

**Loss of South African Citizenship: An investigation into the
implications of the phrase “voluntary and formal act”**

By

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Synopsis

This dissertation focuses on the fact that despite a constitutional guarantee to the contrary, South Africans are in fact losing their South African citizenship as a result of gaining foreign citizenship by way of a *voluntary and formal act*. Specific attention is paid to the difficulty of interpreting the widely generalised designation “a voluntary and formal act” in order to decide exactly whether and when citizenship is actually lost, particularly in light of the said guarantee.

The dissertation dwells generally on the means of acquisition, loss and deprivation of citizenship, but then proceeds naturally to the issue of loss of citizenship by way of a *voluntary and formal act* and how, if at all, citizenship can be restored in such instances. Special attention is paid to significant landmark procedural changes occurring in 1995 in the acquisition of foreign citizenship by South Africans. The affected procedures include applications for exemption, retention, resumption, determination of status and the right to retain permanent residence.

The Constitution of the Republic of South Africa guarantees that no citizen may be deprived of their citizenship and yet South Africans are indeed losing their citizenship.

An investigation is conducted into the procedural fairness, right to written reasons and the reasonableness of the procedures followed by the Department of Home Affairs in depriving South African citizens of their South African citizenship.

A comparative survey of South African citizenship laws and those of the United Kingdom, Germany, the United States of America and Zimbabwe is followed by suggestions deemed constructive in view of the variously intransient positions adopted by the surveyed countries on the pertinent issue of loss of citizenship due to acquiring foreign citizenship.

The solutions offered towards rectifying the current procedures followed by the Department of Home Affairs, and towards increasing public awareness and understanding of the law on this issue include proposed amendments to legislation, procedural changes and the upgrading of

administrative systems in the said Department in order to handle loss of citizenship and related consequences more effectively.

Direct correspondence was conducted with the Citizenship Section of Head Office of the Department of Home Affairs, in compliance with the rules and procedures of the Ethics Committee of the University of Pretoria, in order to gain clarity on the issues at hand.

This dissertation is dedicated to my husband, who stood by me and motivated me through all the good and bad we have been through in the past year. He is also the inspiration for my choice in topic, as well as my best case study. It is also dedicated to my parents who have always supported me in everything I have set out to accomplish in life.

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CHAPTER 1: AN OVERVIEW OF THE INVESTIGATION

- 1.1 Background
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1.1 Background

The right to citizenship affects the inhabitants of all countries throughout the world since it is a birthright in principle. All citizens have the citizenship of some or other country. All citizens have a sense of belonging to the country for which they hold citizenship and there is forever some tie to that country. The purpose of this dissertation is to investigate the issue of loss of citizenship in context with the right inherent to citizenship gained by birth, descent or naturalization and to determine and elucidate the conditions under which it can be lost and restored.

Section 6(2) of the current South African Citizenship Act¹ ("SA Citizenship Act") provides that unless prior application is made to retain South African citizenship²:

"... a South African citizen shall cease to be a South African citizen if- (a) he or she, whilst not being a minor, by some voluntary and formal act other than marriage, acquires the citizenship or nationality of a country other than the Republic."

Section 20 of the Constitution of the Republic of South Africa of 1996 ("SA Constitution") states that:

"No citizen may be deprived of citizenship".

The SA Citizenship Act and the Constitution, as quoted, are clearly at variance in that the right to citizenship is made conditional in the former and unconditional in the latter instance.

¹ Act 88 of 1995.

² Section 6(2) of the South African Citizenship Act 88 of 1995.

As noted above, the object here is to shed light on the conditions relating to the loss of South African citizenship. The regulatory framework for South African citizenship is contained in the SA Citizenship Act of 1949³, repealed in 1995 and replaced by the new SA Citizenship Act. Effectively both of these statutes are still active since persons who acquired their citizenship before October 1995 still fall under the Act promulgated in 1949.

The critical issue as stated at the outset is that the exact purport of the phrase "voluntary and formal act" is not indicated and the Department of Home Affairs does not follow a specific protocol to determine whether such an act has taken place and whether it will therefore result in a loss of citizenship. The lack of such a protocol has been confirmed in the researcher's correspondence with the Department of Home Affairs, which therefore urgently needs to address the matter since it causes considerable strain and inconvenience.

1.2 Research questions

Should legislative measures be adopted to support the constitutionality of section 6 of the SA Citizenship Act⁴ regarding loss of South African citizenship?

- What are the means of acquisition and loss of South African citizenship?
- How do the words "voluntary and formal act" affect the retention or loss of South African citizenship? What are the means to prevent loss of South African citizenship? What options are available to restore lost South African citizenship?
- Does section 6 of the SA Citizenship Act⁵ violate the constitutional guarantee to hold South African citizenship unconditionally as set out in section 20 of the SA Constitution?⁶ How does this legislative inconsistency affect South African citizens in practice?

³ No 44 of 1949 - this includes the basic legal structure and does not delve further into Amendment Acts as of yet which will be elaborated upon further in my research.

⁴ *Supra* at 1.

⁵ *Supra* at 1.

