

## **The single source of trust : understanding the political economy of the South African population register**

Jonthan Klaaren and Keith Breckenridge

Draft: 28 August 2024

### **Part A**

On 16 January 2024, a Pretoria court [declared](#) unconstitutional the practice of the Department of Home Affairs (DHA) “marking” and/or “blocking” the IDs of hundreds of thousands of South African citizens and permanent residents. This High Court [case](#) came after [years of advocacy](#) met with no success and after hundreds of thousands of South Africans were rendered unable to draw money from their accounts or get access to social protection grants.

That the DHA was blocking IDs had long been suspected by the public interest law group Lawyers for Human Rights (LHR). Responding to a complaint, the Human Rights Commission [reported](#) on the practice back in 2018, finding the DHA delays in investigating cases of suspected ID fraud unreasonable. But the DHA did not change its ways -- and the papers before the Pretoria court revealed the surprising extent and the severity of this disturbing and disturbingly persistent identity management practice.

While the DHA Director-General (DG) had initially strenuously defended the case (answering affidavit signed 3 Nov 2022), after a legal insurance firm and a university research centre had joined the litigation, the DG adjusted his argument. Just before the hearing, he disclosed the DHA was “currently busy carrying out a process pertaining to providing a procedurally fair system” (Respondents’ Answering Affidavit to Second Applicant’s Application, signed 25 August 2023).

The DG also put forward a two-phase story of origins of the policy problem DHA faces. First, not mentioning the [amnesties](#) run by the post-apartheid government of national unity, the DG detailed how the DHA attempted after 1994 to cope with a large number of duplicate IDs, ending up with 119 114 such cases on the books as of August 2012 (para 2.6). In a second phase, working with the HANIS IT system commissioned in 2005, the total number of blocked IDs (which includes those IDs blocked for the reason of duplication) had grown to 813 343 by 2020 and was still increasing (para 24.1). ([As of 2020](#), duplicates form about 60% of the blocked IDs cases). Apparently (there is some ambiguity in the documents here), the markers placed on 1 438 313 of the blocked cases -- those with “less security risk” -- were removed on 15 May 2023 with approval of the Minister of Home Affairs (para 24.2). This left around 702 000 blocked cases as of July 2023 (para 24.2).

Summing up the evidence put before her, the judge noted the DHA claimed to have unblocked 1.8 million IDs (paras 5,9). Put together with the approximately 702,000 cases admitted by DHA as of mid-2023, one has a round figure of 2.5 million cases affected by this practice. That’s a lot of invalid ID books and cards.

This 2.5m number is at the scale of the population register itself. There are approximately 37.5 million IDs for the South African population. So, this number of blocked IDs would be 6.67% of the total. That would mean about one of out every 12 South Africans with ID suffered an ID problem within the past ten years.

That degree easily accords with anecdotal evidence of DHA disfunction in some circles of the population.

However, we think the real number is probably considerably lower. Indeed, one of the parties to the lawsuit, Legalwise (Third Applicant's Founding Affidavit, para 47), noted "it appears likely that approximately 1% of all South Africans are subject to an ID block." 1% is still of course a considerable slice of the ID-carrying population.

The number of IDs blocked (and the sources of suspicion) is of more than academic interest. Those crafting appropriate remedies must take into account the scale of the problem. Moreover, the error rate of South Africa's much-lauded population register – the heart of the social grants system among others -- would be closely watched by policy-makers across the globe. Particularly those states interested in increasing birth registration rates have looked for guidance to South Africa's NPR-based post-apartheid citizenship regime. As an aspect of bureaucratic justice, the error rate may also factor into the assessment of the fairness of the administrative system.<sup>1</sup> In any case, whatever the number, the practice is still of urgent and dire concern for those individuals with blocked IDs, some of whom may not yet even be aware of their disability.

Turning back to the contours of the problem as revealed by the High Court case, DHA officials have been placing a marker against IDs for various reasons – including indicating death, that a person is a foreign national, that a person is under investigation, that there was a change in relation to an ID number, that there are multiple identity numbers, and that a person shares an identity number with one or more other persons (paras 54, 57, 58; document bundle 267).

Legalwise, the legal insurance company which joined the case, argued that the DHA practice is informal, may consist of a few mere comments, and does not distinguish between persons under investigation and ones concluded to have engaged in fraud (Third Applicant's Founding Affidavit, para 14). The DG admitted as much, stating "[M]arkers are set on the National Population Register (NPR) as a means of ensuring the integrity and credibility of the [NPR]. When the DHA receives cases of this nature, investigations are conducted to establish whether the Identity document was acquired legally or illegally. In the process of the investigation and as a safety precaution, implicated identity numbers or identity documents are blocked. Where there is sufficient evidence provided to the contrary, markers are lifted accordingly." (paras 3.5 and 3.6).

