Challenging the Practice of Administrative Detention for Stateless Persons in South Africa

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Abstract

In South Africa, section 41 of the Immigration Act requires any person approached on reasonable grounds by a police officer or immigration officer to identify themselves either as a citizen or as a person lawfully present in the Republic. Anyone unable to identify themselves as persons lawfully in South Africa will be deemed to be illegally present and hence subject to an arrest, detention, and possible deportation. This detention can go on for a period of 120 days. This 'unlawful' status automatically entitles immigration officials to arrest and detain such persons, but with the caveat that if such persons express an intention to apply for refugee status their asylum application must be permitted and facilitated. Stateless persons are, by definition, unable to demonstrate their legal presence or provide a valid identity document. They would therefore be deemed to be unlawfully present and therefore detained. This section of the Immigration Act is especially prejudicial to stateless persons since South Africa has no status determination procedure for stateless persons. This paper intends to demonstrate the unlawfulness of the laws regarding the immigration detention of stateless persons and seek an alternative approach or a remedy that could be implemented for stateless persons arrested without the means to identify themselves as legally present in South Africa.

Keywords: statelessness, arbitrary arrest, non-refoulement, status determination, Southern Africa

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I. INTRODUCTION

South Africa has long viewed cross-border movements through the lens of national security, social instability and criminality.[1] The Department of Home Affairs' (DHA) 2017 White Paper on International Migration[2] (hereafter, the 2017 White Paper) underscores that South Arica is a 'destination for irregular migrants (undocumented migrants, border jumpers, over-stayers, smuggled and trafficked persons) who pose a security threat to the economic stability and sovereignty of the country.'[3] This position was reinforced in the Border Management Authority Act, adopted in July 2020.[4] Although the DHA's 2017 White Paper recognises the role of migration in development such as the need to provide protection for refugees and the benefits of visa-free travel, these seemingly progressive plans are framed within the context of threats to national security posed by migration and refugee movements. It emphasises the adoption of policies that can improve enforcement and as a result, detention, and deportation, feature prominently in the 2017 White Paper. The inherently punitive nature of detention is reinforced by the language used by the 2017 White Paper which is steeped in notions of criminality. The use of terms such as 'repeat offenders' and 'illegal migrants' rather than undocumented persons in the 2017 White Paper contributes to the unnecessary criminalisation of migrants because the arrests and detention envisaged by the Immigration Act are administrative rather than criminal.[5] As a result of the evident punitive nature of the detention of migrants in practice, South Africa's migration-related detention policies have drawn criticism for many years. In particular, the operations and conditions at the only long-standing dedicated immigration detention centre — the privately-operated Lindela Repatriation Centre — have been criticised, along with its use of police stations (not listed as legitimate places of detention) and prisons to hold people for immigration purposes, the endemic corruption in the police and immigration bureaucracies that operate detention sites as well as administer the asylum process.[6] 'Numerous reports over the years have highlighted allegations of abuses at detention facilities, prolonged detention periods and repeated accusations of arbitrary detention, as well as overcrowding and poor sanitation, among other problems.'[7] Clearly, South Africa has disregarded a protection-based approach to managing vulnerable non-citizens in favour of a risk-based approach, as seen in its latest 2017 White Paper and Border

[1]Global Detention Project Country Report *Immigration Detention in South Africa: Stricter Control of Administrative Detention, Increasing Criminal Enforcement of Migration*, 28 June 2021, available at https://www.globaldetentionproject.org/immigration-detention-in-south-africa-stricter-control-of-administrative-detention-increasing-criminal-enforcement-of-migration, accessed on 18 June 2022.
[2]The White Paper on International Migration (GN 750 in GG 41009 of 28 July 2017).
[3]Ibid at 35.
[4]The Border Management Authority Act 2 of 2020.
[5]Op cit note 2.
[6]Lawyers for Human Rights 'Monitoring immigration detention in South Africa' September 2010, available at http://www.lhr.org.za/sites/lhr.org.za/files/LHR_2010_Deten tion_Report.pdf, accessed on June 2022.
7See South African Human Rights Commission Investigative Reports Volume 4 *Médecins Sans Frontières and others — The Department of Home Affairs and others* complaint number GP/2012/0134 (2012); Solidarity Peace Trust and PASSOP *Perils and Pitfalls – Migrants and Deportation in South Africa* 5 June 2012.

Management Authority Act.[8]

South Africa's securitisation and punitive approach are particularly worrisome in the cases where individuals are unable to identify themselves as stateless persons. In the simplest form, it can be said that a stateless person is a person without a nationality. It is trite that with a nationality most nationals enjoy the protection of their governments. By means of their nationalities, they will have the right to documentation, access to courts and various civil and social rights. Stateless persons who are not nationals of any country will therefore clearly lack legal protection[9] and may never be able to identify themselves and satisfy the DHA that they are legally in South Africa. The question thus arises whether the administrative detention for the purposes of deportation of a stateless person is lawful.

