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Copied to: Dr Aaron Motsoaledi
Minister
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30 August 2020

Dear Adv. Sebelemetja,

WRITTEN COMMENTS ON THE DRAFT AMENDMENT REGULATIONS ON THE SOUTH AFRICAN CITIZENSHIP ACT, 1995

“The systematic act of stripping millions of black South Africans of their citizenship was one of the most pernicious policies of the apartheid regime, which left many as “foreigners” in the land of [their] birth. The advent of a constitutional dispensation established South African citizenship as a constitutional precept based on equality.”

“Citizenship and equality of citizenship is therefore a matter of considerable importance in South Africa, particularly bearing in mind the abhorrent history of citizenship deprivation suffered by many in South Africa over the last hundred and more years. 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, where xenophobia is a lived reality, to their security of person. Deprivation of, or interference with, a person’s citizenship status affects their private live 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.”

Chisuse & Others v Director-General, Department of Home Affairs & Another
[2020] ZACC 20

We welcome the opportunity to make written comments on the Draft Amendment Regulations on the Citizenship Act, 1995, which was published in Government Gazette No. 43551, Vol. 661 on 24 July 2020 (the “Draft Regulations”),¹ and which propose amendments to the Regulations on the

¹ Department of Home Affairs, *South African Citizenship Act (88/1995): Publication of the Draft Regulations on the Citizenship Act, 1995 for Comments*, Government Gazette Vol. 661 (no. 43551), 24 July 2020.

South African Citizenship Act, 1995 (the “Regulations”),² which give effect to the South African Citizenship Act, 1995 (the ‘Citizenship Act, 1995’ or “Act”).

These comments are based on our extensive experience in the area of refugee and migrant rights, including our consultations with and assistance provided to clients who have lodged applications for citizenship by naturalisation in terms of s 4(3) of the Citizenship Act, 1995, on affidavit, as provided for by the order of the Supreme Court of Appeal in the matter of *Minister of Home Affairs v Miriam Ali*,³ as well consultations with other persons who qualify to apply for citizenship in terms of that provision and who have waited eagerly for Regulations giving effect to that provision.

Endorsements of these written comments

These written comments are endorsed by various human rights and social justice organisations as listed at the end of this cover letter, as well as by others who have sent separate endorsement correspondence to the Department directly.

I. INTRODUCTION

1. These written comments address one procedural concern and two substantive concerns with the Draft Regulations:
 - 1.1. The timeframes for promulgation of the Amended Regulations, and ensuring that the public participation procedure is not reduced to a tick-box approach;
 - 1.2. Ensuring that the Draft Amendment Regulations are in compliance with the relevant empowering provisions in the principal Act; and
 - 1.3. Ensuring that the Draft Amendment Regulations give effect to the interpretations provided by jurisprudence on the specific provisions implicated in these Regulations on the specific provisions implicated in these Regulations and related international law or the recommendations of human rights treaty bodies.
2. In turn, the abovementioned concerns relate to the rule of law, and principle of legality, and, we believe that failure to adequately address them may result in the Department of Home Affairs (“the DHA”/ “the Department”) opening itself up to the risk of potential litigation in regard to the lawfulness of these regulations.

² Department of Home Affairs, *South African Citizenship Act (88/1995): Regulations on the Act*, Government Gazette R. 1122 (no. 36054), 28 December 2012.

³ *Minister of Home Affairs v Ali and Others* (1289/17) [2018] ZASCA 169; 2019 (2) SA 396 (SCA) (30 November 2018), at para 18. Available at: <http://www.saflii.org/za/cases/ZASCA/2018/169.html>

3. This cover letter provides broad a summary of our concerns regarding the Draft Regulations. This should be read with the clause-by-clause analysis provided in **Annexure A** to this letter, as well as the model draft regulations attached as **Annexure B**: a re-drafted set of Regulations intended as suggested wording which would address many of the issues identified with the current Draft Regulations.
4. The Draft Regulations should comply with South Africa's international obligations. They should take into account the relevant international and regional legal provisions, recommendations made by international treaty bodies and the Human Rights Council, particularly where they have provided specific guidance with regards to the prevention and resolution of statelessness and the best interests of the child.

II. PROCEDURAL CONCERNS

5. We commend the Department of Home Affairs on the publication of the Draft Regulations, which are intended to provide for the, *inter alia*, practical implementation of section 4(3) of the Citizenship Act.
6. However, we are concerned about the timeframes envisaged for finalization of these Regulations.
7. In a written response to a Parliamentary Question dated Friday 14 July 2020,⁴ the Minister was asked why the Department of Home Affairs had not yet fully complied with the Order of the Supreme Court of Appeal in the matter of *Minister of Home Affairs v Miriam Ali & Others* [2018] ZASCA 169 (SCA). The Order is dated 30 November 2018, and part of the Court Order provides that the Department must:

“within one year of the date of this order make regulations in terms of s 23(a) of the South African Citizenship Act [...] in respect of applications for citizenship by naturalisation in terms of s 4(3) of the Act”.

The present Draft Regulations have been promulgated in order for the Department to comply with that Court Order.

8. However, in that written reply, the Minister further indicates that whereas the Draft Amendment Regulations had been prepared and finalised, they still had to be published for public comment prior to promulgation. Furthermore, that:

⁴ National Assembly, Question for Written Reply, Question No. 1070, 14 July 2020, Internal Question Paper 19–2020.

“due to the National State of Disaster, especially the period between 26 March 2020 and early June 2020, a decision was taken that the DHA may not be able to obtain the adequate public comments due to the lockdown Regulations. The draft Amendment Regulations ha (sic) been gazetted for public comments” and “the DHA will fully comply [with the Court Order] by 15 September 2020.” (our emphasis).

9. The Draft Regulations were published for comment on 24 July 2020, with the deadline for written comments set for Sunday, 30 August 2020, a mere 11 working days prior to the date that the Minister indicates the DHA will have fully complied with the abovementioned Court Order.
10. This means the Department will only have eleven working days in which to consider any comments submitted, and effect any necessary changes in response to those comments. This is a wholly inadequate time period for substantive consideration of the comments, and runs the risk of reducing the public participation and commenting procedure to a “tick-box” approach. We urge the Minister to ensure that this is not the case.

III. CONTENT CONCERNS

The Draft Amendment Regulations omit vital provisions regarding the implementation of section 2(2) of the SA Citizenship Act, 1995

11. Despite three court orders compelling the Department to make regulations facilitating the implementation of section 2(2), a series of punitive cost orders and recommendations by international human rights monitoring bodies, the Department has failed to promulgate such regulations. The first court order was made in 2014. The Department remains in contempt. Section 2(2) is crucial to South Africa’s international obligations⁵ protecting children who would otherwise be stateless.
12. On 3 July 2014, the High Court of South Africa made an order against the Minister of Home Affairs compelling him to enter a stateless child’s details into the population register as a citizen and “make regulations in relation to section 2(2) of the Citizenship Act pursuant to section 23, within a time period that the Court deems reasonable”⁶. The Minister has not complied with this order.

⁵ UNCRC Art 7 and ACERWC Art 6.

⁶ DGLR and another v the Minister of Home affairs and others 38429/13 (Gauteng Division)

13. On 6 September 2016, the Supreme Court of Appeal (SCA) made an order against the Minister ordering him to comply with the High Court order within 18 months of that order.⁷ The SCA ordered punitive costs against the Department of Home Affairs.
14. After this defeat in the SCA, the Department attempted to rescind the original 2014 order in hopes this would nullify the SCA order. In 2018 the High Court dismissed the Minister's flawed reasoning that contended that the High Court could rescind a High Court order which had been appealed to the SCA. The Minister was again required to comply with court order and has yet to do so.
15. In response international bodies have made official recommendations to the DHA to implement the DGLR order to make regulations and which have been ignored. In 2016 the UN Committee on the Rights of the Child (UNCRC) urged South Africa to 'put in place *regulations* to grant nationality to all children in the jurisdiction of the State party who are or are at risk of being stateless' as well as a recommendation to 'review and amend all legislation ... (on) birth registration and nationality ... which have a discriminatory impact'.
16. The Draft Amendment Regulations cannot be complete without the inclusion of this 6-year overdue regulation on section 2(2).

The Draft Amendment Regulations are *ultra vires* the empowering provisions in the South African Citizenship Act, 1995

17. The primary purpose of the proposed Draft Amendment Regulations on the South African Citizenship Act, 1995, is to give effect to s 4(3) of the Citizenship Act, 1995.⁸
18. Section 4(3) sets out objective criteria which, where met, qualifies an individual to apply for and be granted citizenship by naturalisation in terms of that provision. The section reads as follows:

"A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence qualifies to apply for citizenship, upon becoming a major, if he or she has lived in the Republic from the date of their birth to the date of becoming a major, and his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act (1992)".

19. In summary, the four (limited) objective criteria to qualify for citizenship by naturalisation in terms of section 4(3) are:

⁷ Minister of Home Affairs and Others v DGLR and another 1051/2015 (SCA)

⁸ See National Assembly, Question for Written Reply, Question No. 1070, Internal Question Paper 19 – 2020 (14 July 2020). Available at: <https://pmg.org.za/committee-question/14112/>

- (1) The applicant was born in South Africa;
- (2) The applicant was born to parents who were not South African citizens nor admitted for permanent residence at the time of the applicant's birth;
- (3) The applicant has lived in South Africa from the date of their birth to the date of reaching the age of majority; and
- (4) The applicant's birth was registered in terms of the Births and Deaths Registration Act (BDRA).

The Regulations pertaining to these criteria, must give effect to section 4(3) by setting out the practical and administrative steps that need to be taken in order for an applicant to prove the above four requirements. The requirements should facilitate the application, not add additional requirements not required by or related to the text in the Act.