---

<sup>1</sup> Jerry L. Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value," *The University of Chicago Law Review* 44, no. 1 (1976): 28–59, <https://doi.org/10.2307/1599260>; Jerry L Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1983).

Marking disables the ID, stopping it from functioning for welfare, banking, telecoms, and other credentials like driver's licenses and voter registration. As the High Court put it "The DHA confirms that placing a marker results in the holder of the implicated ID being unable to access the rights, privileges and benefits of citizens (para 57)." The victims were not notified and those that enquired received no adequate responses from the offices of DHA. Indeed, the delays experienced by those with blocked IDs who attempted to remedy the situation as related in the court papers are astonishingly young – three or more years in individual cases and heartrendingly double that the cascading effects on families. The DHA was only slightly less dilatory in responding to the legal representatives.

The legal heart of the case was dealt with carefully by the court (paras 66-91). The claim by the DHA's DG was that he had a broad discretionary power in terms of the Identification Act 68 of 1997 to "rectify, correct, and cancel IDs" (para 60). The court turned down the applicants' request to declare the ID-blocking practice unconstitutional in general (para 91) but insisted that any blocking of an individual ID would need to be preceded by a demonstrable decision that the specific ID did not match the particulars of the person to whom it has been issued (para 92). In other words, the DHA needed to "investigate the matter" and treat the affected person with administrative justice, which meant among other elements that the person be informed of the decision and the blocking and be given an opportunity to contest them (para 93). Since the DHA had no fair administrative process as part of the ID-blocking, the conduct of placing these markers stood to be reviewed under South Africa's general statutory law of administrative justice (para 96).

As the reader knows by now, this case is deep into the bureaucratic bowels of Home Affairs. The shape and size of the complex and multipronged remedy ordered by the court reflects this. In addition to individual relief, the court's order came in three basic parts, comprising in its whole a structural interdict – a form of relief where a court retains control of the matter and demands reporting back of further information and steps taken towards compliance.

First, the court declared the practice of blocking IDs without fair process to be "unjust and irregular administrative action that is inconsistent with the Constitution and therefore invalid" (para 125.2). This declaration legally unblocked the approximately 702000 IDs blocked prior to the court hearing -- but this action was suspended for 12 months for Home Affairs to either investigate the blocked IDs or get a court order to keep them blocked if they were "found to pose a security risk" (para 125.3&5). LHR and LegalWise were allowed to bring comprehensive lists of their clients in order to have their clients' IDs unblocked within 90 days (para 125.4).

Second, reflecting the contours of the problem as well as the work of the amicus curiae, the Children's Institute, DHA was specifically ordered to unblock the IDs of children affected (para 125.7&8).

Third, Home Affairs was interdicted (prevented under court order) from ID blocking without a final and fair decision process being followed, including notice to the person affected and an opportunity to be heard (para 125.12).

The case reveals the weaknesses of Home Affairs perhaps as much as the bureaucratic power of identification documents with respect to individuals. As can be read in the papers, the Department is a large organisation, hit hard by COVID19 and made fraught

by charges of corruption as well as facing heavy transactional demands with (probably) too few staff (only 10,000 of the 20,000 claimed to be required).

The participation of both public interest and private sector organisations shows the breadth of the blocking ID problem across society. This matter involves several well-experienced parties in the justice sector. While it is not a class action, the structural interdict in this case has significant potential to change the law going forward from some recent cases where individuals summarily stripped of citizenship have [successfully applied](#) to court for interdicts for restoration of their citizenship.

What is to be hoped is that a case like this – where the court tries to grasp and deal with the problem as practice rather than as a once-off – can keep Home Affairs from being transformed from an at least semi-functional core state department into a mere repeat litigant in the High Court, [serially hauled to court](#) and ordered to deliver this spousal visa or provide that birth certificate. This prospect has already been the subject of a parliamentary question in early 2024, where the Department admitted it had set up “a dedicated team .. between the Legal and Immigration Services units to focus exclusively on court matters” and that it faced 110 class actions but denied that it had not complied with any court orders.<sup>2</sup>

So, where has the case gone since the January 2024 order?