This paper argues that it is necessary to establish a protection mechanism for stateless persons who are arbitrarily arrested in South Africa, and that such a proposed protection mechanism must be tethered to the international protection framework. This paper furthermore draws attention to the injustices of applying immigration law indiscriminately to all persons who are not South African. It lays plain the inefficiencies of a system that promotes arrest and detention for the purposes of deportation against persons who cannot practically be removed and illustrates the human suffering that often results when they are kept in immigration detention. This paper also explains how South Africa's immigration law is ill-suited to provide the necessary protection for stateless persons and emphasises a call for complementary protection. It proposes first and foremost a way to identify persons as stateless as expeditiously as possible and thereafter a remedy for the administrative detention of stateless persons.

II. INSUFFICIENT PROTECTION FOR STATELESS PERSONS IN SOUTH AFRICA NOTWITHSTANDING A HUMAN RIGHTS APPROACH

A recent United Nations High Commissioner for Refugees (UNHCR) report indicates that statelessness in Southern Africa is driven primarily by colonial history, border changes, migration, poor civil registry systems and discrimination based on gender, ethnicity and religion.[10] Gaps in nationality laws, low birth registrations and forced displacement are some of the causes of statelessness.[11] Even where the legal provisions are in place to protect against statelessness, there are often practical impediments.[12] While many legal gaps remain in Southern Africa, effective civil registration is almost as important as the laws themselves. The practicalities of

[8]Op cit note 2; Op cit note 4.

[9]See Laura van Waas *Nationality Matters: Statelessness under International Law* (2008); Katia Bianchini 'The "stateless person" definition in selected EU member states: Variations of interpretation and application' (2017) 36(3) *Refugee Survey Quarterly* 81; Paul Weis *Nationality and Statelessness in International Law* 2 ed (1979).

[10]Bronwen Manby 'Statelessness in Southern Africa' (2012) Briefing paper for the UNHCR, available at https://www.refworld.org/pdfid/50c1f9562.pdf, accessed on June 2022.

[11]Aimée-Noël Mbiyozo 'Statelessness in Southern Africa: Time to end it, not promote it' (2019) Institute for Security Studies: Southern Africa Report 32, available at https://issafrica.org/research/southern-africa-report/statelessness-in-southern-africa-time-to-end-it-not-promote-it, accessed on July 2022.

[12]Ibid.

obtaining documents are more common barriers than a legal denial of nationality.[13] According to Bronwen Manby, statelessness can have a terrible impact on the lives of individuals.[14] She states, 'possession of a nationality, and official recognition of that nationality, is essential for full participation in society and the enjoyment of the full range of human rights'. She highlights further in her recent analysis of the impact of target 16.9 of the United Nations sustainable development goals (SDGs) on the issue of a legal identity for all, the importance of the possession of nationality.[15]

Even though the grant of nationality is not an international law issue and that there is recognition that it is the prerogative of individual states to decide how to regulate nationality, it is also evident that states cannot disregard international conventions. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930 Hague Convention) did not create an individual right to nationality; states alone grant and withdraw nationality. Article 1 provides that it is 'for each State to determine under its own law who are its nationals'. However, Article 1 also provides that '[t]his law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.'[16]

Since South Africa has ratified various international human rights treaties, the South African Constitution[17] allows for only some rights to be limited to nationals, including the right to vote and stand for public office, but most human rights are to be enjoyed by 'everyone'.[18] In practice, however, many rights of stateless people are violated; they may be detained because they are stateless, they can be denied re-entry to or expelled from the country where they live, they can be denied access to education and health services, or blocked from obtaining employment.[19] The above treatment of stateless persons in South Africa is best summed up in David Owen's paper when he states that

> [T]he momentous development of the international system for protection of human rights since World War II, the citizenship of a person determines how she is treated by this system; the rights people effectively have are still generally

[13]Ibid.

[14]Manby op cit note 10.

[15]Bronwen Manby '"Legal identity for all"' and statelessness: Opportunity and threat at the junction of public and private international law (2020) 2(2) *Statelessness and Citizenship Review* 248–271, available at http://dx.doi.org/10.2139/ssrn.3783310

[16]Michelle Foster and Timnah Rachel Baker 'Racial discrimination in nationality laws: A doctrinal blind spot of International Law? (2021) 11(1) *Columbia Journal of Race and Law*.

[17]The Constitution of the Republic of South Africa, 1996.

[18]Note all the rights in the Bill of Rights that refer to everyone. Rights in the Constitution that refer to 'everyone' include the rights to: Equality at section 9; Human dignity at section 10; Life at section 11; Freedom and security of the person at section 12; Privacy at section 14; Freedom of religion, belief and opinion at section 15; Freedom of expression at section 16; Assembly, demonstration, picket and petition at section 17; Freedom of association at section 18; Freedom of movement and residence at section 21; Labour relations at section 23; Environment at section 24; Housing at section 26; Health care, food, water and social security at section 27; Education at section 29; Language and culture at section 30; Access to information at section 32; Just administrative action at section 33; Access to courts at section 34; and Arrested, detained and accused persons at section 35

[19]Manby op cit note 10.

determined with a reference to the country they belong to.[20]

