

**LAWYERS FOR HUMAN RIGHTS SUBMISSION TO THE SOUTH AFRICAN
HUMAN RIGHTS COMMISSION INVESTIGATIVE INQUIRY ON THE PLACEMENT
AND REMOVAL OF MARKERS ON HOLDER'S IDENTITY DOCUMENTS**

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INTRODUCTION

1. The South African Human Rights Commission (“the Commission”) intends to conduct an investigative inquiry relating to the practice by the Department of Home Affairs (“DHA”) of placing markers on holders’ identity documents (“IDs”) at a systemic level. For brevity’s sake, the practice will be referred to as “blocking” or “blocked IDs”.
2. A holder of an ID that is blocked is stripped of their human rights, unable to access various other basic rights and services, such as passports, bank accounts, careers, grants, and education, denying them the ability to participate fully in public life. Holders allege this is all done without proper notice or opportunities to make representations.
3. The inquiry will specifically probe:
 - 3.1. whether or not DHA complies with the relevant legislation, processes, regulations and policies when placing and removing markers on holders’ identity documents; and
 - 3.2. the impact this has on affected holders and their families.
4. To assist the Commission, it has requested the assistance of Lawyers for Human Rights (“LHR”). LHR is a non-profit, independent human rights organization that provides pro bono legal assistance to vulnerable, marginalized, and indigent communities who are victims of infringements of their human rights. LHR’s work

spans over six programmatic portfolios, namely: Land and Housing, Environmental Rights, Penal Reform, Gender Equality, Refugee and Migrant Rights and Strategic Litigation.

5. In 2011, after noting an influx of queries related to access to nationality and access to identity documentation, LHR established a Statelessness Project under the Refugee and Migrant Rights Programme. This is a specialized project that aims to strengthen and promote the rights of citizens and non-citizens in South Africa to citizenship and access to documentation as a means to combat statelessness. This is achieved by - *inter alia* - providing direct legal assistance, advocating for legislative and policy reform, and conducting and collating research on statelessness in South Africa and the Southern African region. Through the work of the Statelessness Project, LHR has identified certain systemic, administrative, and legal issues related to DHA's practice of blocking/marking identity numbers. Issues affecting both holders of citizen and non-citizen identity numbers.
6. These written submissions, provided to assist the Commission, are a summary of LHR's findings. These are to be used in addition to the oral evidence that will be provided by its witnesses at the hearing itself – along with the Commission's own complainants.

OVERVIEW OF THESE SUBMISSIONS

7. These submissions are, per the request of the Commission's letter, as follows:

- 7.1. Commonalities relating to LHR's clients' complaints;
- 7.2. Administrative barriers LHR experienced in attempting to resolve clients' complaints;
- 7.3. The legal, constitutional and human rights challenges with the processes followed by the DHA in placing and removing markers on holders' identity documents;
- 7.4. The impact that the placement of markers has on the identity document holders and their families;
- 7.5. The contribution of this practice to the scourge of statelessness and undocumented people in the country; and
- 7.6. Proposed reforms to the DHA's current processes of placing and removing markers of holders' identity documents.

COMPLAINTS RECEIVED BY LHR

8. As of writing, LHR has 114 clients whose IDs have been blocked or marked. In each case, there has been no proper administrative process. (See **Annexure "LHR 1"** – a list of current LHR clients and a summary of their circumstances).
9. By the time these submissions reach the Commission, the number of similarly positioned clients would have increased, with little chance of resolution of previous clients.

Commonalities

10. There are numerous factual *commonalities* in all cases:
 - 10.1. Clients are only alerted to their IDs being blocked upon application or attempting to access another service, such as applying for a passport or bank account. Upon making such an attempt, they are informed their identity numbers are blocked/marked by the DHA and their individual status is under investigation;
 - 10.2. None are given notice prior to having their IDs blocked and none are informed about the nature or purpose of the investigation;
 - 10.3. None are given the opportunity to make representations prior to both the decision to block and the finalisation of the investigation; and
 - 10.4. None are given notice advising them of their rights to request reasons nor their right to review or seek an internal appeal.¹
11. The LHR has observed the following common *scenarios* that result in blocked ID:
 - 11.1. Duplication/multiplication: Either two or more people have the same identity number or one person has multiple identity numbers;

¹ This all radically departs from the spirit of section 3 read with section 5 of Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), which requires an administrator, when making a decision that materially and adversely affects the rights of the public, to follow particular notice procedures: either a public inquiry, notice and comment, or alternative procedures which nevertheless give effect to similar procedures.