Subsequent to the court’s January order, LHR and Legalwise duly sent their lists of clients to DHA for unblocking. In February 2024, LHR clients began to report receiving a PAJA letter, a one page letter from DHA informing them that a marker had been placed against their ID document, that they were on notice regarding their ID being cancelled, and giving them 14 days to make representations to DHA. No reasons were given in these individual letters. The then-Minister of Home Affairs Motsoaledi confirmed in March 2024 that 160 000 such letters were being sent out, stating that at least some of the remaining ID-numbers blocked were duplicates.<sup>3</sup> The DHA did not appeal the High Court order.

Examples of a so-called “PAJA letter” were submitted to the case management process and is available at KL3&5 in ZN1 (9 July 2024) of Second Applicant’s report back affidavit, document bundle at 2211).

To the eyes of the applicants, the PAJA letter was malicious compliance with the court order, in avoiding the court process foreseen in the structural interdict.

In April 2024, DHA attested that it had unblocked the minor children as required by the court. As proof, it attached 68-page document with a bare list of IDs numbers (Annexure to Affidavit in terms of Court Order (12 April 2024) document bundle at 1871-1938).

However, at an hour-long case management meeting held with the lawyers in front of the presiding judge in July 2024, the applicants and the amicus curiae indicated their view that the DHA had failed to comply in any part with the court order – not unblocking of many persons on their lists, no unblocking of minor children, and no use of the structural

---

<sup>2</sup> “Question to the Minister of Home Affairs - NW83 | PMG,” accessed August 6, 2024, <https://pmg.org.za/committee-question/25514/>.

<sup>3</sup> Mayibongwe Maqhina, “Home Affairs Implements Court Order on ‘ID Blocking,’” *Cape Times* (blog), March 4, 2024, <https://www.iol.co.za/capetimes/news/home-affairs-implements-court-order-on-id-blocking-9b2c8a7d-7ff5-4c30-b488-5a28c9f3eba8>.

interdict's process of going to court for unblocking-- and that they would bring an application for the Department's contempt of court.

For their part, the DHA admitted in part partial compliance only with the court order (failing as yet to have uplifted the blocks for those persons not found to pose a security risk, see para 125.5) and indicated its intention to apply for an extension of the period for compliance. These two applications will be heard together at a High Court hearing on 13 September 2024.

On 16 August 2024, the DHA DG formally issued a notice of his intention to cancel currently blocked ID numbers and purported to make a call for representations to the contrary by affected persons within 30 days.<sup>4</sup> This notice was issued as a general notice and did not contain a list of the affected ID numbers. According to news reports, the initiative has the support of the Minister and will additionally reach out to the population via social media.<sup>5</sup> Minister Schreiber was quoted in the Sunday Times as saying that "about 250 000" of 696 946 identified blocked cases are seen as "high risk".<sup>6</sup>

*The way forward:* While there may be a new Minister, the post-GNU Department Home Affairs remains beleaguered and defensive and not well endowed at the moment with people who can solve problems. Minister Schreiber should immediately engage the Department in order to formulate and implement a different approach to suspect IDs. Errors and duplications certainly exist (perhaps security risks too) and must be dealt with, but in terms of a rational and sustainable identity management policy and needless to say one that complies with the Constitution. We need a new approach to the integrity of identification documents -- one that does not force people into the twilight world without credentials and without notice.

## **Part B: Causation, Consequences, and Charting Ways Forward**

*At 2718 words, this section is a bit longer than Part A; currently split up into three main sections, still rough and probably with some overlapping material – dealing with the (b1) background and proximate causes of the blocking practice, (b2) consequences for citizenship and for identity management policy, and (b3) Ways Forward: Short, Medium, and Long-Term*

### **B(1): Background and Proximate Factors Leading to this Case**

#### **Six Background Factors**

---

<sup>4</sup> Department of Home Affairs, "Notice in Terms of Section 3 of the Promotion of Administrative Justice Act, 2000; Intention to Cancel Identity Documents or Cards of Persons Whose Identity Numbers Are Blocked and Call For Representations From Affected Persons, GN 5135, GG 51064 (16 August 2024)" (2024), [https://www.dha.gov.za/images/gazettes/Gazette\\_51064-16-8\\_HomeAffairs.pdf](https://www.dha.gov.za/images/gazettes/Gazette_51064-16-8_HomeAffairs.pdf).