The two international conventions dealing with statelessness are the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention)[21] and the 1961 Convention on the Reduction of Statelessness (1961 Convention).[22] The 1954 Convention was adopted pursuant to the events of the Second World War when many persons lost their right to live as citizens in the territories that they had once considered home. The purpose of the 1954 Convention was to increase international awareness of the plight of stateless people who were not refugees and to provide for their rights in the absence of formal state affiliation.[23] Such rights include the freedom to practice religion, freedom of association, free access to courts and freedom of movement, to name just a few. The obligations of the stateless persons toward their state of residence and the standards of treatment that are due to the stateless are also delineated in the 1954 Convention. In addition, the 1954 Convention provides a definition of statelessness. It states at Article 1 that a stateless person is 'a person who is not recognised as a national by any state under the operation of its laws'.[24] The 1961 Convention arose to provide solutions to statelessness, which the 1954 Convention did not provide. It does this by outlining measures to diminish the incidence of statelessness at birth and by demarcating the boundaries within which statelessness could occur.[25] Goodwin-Gill, a leading scholar on statelessness, points out that the 1961 Convention places an obligation on states to grant nationality in certain instances, even though it does not recognise an outright right to a nationality.[26]

Both treaties, however, are silent on whether and what kind of procedures should be adopted to recognise a person as stateless. Considering the implementation problems that this creates at the national level, the UNHCR, which is the UN agency mandated to protect stateless persons, has provided guidance in its Handbook on the Protection of Stateless Persons regarding the adoption of specific stateless determination procedures (SDPs) and their essential elements.[27]

In South Africa, stateless persons do not have the protection of the 1954 or the 1961 statelessness conventions as South Africa has not ratified either. In the absence

[20]David Owen 'On the right to have nationality rights: Statelessness, citizenship and human rights (2018) 65 *Neth Int Law Rev* 299–317, available at https://doi.org/10.1007/s40802-018-0116-7.

21UN General Assembly, Convention Relating to the Status of Stateless Persons 28 September 1954 United Nations Treaty Series 360 at 117, available at https://www.refworld.org/docid/3ae6b3840.html, accessed on 21 July 2022.

[22]UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961 United Nations Treaty Series 989 at 175, available at https://www.refworld.org/docid/3ae6b39620.html, accessed on 21 July 2022.

[23]1954 Convention Relating to the Status of Stateless Persons.

[24]Ibid.

[25]1961 Convention on the Reduction of Statelessness.

[26]Guy S. Goodwin-Gill 'The rights of refugees and stateless persons' in KP Saksena (ed) *Human Rights: Perspective and Challenges (in 1990 and beyond)* (1994) 378–401; Fatima Khan 'Exploring childhood statelessness in Southern Africa' (2020) 23 *Potchefstroom Electronic Journal* 2 at 7.

[27]UNHCR *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (2014). The Handbook, for instance, provides the following guidelines: sharing the burden of proof between the applicant and the decision-maker (para 89); the standard of proof shall be that of establishing the case to a 'reasonable degree' (para 91); a decision shall be taken within a reasonable time, normally six months (para 75); access to legal counsel shall be ensured and legal aid shall be offered to applicants, if available (para 28); and a right of appeal to an independent body shall be provided (para 76).

of any international recognition of statelessness, this paper intends to answer the important question of how stateless persons can be protected in South Africa in the case of arbitrary arrest and detention of persons when they are unable to identify themselves as legally present in South Africa.

III. THE LAWFULNESS OF ADMINISTRATIVE DETENTION FOR STATELESS PERSONS IN SOUTH AFRICA

A great number of countries resort to administrative detention of irregular migrants in connection with violations of immigration laws and regulations, including staying after the permit has expired, non-possession of identification documents, using somebody else's travel documents, not leaving the country after the prescribed period has expired, etc. In such cases, including in South Africa, the purpose of administrative detention is clear. It is to guarantee that another measure, such as deportation or expulsion, can be implemented.[28] Sometimes administrative detention is also admitted on grounds of public security and public order, among others.[29]

Administrative detention is also allowed by the Immigration Act.[30] However, detentions for the purpose of deportation are discretionary administrative detentions authorised by the Immigration Act[31] and subject to the Bill of Rights[32] and the Promotion of Administrative Justice Act.[33] However, it is the practice of the DHA immigration officials and police to enforce a general policy of detaining all suspected illegal foreigners pending deportation,[34] rather than employing a discretionary, case-by-case approach. According to the Lawyers for Human Rights (LHR) monitoring report, there is widespread disregard for the rules and regulations of the Immigration Act and the Refugees Act,[35] resulting in unlawful and prolonged arrests and detentions of foreigners, many of whom have, in fact, lodged applications for asylum or other statuses.[36]

Because the majority of stateless persons are undocumented, they could get caught up in this detention frenzy due to their inability to prove legal presence in the country, their inability to qualify for most immigration permits and their lack of awareness of any pathway to attain lawful immigration status.