- 11.2. Foreign nationals/illegal immigrant: The DHA alleges that a holder is not South African;
 - 11.3. Fraud/misrepresentation: The DHA alleges a holder obtained their ID via fraud or misrepresentation relating to birth, death or marriage.
12. Most of LHR's clients fall within the last two scenarios. The DHA's allegations are never substantiated. The "facts" relied on by the DHA are replete with discrimination and/or arbitrariness:
- 12.1. The shape or position of inoculation marks;
 - 12.2. A record of frequent travel in and out of South Africa;
 - 12.3. An alleged deportation record the holder is unaware of;
 - 12.4. The inability to speak a specific local language;
 - 12.5. A holder having a "foreign-sounding" surname; and
 - 12.6. Having a parent or spouse of foreign nationality.

These categories are distilled from actual LHR clients and, if requested by the Commission, statements detailing the DHA's reliance on these "facts" will be provided.

The DHA has refused to provide the scenarios or criteria that results in blocked IDs.

Problems relating to resolving blocked IDs

13. When attempting to resolve the status for clients, the LHR has observed the following:
 - 13.1. The DHA instructs clients to complete a determination of citizenship form (DHA-529) and to submit documentary evidence for their claim, such as proof of residence, birth records, school records, and DNA evidence.
 - 13.2. Clients submit their fingerprints that are run through the DHA system. This system then provides a reason for the block.
 - 13.3. The DHA, via an immigration officer, conducts interviews with the clients and, sometimes, family members.
 - 13.4. The DHA, via an officer, then compiles a report which is sent to the Head Office for final determination on the removal or maintenance of the block on the ID.
14. This is not a consistent practice and clients' experience vary. **The DHA has refused to provide LHR with Standard Operating Procedures ("SOPs") or directives that must be followed to resolve or rectify a blocked ID situation.**
15. Even assuming the above procedure observed by LHR occurs, numerous other problems then arise for clients.
 - 15.1. Clients struggle to provide the necessary documentary evidence:

- 15.1.1. some did not have their births registered;
 - 15.1.2. some were born at home and have no birth records;
 - 15.1.3. some are orphans or were abandoned at a young age without parental documentation; or
 - 15.1.4. the parents are undocumented.
- 15.2. Clients experience inordinate delays, despite the DHA indicating a waiting period of six to eight weeks. Between months and years, clients are stuck in legal limbo with no resource, despite numerous correspondence.

ADMINISTRATIVE BARRIERS LHR EXPERIENCES

16. As seen above, the overarching barrier has been a lack of response and lack of clarity from the DHA, despite frequent attempts to correspond on behalf of clients.
17. Since 2011, LHR's Stateless Project's strategy has been to inquire in writing on behalf of each client, setting out the client's concern and claim then request rectification of the client's blocked status.
18. Some cases were resolved within a reasonable time but some require judicial review proceedings in the High Court.
19. Regarding some recent engagements, LHR experienced the following:

- 19.1. In December 2020, responding to a question (Question NW2763, noted by LHR in parliament), the Minister of Home Affairs provided a written response² that, *inter alia*, noted the following:
- 19.1.1. The DHA had, at the time, 813 343 identified cases of blocked identity documents under different categories;
- 19.1.2. The afore-mentioned total includes cases that have to remain blocked as these cases are already investigated and/or marked for deletion so that they should not be used again as such;
- 19.1.3. Of this total, about 500 000 were duplicates;
- 19.1.4. Of this total, about 70 000 were under investigation for “various reasons”.
- 19.2. Through further research, LHR discovered that the DHA had battled with blocked ID cases as far back as 2010. **Despite this length, there remains no sustainable solution nor an administrative process to sufficiently resolve these cases. (See Annexure “LHR 2” – a summary of meetings by the Parliamentary Portfolio Committee of Home Affairs on issues related to blocked/marked IDs compiled by LHR).**
- 19.3. On 9 March 2021, LHR conducted a parliamentary briefing on statelessness to the Portfolio Committee on Home Affairs. One of the

² Answer available online at: <https://pmg.org.za/committee-question/15119/>

issues LHR raised as a matter of concern, was the DHA's ID blocking practice. The Portfolio Committee requested the DHA to respond to this issue in writing and to highlight the number of blocked ID cases they were dealing with, the criteria used to block IDs and the steps to be taken in resolving a blocked ID case. **The DHA has not provided any response to date.**³

- 19.4. On 8 July 2021, LHR sent a letter of demand to DHA to address the systemic issues related to their ID blocking practice and to demand rectification of the 98 blocked ID cases that LHR had at that time. The Commission, the office of the Public Protector and the Portfolio Committee on Home Affairs were copied in this letter, attached as **Annexure "LHR 3"**.
- 19.5. On 31 August 2021, LHR received a response from the DHA indicating that the blocks/markers are used as "*an administrative tool to indicate various reasons thereof, such as for duplicate identity numbers, identity numbers obtained through misrepresentation...*" **DHA refused and/or failed to address the systemic issues highlighted in LHR's letter of demand nor to comply with LHR's request to produce DHA's policies or protocols relevant to ID blocking/markings** . (See **Annexure "LHR 4"**).