<sup>5</sup> Shonisani Tshikalange, "People with Blocked IDs Must Provide Reasons Why They Should Not Be Cancelled: Home Affairs," *TimesLIVE* (blog), August 16, 2024, <https://www.timeslive.co.za/news/south-africa/2024-08-16-people-with-blocked-ids-must-provide-reasons-why-they-should-not-be-cancelled/>.

<sup>6</sup> Hendrik Hancke, "Home Affairs Cuts Visas and Permits Backlog in Half," *TimesLIVE* (blog), August 18, 2024, <https://www.timeslive.co.za/sunday-times/news/2024-08-18-home-affairs-cuts-visas-and-permits-backlog-in-half/>.

For starters, to understand its causes, this decision needs to be placed within the Department's institutionalization of a common South African citizenship since 1994, a post-apartheid history that shows some policy successes along with some spectacular failures over six significant moments:

- First, a background of the challenges of rationalization of homeland bureaucracies
- Second, amnesties for long-term residents and voting; in this immediate post-apartheid period, the DHA used the policy tool of amnesty (arguably currently politically impossible) to incorporate massive numbers of long-term residents (largely from Lesotho, Mozambique, and Zimbabwe) without nationality
- Third, social grant roll-out and increases in birth registration
- Fourth, turn-around project improvement re processing times for citizenship, but not immigration
- Fifth, post-turnaround decline re migration (institutional xenophobia, street-level bureaucrats, VFS out-sourcing)
- Sixth, shrinking citizenship (bringing SA into African line)

### Three Proximate Factors

*First, from the political to the deliberate:*

It appears that the ID-blocking practice became significant (or more significant) around 2012. At this point in time, the department began a process of reviewing IDs that had been granted in the 1995-2005 period.

It is unclear exactly what the proximate cause of this uptick was (and perhaps even whether there was a proximate driver) but there may be two places for research into whatever the driver was.

First, there were officials who were complaining about the growth of the population register when Keith did the work for his 2009 piece on [HANIS](#), but they were clear that the extensions were political -- granting citizenship (justly) to long-term migrants from our neighbouring countries because they increased the ANC's votes. It's astonishing (but also consistent with much else in Zuma's SA) that the Home Affairs department, still run by the ANC, decided in 2012 to renege on that bargain.

Second, it's worth asking if the officials had discussed tagging IDs when Jaap did his research for the [very useful review](#) in 2019. The scale of the cancellations in the 2024 LHR court case, even if not as extensive as first apparent, suggest that this trend is not solely about ID fraud; it is, to some extent, a deliberate policy (as Jaap notes) to overturn the generous extensions of citizenship that were granted in the first decade after 1995.

*Enter the Auditors: From a rotten nut emerges a sledgehammer?:*

Also in the category of proximate factors/causes is the much more recent post-State Capture attention given to DHA and the woeful state of its administration and operations.

The starting point here is the set of two reports conducted into DHA in 2022: the Lubisi report<sup>7</sup> and the Msimang report<sup>8</sup>. Both reports were commissioned and delivered within an environment of extreme suspicion of corruption at Home Affairs and of extreme frustration with the current migration policy framework. To address both of these issues, the road to policy reform was understood at least significantly to lie with the operations of the Department.<sup>9</sup>

These high-profile reports had a more immediate history.

In the aftermath of the public outcry (mostly on social media) over the granting in 2016 of permanent residence to the Malawian prophet, Shepherd Bushiri, a special government commission led by one of the investigators from the Zondo commission began to dig into the department. When fourteen officials in the permitting section signed a petition addressed to the minister demanding that the internal Corruption Unit should stop “investigating their errors” it triggered an even larger disciplinary investigation.<sup>10</sup>

The Special Investigating Unit employed an outside auditing firm, Nexis SAB&T, and, together, they extracted the full transactional databases used by the department for all civil, visa and movement transactions between 2004 and 2020. The auditing company examined desktop computers and access control systems across the entire department; they found key loggers, security log edits, fake login records and piles of unsecured application records – leaving the department’s reputation as custodian of the most valuable databases in the country in shreds. The auditors then imported two billion records from the movement control section (recording border crossings), fifteen million visa application records from VFS Global, 240 million refugee applications, 340 million records from the airline pre-boarding databases and, most remarkably and in the face of protests from the department, all 120 million entries from the National Population Register into an SAS data mining server. They ran entity extraction queries against this massive dataset, looking for people, places and transactions that were suspiciously linked to each other or administratively irregular (like rapidly processed visa applications!). The results produced a database of 300,000 suspect transactions and, critically, identified 70 suspect officials inside the department.<sup>11</sup>