⁶ *Ibid* at 1.

- What are the administrative law implications of the processes utilised by the Department of Home Affairs in depriving South Africans of their South African citizenship under section 6(2) of the SA Citizenship Act?⁷ Is loss of citizenship considered an administrative action?
- How does the Department of Home Affairs interpret and apply the law regarding South African citizenship, given the inconsistency between the constitutional guarantee and the qualification of the right to citizenship in relevant legislation, particularly in light of the imprecise key phrase “voluntary and formal act”?
- How does the law and its application regarding citizenship, and especially to the loss thereof, in South Africa compare with similar law and its application in other common and civil law countries?
- What legislative and other measures can be instituted to prevent and/or remedy violations of the intrinsic right to citizenship as laid down in the South African Constitution?

1.3 The influencing factors

The imprecision of the phrase "voluntary and formal act", as noted, makes it very difficult for the general public to ascertain their status is once they have acquired foreign citizenship; and it follows, therefore, that legal assistance in this regard is severely hampered by the same difficulty.

Apart from the significant difficulty presented by the phrase "voluntary and formal act" the law seems reasonably clear about the retention or loss of citizenship and what to do when it is lost. A problem of equal or greater significance is evident from the processing by the Department of Home Affairs of applications concerning loss of citizenship, and from circulars and memoranda put out by the Department of Home Affairs in this regard.

These problems generally only surface when a South African goes to renew his South African passport, often some years after having acquired his foreign citizenship, and is advised that because he is no longer a South African citizen he is not entitled to such renewal.

⁷ *Supra* at 2.

1.4 Preliminary literature survey

Since little is said about citizenship and loss thereof in existing literature (eg. legislation and textbooks), the SA Citizenship Act of 1949 and its replacement (1995) will serve as the main reference sources for the purposes in hand.⁸

Case law is another significant, albeit a scarce resource in this regard. At least there are cases that shed some light on the concept of a "voluntary and formal act".⁹

Finally, the Constitution will serve as a definitive testing ground to determine whether a deprivation of citizenship is justifiable or constitutionally legitimate.

In this regard it should be noted that the guaranteed right to citizenship held under the Constitution is borne out by the Universal Declaration of Human Rights which provides that "everyone has the right to a nationality" and by extension, the right to retain his or her nationality, or to change it.¹⁰

Loss of citizenship naturally has administrative implications, for example in that procedural fairness of administrative acts that have critical implications for a person's constitutional rights is a mandatory requirement under the Promotion of Administrative Justice Act.¹¹ This requirement certainly implies that a person who is deprived of his or her citizenship must be given notice to that effect.

1.5 Proposed methodology and structure

In view of the focal interest of this study an investigation has been done to clarify the current position regarding loss of citizenship with one reference to the SA Citizenship of 1949 and its successor since both statutes remain relevant to date. Reference will also be made to the current position concerning citizenship in comparable jurisdictions in order to place the position in South Africa in a wider, international context. Comparison revealed that the said position in the countries included in the survey (ie. United Kingdom, the United States of America, Germany and Zimbabwe) is broadly

⁸ South African Citizenship Act No 88 of 1995; South African Citizenship Act No 44 of 1949 (now repealed).

⁹ *Green v Minister of the Interior* (1968) 4 All SA 298 (A) - was a voluntary act; *Ebrahim v Minister of the Interior* 1977 (1) SA 665 (A) - provided some examples of what a formal and voluntary act could be.

¹⁰ Article 15 of the Universal Declaration of Human Rights.

¹¹ Section 3(1) of the Promotion of Administrative Justice Act 3 of 2000.

similar to that in South Africa, and their comparability is helped by the fact that the chosen countries include three common-law jurisdictions and one civil-law jurisdiction.

As noted above, reference will be made to directly relevant information and directives gained from senior officials of the Department of Home Affairs about matters concerning loss of South African citizenship including applications for retention, resumption and exemption (fully discussed later in this text) with specific reference to native South Africans and foreigners who have naturalized as South African citizens after obtaining permanent residence under the Immigration Act 13 of 2002.

1.6 Outcomes

Rather than arguing for amendments to constitutional or citizenship law the object in hand is to put forward a process to deal more appropriately with loss of citizenship in South Africa, for example by ensuring that affected persons receive sufficient notice so that they may know their rights.

The option to rectify loss of citizenship is not generally known to the public, for example, with the result that it will take a good few years to resume South African citizenship, if at all, once another citizenship has been acquired.

CHAPTER 2: A STUDY OF THE ACQUISITION, LOSS AND DEPRIVATION OF CITIZENSHIP

- 2.1 Acquisition of citizenship
 - 2.1.1 Citizenship by birth
 - 2.1.2 Citizenship by descent
 - 2.1.3 Citizenship by naturalisation
 - 2.1.4 Citizenship by registration
 - 2.2 Loss and deprivation of citizenship
 - 2.2.1 Acquiring citizenship of a country other than South Africa
 - 2.2.2 Serving in the army of a country at war with South Africa
 - 2.2.3 Renunciation
 - 2.2.4 Deprivation
 - 2.2.5 Imprisonment or "In the public interest"
 - 2.2.6 Using a foreign passport to gain advantage in South Africa
 - 2.2.7 Minors
 - 2.3 The concept of citizenship
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2.1 Acquisition of citizenship

It is important to know how citizenship is acquired in order to fully understand how it is lost. The means of acquiring South African citizenship are described in Chapter 2 of the SA Citizenship Act.