³ Meeting summary available online at: <https://pmg.org.za/committee-meeting/32487/>.

- 19.6. On 4 October 2021, LHR sent a final reply to the DHA indicating the shortcomings of its response and that it had failed to address the systemic issues and to provide adequate reasons for the blocks/markers on our clients IDs. DHA's Director of Legal Services (Tsietsi Sebelemetja) responded via e-mail indicating that he would like to discuss "*a workable way forward*", but when LHR requested a date and time to schedule the discussion **he did not respond**. (See **Annexure "LHR 5"**).
20. Since July 2021, LHR has been approached by at least 50 more clients requiring assistance with their blocked ID cases and the number of our clients grows daily.
21. However, since the DHA refuses to respond, provide clarity, or engage, these cases cannot be resolved in a reasonable time, meaning these cases are but a drop in the ocean to the total.

RIGHTS INFRINGED BY THE BLOCKED ID PRACTICE

22. The DHA's practice infringes on numerous constitutional rights:
- 22.1. The right to citizenship;
 - 22.2. The right to just administrative action;
 - 22.3. The right to human dignity; and
 - 22.4. Children's rights.

Citizenship

23. The right to citizenship is primarily protected by Section 3 and 20 of the Constitution.

23.1. Section 3 states that there is a common South African citizenship and that all citizens are equally entitled to the rights, privileges, and benefits of citizenship.

23.2. Section 20 of the Bill of Rights states “*No citizen shall be deprived of citizenship*”. Subject only to the limitations clause in Section 36, the injunction contained in this section is peremptory and absolute.

24. The right to citizenship is also contained and protected in various regional and international human rights instruments that South Africa has signed and ratified including; the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Social and Economic Rights (1966), the Convention on the Rights of the Child (1989), the African Charter on Human and People’s Rights (1981) and African Charter on the Rights and Welfare of the Child (1990).

25. Blocking IDs results in a deprivation of citizenship, or “citizenship stripping”, particularly where it is coupled with a declaration of being an “illegal immigrant”. In legal and/or practical terms a person with a blocked/marker identity number cannot access the rights, privileges, and benefits of citizenship such as:

25.1. registering to vote;

- 25.2. running for public office;
- 25.3. obtaining travel documents;
- 25.4. seeking diplomatic immunity in a foreign country.

The practice of blocking/marking identity numbers also creates a risk of statelessness for those without access or entitlement to any other citizenship – which is the case in almost all the LHR cases. This leaves affected persons in legal limbo, since they are now neither (according to the DHA) South African citizens nor can they be deported elsewhere to obtain refuge in another country.

- 26. The African Court on Human and People’s Rights (AfCHPR) has handed down three important judgments that confirm that arbitrary confiscation, revocation or invalidation of identity documents can be tantamount to “citizenship stripping” and result in statelessness.

26.1. *Anudo Ochieng Anudo v United Republic of Tanzania* App. No. 012/2015, AfCHPR, Judgment of 22 March 2018: in this case, Mr. Anudo (a Tanzanian citizen) had visited the local police station to process certain formalities for his marriage. The police confiscated his passport on the grounds that there were “suspicions regarding his Tanzanian citizenship”. This ultimately led to an official declaration that he was a “prohibited immigrant”, and he was deported to Kenya. In Kenya he was also found to be in an “irregular status” by a Kenyan Magistrate’s Court and expelled to Tanzania. He eventually found himself living in a no-

mans-land between Tanzania and Kenya – he suffered numerous physical and psychological traumas. The court ruled that the Tanzanian authorities' decision to confiscate Mr. Anudo's passport and declare him a "prohibited immigrant" effectively rendered him stateless and constituted a violation of his right to citizenship and the right not to be arbitrarily deprived of citizenship under the Tanzanian Constitution, the UDHR, and the ACHPR. The court further ruled that the failure to allow Mr. Anudo an opportunity to appeal or review these decisions constituted a violation of his right to be heard and his right to due process. In respect of burden of proof, the court ruled that even where an identity document that records citizenship is not necessarily conclusive proof of citizenship, the possession of such a document constitutes *prima facie* proof and shifts the burden of proof on the authority challenging the person's status as a citizen. The court ruled that the Tanzanian authorities had failed to discharge this burden of proof.