20. It is axiomatic that the promulgation of regulations, including those which give effect to s 4(3) of the Citizenship Act, 1995, must be done within the power or authority conferred by the principal Act. In this case, the Amendment Regulations must be promulgated in terms of section 23 of the South African Citizenship Act.
21. Section 23 of the South African Citizenship Act empowers the Minister to make regulations not inconsistent with the Act with regard to *inter alia*, "*the form of an application declaration, certificate or other document under this Act*" and "*generally, all matters which in terms of this Act are required or permitted to be prescribed or which he or she considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that this Act may be effectively administered*".⁹ Thus, the regulations must provide for the forms and practical procedures through which the purposes of the Act can be achieved. The core purpose of section 4(3) of the Act is to allow for the application and granting of citizenship by naturalization.
22. Section 23 of the Act constrains the Minister's powers in promulgating regulations in that such regulations **must be** consistent with the Act. Anything further would amount to the Minister

⁹ Section 23 of the Act specifically provides:

"The Minister may make regulations not inconsistent with this Act, with regard to -

- (a) the form of an application declaration, certificate or other document under this Act;
- (b)
- (c) the persons before whom declarations of renunciation or resumption of South African citizenship may be made;
- (d) the issuing of certificates of acknowledgment of South African citizenship to persons born elsewhere than in the Republic;
- (e) the fees to be charged for the issuing of any certificate or approval under this Act in consultation with the Minister of Finance; and
- (f) generally, all matters which in terms of this Act are required or permitted to be prescribed or which he or she considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that this Act may be effectively administered."

acting *ultra vires*, or beyond the legal power or authority conferred upon him. Where the Minister makes regulations which are inconsistent with the Act, this would also be *ultra vires* or amount to the Minister acting beyond the legal power or authority conferred upon him, and would be in breach of the principle of legality, detrimental to the rule of law, and inconsistent with the Constitution, and would be subject to judicial review – a process which would entail costly litigation.¹⁰

23. The concept of acting *ultra vires* has recently been summarized by the Constitutional Court, where Justice Jaftha indicated “*the concept [of ultra vires] means that a functionary has acted outside her powers and as a result the function performed becomes invalid.*”¹¹ We respectfully submit that in the present circumstances, the Draft Regulations create or prescribe additional criteria and requirements in relation to citizenship by naturalization – these criteria are not provided for in the Act – and in so doing the Draft Regulations are outside the powers conferred by the principle Act.
24. The consequence of the additional criteria and requirements for a putative citizen, which criteria are not provided for in the principle Act, is that they could potentially exclude many persons whom the legislator intended to include and who otherwise hold the right to apply for, and be granted, citizenship by naturalisation in terms section 4(3) of the Act. This has been expanded upon in detail in the clause-by-clause analysis attached as **Annexure A**, including a detailed explanation for each clause that is *ultra vires* the Act.
25. Where additional criteria are created by the Draft Regulations, this also risks infringing upon the constitutional rights to equality and human dignity, and the constitutional provision that all citizens are equally entitled to the rights, privileges and benefits of citizenship.
26. The DHA should be well acquainted with the concept and consequences of acting *ultra vires*, having benefitted from judiciary input on the matter on several occasions, including in matters such as those of *Watchenuka* (in which the Minister acted *ultra vires* the powers conferred on him by prohibiting asylum seekers the right to work and study, where that duty was instead

¹⁰ For a full discussion, see *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at paras 48 to 50. Available at: <http://www.saflii.org/za/cases/ZACC/2005/3.html#sdfootnote40sym>

¹¹ In *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20, at paras 27 and 28 Justice Jaftha states:

“*In simple terms the concept [of ultra vires] means that a functionary has acted outside her powers and as a result the function performed becomes invalid. The rule forms part of the principle of legality which is an integral component of the rule of law. [...]*”

“*Ordinarily, the ultra vires principle applies where the repository of the public power performs a function outside of the scope of the power conferred. [...]*”

<http://www.saflii.org/za/cases/ZACC/2018/20.pdf>

conferred upon the Standing Committee for Refugee Affairs),¹² *Wile* (in which a regulation creating a closed-list of reasons for the assumption of another surname was ruled *ultra vires* the principle Act),¹³ and *Ahmed* (in which a directive imposing a blanket prohibition on asylum seekers applying for permits under the Immigration Act was ruled *ultra vires*).¹⁴

27. Most relevant to these written comments is the recent matter of *Mulowayi v Minister of Home Affairs*,¹⁵ which dealt with an incongruity in the number of years of permanent residency required prior to eligibility to apply for citizenship by naturalisation in terms of section 5 of the Citizenship Act, 1995. While the Act required only five years,¹⁶ the regulations (prior to their subsequent amendment) imposed a stricter requirement of 10 years.¹⁷
28. The High Court held that section 23 of the Act empowers the Minister to make regulations which **must be consistent with the Act, and that these powers must be used only in so far as those regulations achieve the objective of giving effect to the Act or make its administration more effective**. It held the reference to “10 years” in the regulations to have been *ultra vires* of section 5(1) of the Act and irrational, vague and inconsistent with the Constitution and therefore invalid.
29. In the event that the Draft Regulations were to be promulgated in their current form, without substantial revision, they would risk opening the Department up to similar litigation regarding the rationality and constitutionality of the provisions. Many of the provisions in the Draft Regulations are invalid and fall to be set aside if challenged in Court. We urge the Department to rectify any provisions that are unconstitutional and/ or *ultra vires* the Act prior to

¹² *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003). Available at: <http://www.saflii.org/za/cases/ZASCA/2003/142.html>

¹³ *Wile and Another v MEC for the Department of Home Affairs, Gauteng and Others* (21150/2014) [2016] ZAWCHC 80; [2016] 3 All SA 945 (WCC); 2017 (1) SA 125 (WCC) (24 June 2016). Available: <http://www.saflii.org/za/cases/ZAWCHC/2016/80.html>

¹⁴ *Ahmed and Others v Minister of Home Affairs and Another* (CCT273/17) [2018] ZACC 39; 2018 (12) BCLR 1451 (CC); 2019 (1) SA 1 (CC) (9 October 2018). Available at: <http://www.saflii.org/za/cases/ZACC/2018/39.html>

¹⁵ *Mulowayi v Minister of Home Affairs; Eisenberg Attorneys v Minister of Home Affairs*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, case no. 13550/2017 and case no. 8542/2017 (8 June 2018) (High Court judgment).

¹⁶ S 5(1)(c) of the South African Citizenship Act 88 of 1995 provides:

“The Minister may, upon application in the prescribed manner, grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the Minister that—

[...]

(c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application.”

¹⁷ Regulation 3(2)(a) of the Regulations on the South African Citizenship Act, 1995, GN 1122 in GG 36054 of 28 December 2012, provided:

“(a) The period of ordinary residence referred to in section 5(1)(c) of the Act is 10 years immediately preceding the date of application for naturalisation.” (This 10-year period was ruled unconstitutional).

promulgation as failure to do so could result in costly litigation against the DHA – litigation that would be unnecessary if appropriate regulations are passed in the first instance.¹⁸

The Draft Amendment Provisions fail to comply with established jurisprudence interpreting section 4(3) of the South African Citizenship Act, 1995

30. There are two cases that have dealt with section 4(3) of the South African Citizenship Act – the *Miriam Ali* case, which was heard by the SCA, and the *Jose* case, which was a ruling by the High Court and is currently awaiting a hearing at the SCA. The Draft Regulations are the result of the Court Order in the *Miriam Ali* matter, which stipulated that the DHA must promulgate regulations to give effect to section 4(3) of the Act. In addition to the Order stipulating that regulations must be promulgated, the judgment also provided interpretation on section 4(3). We respectfully submit that the Regulations should be cognizant of the interpretation and jurisprudence provided by our Courts.

31. The full wording of section 4(3) of the Citizenship Act, 1995, as amended, sets out:

“A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if-

(a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and

(b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).”

32. We emphasise the above-quoted section does not differentiate between different categories of non-South African citizens. We further note that the section provides two straightforward requirements, which must be fulfilled by way of a number of administrative steps. Any Regulations regarding section 4(3) of the Act must make provision for these administrative procedures.

33. Section 4(3) of the Citizenship Act was introduced by the South African Citizenship Amendment Act 17 of 2010, which came into operation on 1 January 2013. Despite having come into operation, the necessary regulations had not been promulgated (a deficiency the Draft Regulations aim to ameliorate). This meant there was no formal application procedure for potential applicants who otherwise qualified to apply for citizenship by naturalisation as

¹⁸ We note that the Department of Home Affairs has been the unsuccessful Respondent in various pieces of costly litigation on the Citizenship Act specifically, but also that the total litigation costs from the 2009/10 financial year to 2017/18 financial year was **R366,493,161.00** (Source: Parliamentary Written Reply, Question NW1292, 22 November 2019, available at: <https://pmg.org.za/committee-question/12750>).

per this section. This resulted in the launching of litigation by persons otherwise eligible to apply for citizenship by naturalisation, with the Supreme Court of Appeal ordering on 30 November 2018 *inter alia* that the Minister shall, “[w]ithin one year of the date of this order make regulations in terms of s 23(a) of the South African Citizenship Act 88 of 1995 (the Act) in respect of applications for citizenship by naturalisation in terms of s 4(3) of the Act.”

34. In order to understand how the proposed Draft Regulations on the South African Citizenship Act, 1995, are to properly give effect to s 4(3) of the Citizenship Act, 1995, the interpretation by our Courts must be used as guidance.

Minister of Home Affairs & Others v Miriam Ali & Others [2018] ZASCA 169

35. In *The Minister of Home Affairs & Others v Miriam Ali & Others*,¹⁹ the Minister conceded that the respondents complied with all the jurisdictional requirements set out by section 4(3) of the Act and were therefore qualified to be granted citizenship by naturalisation.²⁰ That is, the applicants were born in South Africa to parents who were not citizens or permanent residents at the time of the child’s birth, and they had lived in South Africa from the time of their birth to the age of majority and their birth was registered in terms of the Births and Deaths Registration Act. The Court did not differentiate as to whether the applicant’s parents were asylum seekers, refugees or on any other type of immigration visa, or lacked documentation, at the time of the birth of the putative citizen.

Jose & Another v Minister of Home Affairs & Others [2019] ZAGPPHC 88

36. In *Jose v Minister of Home Affairs & Others*,²¹ the North Gauteng High Court held that section 4(3) confers simultaneously a right to apply for citizenship **and** the right to citizenship (our emphasis).²² Judge Yacoob stated:

“If one fulfils all the requirements, one then has the right, and the choice to apply for citizenship, and, having made the choice to apply, one then has a right for that citizenship to be granted. There is no room for the exercise of discretion.” (our emphasis)²³

¹⁹ *Minister of Home Affairs v Ali and Others* (1289/17) [2018] ZASCA 169; 2019 (2) SA 396 (SCA) (30 November 2018), at para 18. Available at: <http://www.saflii.org/za/cases/ZASCA/2018/169.html>

²⁰ *Ibid.*, at para 18.