In South Africa, section 41 of the Immigration Act requires any person approached on reasonable grounds by a police or immigration officer to identify themselves either as a citizen or as a person lawfully present in the Republic.[37] Anyone

[28]Daniel Wilsher 'The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives' *The International and Comparative Law Quarterly* (2004) 53(4) 897–934.
[29]Relief Web 'Immigration detention in South Africa: Stricter control of administrative detention, increasing criminal enforcement of migration' June 2021, available at https://reliefweb.int/report/south-africa/immigration-detention-south-africa-stricter-control-administrative-detention, accessed on July 2022.
[30]The Immigration Act 13 of 2002.
[31]*Ulde v Minister of Home Affairs and another* 2009 (4) SA 522 (SCA) para 7.
[32]Op cit note 17 section 35.
[33]The Promotion of Administrative Justice Act 3 of 2000.
[34]Op cit note 31.
[35]The Refugees Act 130 of 1998.
[36]Op cit note 6.
[37]Op cit note 30.

unable to identify themselves as persons lawfully in South Africa will be deemed to be illegally present and hence subject to arrest, detention, and possible deportation. This unlawful status automatically entitles immigration officials to arrest and detain such persons for the purposes of deportation, but with the caveat that if such persons express an intention to apply for refugee status, their asylum application must be permitted and facilitated.[38] Stateless persons are, by definition, unable to demonstrate legal presence or provide a valid identity document. They would therefore be deemed to be unlawfully present and vulnerable to detention. Section 41 of the Immigration Act states:

> When so requested by an immigration officer or police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.'[39]

At first glance, the inclusion of a section on the arrest and detention of a person for the purposes of deportation who cannot identify as being lawfully in a country in the Immigration Act of any country can be seen as rational because a state is reasonably entitled to control the presence of foreigners in a country.

However, South Africa's identification clause has various limitations. First, it provides for a closed list of legal statuses that the arrested person can be identified as — either as a citizen, permanent resident, or foreigner.[40] It does not make provision for a stateless person. This section has either not considered the position of a stateless person or it makes the incorrect assumption that all stateless persons are foreigners (or all stateless persons are non-citizens) and therefore deportable if unlawfully present. Secondly, it assumes that everyone should be able to identify themselves. For most stateless persons, that will be an impossibility. This paper acknowledges that it is possible to encounter stateless persons who have some form of identity document or who gained legal residence or immigration status in another country.

Thirdly, this section has not considered the fact that someone may not be able to verify their legal identity or legal status. The Act requires the immigration officer or police officer to assist with verification.[41] Once again, to verify presupposes the existence of a legal identity. The steps that an immigration official or police officer can take to assist in verifying their status are prescribed and they include: accessing

[38] *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC); *Nibigira v Minister of Home Affairs and others* (41265/2011) [2011] ZAGPJHC 178 (28 November 2011).
[39] Op cit note 30.
[40] Ibid.
[41] Ibid.

relevant documents that may be readily available; contacting relatives or other persons who could prove such identity and status; accessing departmental records in this regard or providing the necessary means for the person to obtain documents that may confirm their identity and status.[42]

It should be noted that these steps are written in peremptory language, thereby creating a positive obligation on an immigration officer or a police officer to assist an individual in satisfying the official regarding the individual's immigration status.[43] When these steps do not produce a legal identity — which they are not likely to in the case of a stateless person — the question is whether it is by default then that the person is considered stateless.

What is lacking and what is therefore a further limitation in this section and in the Immigration Act generally, is that it has not considered how a person who is unable to identify themselves as a national of any state should be protected or dealt with in terms of South Africa's immigration laws.

It is evident that the plight of stateless persons has not been considered by the Immigration Act and by this section because it has not made provision for a status determination procedure that the person is in fact stateless and not a citizen or national of any country. This is ultimately the gap in the legislation; there is no provision that addresses the scenario where a person may not be able to identify themselves. This section is especially prejudicial to stateless persons since South Africa has no laws to protect stateless persons and no status determination procedure for stateless persons.

In my opinion, this section creates an opening for a remedy for stateless persons arrested arbitrarily and, hence, an opening for a remedy for stateless persons arrested for their so-called illegal presence if a stateless determination procedure could be read in for stateless persons. As harsh as the above section is for stateless persons, this category of persons who are unable to identify themselves as citizens, permanent residents, or foreigners will in the very least have access to justice as guaranteed by the Constitution.[44] But this requires a legal intervention,[45] which should in the first instance declare the arrest of a stateless person as arbitrary and therefore unlawful.

IV. CHALLENGING THE ARBITRARINESS OF ADMINISTRATIVE DETENTION

When considering whether the administrative detention of a stateless person is unlawful, the arbitrariness of the detention must be considered. The UNHCR, in its analysis of arbitrary detention, states that '[I]n accordance with international

[42]The Immigration Act Regulations in GN 413 GG 37679 of 22 May 2014 Regulation 37.

[43]*Zimbabwe Exiles Forum and others v Minister of Home Affairs and others* (27294/2008) [2011] ZAGPPHC 29 (17 February 2011) para 30.

[44]Op cit note 17 sections 33 and 34.