- 26.2. Robert John Penessis v. United Republic of Tanzania App. No. 013/2015, AfCHPR, Judgment of 28 November 2019: in this case, Mr. Penessis (a Tanzanian citizen) had been arrested in 2010 and detained for three years on a charge of "illegal presence" in Tanzania. Relying on the *Anudo* judgment, the court found that Mr. Penessis had been rendered stateless and his right to citizenship and the right not to be arbitrarily deprived of citizenship under the Tanzanian Constitution, the UDHR, and the ACHPR had been violated. The court further found that

there had been a violation of his right to freedom of movement and liberty.

- 26.3. *Kennedy Gihana & ORS v Rwanda* App. No. 017/2015, AfCHPR, Judgment of 28 November 2019: in this case, seven Rwandese citizens discovered their passports had been revoked or invalidated by the Rwandese authorities after one of them was informed during a visa application process. They were informed that their names appeared on a list dated 2012, that pronounced the invalidity of the passports held by all persons in the said list. None of them had been given prior notice of the invalidation of their passports and none of them were given an opportunity to appeal against the decision on the invalidation. They alleged that the revocation or invalidation of their passports constituted an arbitrary deprivation of nationality, it rendered them stateless and it had a significant impact on the enjoyment of a number of additional fundamental human rights, such: participation in political life; freedom of movement; citizenship; liberty; family life; and work. In respect of burden of proof, the court found that it would be unjust to place the burden of proof on the applicants given that the Rwandese authorities were the custodians of all civil registration documentation and therefore have access to the necessary records to prove or disprove their claims.

Just administrative action

27. Everyone has a right to administrative action that is lawful, reasonable, and procedurally fair. It further states that everyone whose rights have been materially and adversely affected by administrative action has a right to be given written reasons.
28. Section 3(2)(b) of PAJA in particular provides that, in order to ensure procedural fairness, all persons whose rights are materially and adversely affected by administrative action are entitled to;
 - 28.1. adequate notice of the nature and purpose of the proposed administrative action;
 - 28.2. a reasonable opportunity to make representations (the *audi alteram partem* principle);
 - 28.3. a clear statement of the administrative action;
 - 28.4. adequate notice of any right of review or internal appeal, where applicable; and
 - 28.5. adequate notice of the right to request reasons in terms of section 5 of PAJA.
29. The DHA practice of blocking IDs is inimical to the precepts of both Section 33 of the Constitution and to PAJA. It is unjust, unreasonable, and unfair.
30. Furthermore, it is uncertain what empowering provisions the DHA relies on to justify this practice, since it has consistently failed to provide LHR or clients with

such information. LHR holds the view that there is no such empowering provision.

31. Although the Identification Act 68 of 1997 and the Birth and Deaths Registration Act 51 of 1992 (and its Regulations) have limited provisions on verification, investigation and cancellation of identity documents, these provisions do not empower the DHA to block IDs in the absence of notification and consultation with the affected person at the bare minimum.
32. Further, although the majority of LHR's clients are suspected to be "illegal immigrants", as noted above in the Minister's answer, the administrative procedures provided for under the Immigration Act 13 of 2002 are not complied with either. In any event, the *fact* that a person is an "illegal immigrant" does not absolve the DHA from following a process that respects the constitutional rights of those persons.

Dignity

33. The right to citizenship is arguably one of the most critical rights in the Constitution because it enables access to and realization of other fundamental human rights required to live a dignified life.
34. The Constitutional Court in *Chisuse* deemed citizenship "*the gateway through which a number of rights in the Constitution can be accessed*".⁴ It went on to say:

⁴ *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) at par 24.

“Citizenship is not just a legal status. It goes to the core of a person’s identity, their sense of belonging in a community and... to their security of person. Deprivation of, or interference with, a person’s citizenship status affects their private and family life, their choices as to where they can call home, start jobs, enrol in schools and form part of a community, as well as their ability to fully participate in the political sphere and exercise freedom of movement.”⁵

35. Thus, the deprivation of citizenship can entail or facilitate further acute deprivations, especially when done without notice to the affected person.

36. LHR’s clients have suffered insurmountable challenges, including:
 - 36.1. loss of legal personhood;
 - 36.2. loss of jobs and opportunities;
 - 36.3. loss of access to medical care;
 - 36.4. denial of access to education;
 - 36.5. inability to acquire housing;
 - 36.6. frozen bank accounts;
 - 36.7. restricted freedom of movement or freedom to travel;
 - 36.8. unlawful arrests and detention;
 - 36.9. unlawful threats and attempts of deportation;

⁵ *Chisuse* at par 28. Emphasis supplied.

