include commercial sexual exploitation, forced begging and use in illicit activities. South African children are recruited in criminal activities. As children under the age of 12 do not have criminal responsibility under South African law, gangs use them, known as 'springbokkies', to commit illicit acts, acts of violence, including murder, particularly around Cape Town in the Western Cape. This trend has increased since the pandemic as children became more vulnerable.<sup>29</sup> More generally, as the high rates of mortality have increased, an increased number of children are exposed to exploitation.
- Traffickers force both adults and children, particularly those from poor and rural areas and migrants, into labour in domestic service, mining, food services, construction, criminal activities, agriculture and the fishing sector. There were some reports stating that boys are enticed out of the country for fake sports scholarships and then forced into exploitation.<sup>30</sup>
- Social programmes are not sufficient to address the scope of child labour.<sup>31</sup> Criminal law enforcement agencies in South Africa have taken actions to address child labour and the government has established mechanisms to coordinate its efforts, but this is not sufficient, nor effective enough.<sup>32</sup>

### Sex trafficking:

- Syndicates, often directed by Nigerians, force women from Nigeria, and neighbouring countries into commercial sex, primarily in brothels and other commercial-front establishments. South African trafficking networks exploit girls as young as 10 years old in sex trafficking. Some well-known brothels, previously identified as locations of sex trafficking, continue to operate with officials' tacit approval.<sup>33</sup>

### Child marriage:

- The Marriage Act and the Customary Marriages Act both allow Child marriage. *Ukuthwala* – the customary practice of abducting girls as young as 14 and forcing them into marriage with older men – still happens in the Eastern Cape and KwaZulu-Natal.<sup>34</sup>

### Adoption:

- According to the questionnaire on the practical operation of the 1993 Adoption Convention, South Africa has, so far, not experienced any illicit practice in terms of origin enquiries.<sup>35</sup>

### Potential considerations:

- *What actions are being undertaken to prevent child trafficking within South Africa and beyond its borders and to trace potential family relations, thereby promoting family reintegration?*
- *What actions are foreseen to prevent child marriage and ukuthwala?*
- *What is being undertaken to prevent any event resulting from or resulting in a falsification of identity through adoption?*

# 4

## Preservation of identity and access to origins

### Adoption:

- The Children's Act covers the access to information related to the adoptee's origins. According to Section 248 of the Children's Act, access is allowed only to certain persons and under specific conditions: an adopted child after the child has reached the age of 18; the adoptive parent of an adopted child after the child has reached the age of 18; the biological parent or a previous adoptive parent of an adopted child after the child has reached the age of 18, but only if the adoptive parent and the adopted child give their consent in writing; an adopted child or an adoptive parent is entitled to have access to any medical information concerning (a) the adopted child; or (b) the biological parents of the adopted child, if such information relates directly to the health of the adopted child.
- The records are kept by the Adoption Registrar of the Department of Social Development, as stipulated in Section 247 of the Children's Act. The following information must be kept: personal details of the adopted children, of their biological parents and of their adoptive parents.
- In order to enquire about their origins, adoptees must send their requests to the Registrar. A questionnaire is sent to the adoptee to establish whether an adoptee might require counselling before being provided with adoption documents. Furthermore, the adoptee is made aware of the possibility that the biological parent(s) might not want to have contact with the adoptee.<sup>36</sup>
- With regards to the procedure for accessing information on the child's background, the person concerned can contact the adoption agency or social worker that handled the adoption directly as they would have a file on the adoption. Another option is to contact the Registrar of Adoptions at the DSD in Pretoria, where all adoptions done in the country must be registered.
- In principle, the Registrar would be able to determine which agency processed the adoption, supply the adoptee with a copy of their adoption order and, where possible, provide updated information on the whereabouts of the birth parents.
- Parties to a post-adoption agreement, as provided in Section 234 of the Children's Act, are entitled to have access to information about the child as it has been stipulated in the agreement.
- While a process is in place to access 'records', it does not seem that there is an official system in place to have contact with birth families. It does not seem that there is a government-mandated system to provide professional support to adoptees.
- Adopted Child,<sup>37</sup> a private organisation, has been set up specifically to help adoptees, birth parents etc. reunite. Different accredited adoption bodies may provide tracing services if the person has been adopted through them. There are also a range of private searchers operating.



## Assisted reproductive technologies:

- **Artificial fertilisation:** A child born through artificial fertilisation is considered the child of the intended parents, who have the parental rights and responsibilities (Section 40 of the Children's Act).
- **Surrogacy:** Altruistic surrogacy is legal in South Africa and must be approved by the High Court (Section 295 (C iv-v) of the Children's Act). It is important to note that, in surrogacy arrangements, a genetic link with at least one commissioning parent is required (Section 294 of the Children's Act). This has been confirmed by the Constitutional Court in 2017,<sup>38</sup> which explains that the objective of this requirement is to create a bond between the child and the commissioning parents.
- **Access to information about origins:** The anonymity of the donor is provided for in several pieces of legislation:
  - A child born as a result of artificial fertilisation or by surrogacy, or his or her guardian, is entitled to have access to any medical information concerning that child's genetic parents and any other information concerning that child's genetic parents but not before the child reaches the age of 18 years. However, this information cannot reveal the identity of the donor (Section 41 of Children's Act).
  - According to the Regulations regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes (2003), 'no person shall publish or make known any fact whereby the identity of the donor of gamete may be disclosed' (Section 24).<sup>39</sup>
  - According to the Regulations relating to the Artificial Fertilisation of Persons (2003),<sup>40</sup> 'no person shall disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders' (Section 19). This is problematic for children, who wish to access their origins.

## Potential considerations:

- *What initiatives are being foreseen to ensure the implementation of the right of adoptees to access their information and to safeguard all information relating to their original identity and family relations?*
- *What is the country considering undertaking to ensure that children born through assisted reproductive technologies, including surrogacy, can have access to information about their genetic and gestational background?*

# 5

## Restoration of identity

### Late registration of births:

- Late registration of births (LRB) is unreasonable cumbersome in terms of requirements and takes months to years to finalise. This is because an applicant must appear before a late registration of birth (LRB) panel which are scheduled months in advance. The available data on the amount of outstanding LRB applications is estimated at 260,000 as provided in an answer to a parliamentary questions. The process of late registration is much more complicated than a registration at birth, as there are additional requirements to obtain a birth certificate (Sections 4 and 5 of the Regulations of the Births and Deaths Registration Act (2014)). The BDRA makes provision for a fee to be paid. These factors can prevent access to birth registration.
- The *Naki and Others v Director General*<sup>41</sup> judgement found that, even if one cannot provide all the documents requested, the application for Late Registration for Birth must still be accepted and considered.<sup>42</sup>

### Potential consideration:

- *Are actions foreseen in order to simplify the requirements for late birth registration?*

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