South African labour law is notoriously capacious, and to date, there have been few criminal prosecutions of the named officials and no public evidence of disciplinary investigations.<sup>12</sup>

---

<sup>7</sup> Lubisi, “Report of the Review by Ministerial Committee on the Issuance of Permits and Visas” (Ministry of Home Affairs, June 10, 2022), [https://static.pmg.org.za/Review-Issuance\\_of\\_visas\\_permits.pdf?\\_gl=1\\*uwog1d\\*\\_ga\\*Nzk0NTgzNDc5LjE2OTE1MDEzNjc.\\*\\_ga\\_EBG7VD75NV\\*MTcyMjUwNzExNi43Ni4xLjE3MjI1MDc0Mjc0MC4wLjA](https://static.pmg.org.za/Review-Issuance_of_visas_permits.pdf?_gl=1*uwog1d*_ga*Nzk0NTgzNDc5LjE2OTE1MDEzNjc.*_ga_EBG7VD75NV*MTcyMjUwNzExNi43Ni4xLjE3MjI1MDc0Mjc0MC4wLjA).

<sup>8</sup> Mavuso Msimang, “Report of the Work Visa Review 2023” (Operation Vulindlela Review of the Policy Framework and Processes For Work Visas, August 2022), <https://www.dha.gov.za/images/PDFs/Report-of-the-Work-Visa-Review-2023.pdf>.

<sup>9</sup> Alan Hirsch, “South Africa Needs to Manage Migrants Better. That Requires Cleaning up the Department of Home Affairs,” *The Conversation* (blog), February 2, 2024, <http://theconversation.com/south-africa-needs-to-manage-migrants-better-that-requires-cleaning-up-the-department-of-home-affairs-221998>.

<sup>10</sup> Keith Breckenridge, “The Meaning of the 2024 Elections : Biometric Governance and the Trust Problem,” 2024.

<sup>11</sup> Breckenridge.

<sup>12</sup> Ntwaagae Seleka, “Home Affairs Dept Official in Court for Allegedly Selling Passports for R3 000 Each,” *News24*, accessed August 28, 2024, <https://www.news24.com/news24/southafrica/news/home-affairs-dept-official-in-court-for-allegedly-selling-passports-for-r3-000-each-20240502>.

While many of the department's critics – and many ordinary citizens -- have suggested that the effort to apply digital governance to all elements of life in South Africa has been the source of the problems of identification, the audit report produced a ferocious recommitment to computerisation. The doubling down on the investment in a purely digital government in the aftermath of the investigation has been intense – no applications for visas may be processed outside of VFS's network, all paper records from before 2004 are to be digitised, officials may authorise transactions on the databases only through their own fingerprints, no professional intermediaries may channel applications to the department. The report also called for the development of integrated queries using DHA's records and the outside databases maintained by SAQA, SAPS and SABRIC.<sup>13</sup>

The Lubisi report led to the forensic and data investigations-focused work of the multi-disciplinary task team (MDTT) staffed by 60 officials, with some of the same investigations personnel as the Lubisi report (as well as that personnel holding directorships in the outsourced investigations expertise<sup>14</sup> which is being done in the form of a joint venture<sup>15</sup>). The work of the MDTT – effectively doing on an outsourced basis the internal discipline of the DHA -- after a year of its work was overseen by a committee of the Sixth Parliament on 5 March 2024.<sup>16</sup>

What neither the Mavuso nor the Lubisi report appears to have led to is consideration of the systemic reforms (see below “Consequences: Citizenship and Identity Management”). As noted above, the implementation of the Lubisi report has focused narrowly on disciplining officials. And the Msimang report has been implemented within its policy lane.<sup>17</sup>

### *And the Banks?*

The case papers indicate that, under instruction from its Minister, DHA made a significant adjustment, changing its tack somewhat on ID blocking about two years ago. On 5 August 2022, the Minister of Home Affairs met with the Department (Meeting Number 6 of 2022). The Department argues that pursuant to that meeting, although several months later, in November 2022, it stopped blocking IDs without notice and opportunity to be heard. Indeed, this was DHA's argument to the court. But that argument was rejected since the Minister and the Department did not submit any evidence or detail regarding that

---

<sup>13</sup> “Ministerial Committee Reviewing Permits and Visas: Portfolio Committee Presentation,” [https://pmg.org.za/files/220712Report\\_on\\_review\\_of\\_permits\\_-\\_Final.pptx](https://pmg.org.za/files/220712Report_on_review_of_permits_-_Final.pptx).