[45]Ashley Terlouw 'Access to justice for asylum seekers: Is the right to seek and enjoy asylum only black letter law?' in Carolus Grütters, Sandra Mantu, and Paul Minderhoud (eds), *Migration on the Move: Essays on the Dynamics of Migration* (2017).

standards, arbitrariness is to be interpreted to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability.'[46] It thus provides for a broad interpretation of arbitrary detention in line with its protection-based approach of vulnerable persons. In addition, detention will be arbitrary when it is not lawful, when it is resorted to without a legitimate purpose, when it exceeds a reasonable time limit or when no less coercive or intrusive measures are available or appropriate in the individual case being considered.[47] The following additional criteria can be used in evaluating the arbitrariness of detention such as conditions of detention and the availability of access to an effective remedy while in detention.[48] Statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess. Thus, being undocumented or lacking the necessary immigration permits cannot be used as a general justification for the detention of such persons. Furthermore, for detention not to be arbitrary, it must be necessary in each individual case, reasonable in all the circumstances, proportionate and non-discriminatory.[49] Indefinite as well as mandatory forms of detention are intrinsically arbitrary. Detention should be used as a measure of last resort and can only be justified where other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective. Once it has been established that a person is stateless and cannot be removed from the territory, their continued detention automatically becomes arbitrary. To hold otherwise would be to condone the potential of indefinite detention which would certainly be unconstitutional if the person has committed no crime.

The unlawfulness of arbitrary detention and arrest is also considered in various international human rights documents. It is considered unlawful, for example, by the Universal Declaration of Human Rights (UDHR),[50] the International Covenant on Civil and Political Rights (ICCPR),[51] the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPRMW)[52] and the Convention on the Rights of the Child (CRC).[53] Arbitrariness, for the purposes of these provisions, is best summed up by Alice Edwards when she states that the lawfulness of the arrest and detention requires a consideration of the (insufficiency of) reasonableness, necessity, proportionality, and non-discrimination of the detention.[54]

[46]UNHCR *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) at 15, available at https://www.refworld.org/docid/503489533b8.html, accessed on 19 July 2022.
[47]The Equal Rights Trust *Guidelines to Protect Stateless Persons from Arbitrary Detention* (2012), available at https://www.equalrightstrust.org/ertdocumentbank/guidelines%20complete.pdf, accessed on 17 July 2022.
[48]UNHCR *Compilation of International Human Rights Law and Standards on Immigration Detention*, February 2018, available at https://www.refworld.org/docid/5afc25c24.html, accessed on 22 July 2022.
[49]Alice Edwards 'Back to basics: The right to liberty and security of person and 'alternatives to detention' of refugees, asylum-seekers, stateless persons and other migrants' UNHCR Legal and Protection Policy Research Series PPLA/2011/01. Rev.1 of April 2011, at 20.
[50]Universal Declaration of Human Rights, 1948, articles 3 and 9.
[51]International Covenant on Civil and Political Rights, 1966, articles 9 and 12.
[52]International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 article 16.
[53]Convention on the Rights of the Child 1989 article 37.
[54]Edwards op cit note 49.

In South Africa, the immigration detention of stateless individuals is therefore inherently arbitrary due to the impossibility of their deportation. In terms of the Immigration Act, in cases where immigration detention lasts over 48 hours, it must be intended for purposes of deportation.[55] Therefore, where it is determined that a person is stateless and no country will accept them for deportation, their detention becomes a violation of their rights, in terms of the Bill of Rights, to freedom and security of person and to human dignity.[56]

Problematically, no dedicated provision exists in South Africa's Immigration Act for the release of undocumented persons from detention. There are no reported judgments and hence, no reasons given by the judiciary in South Africa clarifying the question of whether a stateless person can lawfully be detained for deportation after it has been determined that they cannot be deported. There are, however, two instances where the judiciary declared the continued detention of stateless persons unlawful. The first is in the case of *Herbert Baluku v Minister of DHA* (Case number 35164/2013) in the North Gauteng High Court where the detention of the stateless person was declared unlawful because he had a pending application for permanent residence, and he was released. Unfortunately, there was no judgment and therefore no reasons provided by the judiciary. The second is in the case of *Mntambo v Minister of Home Affairs*, (Case number 20485/2015) in the Gauteng Local Division High Court, where, as a stateless person, he was detained and deported before the case was heard. His deportation was subsequently declared unlawful. Hence, the law as it stands makes very little provision for the protection from arbitrary detention of persons who cannot be deported, but who also do not qualify as legally present in the territory. This is an impasse, and it appears in the *Nibigira* case, where the judiciary does not appear to find the detention arbitrary, even when the judiciary recognised that deportation is not possible.[57] The judiciary in this case was focused on the time limits provided by the Immigration Act. In South Africa, the 120 days provided by the Immigration Act were not seen as being punitive and judges appear reluctant to release anyone before the expiration of the 120 days unless a ministerial exemption is granted, as in *Baluku and Mntambo*.[58]

The judgment admitted that 'There is no country that is prepared to acknowledge [the applicant] as a citizen.'[59] Yet, it argues:[60]

> [76] Where would the applicant go if there was a need that he be released from detention? Would that court sanctioned release have meant that he should be