²¹ *Jose and Another v The Minister of Home Affairs and Others* (38981/17) [2019] ZAGPPHC 88; 2019 (4) SA 597 (GP) (15 March 2019). Available at: <http://www.saflii.org/za/cases/ZAGPPHC/2019/88.html>

²² *Ibid.*

²³ *Ibid.*

We note that the Minister of Home Affairs was been granted leave to appeal this matter to the Supreme Court of Appeal. However, the granting of leave to appeal was on limited grounds and was not in respect of the subject of the exercise of discretion. See *Minister of Home Affairs and Others v Jose and Another; In re Jose and Another v Minister of Home Affairs and Others* (38981/17) [2019] ZAGPPHC 348 (12 August 2019), at paras 21 to 29. Available at: <http://www.saflii.org/za/cases/ZAGPPHC/2019/348.html>

37. What this means is that if a citizenship applicant fulfils all the objective criteria as set out in section 4(3), then they must be granted citizenship. The objective criteria set out by s 4(3) can be broken down into the following –
- 37.1. The applicant was born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence (at the time of the applicant's birth);
 - 37.2. The applicant has reached the age of majority;
 - 37.3. The applicant has lived in the Republic from the date of their birth to the date of becoming a major; and
 - 37.4. The applicant's birth has been registered in accordance with the provisions of the Births and Deaths Registration Act.
38. We note that the criteria set out at paragraph 37.1 above, namely that the applicant was a child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, applies at the time of birth of the applicant. This is to distinguish persons born of parents who are South African citizens at the time of birth, in which case they would be eligible for citizenship by birth in terms of s 2(1), and persons who were born of parents who have been admitted into the Republic for permanent residence, in which case they would be eligible for citizenship by birth in terms of s 2(3), where such persons meet all other requirements in the respective provisions. The provision recognises the strong link a person born and raised in South Africa will undoubtedly have to the Republic and gives them to opportunity to formalise that link regardless of the status of their parents.
39. We further note that the objective criteria in 4(3), specifically the requirement that the child is born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, relates to negative circumstances or circumstances which do not exist. This is information which is readily available to DHA in the National Population Register (which records both citizens and those admitted for permanent residence). The applicant cannot be expected to a prove a negative, particularly where such information is already readily available to DHA, but may prove more difficult or impossible to the applicant.
40. Following the Minister's concession in the *Miriam Ali* matter and the High Court's ruling in the *Jose* matter, it can further be understood that once these objective criteria have been met and an application has been duly made, the applicant qualifies to be granted citizenship by naturalisation.
41. The Regulations should give effect to the above, and should not be used as a mechanism to insert additional criteria, barriers or burdens on the potential citizenship applicant.

42. We recommend that in each instance where the Draft Regulations do insert additional barriers or criteria, that these provisions should be amended so that they are strictly in line with the jurisprudence and interpretations provided by our Courts. **Annexure A** to this letter clearly identifies each instance where additional barriers or criteria are created by the Draft Regulations.

The Draft Regulations fail to take into account recommendations made by international treaty bodies and are incompatible with international law

43. International and regional human rights bodies have urged South Africa to revise legislation and create regulations promoting the right to nationality and which do not violate the human rights of children and adults. The Draft Amendment Regulations fail to take these recommendations into account. Indeed, certain provisions in the draft regulations undermine the object of the recommendations. Specific findings in international law include:

The UN Committee on the Rights of the Child (UNCRC): In the Concluding Observations on the Second Periodic Report of South Africa (Sept 2016)

“Taking note of target 16.9 of the Sustainable Development Goals on providing legal identity for all, including birth registration, the Committee strongly recommends that the State party:

(a) Review and amend all legislation and regulations relevant to birth registration and nationality to ensure their full conformity with the Convention, including through the *removal of requirements that may have punitive or discriminatory impacts on certain groups of children*;

(b) Put in place regulations to grant nationality to all children under the jurisdiction of the State party who are stateless or are at risk of being stateless.”

The UN Human Rights Council’s Working Group Report on South Africa in the third cycle of the Universal periodic Review (2017)

In May 2017, states had the opportunity to consider and make recommendations to South Africa on its human rights record. 14 relevant recommendations were made by 12 recommending states:

“6.237. Review and amend all legislation and regulations relevant to birth registration and nationality to ensure their full conformity with the Convention on the Rights of the Child;

6.222. Implement the Convention on the Rights of the Child through the harmonization of its national laws to ensure that the minimum age for marriage is established at 18 years for both girls and boys and remove barriers to birth registration;

- 6.235. Ensure registration of all children at birth as well as delayed registration of children that have not been registered at birth;
- 6.236. Further engage in facilitating administrative procedures for birth registration, especially for disadvantaged children coming from rural and poor areas;
- 6.239. Review its relevant legislation and regulations on birth registration to ensure their full conformity with the Convention on the Rights of the Child;
- 6.240. Ensure birth registration of all children born on South African territory, regardless of the immigration status or nationality of the parents;
- 6.241. Amend legislation and regulations in order to ensure universal birth registration for children born in its territory;
- 6.243. Refrain from deprivation of citizenship through blocking of identity documents and establish a dedicated procedure to identify stateless persons.”

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC): Concluding Recommendations on South Africa (2014)

“The Committee appreciates the measures undertaken by the State Party in relation to the right to name, nationality and birth registration of children. However, the fact that a large number of foreign children born to undocumented migrant women and unaccompanied foreign children without asylum claims do not have birth certificates is a concern for the Committee as it may contribute in making the children stateless persons or create a situation whereby they are denied access to health care services, education, grants, protection services or alternative care.

31. Thus the Committee recommends that the State Party should avoid any barriers as well as address the complex checks and burdens of proof on care givers who do not necessarily fit the married nuclear family unit required to register births and, where in the best interests of a child requires, also to consider giving nationality to refugee and migrant children. Further the Committee would like to recommend that the State Party should regularly monitor and ensure that the implementation of the Birth and Death Registration Act and Regulations of 1st March 2014 does not serve to be a hindrance for the registration of the births of children in South Africa including non-citizens.

32. The Committee also encourages the State Party to create a more accessible mechanism for fathers, including unmarried fathers, to add their particulars to the birth register as appropriate and other extended families that have custody of a child to make declaration have births registered.

33. Moreover, the Committee recommends the State Party should promote non-punitive mechanisms for late registration, including the possibility to remove fees and penalties attached to birth registration to make sure that

birth registration is free. The State Party should also ensure that adequate training is provided to staff members involved in the implementation of the Law and its Regulations. The Committee also strongly urges the State party to take into account General Comment No.2 of the African Committee on Article 6 of the Charter for the implementation and full realization of children's right to name, nationality and birth registration."

44. The above recommendations from specialised human rights bodies upon consideration of the situation in South Africa make it clear that many children are not in a position to provide all the additional documents required by the Draft Regulations and that they should be accommodated as much as possible by regulations, as opposed to placing additional barriers in the way of such children.
45. Unattainable requirements in the Draft Regulations nullify the object of the Act and render its provisions meaningless. The courts have guided us in this principle saying:

"It is clear that if a child has, as is provided in s 28(1)(a) of the Constitution, the 'right to a name from birth', the official of the state who is charged with doing those things that enable his or her name to be recorded must have a correlative duty to facilitate the registration of that name in the records of the state: certainly it is not part of the function of the official to place technical difficulties in the way of such registration".²⁴

46. It is certainly the duty of the government to make regulations which enable the child to have access to the rights afford to them by the Constitution. For that reason, in addition to those stated above, the Draft Regulations stand to be struck down as unconstitutional; and should be revised.

The Draft Amendment Regulations inhibits South Africa's potential to fulfil its official pledges and commitments to the international community to prevent, reduce and eradicate statelessness within its borders

47. Statelessness is recognised in international law as a serious human rights violation which should be addressed collectively by all states. A stateless person is defined in international customary law as "a person who is not considered to be a national of any State under the operation of its laws".²⁵ It is the opposite of having a nationality. States have an obligation to each other to ensure that all persons born in their territory are protected from statelessness so as to prevent its spread, geographically and across generations. Section 2(2) and section 4(3) of the Citizenship Act acts as crucial prevention and eradication mechanisms without which the reduction of statelessness in South Africa and Southern Africa is unlikely.

²⁴ *Hadebe v Minister of Home Affairs* 2006.

²⁵ Art 1 of the 1961 UN Convention on the Status of Stateless Persons.

48. South Africa made a pledge to end statelessness in 2011 at the EXCOM meeting in Geneva. In South Africa's country statement and pledge, Deputy Minister Chohan said:

“Statelessness is a global challenge and South Africa will renew its efforts to work regionally and internationally towards the important goal of the prevention and reduction of statelessness”.

The lack of enabling regulations to section 2(2) and section 4(3) undermine to realisation of these pledges and render them empty.

49. The Sustainable Development Goals (SDGs) aspire in Goal 16 to *“Promote peaceful and Inclusive Societies for sustainable development, provide access to justice for all and build effective, accountable institutions at all levels”*. The identified target for SDG 16 requires South Africa to provide legal identity for all by 2030. This includes access to citizenship and the eradication of statelessness.
50. Agenda 2063 is Africa's blueprint and masterplan for transforming Africa into the global powerhouse of the future. Its goals are inclusive and sustainable development. It is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress and collective prosperity. Nothing is more detrimental to these goals than statelessness in Africa. South Africa must make citizenship accessible to those with a nexus to it in order to be part of this agenda. Making accessible regulations to empowering legislation is crucial to this.
51. African Union expects South Africa to act in alignment with its decisions to promote access to nationality on the continent. It has made many statements and taken important decisions toward fostering access to nationality in Africa.
52. The Pan African Parliament (PAP) has considered the effect of statelessness made recommendations to African members of parliament, as the persons responsible for crafting their nations laws. The PAP indicated that Members should advocate for the elimination of statelessness and ensure that the rights of stateless persons are protected. Members must not only encourage their governments to adopt laws that conform to international standards, but they must also win the support of their constituents. This includes South Africa's Minister of Home Affairs.
53. In 2016, the SADC Parliamentary Forum at which South African Members of Parliament were present made a resolution to resolve statelessness in SADC and called on SADC states to:

“Review the legislative frameworks and administrative practices in nationality matters with a view to ensure their consistency with international standards on the prevention and resolution of statelessness, as well as on protection of stateless persons;

*Initiate legislative reforms that addresses any identified gaps or challenges, including any discrimination on the basis of race, ethnicity, religion, or gender, thereby helping to prevent statelessness;
Expedite the implementation of Article 6 (4) of the African Charter on the Rights and Welfare of the Child, thereby preventing childhood statelessness.”*

54. South Africa should rise to the occasion with the drafting of these regulations in order to uphold our promises to the people of our region, the continent and her people by enabling access to citizenship in Africa.