<sup>14</sup> Copperleaf, “About Us: CAJV,” CA JV (blog), accessed August 1, 2024, <https://cajv.co.za/about-us/>.

<sup>15</sup> “Question to the Minister of Home Affairs - NW78 | PMG,” accessed August 6, 2024, <https://pmg.org.za/committee-question/25617/>.

<sup>16</sup> “Media Statement: Committee Welcomes Progress in Implementing Lubisi Report on Issuing Fraudulent Visas - Parliament of South Africa,” March 5, 2024, <https://www.parliament.gov.za/press-releases/media-statement-committee-welcomes-progress-implementing-lubisi-report-issuing-fraudulent-visas>; “Briefing by the Department of Home Affairs on the Implementation of the Recommendations of the Lubisi Report and Update on Committee Oversight in March 2024,” [https://pmg.org.za/files/2403035DHA\\_PC\\_PRESENTATION\\_-\\_REVISED\\_LUBISI.pptx](https://pmg.org.za/files/2403035DHA_PC_PRESENTATION_-_REVISED_LUBISI.pptx); “Fraudulent Visas and Permits Task Team; GPW Data Loss: Progress Reports” (Parliamentary Monitoring Group, March 5, 2024), <https://pmg.org.za/committee-meeting/38494/>.

<sup>17</sup> Operation Vulindlela, “Vulindlela Report: Recommendations and DHA Implementation Plan” (Operation Vulindlela Review of the Policy Framework and Processes For Work Visas, April 12, 2023), <https://www.dha.gov.za/images/PDFs/DHA-Implementation-Plan-for-Vulindlela-Report-12-April-2023.pdf>.



resolution and its implementation. All that was submitted as evidence was a single “relevant extract” of (apparently) the August 2022 meeting. What this change in tack has actually amounted to is not at all clear.

Intriguingly, the partial extract of the Minister-Department meeting – “LTM2” – appears to indicate that the Department presented the blocking ID practice to the Minister as significantly driven by the banks. (In fact, the LHR cases make clear that most instances of being turned away at the banks were the result of a blocked ID, not its likely cause.)

According to the minutes:

“DDG:CS explained the Department does place “markers” on the systems for various reasons. This could relate to reasons other than the ID being fraudulent, and it could be driven by engagements with the banks, or similar institutional authorities, where such requirements are raised.

It was noted in discussion of the matter, that the Department must adhere to provisions within the Identification Act, and blocking of an ID is not provided for. The Act does however allow for the Department to exercise for the withdrawal of an identification documents if the circumstances suggest that it is reasonable to do so.

It was resolved that an independent legal opinion should be obtained on the rights of the Department when it suspects that the holder of an ID has obtained it under it under [sic] suspicious circumstances.” (Document bundle at 1379).

In the respondents’ answering affidavit to the second applicant’s application, (25 August 2023, para 9.3.2, document bundle 1304), SABRIC is noted as having “entered into a memorandum of understanding with the DHA to foster cooperation in the investigation and prosecution of perpetrators of bank-related identity fraud and corruption.”

Further, “SABRIC, the custodian of the relationship between the banking industry and the DHA, facilitates bank access to the DHA systems. The biometric verification system enables banks to verify clients’ fingerprints and identity numbers with the DHA, which also meets the “Know Your Client” (“KYC”) requirement in terms of the Financial Intelligence Centre Act 38 of 2001.” (para 9.3.5).

How does this operate? “The DHA non-biometric information is queried for inter alia client onboarding to mobile banking applications or banking services rendered by digital banks. Through advanced algorithms the banks are, for example, able to compare client provided photos to the DHA photos on record. The two systems will typically be utilised during onboarding or applications for additional products like home loans, personal loans, vehicle or other asset financing, where the details shared in the loan application are validated against the data held by DHA. From January to June 2023, the banking industry queried the mentioned systems 8.7 millions times per month on average.” (para 9.3.6)

It may simply be that the banks have an interest in portraying themselves as a beneficiary of the DHA data rather than as a source of errors and blocking IDs – but the network bears further research.