- 36.10. inability to register marriages, births or deaths; and
- 36.11. inability to access social grants and pension funds.
- 36.12. Those eligible to vote have also been precluded from participating in elections because of blocked/marked IDs.
- 36.13. Another major concern is access to health care services – some LHR clients were unable to access Covid-19 testing and treatment (including vaccination) because they did not have valid IDs to register on the Electronic Vaccination Data System (EVDS).
37. A first-hand account, summarised below, will also be given by the specified LHR clients on the day of hearing for more details.

Children and parental rights

38. Parents with invalid or blocked IDs cannot register the births of their children as the DHA insists on the production of valid identity documentation as prerequisite to birth registration.
39. While lack of birth registration may not necessarily result in childhood statelessness, it exacerbates the risk thereof because the birth certificate provides proof of the two critical facts required to establish citizenship: parentage and place of birth.
40. In some cases, where the affected person is a parent whose ID number is linked to the ID numbers of their children, the children's ID numbers are also

automatically blocked. This form of derivative deprivation is not only unconstitutional and unlawful but also exacerbates the risk of childhood statelessness.

41. Thus, in considering specific people whose IDs are blocked, this number should be expanded to consider the domino effect this has on their children. In summary: the DHA, in blocking one ID, is in effect blocking several.

IMPACT OF BLOCKED IDS ON HOLDERS

42. The prejudice described above goes beyond the individual affected and becomes collective.
43. This is particularly so in situations where providers have lost their jobs due to the invalidation of their documentation, and can no longer provide for their families or discharge family obligations. Family members also suffer material and moral prejudice.
44. Further, as noted above, there is a domino effect when the DHA blocks the IDs of children whose parents have their IDs blocked.
45. We now outline two such clients' experiences.

Gumede

46. Ms. Thulisiwe Goodness Gumede (Ms Gumede) is a South African citizen by birth in terms of Section 2(1) of the South African Citizenship Act 88 of 1995

(“Citizenship Act”). She was born on 26 September 1976, in Kwa-Ngwanase, KwaZulu Natal Province, South Africa.

47. She was born to Ms. Kholiwe Belinah Tembe and Mr. Musa Gumede – both South African citizens. She applied for her first identity document in or about 1993, after she had turned 16 years old.
48. In June/July 2018, Ms. Gumede discovered the block/marker on her ID, when she visited the DHA Vereeniging office to assist one of her children in applying for an identity document.
 - 48.1. She was not informed why the block/marker was placed on her ID.
 - 48.2. She was not given a clear explanation of how to rectify the block/marker.
 - 48.3. She was informed that as a consequence of the block/marker on her ID, all her children’s IDs that are linked to hers were also automatically blocked/marked and her children could not apply for identity documents until the block/marker on her ID was lifted.
49. In October 2018, Ms. Gumede then approached LHR. She suspected that the block/marker on her ID was related to an incident in 2010 when her passport was confiscated by South African immigration officials at the Beitbridge border, as she was travelling from Zimbabwe to South Africa.
 - 49.1. Ms. Gumede’s partner is a Zimbabwean citizen and they have been married since 2004. They have three children: Lungani Honest Gumede

(born in 1999), Luthando Siyabonga Shabalala (born in 2005) and Methembe Lindokuhle Shabalala (born in 2008).

- 49.2. In 2003, she applied for her first passport and decided to travel to Zimbabwe to meet her partner's family.
 - 49.3. She made several trips to Zimbabwe between 2003 and 2010 when her passport was confiscated.
 - 49.4. After her passport was confiscated, she was not too concerned, and she believed she would be able to resolve it once she was back in South Africa.
50. In October 2018, LHR sent a letter to the DHA Vereeniging office manager highlighting that DHA had violated Ms. Gumede's constitutional and administrative rights by blocking/marking her ID without prior notice, without an opportunity to challenge the decision and without notification of the reasons why her ID was blocked.
51. In response, the DHA Vereeniging office manager confirmed that Ms. Gumede's ID has been blocked in relation to the incident at the Beitbridge border in 2010, but indicated that the local office could not assist any further and that Ms. Gumede should approach the DHA Head Office in Pretoria to seek more clarity. LHR thereafter forwarded a copy of the letter to the DHA Head Office in Pretoria as advised, but did not receive a response.