The Draft Amendment Regulations places restrictions on the rights of citizens naturalised in terms of section 4(3) of the South African Citizenship Act, 1995, thereby impairing their equal enjoyment of the rights, privileges and benefits of citizenship

55. The Draft Amendment Regulations differentiates between South African citizens who acquired citizenship in terms of section 4(3) of the Citizenship Act, and those who acquired or derived citizenship terms of other provisions of the Act, and places restrictions on the former.
56. Draft Regulation 3A(6) provides that “citizenship in terms of section 4(3) of the Act is not transferrable to, and shall not be used to obtain any immigration status in terms of the Immigration Act, by any of the parents, siblings or relatives of the person so naturalised.”
57. Restrictions on the rights of a certain category of South African citizens is inconsistent with the founding provision of the Constitution that all citizens are equally entitled to the rights, privileges and benefits of citizenship.
58. The inclusion of Draft Regulation 3A(6) is furthermore superfluous in that the Citizenship Act and the Immigration Act already provide who may and who may not obtain citizenship or immigration status, respectively.

IV. CONCLUSION & SUMMARY OF RECOMMENDATIONS

59. In summary, we recommend that prior to promulgation, the Draft Amendment Regulations must be further amended in order to ensure that they are consistent with the empowering provisions in the principle Act, as well as consistent with the Constitution and international law, and in line with recommendations made by international treaty bodies and South Africa’s commitments.

60. We further recommend, and urge the Department to make use of the detailed clause-by-clause analysis of the Draft Amendment Regulations that we have provided in **Annexure A**, as well as the draft model Amendment Regulations provided in **Annexure B**. These clearly illustrate potential flaws, inconsistencies and examples of overreach in the current Draft Amendment Regulations – all of which must be addressed prior to final promulgation of the Amendment Regulations. The draft model Amendment Regulations are provided in order to assist the Department in re-drafting the Amendments so that they are in line with jurisprudence, and the Act.
61. Finally, we recommend that the Department amend the Amendment Regulations further so as to ensure that the final promulgated version is in line with guidance and jurisprudence provided by our Courts in relation to the interpretation of the specific provisions to which these Regulations pertain.
62. We reiterate our concern regarding the timeframes for finalisation of the Amendment Regulations, and urge the Department to meaningfully engage with comments submitted including these ones.

We thank the Department of Home Affairs for the opportunity to make these written comments, and welcome further engagements as relevant stakeholders.

Yours sincerely,



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and

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SOUTHERN AFRICA
LITIGATION CENTRE



The centre is registered with the South African Department of Social Development as a non-profit organisation (021-079 NPO), as a Child and Youth Care Centre (C7569) and as a Public Benefit Organisation with the South African Revenue Services (930012808) and governed by a Trust (IT2746/2006).
Auditors: CAP Chartered Accountants. VAT number: 4780251437.

Annexure A

<u>Comments on the Draft Amendment Regulations to the 2012 Regulations to the SA Citizenship Act</u>		
Draft Amendment Regulation No.	Draft Regulation Text	Comment
1.		No comment.
2. (Amendment of regulation 1 of 2012 Regulations)	Definitions	No comment.
2 (repeated) (Amendment of regulation 3 of 2012 Regulations)	<p>Certificate of naturalisation in terms of section 5 of Act.</p> <p>3.(1)(a) [...] [...] (f) proof of knowledge of one South African official language (g) a copy of identity document for permanent residents; (h) proof of employment and duration thereof; and (i) proof of fixed property, if any.</p>	<p><u>Comment on draft regulation 3</u></p> <p>The purpose of section 5 of the principle Act provides for the Minister to grant citizenship by naturalisation to certain foreign nationals who fulfil specific criteria provided for in the Act. The additional criteria provided by the Draft Amendment Regulations of a copy of an identity document for permanent residents is <i>ultra vires</i> the Act. The Act simply requires that the applicant must “satisfy the Minister that he or she has been admitted to the Republic for permanent residence therein”. This should be possible with any type of document showing admission for permanent residence, not solely a Permanent Resident Identity Document, which can only be applied for by someone admitted for permanent residence after they have been admitted, and often with some delays and difficulties.</p> <p>Regulation 3(1)(e) of the 2012 Regulations, which is not substantively amended by the current draft Regulations, requires the applicant for naturalisation to submit “the original identity document” and subsection 3(1)(g) which is added by the draft Regulations requires a “copy of identity document for permanent residents”.</p> <p>We are concerned by the additional criteria required by subsections 5(1)(h) and (i), which are not provided for by the principle Act.</p>

	<p>3(2)(a) The period of ordinary residence referred to in section 5(2)(c) of the Act is five years immediately preceding the date of application for naturalisation.</p>	<p>It is recommended that:</p> <ol style="list-style-type: none"> 1. Clarity is provided on the difference, if any, between the two identity documents listed, or if it is a repeat that one of these is omitted. 2. Where it states that an original document is required, that this be changed to ensure that where the original is unavailable, that an affidavit deposed to by the applicant can replace the need for an original document. 3. It be made clear that the criteria in subsections 5(1)(h) and (i) are optional and not a requirement. They are not provided for in the principle Act. If these subsections are included, it must be made clear that they are not mandatory and cannot be used as a basis for exclusion from citizenship. This is particularly relevant regarding the requirement of proof of employment, as it may not provide for self-employed persons. <p>We commend the Department for ensuring that the time period of ordinary residence in the Republic is five years instead of ten. This is in line with established jurisprudence.</p>
<p>3. (Insertion of regulation 3A into 2012 Regulations) / 3A(1)(a) and (b)</p>	<p>Certificate of naturalisation in terms of section 4(3) of Act</p> <p>3A. (1) An application for naturalisation as a South African citizen in terms of section 4(3) of the Act must be in a form containing substantially the information indicated in Annexure 1A (DHA-63A), and must be accompanied by the following supporting documents:</p> <p>(a) in the case of an applicant born of asylum seekers or refugees—</p>	<p><u>Comment on draft regulation 3A(1)(a) and 3A(1)(b)</u></p> <p>Draft Regulations 3A(1)(a) and 3A(1)(b) distinguish between applications made by persons born of asylum seekers or refugees and by persons born of foreigners not admitted for permanent residence, respectively.</p> <p>The differentiation between children born of asylum seekers/refugees and those born of any other foreigner not admitted for permanent residence is arbitrary and is not provided for in the principle Act. While a person may be born of asylum seekers or refugees or of foreigners not admitted for permanent residence, such immigration status is not always and immediately directly transferable to the child at birth. In addition, such immigration status is subject to change during the 18 or more years from the child's date of birth to the potential date of application for citizenship by naturalisation.</p> <p>For example, in the Refugees Amendment Act, which came into operation on 1 January 2020, section 21B(3A) provides that where a dependant of an asylum seeker ceases to be a dependent by virtue of, <i>inter alia</i>, cessation of his or her dependance upon the asylum seeker parent, that he or she may apply for asylum him- or herself in accordance with the provisions of the Refugees Act. The impact of this is that when the child who had the same status as her parent reaches the age of majority, where she would be entitled to apply for citizenship by naturalisation, she simultaneously loses her asylum status in the country subject to re-application on her own grounds. This means at that specific point in the individual's life, she would be rendered without documentation. This renders the young adult incredibly vulnerable to deportation as well as at risk of statelessness. The differentiation in documentation type of the parents is not provided for in the principle Act and should not be included in the Regulations.</p>

	<p>[...]</p> <p>(b) in the case of an applicant born of foreigners not admitted for permanent residence—</p>	<p>Proving the status of the parent is completely irrelevant. Quite apart from being irrelevant, it creates a serious obstacle to abandoned or orphaned children without having a legitimate objective.</p> <p>We therefore recommend that:</p> <ol style="list-style-type: none"> 1. The distinction between applications made by persons born of asylum seekers or refugees and those made by persons born of foreigners not admitted for permanent residence must be completely removed from Draft Regulations 3A(1)(a) and 3A(1)(b).
<p>3. (Insertion of regulation 3A into 2012 Regulations) / 3A(1)</p>	<p>3A. (1) An application for naturalisation as a South African citizen in terms of section 4(3) of the Act must be in a form containing substantially the information indicated in Annexure 1A (DHA-63A), and must be accompanied by the following supporting documents: (i) [...]</p>	<p><u>Comment on draft regulation 3A(1)</u> This draft amendment regulation provides for compulsory submission of certain documents, listed in subsections 3A(1)(a)(i) to (xii) and 3A(1)(b)(i) to (xi). The documents listed in addition to a birth certificate are not provided for in the principle Act and thus should not be mandatory. This can be achieved by changing the wording from “must” to “may”.</p> <p>The only supporting document that relates to a requirement as set out in the objective criteria of section 4(3) of the Act is a form DHA-19 or a birth certificate, which is provided for by Draft Regulations 3A(1)(a)(i) and 3A(1)(b)(i). The birth certificate relates to the objective requirement that the individual’s birth was registered in the Republic, but a birth certificate should not be interpreted as the only mechanism by which proof of registration of birth can be provided. Requiring additional supporting documents which, where an applicant is unable to furnish them would result in their exclusion from applying for citizenship by naturalisation in terms of s 4(3), is <i>ultra vires</i> the Act.</p> <p>The draft amendment regulation must make provision for the scenario in which a potential applicant is not in possession of the original birth certificate. This scenario is not uncommon, particularly for those who have grown up in households that may have been the target of xenophobic violence or attack. If the birth of an individual was registered, then presumably the Department of Home Affairs would be in possession of all the information in regard to the registration of that birth as the Department is required to keep records of such. Thus, where an applicant is not in possession of their original birth certificate, or copy, provision must be made for the applicant to provide an affidavit setting out the circumstances of their individual situation, as well as providing any essential details that the Department can use to verify the registration of birth through its own records.</p> <p>We therefore recommend that:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1) should be amended to provide that an application for naturalisation in terms of s 4(3) “must” be accompanied by the original DHA-19 Form issued to the applicant upon registration of his or her birth in terms of the Births and Deaths Registration Act (as currently provided for by draft regulation 3A(1)(a)(i) and 3A(1)(b)(i)), or if the applicant is not in possession of this that they must depose to an