2.1.1 Citizenship by birth

The first and most common way to acquire citizenship is by birth to at least one parent who is a South African citizen,¹² even if such parent is abroad at the time of the birth, but provided that the parent is employed by the South African government or an international organization of which South Africa is a member at the time in question.¹³

Citizenship by birth also extends to a person who has been lawfully adopted by a South African citizen.¹⁴ Finally, where a person who is resident in South Africa does not have, and is not entitled to, the citizenship of any other country and is technically left stateless, such person is seen as a citizen by

¹² Section 2(1)(b) and s 2(2) of Act 88 of 1995.

¹³ Section 2(1)(c) of Act 88 of 1995.

¹⁴ Section 2(4)(a) of Act 88 of 1995.

birth.¹⁵

2.1.2 Citizenship by descent

South African Citizenship can also be acquired by descent, which is covered by section 3 of the SA Citizenship Act, in the case of persons born abroad to a parent or parents holding South African citizenship,¹⁶ or to adoptive parents holding such citizenship.¹⁷ Thus citizenship by birth is gained by birth on South African soil while citizenship by descent is gained by birth on foreign soil to a natural or adoptive parent or parents holding South African citizenship.¹⁸

In both of the above instances the child's birth has to be registered in South Africa, either through a South African Embassy abroad or through a local office of the South African Department of Home Affairs.¹⁹ Late registration is permissible on request in cases of significant delay.²⁰

2.1.3 Citizenship by naturalisation

Foreigners can acquire South African citizenship by naturalisation on compliance with the various conditions for temporary and permanent residence in South Africa as laid down by the Immigration Act.^{21 22} Application for naturalisation can be made after a specified period of permanent residence.²³ Naturalisation is finalised once a successful applicant makes a declaration of

¹⁵ Section 2(4)(b) of Act 88 of 1995.

¹⁶ Section 3(1)(b)(i) of Act 88 of 1995.

¹⁷ Section 3(1)(b)(iii) of Act 88 of 1995.

¹⁸ Whilst writing this paper amendments were made to the SA Citizenship Act which can be found in the South African Citizenship Amendment Act 17 of 2010 which has now changed this distinction. The Amendment Act states in section 3 that only a child adopted by a South African citizen will be seen as a citizen by descent. A child will be considered a citizen by birth so long as he is born to a South African citizen parent, whether inside or outside of South Africa according to the section 2. Finally, according to section 2(4)(a) of the Amendment Act, an additional form of citizenship by birth will be added which will allow a foreigner who has lived in South Africa from date of birth to majority to qualify as a South African citizen by birth.

¹⁹ Section 9(3) and s 9(3A) of the Births and Deaths Registration Act 51 of 1992.

²⁰ This is contained in Home Affairs Application Form BI-288.

²¹ Temporary residence is covered by sections 10 - 24 and permanent residence is covered by sections 25 - 28 of the Immigration Act 13 of 2002.

²² Section 5(1)(c) of Act 88 of 1995 requires a person to have been resident for a continuous period of 1 year before applying for naturalization, and for 4 years during the 8 years before seeking naturalisation. This section is rather confusing, but in essence, requires a permanent resident to be resident in South Africa for 5 years from date of obtaining such permanent residence before applying for naturalisation.

²³ Sections 25-28 of Act 13 of 2002 – an example here would be where a foreigner is married to a South African citizen. According to section 26(b) of the Immigration Act 13 of 2002 a foreigner who has been married to a South African citizen for five years is entitled to apply for permanent residence and after two of

allegiance to the Republic of South Africa.²⁴

2.1.4 Citizenship by registration

Citizenship by registration has been abrogated by the current SA Citizenship Act. The original purpose of this arrangement was to accommodate British national living in South Africa at a time the Republic of South Africa and the Orange Free State were annexed.²⁵ This citizenship was then conferred automatically.

2.2 Loss and deprivation of citizenship

Citizenship can be either gained or lost in various ways. The following is an outline of how it can be lost.

2.2.1 Acquiring citizenship of a country other than South Africa

As stated in Chapter 1 above the object of this dissertation is to deal with the loss of South African citizenship in terms of s 6(1)(a) of the SA Citizenship Act which provide that:

"... a South African citizen shall cease to be a South African citizen if- (a) he or she, whilst not being a minor, by some voluntary and formal act other than marriage, acquires the citizenship or nationality of a country other than the Republic."

And again as stated at the outset, the crucial matter arising from the above provision is that of interpreting the key phrase "voluntary and formal act". In this regard it should be noted that loss of South African citizenship on acquiring the citizenship of another country is contingent upon:

- The majority of the South African citizen concerned at the time of acquiring the other citizenship;
- assurance that the new citizenship is not being acquired as a result of marriage; and
- assurance that the acquisition is the result of a voluntary and formal act on the part of the

permanent residence the person concerned is entitled to seek naturalization as a South African citizen in terms of Section 5(5) of the SA Citizenship Act.