[55]Op cit note 30 section 34(2).
[56]Op cit note 17 sections 12 and 10, respectively.
[57]*Nibigira v Minister of Home Affairs and others* (41265/2011) [2011] ZAGPJHC 178 (28 November 2011).
[58]Ibid. To be noted — the initial period of detention is a maximum of 30 days, at which point one must be brought before a magistrate who may then extend the detention for no longer than 90 days. To be further noted — the court in *Lawyers for Human Rights v Minister of Home Affairs and others* (CCT38/16) [2017] ZACC 22 declared s34(1)*(b)* and *(d)* inconsistent with sections 12(1), 35(1)*(d)* and 35(2)*(d)* of the Constitution because it did not provide for automatic judicial oversight before the expiry of 30 calendar days; sections 34(1)*(b)* and *(d)* were. The challenge against section 34(1)*(d)* was based on the contention that it did not permit a detainee to appear in person before a court and impugn the lawfulness of their detention.
[59] Ibid.
[60]Ibid paras 76–77.

> allowed to roam South Africa despite the fact that he came in illegally and he has no right or papers to allow him to be here? Must the police or immigration officials not arrest and detain him for deportation again?
> [77] Surely the above scenario is not what the legislature intended when this Immigration Law [sic] passed.[61]

The issue of time periods for administrative detention is deemed to be controversial in the United Kingdom (UK) law as well because of the absence of a statutory maximum time limit on administrative detention. Some general limitations on and guidance about the length of immigration detention can be found in Home Office policy and case law. According to the policy, immigration detention must be used 'sparingly' and for 'the shortest period necessary'.[62]

In the *Hardial Singh* case,[63] the UK Supreme Court established the principle that the power to detain is limited to a reasonable duration and by circumstances consistent with its statutory purpose and reasonableness. The Supreme Court confirmed this principle in *R (Lumba) v Secretary of State for the Home Department*,[64] and it further established that migrants may be detained only for the purpose of removal for a reasonable period to achieve that purpose, and if the Home Office is acting with due diligence and expedition to remove them.

V. CHALLENGING THE IMMIGRATION DETENTION OF STATELESS PERSONS IN SOUTH AFRICA

Determining whether there are grounds for release for stateless persons in immigration detention is indeed a difficult task in the absence of their recognition as such in terms of South African law. Typically, release from immigration detention requires the detained individual to have a legal basis to remain in South Africa through a valid immigration status, or a pending application for citizenship status or permanent residence as a dependent child, parent or spouse of a resident or citizen[65] that can be pursued under the Immigration Act. The other basis is an asylum claim that can be pursued under the Refugees Act. [66]As stated above, this paper proposes a protection mechanism for stateless persons arbitrarily arrested in South Africa, and such a proposed protection mechanism must be tethered to a protection framework. The international protection framework recommends the reduction of statelessness where possible.[67] The international protection system also recommends preventing deportation to a place where stateless persons will not be granted citizenship.[68]

South Africa has not ratified the statelessness conventions, but as a result

[61]Ibid.
[62]UK Home Office 'Policy, Detention: General instructions', Version 2.0 of 14 January 2022 at 7.
[63]*R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704.
[64]*R (Walumba Lumba and another) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.
[65]Op cit note 30 section 26.
[66]Op cit note 35 section 22.
[67]1961 Convention on the Reduction of Statelessness.
[68]Ibid Article 10.

of its own protection framework (its Constitution), it has already demonstrated its willingness to reduce the statelessness of children born in South Africa who would otherwise be stateless.[69] South Africa has also demonstrated that within its immigration laws a remedy can be found to regularise the status of a stateless person in terms of a ministerial exemption.[70] This section demonstrates that South Africa needs to incorporate the international protection mechanism available for stateless persons because the ad hoc measures such as a ministerial exemption have proven difficult without the protection of the statelessness conventions and the introduction of a statelessness determination process. It is evident that before any of the above-mentioned remedies can be accessed, it is imperative that such persons have access to justice.

(a) Access to justice

Both the national and international frameworks operational in South Africa allow for access to justice for 'everyone' present in South Africa.[71] As a first step, stateless persons, whether documented or not, or recognised as such or not, must have access to justice. They should have the right to a fair solution. In this paper, access to justice is understood to mean 'the ability to vindicate rights in an accessible way through a process that ensures an effective remedy'.[72] This requires the detained person to have at the very least, access to a lawyer, a remedy, an independent adjudicator and all the elements of a fair trial as embodied in section 34 of the Constitution.[73]

Katia Bianchini, in her paper on identifying the stateless in immigration detention, adopted an access to justice lens to explore aspects and legal challenges of the statelessness determination–immigration detention nexus in the United Kingdom.[74] In her study, she found that despite the adoption of a national statelessness determination procedure, stateless persons in immigration detention still experience a plethora of problems.[75] This is especially so, she states, where those in immigration detention who are stateless are generally not acknowledged as such due to gaps in the legal framework.[76] This situation sits uneasily with access to justice principles, which require the guarantee of an effective remedy and a fair solution to the legal problems of every individual. Her paper ultimately shows that access to justice requires a holistic approach, whereby the special problems and needs of the users must always be taken into consideration.[77]

[69]The Citizenship Act 88 of 1995, section 2(2); The Births and Deaths Registration Act 51 of 1992. See also Fatima Khan 'Exploring childhood statelessness in Southern Africa' (2020) 23 *Potchefstroom Electronic Journal* 2.
[70]Op cit note 65 section 31 (2) b.
[71]Op cit note 17 section 34.
[72]Katia Bianchini 'Identifying the stateless in statelessness determination procedures and immigration detention in the United Kingdom' (2020) 32(3) *International Journal of Refugee Law* 440 at 452.
[73]S 34 Everyone has a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum.
[74]Op cit note 72.
[75]Ibid.
[76]Ibid.
[77]Ibid.