		<p>affidavit setting out why they do not have it and providing the circumstances and details regarding the registration of their birth; and</p> <ol style="list-style-type: none"> 2. Draft Regulation 3A(1) should be amended to provide that an application for naturalisation “may” be accompanied by optional supporting documents which are currently provided for by Draft Regulations 3A(1)(a)(ii) onwards, and 3A(1)(b)(ii) onwards. 3. Draft Regulation 3A(1) should furthermore be amended to provide that an applicant “may” provide as an optional supporting document a sworn affidavit which speaks to circumstances relevant to the criteria set out by s 4(3), in addition to those supporting documents listed under 3A(1)(a)(ii) onwards and 3A(1)(b)(ii) onwards (which, on the basis of the above recommendation, are optional supporting documents).
<p>3. (Insertion of regulation 3A into 2012 Regulations) / 3A(1)(a)(i) - 3A(1)(xii)</p>	<p>(a) in the case of an applicant born of asylum seekers or refugees—</p>	<p>See the recommendation above in respect of removal of the distinction between documentation or immigration status of the putative citizenship applicant’s parents.</p>
	<p>(i) the original DHA-19 Form issued to the applicant upon registration of his or her birth in terms of the Births and Deaths Registration Act;</p>	<p><u>Comment on draft regulation 3A(1)(a)(i)</u> In practice, children born of non-citizens are provided a handwritten form DHA-19 or birth certificate, not a system printed one. In the event that this handwritten birth certificate is lost, which could easily take place as a result of unfortunate circumstances (which commonly may include xenophobic incidents, robbery or theft, houses burning down, or other unforeseen circumstances), the re-issuing of such documents is not commonplace. The Draft Regulations must make provision for such circumstances. In addition, this requirement does not take into account the low rate of birth registration in South Africa (ISS report on statelessness) or the fact that many asylum seekers are unable to register the birth of a child until they are documented or unless their documentation is valid at the time of the registration of the birth. This is a barrier for many in terms of the registration of the birth of a child, particularly where the asylum document has to be renewed at a faraway Refugee Reception Office, which would require days of travel by the mother, and which is often not possible while heavily pregnant or with a newborn child, which means that in many circumstances when the mother is nearing the due date her documentation may expire and she is unable to renew the documentation until after the first 30 days of the child’s life. This may then entail the need for a late registration of birth application, or further barriers to the registration of the birth of the child.</p> <p>We therefore recommend that:</p> <ol style="list-style-type: none"> 1. An alternative is provided for, so that circumstances where the birth registration document (birth certificate) is lost, the applicant can still make application for citizenship - it is suggested that an affidavit or submission of supporting documentation be provided for; and 2. In circumstances where there have been barriers to the registration of birth, alternatives are available to the applicant in order to ensure registration and submission of such to the department.

	<p>(ii) a copy of proof of birth issued by the health facility in which the applicant was born;</p>	<p><u>Comment on draft regulation 3A(1)(a)(ii)</u> The requirement of proof of birth issued by a health facility is not provided by the Act, and therefore the requirement of this in the amendment regulations is <i>ultra vires</i> the Act. Furthermore, it fails to take account of other diverse birth practices, such as home births or those attended by traditional birth attendants – a practice common among some religions and cultures, which would not result in notification of birth issued by a hospital.</p> <p>The requirement for such a document is nonsensical and serves no legitimate purpose, particularly as the form DHA-19 (Home Affairs issued birth certificate) already provides sufficient details of the applicant's birth.</p> <p>It is therefore recommended that:</p> <ol style="list-style-type: none"> 1. Section 3A(1)(a)(ii) be omitted from the regulations in its entirety, or simply be an optional document that may be submitted.
	<p>(iii) the original copies of the applicant's parents' asylum seeker visa or refugee status issued in terms of the Refugees Act;</p>	<p><u>Comment on draft regulation 3A(1)(a)(iii)</u> This provision is vague in that it fails to specify whether the documentation required is the documentation that the applicant's held at the time of the child's birth, or at the time of the application for citizenship by naturalisation. While an applicant may have been born of asylum seekers or refugees, their application for citizenship by naturalisation will be lodged 18 years or more later – this is a long time, and thus the applicant's parents may no longer hold asylum seeker or refugee status. To require the documentation of the parents at the time of the citizenship application serves no legitimate purpose, particularly given that the individual applicant is a major. However, if the document required is specifically the documents held by the parents at the time of the individual's birth, there may be a legitimate purpose in terms of proving that the applicant was born to parents who were neither citizens, or admitted as permanent residents at the time of the applicant's birth.</p> <p>However, requiring the original copies of the applicant's parents' asylum seeker visa or refugee status issued in terms of the Refugees Act as a supporting document is <i>ultra vires</i> the Act. In addition, this section indirectly creates a requirement that at the date of birth of the child, her parents had regularised their stay in South Africa through obtaining documentation. This fails to take into account the fact that some asylum seekers may be in the country with <i>de facto</i> asylum claims, but not yet be in possession of asylum documentation.</p> <p>This has the potential to exclude an applicant who is otherwise eligible to apply for citizenship by naturalisation in terms of s 4(3) if they are unable to furnish such a document, either because such documentation did not exist at the time of their birth or because such documentation has been lost or destroyed through no fault of the applicant's. The provision also fails to take into account the circumstances of foundling children, or abandoned children.</p> <p>The information being requested should in any event already be within the knowledge of the Department of Home Affairs, as the Department responsible for the issuing of asylum seeker and refugee documentation.</p>

		<p>It is therefore recommended that:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(a)(iii) should be amended to provide that an applicant “may” provide, where applicable and available, the copies of the applicant’s parents’ asylum seeker visa or refugee status issued in terms of the Refugees Act which copies must correspond with the date of the applicant’s birth.
	<p>(iv) where applicable, the refugee identity documents of the applicant’s parents;</p> <p>(v) where applicable, the original refugee travel documents of the applicant’s parents;</p>	<p><u>Comment on draft regulation 3A(1)(a)(iv) and (v)</u></p> <p>Draft regulation 3A(1)(a)(iii) already provides for the applicant to provide copies of their parents’ refugee or asylum documentation, which we recommend should be optional. The documents required in terms of draft regulation 3A(1)(a)(iv) and (v) are only available, on application, to persons already in possession of a refugee recognition document issued in terms of section 24 of the Refugees Act. As such, any compulsory requirement of these documents is superfluous as they hold little to no probative value beyond what is already provided for in the form of submission of the refugee status documentation issued to the parents. Should the Department require information regarding the parents, including information in relation to the Refugee Identity Document or travel document of the parents, all of this information is already within the Department’s records.</p> <p>We therefore recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(a)(iv) and 3A(1)(a)(v) should be omitted in their entirety, or be amended to provide that the requested documents are only required where a copy of the refugee status document is unavailable, with the proviso that even the requested refugee status document is not a requirement, but “may” be provided.
	<p>(vi) where applicable, the original copies of the death certificates, and citizenship at the time of death, of the applicant’s parents;</p>	<p><u>Comment on draft regulation 3A(1)(a)(vi)</u></p> <p>Requiring the original copies of the death certificates, and citizenship at the time of death, of the applicant’s parents is <i>ultra vires</i> the Act. The only information that is applicable is the information regarding the parent’s status at the time of the birth of the applicant which is already supplied by way of copies of the parent’s documentation illustrating that they were neither South African citizens or admitted as permanent residents at the time of birth of the applicant.</p> <p>No further information is provided regarding the circumstances where provision of these documents would be applicable. We submit that there are no circumstances where these documents would be needed.</p> <p>We therefore recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(a)(vi) should be omitted in its entirety.
	<p>(vii) the applicant’s asylum seeker visa or refugee status issued</p>	<p><u>Comment on draft regulation 3A(1)(a)(vii)</u></p> <p>While an applicant may be born of asylum seekers or refugees, they may not themselves hold an asylum seeker visa or refugee status. This can come about simply as a result of the barriers faced when trying to effect family</p>

	<p>in terms of the Refugees Act;</p>	<p>unification or “family joining” procedures at the Refugee Reception Offices. In addition, the Refugees Amendment Act, which came into operation on 1 January 2020, section 21B(3A) provides that where a dependant of an asylum seeker ceases to be a dependent by virtue of, <i>inter alia</i>, cessation of his or her dependance upon the asylum seeker parent, that he or she may apply for asylum him- or herself in accordance with the provisions of the Refugees Act. The impact of this is that when the child who had the same status as her parent reaches the age of majority, where she would be entitled to apply for citizenship by naturalisation, she simultaneously loses her asylum status in the country subject to re-application on her own grounds. This means at that specific point in the individual’s life, she would be rendered without documentation. This renders the young adult incredibly vulnerable to deportation as well as at risk of statelessness. In addition, it means that at the time when the putative citizen by naturalisation is permitted to make the application, they also may have had their asylum or refugee documentation withdrawn only as a result of reaching the age of majority.</p> <p>Requiring the applicant’s asylum seeker visa or refugee status issued in terms of the Refugees Act is <i>ultra vires</i> the Act and does not fulfil any purpose provided for in section 4(3) of the Act.</p> <p>We therefore recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(a)(vii) should be amended to provide that an applicant “may” provide, where applicable, the applicant’s asylum seeker visa or refugee status issued in terms of the Refugees Act as an optional supporting document; or that the subsection is omitted in its entirety.
	<p>(viii) where applicable, the original of the applicant’s travel document;</p>	<p><u>Comments on draft regulation 3A(1)(a)(viii)</u></p> <p>We have already indicated that the differentiation between an child born of asylum seeker or refugee parents and persons on any other type of immigration visa is arbitrary and ought to be omitted. This provision assumes specifically relates to asylum seekers and refugees, as the Draft Amendment Regulations currently read. As such, the applicant would not have any travel documents other than those issued by the South African Department of Home Affairs. Such a document is only available, on application, only to persons already in possession of a refugee recognition document issued in terms of section 24 of the Refugees Act. As such, any compulsory requirement of these documents is superfluous as they hold little to no probative value beyond what is already provided for in the form of submission of the refugee status documentation. The requirement of this document is not provided for in the principle Act, and thus this requirement in the Regulations is <i>ultra vires</i> the Act. In any event information contained in a refugee travel document is already within the Department’s records and thus this should not be a requirement from the Applicant.</p> <p>We therefore recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(a)(viii) should be omitted in its entirety, or be amended to provide that the requested documents are only required where a copy of the refugee status document is unavailable, with the proviso that even the requested refugee status document is not a requirement, but “may” be provided.