²⁴ The Declaration of Allegiance is contained in Schedule 1 of the South African Citizenship Act 88 of 1995.

²⁵ Section 9(2) of Act 44 of 1949.

South African citizen.

2.2.2 Serving in the army of a country at war with South Africa

A South African citizen who has citizenship of a foreign country and serves in the armed forces of that country at a time when it is at war with South Africa can lose his or her South African citizenship for that reason.²⁶

2.2.3 Renunciation

Under section 7 of the SA Citizenship Act, South African citizenship can be lost by personal choice. This measure, which is known as renunciation, is typically adopted where a South African citizen wishes to acquire citizenship of a foreign country that does not allow for multiple or dual citizenship.²⁷ Citizenship can be renounced by making a declaration to that effect in a prescribed form before an immigration official of the Department of Home Affairs. It is important to note in this regard that the minor children of a South African citizen, who renounce/s his or her South African citizenship, thereby cease to be South African citizens in the absence of another parent who remains a South African citizen.²⁸

2.2.4 Deprivation

The SA Citizenship Act also refers to deprivation of citizenship in section 8. A person who has obtained South African citizenship by way of naturalisation may be deprived of such citizenship where it is determined that the issuance of a certificate of naturalisation is tainted by "fraud, false representation or the concealment of a material fact" or where it was issued contrary to the Act.²⁹

²⁶ Section 6(1)(b) of Act 88 of 1995. An additional instance under section 6 of the SA Citizenship Act that has just been enacted in terms of the South African Citizenship Amendment Act 17 of 2010 is that a naturalised South African citizen will lose his or her South African citizenship where "he or she engages, under the flag of another country, in a war that the Republic does not support". This additional instance of loss of citizenship has been heavily criticised under the submissions to Parliament on the Bill as per the public hearings held in Parliament on 17 August 2010.

²⁷ Section 7(1) of Act 88 of 1995.

²⁸ Section 7(3) of Act 88 of 1995.

²⁹ Section 8(1) of Act 88 of 1995.

2.2.5 Imprisonment or "In the public interest"

A South African citizen who also has a foreign citizenship and has been sentenced to imprisonment for at least 12 months in the relevant foreign jurisdiction for an offence which, if committed abroad, would also be considered an offence in South Africa may also be deprived of his or her South African citizenship.³⁰ Deprivation may also ensue if, at the discretion of the Minister of Home Affairs, it is deemed in the public interest to deprive such dual citizenship holder of his or her South African citizenship on the ground of something that he or she has done.³¹

2.2.6 Using a foreign passport to gain advantage in South Africa

According to section 9 of the SA Citizenship Act deprivation or loss of citizenship will also occur where a South African citizen, who also has the citizenship of a foreign country, utilises the franchise or passport facilities of that foreign country or performs a voluntary act that indicates use of that foreign citizenship or passport.³² This section is very vague although it is assumed that the intention of the legislator was to refer to instances where a foreign passport is used to gain some wrongful advantage in South Africa for a South African citizen.

2.2.7 Minors

Finally, section 10 of the SA Citizenship Act provides that the Minister of Home Affairs has the power to deprive a minor South African citizen of his or her South African citizenship in the event of loss or deprivation of the South African citizenship of such minor's responsible parent(s) for any of the above reasons, provided that such minor was born outside of South Africa and has not reached majority by the time the loss takes place.³³

2.3 The concept of citizenship

South African citizenship can be gained or lost in a number of ways, all of which have now been

³⁰ Section 8(2)(a) of Act 88 of 1995.

³¹ Section 8(2)(b) of Act 88 of 1995.

³² Section 9 of Act 88 of 1995.

³³ Section 10 of Act 88 of 1995.

discussed and elaborated upon.

The importance of citizenship is emphasised by the constitutional provision that "No citizen may be deprived of citizenship".³⁴ Obviously all rights contained in the Bill of Rights are subject to the limitations clause contained in s 36 of the same text. A further discussion in this regard can be found in the chapter on the constitutionality of loss of citizenship which is pivotal for the purposes of this dissertation.

The current laws and procedures pertaining to loss of citizenship, with special reference to the abovementioned key reference to a *voluntary and formal act*, will now be discussed to further elucidate loss of citizenship.

³⁴ Section 20 of Act 108 of 1996.

CHAPTER 3: AN ANALYSIS OF THE LOSS OF CITIZENSHIP AS A RESULT OF A VOLUNTARY AND FORMAL ACT

- 3.1 The ambit of the provisions
 - 3.2 The words — *A voluntary and formal act*
 - 3.3 How to prevent loss of citizenship
 - 3.3.1 The retention application
 - 3.3.2 The exemption application
 - 3.3.3 The right to permanent residence and the resumption application
 - 3.3.4 The issue of automatic loss
 - 3.4 Travelling on a foreign passport
 - 3.5 A practical example
 - 3.6 Conclusion
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3.1 The ambit of the provisions

To start, I need to restate the basis for the issue of loss of citizenship being a debate in the first place. As noted, this dissertation is focused on section 6(1) of the SA Citizenship Act which provides that:

"a South African citizen shall cease to be a South African citizen if ... he or she, whilst not being a minor, by some voluntary and formal act other than marriage, acquires the citizenship or nationality of a country other than the Republic".