If we apply this holistic approach to access to justice in South Africa where, even though theoretically such persons will have access to courts, it does not necessarily mean access to justice because, unlike the United Kingdom, South Africa has no statelessness legislation in place and no status determination procedure for stateless persons. Also, immigration detention is an administrative detention and not a criminal detention, which means that legal representation from the state is not a requirement.[78] In addition, the lack of status determination is especially prejudicial in South Africa because if the stateless are not acknowledged as stateless persons, the access to justice right in the Constitution is a hollow right. With such a lack of laws and procedures to determine whether the person is in fact stateless and with insufficient access to justice, it cannot be deemed to be fair to deport a stateless person, even if another country is willing to receive such a person.

(b) Preventing deportation to a place where they will not be granted citizenship

Article 10[79] of the 1961 Statelessness Convention states that States shall use their best endeavours to ensure that a person transferred to another territory shall confer its nationality if, because of the transfer, the person is likely to become stateless. On the face of it, it may appear that South Africa is not bound by this article because South Africa has not ratified this treaty. However, a broad interpretation of this article could be interpreted as a violation of the principle of non-refoulement.[80] Even though the above article does not directly address the principle of non-refoulement this paper argues that the principle of non-refoulement[81] is embedded in this section, which means that South Africa must ensure that no one is deported to a country where they will likely become or remain stateless. This paper further proposes that article 10 should be read as a safeguard of the principle of non-refoulement, especially since the UN treaties on statelessness do not have any provisions for non-refoulement — that is to say, stateless persons, are not protected in terms of the treaties from deportation to a country where they will not be able to access citizenship. However, non-refoulement applies to all migrants regardless of their status. The UN Human Rights Committee (HRC) has clarified that the ICCPR applies to all migrants regardless of their status:

[78]UN Office of the High Commissioner for Human Rights (OHCHR) *The right of anyone deprived of his or her liberty to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention* - Background Paper on State Practice on Implementation of the Right 2 September 2014, available at https://www.refworld.org/docid/553e2e944.html, accessed on 22 July 2022.

[79]Article 10 states:

'1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless because of the transfer. A Contracting State shall use its best endeavors to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions.

2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.'

[80]Op cit note 35 section 2. See also the 1951 UN Convention Relating to the Status of Refugees, Article 33 and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Articles 2(3) and 5.

[81]South Africa is bound by the principle of non-refoulement because it is found in the Refugees Act as well as the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3. The principle has also reached the status of customary international law. See GS Goodwin-Gill *The Refugee in International Law* 2 ed (1996) at 167–171.

> [T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers, and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.[82]

The principle of non-refoulment, which represents a safeguard against the most flagrant violations of human rights, also applies to every person subject to the State's jurisdiction, including all migrants, irrespective of their status and regardless of whether the person has entered the State regularly or not. Most important in the South African context is for the State to recognise that the application of non-refoulement protection to migrants does not only depend on the migrants' ability to gain or maintain status as a refugee. The European Court of Human Rights (ECtHR) has on several occasions held the position that the principle of non-refoulement applies to all migrants.[83]

In South Africa, the LHR has been advocating for diplomatic authorities to provide written assurance upon deportation that the individual qualifies as a national and will be recognised by the competent nationality authority upon arriving in the country in question. It has argued that deporting or accepting for deportation a person who would not be able to meet the administrative burden of proof for citizenship in the country is tantamount to refoulement for stateless persons.[84] It is a violation of their right to acquire citizenship and a violation of their fundamental right to human dignity. They could face prolonged and sometimes indefinite detention if deported to a country where they cannot obtain citizenship. And if the stateless person cannot be deported, what then are the legal tools that can be used to argue for the release of the stateless from detention and for the regulation of their stay in South Africa?

(c) Reducing statelessness

Even though South Africa has not ratified the statelessness conventions, it has demonstrated a willingness to reduce statelessness. This has been done in the case of children born in South Africa who would otherwise be stateless. South Africa maintains that its laws are sufficient to protect children born in its territory from statelessness. In accordance with its Constitution, South Africa must consider

[82]UN Human Rights Committee (HRC), General comment no. 31, [80], The nature of the general legal obligation imposed on States Parties to the Covenant (26 May 2004), CCPR/C/21/Rev.1/Add.13 at para 10, available at https://www.unhcr.org/4963237716.pdf, accessed on July 2022.