	<p>(ix) a school report, or a letter from the principal with any extract of the school register, of the primary school in which the applicant was registered for Grade 1;</p>	<p><u>Comments on draft regulation 3A(1)(a)(ix)</u> A school report, or a letter from the principal with any extract of the school register, of the primary school in which the applicant was registered for Grade 1, may not be available in the event that such a school has closed, or has failed to keep such records, or for other reasons beyond the control of the applicant. The Department of Education’s National Guidelines on ‘How to Manage School Records’ states that “records must be archived and kept for three years after a child has left the school.”</p> <p>An applicant is only permitted to apply for citizenship by naturalisation upon reaching the age of majority. This would mean that the citizenship application is at the very least 5 or 6 years after the applicant has completed primary school, assuming that they began primary school and enrolled in Grade 1 at the age of seven years old and completed grade 7 at the age of thirteen years. If schools are advised to keep records for three years, then this could mean that the records may not exist by the time the applicant makes application for citizenship.</p> <p><u>Requiring</u> a school report, or a letter from the principal with any extract of the school register, of the primary school in which the applicant was registered for Grade 1 as a supporting document which, where an applicant is unable to furnish such a document, would result in their exclusion from applying for citizenship by naturalisation in terms of s 4(3), is <i>ultra vires</i> the Act.</p> <p>We therefore recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(a)(ix) should be amended to provide that an applicant “may” provide a school report, or a letter from the principal with any extract of the school register, where available, of the primary school in which the applicant was registered for Grade 1 as an optional supporting document.
	<p>(x) proof of residence of the applicant from the date of birth to the date of application as contemplated in section 4(3) of the Act;</p>	<p><u>Comments on draft regulation 3A(1)(a)(x)</u> While this provision may speak to the criteria set out by section 4(3) that the applicant “has lived in the Republic from the date of his or her birth to the date of becoming a major”. A person’s place of residence after their age of majority is irrelevant for the purposes of section 4(3). As such, the provision should at the very least specify that the proof of residence is only required from birth to the age of majority. In addition, it must be clear that this criteria can be met by way of deposing to an affidavit, as it is otherwise unclear what other proof is required and the provision is overly vague. This is particularly relevant as minors may not necessarily receive any formal correspondence addressed to their place of residence.</p> <p>Requiring proof of residence of the applicant from the date of birth to the date of application as contemplated in section 4(3) of the Act (or alternatively to the date of becoming a major on the basis of our above recommendation) as a supporting document which, where an applicant is unable to furnish such a document, would result in their exclusion from applying for citizenship by naturalisation in terms of s 4(3), would be <i>ultra vires</i> the Act.</p>

		<p>There are several reasons beyond the control of the applicant that they may not be able to provide proof of residence from the date of birth to the date of becoming a major, and that these reasons should exclude a potential applicant from being eligible to apply for exclusion from applying for citizenship by naturalisation in terms of s 4(3).</p> <p>We therefore recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(a)(x) should be amended to provide that an applicant “may” provide proof of residence of the applicant from the date of birth to the date of becoming a major as an optional supporting document. 2. If Draft Regulation 3A(1)(a)(x) is kept in the Regulations, it should be reworded as follows to ensure that proof of residence, including proof of affidavit, is only needed from date of birth to date of reaching the age of majority.
	<p>(xi) proof of knowledge of one of the South African official languages; and</p>	<p><u>Comment on draft regulation 3A(1)(a)(xi)</u></p> <p>The requirement that an applicant for naturalisation in terms of s 4(3) have knowledge of one of the South African official languages is not a criteria provided by the Act, and therefore demanding proof thereof is <i>ultra vires</i> of the principle legislation. By contrast, s 5(1)(f) of the Act provides that the Minister may, upon application in the prescribed manner, grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the Minister <i>inter alia</i> that he or she is able to communicate in any one of the official languages of the Republic to the satisfaction of the Minister.</p> <p>While we concede that most, if not all, applicants for naturalisation in terms of s 4(3) will be able to meet this criteria, its inclusion creates an unnecessary burden on the applicant, and in as far as its inclusion is <i>ultra vires</i> the Act, it undermines the Constitution, the rule of law and the principle of legality.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(a)(xi) should be omitted in its entirety.
<p>3. (Insertion of regulation 3A into 2012 Regulations) / 3A(1)(b)(i) - 3A(1)(b)(x)</p>	<p>3A. (1) An application for naturalisation as a South African citizen in terms of section 4(3) of the Act must be in a form containing substantially the information indicated in Annexure 1A (DHA-</p>	<p><u>Comment on draft regulation 3A(1)(b)</u></p> <p>See the recommendation above in respect of removal of the distinction between documentation or immigration status of the putative citizenship applicant’s parents.</p>

	<p>63A), and must be accompanied by the following supporting documents: [...]</p> <p>(b) in the case of an applicant born of foreigners not admitted for permanent residence—</p>	
	<p>(i) the original DHA-19 Form issued to the applicant upon registration of his or her birth in terms of the Births and Deaths Registration Act;</p>	<p><u>Comment on draft regulation 3A(1)(b)(i)</u> Children born of foreigners are provided a handwritten form DHA-19 or birth certificate, not a system printed one. In the event that a parent lost the birth certificate due to unfortunate circumstances (which commonly may include xenophobic incidents, robbery or theft, houses burning down, or other unforeseen circumstances), the re-issuing of such documents is not commonplace. The Draft Regulations must make provision for such circumstances.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft regulation 3A(1)(b)(i) is reworded in order to allow for reissued DHA-19 Forms, or where DHA refuses to provide a re-issue, with a copy of the lost original, or evidence on affidavit regarding the registration of the birth.
	<p>(ii) a copy of proof of birth issued by the health facility in which the applicant was born;</p>	<p><u>Comment on draft regulation 3A(1)(b)(ii)</u> The requirement of proof of birth issued by a health facility is not provided by the Act, and therefore its requirement is <i>ultra vires</i> the Act. Furthermore, it fails to take account of diverse birth practices, such as home births attended by birth attendants – a practice common among some religions and cultures.</p> <p>The requirement for such a document is nonsensical and serves no legitimate purpose, particularly as the form DHA-19 (Home Affairs issued birth certificate) already provides sufficient details of the applicant's birth.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(b)(ii) should be omitted in its entirety.
	<p>(iii) the original copies of the applicant's</p>	<p><u>Comment on draft regulation 3A(1)(b)(iii)</u></p>

<p>parents' temporary residence visas issued in terms of section 10(2) of the Immigration Act;</p>	<p>While an applicant may have been born of foreigners not admitted for permanent residence, this does not necessarily mean that the applicant's parents held temporary residence visas issued in terms of section 10(2) of the Immigration Act.</p> <p>The applicant's application should not be contingent upon the production of such a document, or on the type of visa held by the applicant's parents at the time of his or her birth.</p> <p>Requiring the original copies of the applicant's parents' temporary residence visas issued in terms of section 10(2) of the Immigration Act which, where an applicant is unable to furnish such a document, would result in their exclusion from applying for citizenship by naturalisation in terms of s 4(3), is <i>ultra vires</i> the Act.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(b)(iii) should be amended to provide that an applicant "may" provide, where applicable, the original copies of the applicant's parents' temporary residence visas issued in terms of section 10(2) of the Immigration Act.
<p>(iv) a valid passport or travel documents of the applicant's parents;</p>	<p><u>Comment on draft regulation 3A(1)(b)(iv)</u></p> <p>Requiring a valid passport or travel documents of the applicant's parents which, where an applicant is unable to furnish such a document, would result in their exclusion from applying for citizenship by naturalisation in terms of s 4(3), would be <i>ultra vires</i> the Act. It is furthermore <i>ultra vires</i> the Act for any negative consequences in relation to the citizenship applicant if the parents travel documentation or visas are invalid.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(b)(iv) should be amended to provide that an applicant "may" provide, where applicable, copies of the passport or travel documents of the applicant's parents.
<p>(v) where applicable, the original copies of the death certificates, and citizenship at the time of death, of the applicant's parents;</p>	<p><u>Comment on draft regulation 3A(1)(b)(v)</u></p> <p>No further information is provided regarding the circumstances where provision of these documents would be applicable. Requiring the original copies of the death certificates, and citizenship at the time of death, of the applicant's parents is <i>ultra vires</i> the Act. The only information that is applicable is the information regarding the parent's status at the time of the birth of the applicant which is already supplied by way of copies of the parent's documentation illustrating that they were neither South African citizens or admitted as permanent residents at the time of birth of the applicant.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(b)(v) should be omitted in its entirety.

<p>(vi) the original copy of the applicant's temporary residence visa issued in terms of section 10(2) of the Immigration Act;</p>	<p><u>Comment on draft regulation 3A(1)(b)(vi)</u> The requirement that an applicant for naturalisation in terms of s 4(3) holds a temporary residence visa issued in terms of section 10(2) of the Immigration Act is not provided by the Act. Requiring a original copy of the applicant's temporary residence visa issued in terms of section 10(2) of the Immigration Act which, where an applicant is unable to furnish such a document, would result in their exclusion from applying for citizenship by naturalisation in terms of s 4(3), is <i>ultra vires</i> the Act.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(b)(viii) should be amended to provide that an applicant "may" provide an original copy of the applicant's temporary residence visa issued in terms of section 10(2) of the Immigration Act as an optional supporting document.
<p>(vii) where applicable, the original passport or travel document of the applicant;</p>	<p><u>Comment on draft regulation 3A(1)(b)(vii)</u> The requirement that an applicant for naturalisation provide any other passport or travel document that they may hold, is not provided by the Act. Requiring the original copy of the applicant's passport or travel document, where an applicant is unable to furnish such a document, would result in their exclusion from applying for citizenship by naturalisation in terms of s 4(3), is <i>ultra vires</i> the Act. The only situation where the this requirement may be of use to the Department is in order to ascertain whether the applicant has remained in the country from birth to the age of majority, but this can be done on affidavit, and is also provided for in regulation 3A(1)(b)(ix).</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(b)(viii) should be amended to provide that an applicant "may" provide an original copy of the applicant's passport or travel document as an optional supporting document.
<p>(viii) a school report, or a letter from the principal with any extract of the school register, of the primary school in which the applicant was registered for Grade 1;</p>	<p><u>Comment on draft regulation 3A(1)(b)(viii)</u> A school report, or a letter from the principal with any extract of the school register, of the primary school in which the applicant was registered for Grade 1, may not be available in the event that such a school has closed, or has failed to keep such records, or for other reasons beyond the control of the applicant. The Department of Education's National Guidelines on 'How to Manage School Records' states that "records must be archived and kept for three years after a child has left the school."</p> <p>An applicant is only permitted to apply for citizenship by naturalisation upon reaching the age of majority. This would mean that the citizenship application is at the very least 5 or 6 years after the applicant has completed primary school, assuming that they began primary school and enrolled in Grade 1 at the age of seven years old and completed grade 7 at the age of thirteen years. If schools are advised to keep records for three years, then this could mean that the records may not exist by the time the applicant makes application for citizenship.</p>