52. In early 2019, Ms. Gumede approached the DHA Head Office in Pretoria and met with Mr. Matheus Motedi – a Control Immigration Officer in the Immigration Inspectorate.
- 52.1. She was advised to submit an affidavit explaining the issue with her ID.
- 52.2. In addition she was required to submit documentary evidence, such as letters from all the schools she has attended, supporting affidavits and documentation from relatives.
- 52.3. She also was required to submit a DNA test result confirming her biological link to a South African citizen (she conducted the test with her mother).
- 52.4. She submitted everything and was told to wait for an outcome.
53. From 2019 to 2021, Ms Gumede made several follow ups with Mr. Motedi. She was told the same thing each time – he had compiled and submitted a report that needed final approval from the DHA Head Office.
54. In August 2021, LHR drafted a letter to DHA regarding 98 cases of blocked/marked IDs and requesting that these cases be rectified. The list included Ms. Gumede’s case.
55. In its response, the DHA noted the following in respect of Ms. Gumede’s case “Traced as illegal immigrant – referred to IMS (*Sharon Raats – Beitbridge

Project)” – with no further details or any indication of if or when her case would be resolved.

56. On 15 February 2022, after four years since her initial enquiry, Ms. Gumede finally received confirmation from Mr. Motedi that the block/marker on her ID had been lifted.
57. On 15 March 2022, Ms. Gumede approached DHA Vereeniging office once again to assist her oldest child in applying for an identity document. Much to Ms Gumede’s dismay, she was informed that the blocks/marker on her children’s IDs still remain and her children are still not able to apply for identity documents. They were referred to an immigration officer who informed that DHA would have to open a “new investigation” into her children’s IDs and advised them to return to LHR for further legal assistance.
58. Ms. Gumede’s children are 23 years old, 17 years old and 14 years old, respectively. The blocks/markers on their IDs have affected them significantly. They must frequently produce affidavits at school explaining why they do not have identity documents; they cannot apply for other enabling documents such as passports to travel to Zimbabwe to visit their family or drivers’ licenses. As a result of the block, her oldest child struggles to secure employment or further studies.
59. The process of rectifying the block/marker on her own ID has cost her so much in time and in money and now she has to go through the same process again for

her children – travelling back and forth collecting school letters and birth records and raising funds for DNA tests should they be required once again.

Lukhele

60. Mr. Nadim Siboniso Lukhele (“Mr Lukhele”) is a South African citizen by birth in terms of Section 2(1) of the South African Citizenship Act 88 of 1995. He was born on 21 August 1982 at their family home in Tembisa, Gauteng Province, South Africa. His birth was registered by the Department of Home Affairs, and he was issued a South African birth certificate with an ID number.
61. He was born to South African citizens. His mother is still alive but his father died in 2010. His maternal grandparents were Swazi citizens who migrated to South Africa in 1953 and lived here until about 1962. Mr. Lukhele’s mother was born during this time – her birth was registered by the DHA, and she was issued a South African birth certificate with an ID number.
62. In 2006, Mr. Lukhele discovered the block/marker on his ID when he visited a DHA Pretoria office to apply for a passport.
 - 62.1. He was told “*there is something wrong with your fingerprints*” and informed that it appeared that there was a criminal record against him in the system – he was confused by this as he knew he did not have any criminal record.

- 62.2. He was advised to apply for a police clearance. He applied and received the police clearance certificate confirming that there is no criminal record against him and submitted it to DHA.
 - 62.3. The officials took his fingerprints again and the informed him that there was a block/marker on his ID because he had a deportation record appearing in the system – the record reflected that he was apparently deported to Eswatini through Osheok border post in 2002.
 - 62.4. He informed them that this must be a mistake – he recalls crossing the border at the time, and having his fingerprints taken because he had lost his emergency travel passport but denied that he was deported.
 - 62.5. They advised him to return with his mother and to submit documentary evidence of their South African citizenship e.g., birth records, school letters, supporting affidavits from his maternal grandfather.
 - 62.6. They compiled and submitted all the required documents and were told to wait for feedback.
63. He made frequent follow ups and enquiries when he eventually decided to escalate the issue and to report it to the then Minister of Home Affairs.
 64. On 18 August 2016, he was notified that his case was referred to the DHA central law enforcement and he was called in for an interview with Mr. Joseph Mogajane.

He narrated the whole story to Mr. Mogajane and believed the matter would finally be resolved.

65. However, on 16 November 2016 he was then served with a notice declaring him an “illegal foreigner” and a deportation order. The notice did not contain any reasons for this finding.
66. In November 2016, Mr. Lukhele then approached the Eswatini consulate to seek verification of his status in Eswatini. The Eswatini government issued a letter in response, confirming that he was never deported to Eswatini according to their records, that he was not recognised as a Eswatini/Swazi citizen, and that he has never had any Eswatini/Swazi identity documents issued to him.
67. On 28 November 2016, with legal assistance, Mr Lukhele submitted an appeal application to the Director General challenging DHA’s decision to declare him an “illegal foreigner” and to deport him.
68. Between November 2016 and August 2017, Mr. Lukhele made several follow ups on the appeal and the resolution of the case. He was sent back and forth to different DHA offices, he was asked to re-submit his documents numerous times, he had to undergo several interviews, and he received promises from various DHA officials that the issue would be resolved.
69. On 3 July 2017, he even received a call from DHA informing him that his ID was unblocked – he visited the DHA Randburg office and the DHA Centurion office, but he was informed that the block/marker still appeared in their system.