This raises a few automatic exclusions to the loss of citizenship in respect of persons who acquire a foreign citizenship whilst still a minor and persons who acquire foreign citizenship by way of marriage to a person who holds such foreign citizenship. On a basic understanding of this provision it provides that a South African citizen who takes up a foreign citizenship while a minor will not lose his or her South African citizenship. In respect of the exclusion of marriage, this will apply where a South African citizen takes up a foreign citizenship as a result of the entitlement thereto due to marriage to a national of the relevant foreign country. While these are reasonably clear exclusions, there is no clarity at present about the question whether marriage, and naturalisation as a foreign citizen by virtue of marriage, does not fall under the rubric of a *voluntary and formal act*. Unfortunately, as a direct result of the Department of Home Affairs going against this provision and continuously dealing with exactly this kind of issue in different ways, the answers to questions

such as this are not clear cut.³⁵ It is necessary to investigate this provision regarding loss of citizenship further and obtain comment from the Department of Home Affairs.

3.2 The meaning of a voluntary and formal act

Nowhere in any of the citizenship acts to date are the words "voluntary and formal act" defined or elaborated upon.³⁶ This aggravates an already precarious situation. A more precise formulation would probably have precluded the need for an investigation such as this. The fact of the matter is that there is no definition or standard.

After a question and answer session conducted with the Department of Home Affairs: Citizenship Section an indication was given that the words *voluntary and formal act* refer to "a person applying for citizenship being over the age of 18 years and [having] sign[ed] a document, like an oath or declaration".³⁷

On the matter of acquiring citizenship by birth: birth is an involuntary act, and since that is so it follows that where a foreign citizenship is acquired as a result of birth to a parent who is a foreigner, South African citizenship is not lost as a result of acquiring foreign citizenship by birth. Birth is therefore ruled out as a *voluntary and formal act*. However, the Department of Home Affairs seems to interpret the filling in of forms, by a South African citizen who wishes to acquire a foreign citizenship, as a *voluntary and formal act*. This inference must be drawn from the fact that South Africans are losing their South African citizenship as a result of obtaining foreign citizenship by birth. As indicated, a minor who acquires a foreign citizenship does not thereby lose his or her South African citizenship, so that as indicated above, citizenship by birth is excluded from the application of section 6(l)(a) of the SA Citizenship Act. However, if a child who is born a South African citizen but is also entitled to citizenship of a foreign country by birth, because citizenship

³⁵ The Department of Home Affairs, after answering to questions on this research, has indeed confirmed that naturalization as a citizen of a foreign country as a result of marriage is indeed considered a *voluntary and formal act*.

³⁶ The writer assisted in submissions made to Parliament on 17 August 2010 by the Law Society of South Africa, as a result of public hearings made on the South African Citizenship Amendment Bill 17 of 2010, to put forward a submission that a definition should be given to the words *a formal or voluntary act*.

³⁷ Question and Answer session with RL Krüger from Head Office of the Department of Home Affairs: Citizenship Section.

of that country is held by a parent, but only takes up such entitlement after reaching majority, then despite the acquisition of such foreign citizenship by birth, the South African citizenship will be lost as a direct result of taking up the said entitlement by way of a *voluntary and formal act*.

In light of the above interpretation it must be considered that any acquisition of citizenship will inevitably include a stage where a form has to be filled in or a document has to be signed, which seems to imply that the acquisition of any foreign citizenship is a *voluntary and formal act* per definition, regardless of the reason for seeking the acquisition.

An important case dealing with this subject, and the first reported case of its kind, was that of *Green v Minister of the Interior*.³⁸ In this matter the applicant was a South African citizen by birth. In 1948, whilst no longer a minor, and after living in the United States of America for some time he acquired American citizenship. He returned to stay permanently South Africa in 1949. He was met with the contention that in acquiring a foreign citizenship by way of a *voluntary and formal act* he had lost his South African citizenship. Green argued that the acquisition of American citizenship was not voluntary for the following reasons:

"[M]y parents decided to apply for citizenship of the United States of America and, although I was then a major and not obliged to comply with their wish that I also become a citizen of the United States of America, I acceded to their request mainly because I was still financially dependent upon them and also because at that time they were both ill and I did not want to upset them or put difficulties in their way."³⁹

The court found that although Green had good reason to take up American citizenship he did in doing so, hence act voluntarily. The court found that he had in fact lost his South African citizenship.⁴⁰

The meaning of a *voluntary and formal act* was considered in *Ebrahim v Minister of the Interior*.⁴¹ In this case the appellant, a South African citizen, had acquired British citizenship. Ebrahim applied for his British citizenship whilst he was in the United Kingdom but the citizenship application was only approved and the citizenship acquired at a time when he was present in South Africa. This fact is

³⁸ 1968 (4) All SA 298 (A).