[83]*ECtHR, Ahmed v. Austria*, Application No. 25964/94, Judgment 17 December 1996, at 42 and 47, stating that the applicant lost refugee status because of a criminal conviction, but was granted non-refoulement. See also *IACtHR, Caso Familia Pacheco Tineo vs. Estado Plurinacional de Bolivia*, 25 November 2013, Series C No. 272, at 135, stating that the inter-American system recognises the right of every foreign person regardless of legal or migratory status, and not only of asylum seekers and refugees, not to be returned to a place where their life, integrity and/or liberty risk being violated. See also Convention Against Torture (CAT), *Mutombo v. Switzerland*, Communication No. 13/1993, 27 April 1994, U.N. Doc. A/49/44, at 2.5, 9.7; CCPR, *Hamida v. Canada*, Communication No. 1544/2007, 11 May 2010,5 U.N. Doc. CCPR/C/98/D/1544/2007, at 8.7, 9.

[84]Op cit note 6.

international law,[85] which demands respect for the human rights of all present in South Africa. There are multiple laws applicable to the protection of the stateless child in South Africa. Section 28 of the Constitution guarantees every child a right to a name and nationality,[86] and the Citizenship Act at section 2(2) promises citizenship to every child born in South Africa if they do not have the nationality of any other country.[87] While this may be the case, citizenship does not happen for such children by operation of law in South Africa; it requires an application, and the practice has revealed that the implementation of these generous laws has been met with great difficulty.

This paper proposes that such a safeguard be built into the Immigration Act, whereby those detained under the Immigration Act who are unable to identify themselves and who therefore face the risk of statelessness are allowed to regularise their stay in South Africa. Such a scenario requires that a stateless determination becomes a necessity.

Thus far, lawyers have made use of the ministerial exemption founded in section 31(2)(b) of the Immigration Act.[88] However, even with this application, a significant challenge in securing the release and protection from the further arrest of stateless persons is the lack of dedicated interim documentation available to section 31(2)(b) applicants. The regulation, which corresponds to section 31(2)(b) of the immigration Act, makes no mention of the status of applicants pending the outcome of their application.[89] The Form 20 — Authorisation for Illegal Foreigners to Remain in the Republic Pending an Application for Status — does not refer specifically to section 31(2)(b) but can be used to provide a document to exemption applicants pending a decision from the Minister.[90] The DHA has been reluctant to issue this Form 20 without which the stateless person may be vulnerable to re-arrest.

(d) Status determination

According to the LHR, even though the above remedy of a ministerial exemption is available, courts have largely disallowed its use before the expiration of the 120 days in immigration detention and without the Form 20 re-arrests have been made.[91] In the rare cases of *Baluku* and *Mntambo* ministerial exemptions were considered prior to the expiration of the 120 days. It is therefore imperative that a status determination is made as soon as possible. Should the person be found to be stateless, their continued arrest will be arbitrary and therefore unlawful, as stated above.

Although it is important that a status determination procedure is put in place, it is also important to consider who should be in charge of status determination. The primary institutional question is which authority (immigration, nationality, asylum

[85] 39(1)(b)
[86] Op cit note 17 section 28.
[87] The Citizenship Act 88 of 1995.
[88] Op cit note 30.
[89] Ibid.
[90] Op cit note 6.
[91] Ibid.

or other) ought to be in charge of identifying and determining the status of stateless persons. It is apparent that the answer can only be context specific. In the situation described in this paper where immigration detention is dealt with, there is the expectation that immigration officials should conduct this determination. However, where the applicant claims never to have lived anywhere else but in South Africa, then authorities in charge of nationality issues and citizenship appear to be the most appropriate bodies for statelessness determination (given the fact that the likely solution for statelessness will be reduction, instead of protection, by implementing the country's own nationality legislation).

Because asylum and statelessness share the same characteristic of being based on international protection obligations, asylum authorities specialised in this field may prove to be better able to accept and effectively deal with the specific procedural features resulting from the protection-oriented character of the procedure, such as a lower standard of proof, the scarcity of documentary evidence and the prevention of the violation of the principle of non-refoulement.

Irrespective of who conducts the status determination, it is important that a status determination is conducted as soon as possible. Currently, stateless persons will have to remain in detention for 120 days before the courts will even consider the release of such a person, as found in the *Nibigira* case. Hence, the sooner the person is confirmed as stateless, the sooner the detention will be recognised as arbitrary because the person is not deportable, and their continued arrest will be deemed to be arbitrary.

VI. CONCLUSION

Even though South Africa has not ratified any of the international treaties that deal with statelessness, there is still a strong constitutional obligation to ensure that everyone is granted the opportunity to enjoy the rights that come from belonging to a state. This constitutional obligation means that South Africa must be diligent in ensuring that it is working on protecting the rights of vulnerable immigrants. The ministerial exemption is not an effective solution to the issue of statelessness because there are other issues that need to be addressed first, such as access to justice, which immigrants are often not granted equal access to. The immigration law in South Africa needs to be developed so that it can be better suited to provide the necessary protection for stateless persons. To protect the rights of those in this vulnerable position, it is imperative that a solution is created to identify persons as stateless as expeditiously as possible and to then create a remedy for the administrative detention of stateless persons.