		<p>Requiring a school report, or a letter from the principal with any extract of the school register, of the primary school in which the applicant was registered for Grade 1 as a supporting document which, where an applicant is unable to furnish such a document, would result in their exclusion from applying for citizenship by naturalisation in terms of s 4(3), would be <i>ultra vires</i> the Act.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(b)(viii) should be amended to provide that an applicant “may” provide a school report, or a letter from the principal with any extract of the school register, where available, of the primary school in which the applicant was registered for Grade 1 as an optional supporting document.
	<p>(ix) proof of residence of the applicant from the date of birth to the date of application as contemplated in section 4(3) of the Act;</p>	<p><u>Comment on draft regulation 3A(1)(b)(ix)</u> This may speak to the criteria set out by s 4(3) that the applicant “has lived in the Republic from the date of his or her birth to the date of becoming a major”. A person’s place of residence after their age of majority is irrelevant for the purposes of s 4(3).</p> <p>Requiring proof of residence of the applicant from the date of birth to the date of application as contemplated in section 4(3) of the Act (or alternatively to the date of becoming a major on the basis of our recommendation) as a supporting document which, where an applicant is unable to furnish such a document, would result in their exclusion from applying for citizenship by naturalisation in terms of s 4(3), would be <i>ultra vires</i> the Act.</p> <p>There are several reasons beyond the control of the applicant that they may not be able to provide proof of residence from the date of birth to the date of becoming a major, and that these reasons should exclude a potential applicant from being eligible to apply for exclusion from applying for citizenship by naturalisation in terms of s 4(3).</p> <p>We recommend: We therefore recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(b)(ix) should be amended to provide that an applicant “may” provide proof of residence of the applicant from the date of birth to the date of becoming a major as an optional supporting document. 2. If Draft Regulation 3A(1)(b)(ix) is kept in the Regulations, it should be reworded as follows to ensure that proof of residence, including proof of affidavit, is only needed from date of birth to date of reaching the age of majority.
	<p>(x) proof of knowledge of one of the South African official languages; and</p>	<p><u>Comment on draft regulation 3A(1)(b)(x)</u> The requirement that an applicant for naturalisation in terms of s 4(3) have knowledge of one of the South African official languages is not a criteria provided by the Act, and therefore demanding proof thereof is <i>ultra vires</i> of the principle legislation. By contrast, s 5(1)(f) of the Act provides that the Minister may, upon application in the prescribed manner, grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the</p>

		<p>Minister <i>inter alia</i> that he or she is able to communicate in any one of the official languages of the Republic to the satisfaction of the Minister.</p> <p>While we concede that most, if not all, applicants for naturalisation in terms of s 4(3) will be able to meet this criteria, its inclusion creates an unnecessary burden on the applicant, and its inclusion is <i>ultra vires</i> the Act. In addition, without clear criteria on how proficiency will be determined, or which body would be responsible for determination of such, the provision is also vague and it undermines the Constitution, the rule of law and the principle of legality.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(1)(b)(x) should be omitted in its entirety.
<p>3. (Insertion of regulation 3A into 2012 Regulations) / 3A(2)</p>	<p>3A(2) The applications referred to in subregulation (1) shall, subject to the requirements set out in this regulation, be made by persons—</p>	<p><u>Commend on draft regulation 3A(2)</u> In as far as Draft Regulation 3A(2) prescribes who may apply for citizenship by naturalisation in terms of s 4(3) of the Act it is superfluous, in that the Act already prescribes who may apply for in terms of that provision, namely “[a] child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence” upon becoming a major and who meets the other requirements provided for by that provision.</p> <p>The prescription by Draft Regulation 3A(2) of who may apply in terms of s 4(3) excludes potential applicants who are otherwise eligible to apply for citizenship by naturalisation in terms of s 4(3), as will be discussed below in detail, and is <i>ultra vires</i> the Act.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(2) should be omitted in its entirety.
	<p>3A(2)(a) born in the Republic between 6 October 1995 and the date of having attained the age of 18 years;</p>	<p><u>Comment on draft regulation 3A(2)(a)</u> We note that the date 6 October 1995 corresponds with the date that the Citizenship Act, 1995 was assented. The restriction set out by Draft Regulation 3A(2)(a) that a person is not eligible to apply in terms of s 4(3) if they were born before 6 October 1995 is arbitrary, unfairly discriminatory and is <i>ultra vires</i> the Act.</p> <p>A potential applicant may, for example, meet all the objective criteria in terms of s 4(3), including having had their birth registered in terms of the Births and Deaths Registration Act (which we note came into operation prior to the ascension of the Act), however by sheer back luck was born an hour too early - on the eve of 6 October 1995 - and on the basis of Draft Regulation 3A(2)(a), be excluded from eligibility to apply for citizenship in terms of s 4(3).</p> <p>We therefore recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(2)(a) should be omitted in its entirety.

	<p>3A(2)(b) born of asylum seekers, refugees or foreigners not admitted for permanent residence; and</p>	<p><u>Comment on draft regulation 3A(2)(b)</u> In as far as Draft Regulation 3A(2)(b) prescribes who may apply for citizenship by naturalisation in terms of s 4(3) of the Act it is superfluous, in that the Act already prescribes who may apply for in terms of that provision, namely “[a] child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence” upon becoming a major and who meets other requirements provided for by that provision.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(2)(b) should be omitted in its entirety.
	<p>3A(2)(c) have lived in the Republic and have no citizenship, residency or connection, in any manner whatsoever, of any other country.</p>	<p><u>Comment on draft regulation 3A(2)(c)</u> Aside from s 5(1)(h), which provides that an applicant for citizenship by naturalisation must satisfy the Minister that they are a citizen of a country that allows dual citizenship (failing which they must renounce the citizenship of that country), or s 6(1) read with 6(2), which provide that a South African citizen shall cease to be a South African citizen if, whilst not being a minor, by some voluntary and formal act other than marriage, they acquire foreign citizenship without having applied and been granted retention of citizenship, there is nothing within the Act which prevents a South Africa citizen, including a South African citizen by naturalisation in terms of s 4(3), from holding dual citizenship.</p> <p>The prescription by Draft Regulation 3A(2)(c) of who may apply in terms of s 4(3) excludes potential applicants, particularly children of refugees or asylum seekers, who are otherwise eligible to apply for citizenship by naturalisation in terms of s 4(3) and is <i>ultra vires</i> the Act.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(2)(c) should be omitted in its entirety.
<p>3. (Insertion of regulation 3A into 2012 Regulations) / 3A(3)</p>	<p>3A(3) For the purposes of this regulation, registration of birth in terms of the Births and Deaths Registration Act means that the birth of the child was registered within 30 days of the date of birth in terms of</p>	<p><u>Comment on draft regulation 3A(3)</u> While birth registration in South Africa must be done within 30 days, it is not a simple or easy process for asylum seekers, refugees and other migrants in South Africa, but rather is fraught with barriers, expenses, and delays. For example, an undocumented asylum seeker who has been unable to approach a Refugee Reception Office owing to a lack of geographic accessibility and costs associated thereto, or an asylum seeker or refugee who is unable to timeously renew their documentation owing to similar or other reasons, may be unable to register the birth of a child within 30 days through no fault of their own. Birth registration for abandoned children (normally referred to as foundlings), whose birth had to be registered with the assistance of a social worker, can take months due to investigations by a social worker as well as the Children’s Court process.</p>

	<p>section 9 of the Births and Deaths Registration Act, read with regulation 7(2)(b) or 8 of the Regulations on the Registration of Births and Deaths, as the case may be.</p>	<p>Notwithstanding the above, birth registration is the right of the child, as it gives effect to the Constitutional right of every child in South Africa to a name and nationality from birth. Children should not be punished for the failures of their parents. Similarly, by extension, a potential applicant for citizenship by naturalisation in terms of s 4(3) should not be excluded on the basis of circumstances beyond their control, or the timeous registration of their birth by their parents, particularly where they can nonetheless provide a form DHA-19 or birth certificate.</p> <p>Where a birth was not registered within 30 days, such a birth can nonetheless be registered where prescribed requirements for a late registration of birth are met. Such a child would be issued a form DHA-19 or birth certificate, and their birth will have been registered in terms of the Births and Deaths Registration Act, thereby fulfilling the criteria set out by s 4(3)(b) of the Act.</p> <p>An interpretation that registration of birth in terms of the Births and Deaths Registration Act means that the birth of the child was registered within 30 days of the date of birth, to the exclusion of late registration of birth, which, where such an interpretation would result in the exclusion of an applicant from applying for citizenship by naturalisation in terms of s 4(3), would be <i>ultra vires</i> the Act.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(3) be omitted in its entirety.
<p>3. (Insertion of regulation 3A into 2012 Regulations) / 3A(6)</p>	<p>3A(6) The citizenship acquired in terms of section 4(3) of the Act is not transferrable to, and shall not be used to obtain any immigration status in terms of the Immigration Act, by any of the parents, siblings or relatives of the person so naturalised.</p>	<p><u>Comment on draft regulation 3A(6)</u> The restrictions proposed by Draft Regulation 3A(6) are not provided by the Act and therefore it is <i>ultra vires</i> the Act.</p> <p>The restriction that citizenship acquired in terms of section 4(3) of the Act is not transferrable to any of the parents, siblings, or relatives of the person so naturalised is superfluous. The Citizenship Act already sets out the requirements for citizenship by birth, naturalisation, and descent, and these apply to parents, siblings, or relatives of a person naturalised in terms of section 4(3).</p> <p>The restriction that citizenship acquired in terms of section 4(3) of the Act is not transferrable to any of the relatives of the person so naturalised may also be in conflict with sections 2 and 3 of the Act. Where the definition of "relatives" is taken to include biological children, draft regulation 3A(6) has the effect of depriving children born to parents who were (at the time of their birth) naturalised citizens in terms of section 4(3) of the Act to their right to citizenship.</p> <p>The restriction that citizenship acquired in terms of section 4(3) of the Act shall not be used to obtain any immigration status in terms of the Immigration Act by the parents, siblings or relatives of the person so naturalised</p>