70. On 14 July 2017, a DHA immigration officer visited their family home in Tembisa. They accused Mr. Lukhele's mother of being an "illegal immigrant" from Eswatini.
71. On 21 August 2017, they ordered her to leave the country immediately.
72. On 29 August 2017, Mr Lukhele eventually received the outcome of the appeal. The Director General had dismissed the application on the grounds that:
- 72.1. he had obtained his birth certificate through fraud/misrepresentation of the fact that he was born in South Africa; and
- 72.2. his mother had also obtained her birth certificate or ID through fraud/misrepresentation and does not qualify to be a South African citizen.
- 72.3. The above claims were made without substantiation or supporting evidence.
73. On 12 September 2017, Mr. Lukhele then submitted a review application to the Minister of Home Affairs.
74. On 11 May 2018, he received the outcome of the review: the Minister had dismissed the application and confirmed the decision of the Director General. The Minister also failed to offer any additional reasons or clarity on the findings made by DHA.
75. Since his ID was blocked, Mr. Lukhele suffered numerous hardships:

- 75.1. He has not been able to further his studies in film.
 - 75.2. He missed an opportunity to travel to the United States of America to attend a course because DHA refused to issue him a passport.
 - 75.3. He struggled to secure employment opportunities because he was required to provide SARC verification, which he could not do without a valid ID.
 - 75.4. He missed out on several opportunities outside the country – including a job offer from Sky Sports, England.
 - 75.5. He had a son, Rahiem, who was born and died in 2011. He was not able to register the birth and death of his son because of his blocked ID. As a result, there is no official record of him having a son.
 - 75.6. The block/marker on his ID has also effectively rendered him stateless as he is not recognised as a citizen of any country.
76. Mr. Lukhele's mother was selling clothes to earn a living, but, since her ID was blocked, she has been unable to travel to buy and sell stock. She is struggling to provide for her other five minor children in her care. Her bank account was frozen and the IDs of all five of her children are also blocked.
77. Both Mr. Lukhele and his mother have suffered severe stress from the fear of being arrested and deported from the only country they know as home.

78. In 2019, LHR launched a judicial review on behalf of Mr. Lukhele and his mother. The case is still pending and their IDs have been temporarily unblocked pending the finalisation of the litigation. Further, Mr Lukhele cannot move forward with his case, as he has to raise funds to obtain a DNA test.

A summary of the data collected by LHR

79. LHR has had extensive engagement with the problem of blocked IDs. Thandeka Chauke, the Head of LHR's Statelessness Project, will be on hand at the hearing to provide details of the LHR's data.

80. In summary, the LHR has noted the following:

80.1. Trends indicate that the issue of ID blocking disproportionately affects Black clients more than white clients.

80.2. The majority of affected persons are from a poor economic background with very little resources to, for example: travel to and from DHA offices, travel to schools or hospitals, pay to uplift records, photocopy and certify documents, pay for DNA tests, and so forth.

80.3. More men than women are impacted.

80.4. In the majority of cases, clients are South African citizens.

80.5. Finally, clients' ages are widely spread, from 18 to 59. Young clients often only become aware of issues with their ID when they attempt to apply for their first ID.

CONTRIBUTION OF BLOCKED IDS ON STATELESSNESS

81. As already noted, blocked IDs perpetuate statelessness, a profound problem in South Africa.

81.1. First, by virtue of blocked IDs, people have no ties to South Africa due to a removal of their citizenship and the rights flowing thereto;

81.2. Second, as noted, the DHA removes the citizenship status of not just one holder, but the holder's children. This leads to generational statelessness.

81.3. As will be explained at the hearing, the majority of LHR's clients are South Africans who are accused by the DHA of being foreigners. With no ties to any other countries, and the removal of their South African citizenship by the DHA, these clients are stateless since they cannot find relief from the DHA and cannot be deported since there is no other country they actually have ties to.

82. Since the DHA has also consistently failed to provide reasons or a basis for determining why IDs are blocked, the LHR can only go by virtue of their clients' evidence.