³⁹ *Supra* at page 304.

⁴⁰ *Supra* at page 304.

⁴¹ 1976 (1) SA 665 (AD).

important because the then active SA Citizenship Act of 1949, which also made loss of citizenship contingent on a *voluntary and formal act*, imposed the condition on loss of citizenship as a result of adopting a foreign citizenship that the forfeiture would not occur where the foreign citizenship was acquired during the applicants presence in South Africa (more about this later in this chapter).⁴² The question before the court was whether or not Ebrahim had lost his South African citizenship by adopting British citizenship. The court found that the clear meaning of the text of the SA Citizenship Act of 1949 was that "acquisition must be while the citizen is outside the Union",⁴³ and that it therefore followed that in the circumstances Ebrahim had not lost his South African citizenship. On the issue of what a *voluntary and formal act* is Joubert AJA stated that:

"[i]t is most significant that the Legislature did not refer to a specific type of voluntary and formal act, but rather to an undetermined and unspecified voluntary and formal act which could be any voluntary and formal act other than marriage. In fact the voluntary and formal act (other than marriage) whereby the foreign citizenship is acquired may include the making of a formal application in a foreign country for naturalization or the making of a declaration of allegiance to a foreign country".⁴⁴

Sadly, to date, this is the closest to a definitive statement about the meaning of a *voluntary and formal act* in South African law.

The following situation illustrates exactly what is meant by a *voluntary and formal act*. Before 1949 a woman could automatically acquire British citizenship by marrying a British citizen⁴⁵ and this by no means affected her South African citizenship.⁴⁶ The reason for this was simply because no *voluntary and formal act* was involved in the acquisition since conferral took place without any formal application. However, in 1948 the United Kingdom changed its laws so that acquisition of British citizenship became contingent upon registration or naturalization,⁴⁷ a requirement that according to South African law (or rather according to the Home Affairs interpretation) involved a *voluntary and formal act* that would per definition result in the acquirer's loss of South African citizenship.

⁴² Section 15(1)(a) of the South African Citizenship Act 44 of 1949.

⁴³ Ebrahim v Minister of the Interior 1976 (1) SA 665 (AD) at 665 para F.

⁴⁴ Ebrahim v Minister of the Interior 1976 (1) SA 665 (AD) at 679 para F-G.

⁴⁵ s 6(2) of the British Nationality Act, 1948.

⁴⁶ Travern 2005, line 3-8.

⁴⁷ British Nationality Act, 1981 -s 6(2).

In most countries today it will be seen on investigation that foreign citizenship cannot be acquired without performing a *voluntary and formal act*; indeed such acquisition is the rule rather than the exception.

There is certainly no formal clarity on the words *voluntary and formal act* and their application in respect of loss of citizenship. The present investigation into the process of loss of citizenship will now be continued by considering specific details concerning the loss and the resumption of citizenship.

3.3 How to prevent loss of citizenship

On the whole South Africans only discover that they have lost their South African citizenship when they apply for passport renewals to which end they have to fill in the BI-73 Application form on which details they are requested of their acquisition of foreign citizenship (see facsimile below).

D. CITIZENSHIP (Must be completed by all applicants)

(a) Have you acquired citizenship of another country on application? YES NO if so, state

COUNTRY	PLACE OBTAINED	MEANS OF OBTAINING	DATE

(a) Have travel facilities previously been issued to you? YES NO if so, when? Y Y Y Y M M D D

Passport /document number

NOTE: South African passports or other travel documents presently in the possession of the applicant must be presented with this application unless lost, stolen or damaged, in which case the applicant has to comply with regulation 7 or 13 of the Passport and Travel Document Regulations, 1996.

Upon handing in the completed application form giving the requested details of having acquired a foreign citizenship the applicant, who is unaware of the contingency of loss of citizenship, is advised by a Home Affairs official that he or she is no longer a South African citizen.

This is how South African citizenship is lost in practice as a result of acquiring foreign citizenship by way of a *voluntary and formal act* as interpreted by the Department of Home Affairs. The process of reversing the loss incurred in this way will now be discussed.

3.3.1 *The retention application*

Section 6 of the SA Citizenship Act provides for the loss of citizenship. Section 6(2) of the SA Citizenship Act provides for the retention thereof. This section provides that:

"Any person ... may, prior to his or her loss of South African citizenship in terms of this section, apply to the Minister to retain his or her South African citizenship, and the Minister may, if he or she deems it fit, order such retention."

Section 6(1), as discussed, is applicable where a South African citizen has lost his South African citizenship as a result of performing some *voluntary and formal act* in acquiring a foreign citizenship. The retention application must therefore be lodged before obtaining a foreign citizenship. This application, as the name suggests, allows the holder to proceed to apply for a foreign citizenship. In effect this document provides the holder with the right to hold dual citizenship. This is the only way that South African citizens can hold dual citizenship without losing their South African citizenship.