## **B(2): Consequences of the Practice and the Case: Citizenship and Identity Management**

First, tellingly – aligned with the Department’s “shrinking” sense of citizenship -- the case presented by Home Affairs in court presents a strikingly different reading of the expansion of citizenship in South Africa at the end of apartheid. In particular, DHA’s history completely reads out of the story the amnesties granted to hundreds of thousands of

long-term residents in South Africa originally from Lesotho, Zimbabwe, and Mozambique.<sup>18</sup> The use of amnesties as a policy tool to address South Africa's current migration crisis is probably politically infeasible. The amnesties are seen as part of a failed past of welcoming refugees, a category now more grudgingly tolerated.<sup>19</sup> This political reality leaves supra-national regional solutions – either AfCFTA or SADC -- as the best arguable way forward.<sup>20</sup> But those amnesties represent part of South Africa's founding moment, should be seen as part of South Africa's migration/citizenship tradition, and form a base to its constitutional history.

Frances Hobden wrote an excellent overview in 2020 on the current situation of [SA's shrinking citizenship regime](#). The look into DHA provided by this 2024 High Court case shows one of the muscular ways in which that shrinkage occurs, wreaking havoc on the lives of ordinary South Africans.

In terms of consequences (as well as acknowledging the significant advocacy around children's rights in the blocked IDs litigation), one should include children of persons with blocked IDs as many of them would not have been able to secure ID numbers in their own right without an operational ID number for their parents.

Second, we think we should ask how this judgment may affect South Africa's current identity management regime – the institutions, policies, and current trajectories in this field. Closely related to citizenship, identity management is not quite the same thing.

DHA's latest attempt to put together its responsibilities in these fields (citizenship, identity management, and migration) is the [current DHA White Paper](#) from November 2023. It is a document not only vociferously criticized within civil society but revealing acknowledged as simply inadequate in its scope for its comprehensive policy reform purpose. It focused narrowly on legal reform to refugees, immigration, and citizenship legislation rather than working at all with the necessary interoperability links to the identification and registration regimes of the Department.<sup>21</sup> For instance, the White Paper did not take on board or acknowledge the revisions offered by LHR to the Department's draft Identification and Registration Bill (2022), proposing legal text for one version of a constitutionally compliant procedural fairness regime for investigating suspect identification documents (Submission by LHR and the Centre for Child Law to DHA re Draft Identification and Registration Bill (2022) (30 June 2023) (para 48, document bundle 1552)).

---

<sup>18</sup> J. S. Crush and Vincent Williams, *The New South Africans?: Immigration, Amnesties, and Their Aftermath* (Southern African Migration Project, 1999), <https://samponline.org/wp-content/uploads/2016/10/The-New-South-Africans.pdf>.

<sup>19</sup> Alan Hirsch, "South Africa Country Study: Migration Trends, Policy, Implementation, and Outcomes" (New South Institute, January 2024), 12, <https://nsi.org.za/wp-content/uploads/2024/01/South-Africa-Country-Study-%E2%80%93-Migration-trends-02-12-2023-V5.pdf>.

<sup>20</sup> Alan Hirsch, "The African Union's Free Movement of Persons Protocol: Why Has It Faltered and How Can Its Objectives Be Achieved?," *South African Journal of International Affairs* 28, no. 4 (October 2, 2021): 497–517, <https://doi.org/10.1080/10220461.2021.2007788>.

<sup>21</sup> Jonathan Klaaren, "Re: White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa," January 30, 2024.

The department insists that disabling the IDs is critical to three objectives: protecting national security, ensuring the safety and integrity of the population register and safeguarding the banking system. Only the second of these objectives rings in the judgement with any degree of truth: “The marking of IDs forms an integral and indispensable part of the banking industry’s fraud risk management programs, crime detection, and crime prevention efforts. The respondents submit that the banking industry relies on the DHA as the primary data source for customer verification to combat identity theft and fraud.” (p. 26). Granted that the banking industry does rely upon and use DHA data in the SA identification ecosystem but that this “safeguards” the banking industry appears an overstatement. It may be worth engaging with the banking industry in order to confirm these impressions, to separate out the national security rationale, and to embark upon a constructive way forward.

Third, it is worth placing information technology in this story. There are elements of digital ID to this story (the banks noticing invalidated IDs, for example) but, like the cancellations in the Dominican Republic, it may well be that this practice is mostly old fashioned bloody-minded bureaucracy, on a massive scale.

The [2019] white paper, on the other hand, on the future of DHA makes it clear that they intend to do this kind of filtering with machine learning. That might potentially be fairer in some dimensions than the current practice of thousands of officials looking for reasons to overturn citizenships granted twenty-five years ago. But it is doubtful that the courts will allow it. In any case, it may be that this case shows the emergence in SA of a new source of suspicion akin to the type of suspicion that derives from more classically mechanical and rule-based types of database profiling.<sup>22</sup> It may be precisely the fuzziness and arbitrariness of these comments/markings that are distinctively revealed in the South African context (WiSER suspicion colloquium).