PROPOSED REMEDY

83. With a mind to the Commission's powers, the LHR proposes a remedy that the Commission is capable of implementing.

The Malope Report Recommendations

84. First, we draw from a report drafted by the Commission itself, in the matter between Balitiye Patience Malope (on behalf of Fana Ntando Malope) and the DHA, File Ref No: MP/1516/0062, dated 18 December 2018 and signed by Commissioner JB Sibanyoni (“the Malope Report”).
85. Briefly: That report dealt with a blocked ID situation, where Fana Malope’s ID was blocked due to alleged problems with birth registration. This was discovered when the complainants attempted to have Fana’s name changed (from Ntando Adriaan Malope to Fana Ntando Malope) in 2011. The DHA initially granted the request, but subsequently refused to register the change, citing alleged concerns with birth registration. Thus, Fana’s ID remained blocked. The DHA never furnished either Mrs Malope or the Commission with the outcome of an investigative report.
86. In terms of section 13 of the South African Human Rights Commission Act 40 of 2013, the Commission is entitled to make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution.
87. In the Malope Report, the Commission made recommendations, which is a workable remedy for the current blocked ID situation in general, if properly implemented.

Recommendations

88. We submit the Commission should recommend the following:

88.1. The DHA reviews and aligns all operational systems relating to the issuing of IDs and investigations of fraud relating to IDs with legislation such as PAJA, and judicial precedent.

88.2. The DHA identifies and provides to the Commission, the number of IDs affected by suspected fraudulent activity, the number of investigations of such alleged fraud, and the duration of such investigations.

88.3. In addition, the DHA is to include in its report referred to above, details of the steps to be taken in responding to complaints regarding delays in the issuing of findings in respect of blocked IDs.

88.4. The report is to be presented to the Commission after 60 (sixty) days of receipt of the Commission's report.

88.5. The report from the DHA to the Commission should demonstrate the following:

88.5.1. An outline of the consultative process the DHA will put into place.

88.5.2. A written commitment that the DHA will henceforth not block or mark IDs without consultation with ID holders and in contravention with the constitutional provisions outlined above.

89. The LHR also submits the Commission should recommend that when the DHA decides to mark an ID, it should, at the very least, do the following:
- 89.1. Create a procedure for the issuing of unique temporary IDs;
 - 89.2. Notify the person of the intention to place a marker or “block”;
 - 89.3. Allow the person to make representations;
 - 89.4. Issue a unique temporary ID pending finalization of investigation;
 - 89.5. Notify the person of the outcome of the investigation and any internal appeal or review processes;

Interim Measures

90. Pending the DHA finally implementing an administratively fair procedure, for example as we note in the preceding paragraph, LHR also submits that the Commission should recommend that the DHA:
- 90.1. removes the blocks/markers on the listed LHR clients’ IDs in **Annexure “LHR 1”**;
 - 90.2. Provide a record and any report[s] that form the basis for, or are relevant to the blocking of LHR clients’ IDs listed in **Annexure “LHR 1”**;
 - 90.3. Send a proper formal notice to LHR clients whose ID number the DHA still intends to block;

- 90.4. Create a provincial office or officer in each province to whom the LHR and other groups can refer affected clients.

In absentia procedure

91. Regarding the just administrative process of providing proper notice, LHR notes a frequent issue the DHA raises is an inability to contact an affected person whose ID the DHA intends to block. This results in people having their IDs blocked *in absentia*.
92. If the DHA is unable to identify a serviceable address of an affected individual, the DHA must utilise alternative measures such as publication, telephonic inquiry and contact, electronic mail, publication on the DHA website, and so forth.
93. LHR further submits the Commission should recommend the following procedure if the DHA intends to give effect to any decision *in absentia*:
- 93.1. The DHA must obtain a court order confirming deprivation of nationality – the result of blocking an ID number – *in absentia* is strictly necessary to (i) avoid risks to national security posed specifically by the presence of the affected person and (ii) that such risks cannot be mitigated through alternate, less prejudicial measures.
- 93.2. Should the DHA obtain such an order and that affected individual comes forward to challenge the deprivation, the DHA should as a matter of good practice declare the deprivation void and undertake the relevant legal and administrative proceedings afresh.

- 93.3. Further, the DHA should ensure that the person has practical and effective access to an appeal procedure and suspend the deprivation of nationality while the appeal procedure is ongoing.⁶
94. This proposal is in line with the right to just administrative action and principles of natural justice.
95. A person being denied access to various rights should be a ceiling, not floor, yet that is the effect the DHA's ID blocking mechanism has on people.
96. A temporary ID does not hinder the DHA from conducting its investigation. Importantly, a temporary ID does not trap an affected person in a legal limbo and denied numerous rights we have detailed above.
97. We trust these submissions have been of assistance.

⁶ Drawn from the United Nations *Guidelines On Statelessness No.5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness* (2020) paras 104 - 105.