A requisite for this retention process is that the citizen concerned has to apply for a determination of status from the Department of Home Affairs.⁴⁸ On receipt of such application the Department of Home Affairs is requested to investigate the applicant's status with regard to citizenship to which end the vault copy of the citizen's birth certificate needs to be located and a statement needs to be issued to confirm that the applicant is in fact a South African citizen and that there are no impediments to that citizenship. Such impediments, if any, will be stated on the document reflecting the applicant's status. This document, which will be issued on completion of the investigation, will either confirm the citizenship in question or advise that it has been lost.

With the determination of status in hand the citizen can proceed to retention application⁴⁹ which requires disclosure of the details concerning the prospective foreign citizenship: the country of which citizenship is sought, the reasons for the applicant's entitlement to such citizenship, and why retention of South African citizenship is requested. Now the decision is left in the hands of the Department of Home Affairs. If a retention certificate is issued it will advise that the applicant has

⁴⁸ This is contained in Home Affairs Application Form BI-529.

⁴⁹ This is contained in Home Affairs Application Form BI-1664.

been exempted in terms of section 6(2) of the SA Citizenship Act from the loss of his or her South African citizenship and will therefore remain a South African citizen on acquiring a foreign citizenship. The problem with this kind of retention certificate currently issued by Home Affairs is that it is headed: Certificate of Exemption. This is definitely a very different process to an exemption, which will be discussed further on in this chapter since it causes confusion.

A portion of the South African Citizenship Amendment Act 69 of 1997 that was in operation until it was repealed by the South African Citizenship Amendment Act 17 of 2004 related to the section 9(2) exemption letter, often referred to as a "permission letter" or "retention letter". The term "permission letter" will be used here to avoid confusion. While a similar process to the retention application was followed in that it entitled the holder to hold dual citizenship, the entitlement was subject to a time limit that usually lapsed after five years,⁵⁰ which meant that renewal had to be sought before the expiry date. This process fell away with the repeal of section 9(2).⁵¹

The problem attending issuance of permission letters was that although s 6(2)⁵² was already in place to allow retentions, the Department of Home Affairs refused to issue or even take in applications for retentions at the time,⁵³ with the result that holders of valid permission letters were back to square one when section 9 was repealed.⁵⁴ That is to say: They had already claimed their foreign citizenship but their permission letters had been turned into worthless paper and they had lost their South African citizenship despite their efforts to abide by the law. They now had to apply for a resumption (discussed later on in this chapter) and only became South African citizens again when their applications were approved. This can only be described as an anomaly of note.

3.3.2 *The exemption application*

The SA Citizenship Acts of 1949 and 1995 both specify a *voluntary and formal act* as the reason for

⁵⁰ This is contained in the Certificate of Exemption in terms of the now repealed section 9(2) of the SA Citizenship Act 88 of 1995 – Form BI-1155.

⁵¹ By South African Citizenship Amendment Act 17 of 2004.

⁵² *Supra* at 31.

⁵³ Discussion with Immigration Attorney Julian Pokroy of Julian Pokroy Attorneys specializing in Immigration, Nationality and Refugee Law and Chairperson on the Law Society's Immigration, Nationality and Refugee Law Committee.

⁵⁴ *Supra* at fn 54.

losing South African citizenship.⁵⁵ The same exclusions are still applicable. The procedures to be followed, however, are not quite the same.

The exemption application formed part of the SA Citizenship Act of 1949.⁵⁶ No provision was made in this Act for any retention application. For dual citizenship holders the only option available until the 1995 Citizenship Act came into force was to obtain an exemption from loss of South African citizenship. The main difference between this kind of exemption and the retention application is that this provision stated that the exemption could be made for a definite or indefinite period. The idea of a fixed term exemption shows where the idea of permission letters discussed above stemmed from. This kind of exemption could be requested before or after acquiring foreign citizenship.

The amendment to the SA Citizenship Act by promulgation of the South African Citizenship Amendment Act 69 of 1997 included the addition of section 26(4) which also provided for an exemption.⁵⁷ The provision was made by stating that the Minister was authorised to exempt a person from loss of South African citizenship as a result of a *voluntary and formal act*, either unconditionally.⁵⁸ The exemption was not subject to time limits but was operationally similar to a resumption application (discussed later on in this chapter). The exemption provided under s 26(4) could only be sought after acquiring a foreign citizenship, unlike the exemption in terms of the SA Citizenship Act of 1949. Once the application had been duly processed (after acquiring foreign citizenship) the South African citizenship was deemed to have remained intact when the foreign citizenship was acquired.⁵⁹ The added section 26(4) provided specifically that although section 15(1)(a) had been repealed it remained in force for persons who acquired foreign citizenship during the period from 1949 to 1995.

As indicated, this method of regaining or retaining South African citizenship is limited to cases where the loss has occurred before 1995. The procedure applicable to more recent cases will now

⁵⁵ Section 15(1)(a) of the South African Citizenship Act 44 of 1949 and s 6(1)(a) of the South African Citizenship Act 88 of 1995.

⁵⁶ Section 15(1A) of the South African Citizenship Act 44 of 1949.

⁵⁷ Section 26 (4) of the South African Citizenship Amendment Act 69 of 1997.