		<p>infringes on the Constitutional right to equality, and the Constitutional provision that all citizens are equally entitled to the rights, privileges and benefits of citizenship.</p> <p>The restriction differentiates between those South African citizens who were naturalised in terms of section 4(3), and those who were naturalised in terms of section 5 or who are citizens by birth or descent. This differentiation has the effect of relegating South African citizens who were naturalised in terms of section 4(3) to a second-class citizenry, where such citizens do not equally enjoy the rights and privileges of all South Africa citizens. This infringes on the Constitutional right to equality, and the Constitutional provision that all citizens are equally entitled to the rights, privileges and benefits of citizenship.</p> <p>The restriction also undermines the Constitutional right to human dignity. Writing on the subject of South African citizens with foreign spouses or children, the Constitutional Court wrote in the opening line of the <i>Nandutu</i> matter that “the right to family life is not a coincidental consequence of human dignity, but rather a core ingredient of it”.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3A(6) be omitted in its entirety.
<p>3. (Insertion of regulation 3A into 2012 Regulations) / 3A(7)</p>	<p>3A(7) A South African citizen by naturalisation may be deprived of his or her citizenship in terms of section 8 of the Act.</p>	<p><u>Comment on draft regulation 3A(7)</u> Section 20 of the Constitution provides that "No citizen may be deprived of citizenship", though this is a derogable right, criticism has been lodged that a citizen by naturalisation can have their citizenship revoked on certain grounds, and that this may infringe on their right in terms of section 20. We submit that where this provision is implemented that a clear appeal process is set out and that such appeal process is regulated in terms of PAJA</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Section 3A(7) be omitted in its entirety, or failing that that a fair administrative appeal and review process is provided for in the regulations, with set timeframes.
<p>3. (Insertion of regulation 3B into 2012 Regulations) / 3B(a) - (b)</p>	<p>The Minister or his or her delegated official may, in appropriate circumstances, require the applicant to appear for a hearing— (a) which the procedure thereof</p>	<p><u>Comment on draft regulation 3B(a)</u> We note that there is no clarity as to what constitutes “appropriate circumstances”, and furthermore no clarity as to the purpose of the hearing provided for by Draft Regulation 3B. These provisions are therefore vague, and should be clarified prior to final promulgation of the Regulations.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Clarity is provided regarding the ‘appropriate circumstances’ mentioned in this provision; and 2. Clarity is provided regarding the purpose of the hearing.

	shall be determined by the Minister; and	
	(b) in which the applicant shall not have a right to legal representation.	<p><u>Comment on draft regulation 3B(b)</u></p> <p>This provision undermines several rights in the Bill of Rights, including the right to have access to courts which provides that “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum” and the right to fair administrative procedures and just administrative action.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Draft Regulation 3B(b) should be omitted in its entirety.
Annexure 1A / Draft Form DHA 63A	To be completed in full and submitted, together with DHA-1620, at the Department of Home Affairs' Office.	<p><u>Comment on Form DHA-63A</u></p> <p>Draft Regulation 3A(1) provides that an application for naturalisation in terms of s 4(3) must be made with Draft Form DHA-63A. Draft Form DHA-63A provides that an application must be submitted “together with DHA-1620”. Form DHA-1620 is an Application for Proof of Permanent Residence. Permanent Residence is not a criteria of s 4(3), and therefore is irrelevant to that provision.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. The words “together with DHA-1620” should be deleted from Draft Form DHA-63A.
	Applicants must have, at the time of application, spent five years continuous period of ordinary residence in the Republic.	<p>A person’s place of residence after their age of majority is irrelevant for the purposes of s 4(3).</p> <p>That a person has spent five years continuous period of ordinary residence in the Republic at the time of application is a requirement for an application for citizenship by naturalisation in terms of s 5 of the Citizenship Act. This is an entirely different provision with different requirements than those of s 4(3).</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. The words “[a]pplicants must have, at the time of application, spent five years continuous period of ordinary residence in the Republic” should be deleted from Draft Form DHA-63A.
	Incomplete application will not be accepted	<p>We note with concern that several sections of Draft Form-63A request information that may not be of relevance to the applicant. For example, Section A. Details of the Applicant requests information on “Asylum Seeker / Refugee / Temp Res Visa No.”, “Travel Doc / Passport No.”, “Date of Issue” and “Place of Issue”. There is no requirement in the principle Act that an applicant in terms of s 4(3) hold any such document or status.</p> <p>We recommend:</p>

		1. These sections in the form be deleted in their entirety.
Have you ever left the RSA at any time since you were born? "Yes" or "No"	There is no provision made within Draft Form-63A to provide any details regarding a person's departure from the Republic, including the reasons therefore and the dates of departure and return. We recommend: 1. Draft Form-63A should be amended to include a section where an applicant may furnish, where applicable, details regarding their departure from the Republic, including the reasons therefore and the dates of departure and return.	
C. Marital Status of Applicant	A person's place of residence after their age of majority is irrelevant for the purposes of s 4(3). We recommend: 1. Section C of Draft Form-63A should be omitted entirely.	
E. Particulars of Residence in South Africa	Section E. Particulars of Residence in South Africa prompts an applicant to enter their "Visa Ref No." and "Date of Issue" thereof, however an applicant in terms of s4(3) will not necessarily hold a visa or permit issued in terms of the Immigration Act. They may hold an Asylum Seeker Visa or Formal Recognition of Refugee Status, or they may hold no document issued in terms of either the Immigration Act or the Refugees Act. There is no requirement in the principle Act that they hold any such status. In any event, such information is already requested at Section B. Citizenship Details of Applicant, where an applicant is prompted to provide information on "Asylum Seeker / Refugee / Temp Res Visa No." Prompting an applicant to submit information on "Date of first entry into RSA" and "Purpose of entry" is disingenuous. An applicant in terms of s 4(3) is born in South Africa. Where the aim of this information is to verify whether an applicant was indeed born in South Africa, such information is requested at Section B. Citizenship Details of Applicant, where an applicant is prompted to provide information on "Country of birth" and "Place of birth: City/Town". We recommend: 1. Section E of Draft Form-63A should be omitted entirely.	
F. Criminal or Civil Record	A person's criminal or civil record, or the criminal or civil record of a family member, is irrelevant for the purposes of s 4(3). By contrast, s 5(1)(d) of the Act provides that the Minister may, upon application in the prescribed manner, grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the Minister <i>inter alia</i> that he or she is of good character.	

		<p>We recommend:</p> <ol style="list-style-type: none"> 1. Section F of Draft Form-63A should be omitted entirely.
	G. Language Proficiency	<p>A person's language proficiency is irrelevant for the purposes of s 4(3).</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Section G of Draft Form-63A should be omitted entirely.
	H. Educational and Employment Background	<p>A person's educational and employment background is irrelevant for the purposes of s 4(3).</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Section H of Draft Form-63A should be omitted entirely.
	I. Property Ownership	<p>A person's ownership of property is irrelevant for the purposes of s 4(3).</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. Section I of Draft Form-63A should be omitted entirely.

Annexure B

Amendment of regulation 3 of Regulations

2. Regulation 3 of the Regulations is hereby amended by—

(a) the substitution for the heading of the following heading:

“Certificate of naturalisation in terms of section 5 of Act”

(b) the substitution in subregulation (1) for paragraphs (d) and (e) of the following paragraphs:

“(d) if the marital status has changed, the marriage or death certificate;

(e) the original identity document, or, in the case a of a child, an original birth certificate;”;

(c) the addition after paragraph (e) of the following paragraphs:

“(f) proof of knowledge of one of the South African official languages;

(g) copy of identity document for permanent residents;

(h) where available, proof of employment and duration thereof; and

(i) proof of fixed property, if any.”;

(d) the substitution in subregulation (2) for paragraph (a) of the following paragraph:

“(a) The period of ordinary residence referred to in section 5(1)(c) of the Act is five years immediately preceding the date of application for naturalisation.”;

(e) the substitution for subregulations (5) and (6) of the following subregulations:

“(5) The applicant must, on approval of his or her application for naturalisation and before being issued with a certificate of naturalisation, sign the declaration of allegiance in a form containing substantially the information indicated in Annexure 2A (DHA-75).

(6) A certificate of naturalisation as a South African citizen in terms of section 5 of the Act must be in a form containing substantially the information indicated in Annexure 2 (DHA-64E).”; and

(f) the addition after subregulation (6) of the following subregulation: “(7) A South African citizen by naturalisation may be deprived of his or her citizenship in terms of section 8 of the Act.”.

Insertion of regulation 3A, 3B and 3C into Regulations

3. The following regulations are hereby inserted into the Regulations after regulation 3:

“Certificate of naturalisation in terms of section 4(3) of Act

3A. (1) An application for naturalisation as a South African citizen in terms of section 4(3) of the Act –

- (a) must be in a form containing substantially the information indicated in Annexure 1A (DHA-63A);
- (b) must be accompanied by:
 - (i) the original DHA-19 Form issued to the applicant upon registration of his or her birth in terms of the Births and Deaths Registration Act or, where applicable, a re-issued DHA-19 Form; and
 - (ii) biometrics of the applicant.
- (c) may be accompanied by the following supporting documents:
 - (i) where applicable, certified copies of the applicant's parents' asylum seeker visa or refugee status issued in terms of the Refugees Act;
 - (ii) where applicable, certified copies of the refugee identity documents of the applicant's parents;
 - (iii) where applicable, certified copies of the refugee travel documents of the applicant's parents;
 - (iv) where applicable, a certified copy of the applicant's asylum seeker visa or refugee status issued in terms of the Refugees Act;
 - (v) where applicable, the original passport or travel document of the applicant;
 - (vi) where applicable, the original copy of the applicant's temporary residence visa issued in terms of section 10(2) of the Immigration Act.
 - (vii) where available, a school report, or a letter from the principal of the primary school in which the applicant was registered for Grade 1;
 - (viii) where available, proof of residence of the applicant from the date of birth to the date of becoming a major;
 - (ix) where applicable, certified copies of the applicant's parents' temporary residence visas issued in terms of section 10(2) of the Immigration Act; and
 - (x) where applicable, certified copies of the passport or travel documents of the applicant's parents.

(2) Where the supporting documents referred to in subregulation 1(c) are not available, the applicant may depose to a sworn affidavit which speaks to the circumstances relevant to the criteria listed in section 4(3) of the Act.

(3) The applicant must, on approval of his or her application for naturalisation and before being issued with a certificate of naturalisation, sign the declaration of allegiance in a form containing substantially the information indicated in Annexure 2A (DHA-75).

(4) A certificate of naturalisation as a South African citizen in terms of section 4(3) of the Act must be in a form containing substantially the information indicated in Annexure 2 (DHA-64E).

(5) A South African citizen by naturalisation may be deprived of his or her citizenship in terms of section 8 of the Act.

Hearing

3B. The Minister or his or her delegated official may, in appropriate circumstances, require the applicant to appear for a hearing, which the procedure thereof shall be determined by the Minister and published in regulations.

Register

3C. The details of all persons who have been naturalised in terms of sections 4(3) and 5 of the Act must be included in a register to be kept and maintained by the Director-General.”.