### **B(3): The Ways Forward: Short, Medium, and Long**

#### *Towards a short-term solution:*

In addition to the crucially useful actions of the applicants and the court here, someone should explain to DHA how this blocking practice is a terrible strategy, driving millions of people into the netherworld, shredding their rights and weakening the state.

Unfortunately, much of the legal framework in SA makes the population register a treasure house of citizenship (for instance policymakers and the courts have accepted in various contexts that the distinction between citizens and temporary residents is a lawful basis for denying access to employment (*Rasonfke*) and to social protection (*Khosa*)) so it is not possible to move to being indifferent about citizenship status for the ID number.

The only positive part of this story is that the courts have some control over the process. And that at least this Pretoria High Court is approaching the matter with a balance

---

<sup>22</sup> Simon A. Cole and Michael Lynch, “The Social and Legal Construction of Suspects,” *Annual Review of Law and Social Science* 2, no. Volume 2, 2006 (December 1, 2006): 39–60, <https://doi.org/10.1146/annurev.lawsocsci.2.081805.110001>.

for the appreciation of both individual rights and the need for policy and institutional development in this critical infrastructure of citizenship. Politicians, lawyers and others using a purely external approach to improving the accountability of the Department of Home Affairs need to appreciate the potential of an internal approach as a complement to the external approach, and to realize that we can analyze the administrative justice affected in terms of “trade-offs” between different normative models of administrative decision-making.<sup>23</sup>

There is an urgent need for policy-relevant comparative research on the size shape and politics of revoking identification documents in jurisdictions across the world. It would be useful to research, understand, and explain to policy-makers how these reviews work in other countries. This problem may be approached from the two overlapping literatures of administrative justice in context and the Trust Project.<sup>24</sup> We are thinking here particularly of the Dominican Republic, India, Kenya, and Cameroon. Note also that the UK’s data protection authority has started an investigation into 76 000 biographical and biometric errors in that country’s immigration database.<sup>25</sup> Note also recent work by Adeleke and Razzano on AI and administrative justice.<sup>26</sup>

#### *Towards a medium-term solution:*

What can be done in the medium-term is specify and make constitutional how the Department deals with this problem.

This is basically what Judge S has given the Department 12 months to do – come up with a lawful method to engage with those suspected of defrauding the ID system.

The bonus would be for such a minimally lawful method to additionally fit within a rational national identity management policy.

#### *Towards a long-term solution:*

The automated and binary approach that DHA is using to South African ID will likely have damaging effects on digital ID projects well beyond SA. We have to this point been a poster child for our post-apartheid increase of birth registration rates. However, the practice of automatically disconnecting a significant number of the population puts that status in jeopardy.

---

<sup>23</sup> Michael Adler, “A Socio-Legal Approach to Administrative Justice,” *Law & Policy* 25, no. 4 (2003): 323–52, <https://doi.org/10.1111/j.0265-8240.2003.00153.x>; Michael Adler, *Administrative Justice in Context* (Bloomsbury Publishing, 2010).

<sup>24</sup> Simon Halliday and Colin Scott, “A Cultural Analysis of Administrative Justice,” in *Administrative Justice in Context*, ed. Michael Adler (Bloomsbury Publishing, 2010), 183–202; Adler, *Administrative Justice in Context*; Irvine Lapsley and Jeremy Lonsdale, “The Audit Society: Helping to Develop or Undermine Trust in Government?,” in *Administrative Justice in Context*, ed. Michael Adler (Bloomsbury Publishing, 2010), 73–96; Robert A. Kagan, “The Organisation of Administrative Justice Systems: The Role of Political Mistrust,” in *Administrative Justice in Context*, ed. Michael Adler (Bloomsbury Publishing, 2010), 161–82.

<sup>25</sup> Masha Borak, “UK Data Watchdog to Investigate Country’s Troubled Immigration IT Systems,” *Biometric Update* (blog), March 20, 2024, <https://www.biometricupdate.com/202403/uk-data-watchdog-to-investigate-countrys-troubled-immigration-it-systems>.

<sup>26</sup> Fola Adeleke and Gabriella Razzano, “Algorithms and Administrative Justice in Africa: A Case Study from Nigeria,” *Development*, August 13, 2024, <https://doi.org/10.1057/s41301-024-00407-5>.