⁵⁸ *Supra*.

⁵⁹ Whereas to the law under the 1995 Act made the loss of citizenship automatic upon acquisition of a foreign citizenship, citizenship was deemed to have remained intact once an application for exemption had been made under the 1949 Act.

be discussed.

3.3.3 The right to permanent residence and the resumption application

A resumption application is very similar to the exemption application except that it can only be made after acquiring the foreign citizenship and thereby losing South African citizenship. All South African citizens who have lost their South African citizenship retain the right to permanent residence.

The discovery of this loss when applying for a passport (in cases occurring after 1995) and the remediation of the loss must now be discussed.

Once again the determination of status process needs to be followed.⁶⁰ Actually, this process is required for any application made through the Department of Home Affairs regarding South African citizenship. Where a South African has taken up foreign citizenship by way of a *voluntary and formal act* and not within one of the exclusions, this determination would state that the applicant's South African citizenship became forfeit on adopting the foreign citizenship, but without affecting the applicant's right to permanent residence; and further that if the applicant intends to return to South Africa permanently he or she would be entitled to apply for a resumption of South African citizenship.

This brings to the fore two separate processes. First: even if the now ex-South African citizen does not wish to return to South Africa permanently, he or she retains the right to permanent residence in South Africa and is entitled to an endorsement to that effect in his or her foreign passport. While this will not reinstate such person with all the entitlements of a South African citizen, such as obtaining a South African passport, identity document or being allowed to vote in general elections, permanent residence will entitle the holder to enter, exit, work and remain in South Africa for as long as it suits him or her. Such person would also be entitled to apply for a non-South African citizen's identity document. It is important to note here that this process relating to the inherent right to permanent residence was and is still also followed under the SA Citizenship Act of 1949. As regards the above

⁶⁰ This is contained in Home Affairs Application Form BI-529.

discussion of the exemption application, if an applicant who acquired foreign citizenship before 1995 were to apply for a determination of status the outcome would be similar to that described in this section on resumption, except that such person would need to follow the exemption route to regain citizenship.

In *Ex Parte Moseneke* 1979 (4) All SA 891 (T), the applicant was a South African citizen by birth but ceased to be such due to becoming a citizen of Bophuthatswana. Section 6(4) Status of Bophuthatswana Act 89 of 1977 provided that:

"No citizen of Bophuthatswana resident in the Republic at the commencement of this Act shall, except as regards citizenship, forfeit any existing rights, privileges or benefits by reason only of the other provisions of this Act."⁶¹

The application proceeded from admission of the applicant as an attorney. Section 4 of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934 required that to qualify for admission as an attorney the applicant had to be a South African citizen or be lawfully admitted to the Republic for permanent residence and be ordinarily resident in the Republic. The question the court faced was whether the applicant met the requirement of citizen or permanent residence. The applicant had taken up citizenship of Bophuthatswana according to the section of the Act as cited above, but did not thereby incur any loss of *rights, privileges or benefits* because he had been resident in South Africa when taking up the foreign citizenship. The court found that the applicant had indeed lost his South African citizenship by virtue of acquiring citizenship of Bophuthatswana but that he retained his right to permanent residence and was therefore still entitled to be admitted.

The second process is covered by section 13(3) of the SA Citizenship Act which provides for the application for resumption of South African citizenship.⁶² The main requirement here is that the applicant must have resumed, or must intend to resume, permanent residence in South Africa.⁶³ This application for resumption requires a disclosure of the foreign citizenship acquired and the specific dates on which the applicant left and returned to South Africa.⁶⁴ Proof of resumption or intention to resume permanent residence must be furnished to the Department of Home Affairs.

⁶¹ Section 6(4) of Act 89 of 1977.

⁶² This is contained in Home Affairs Application Form BI-175.

⁶³ Section 13(3)(a)(i) of the South African Citizenship Act 88 of 1995.

⁶⁴ This information is requested in Home Affairs Application Form BI-175.

One of the most awkward situations that arises in this instance is where South African citizens, whilst never having left nor intending to leave South Africa, acquire foreign passports without realizing that they first have to go through the retention process. The South African citizen in question applies for a passport renewal and, in good faith, fills in the passport form, indicating his or her new possession of a foreign passport. The passport application is refused and the applicant is advised that he or she is no longer a South African citizen regardless of the fact that he or she has never left South Africa. This applicant now has to go through exactly the same lengthy process mentioned above, which can take around four months at the very least to complete, and in the interim has to endure the status of being a foreigner in his or her own country. Once the resumption process is completed the applicant has to apply for a new identity document and passport and only then resumes his place in society as a South African citizen. The applicant is now entitled to hold dual nationality.

3.3.4 The issue of automatic loss

The main difference between the exemption brought forward under the Amendment Act of 1997 and the process for a resumption followed under the SA Citizenship Act is that the exemption under section 26(4) which stems from the former, specifically provides that once the exemption process is complete and successful the applicant:

"shall be deemed to have remained a South African citizen".⁶⁵

In this regard, the process does not result in automatic loss of citizenship by way of a *voluntary and formal act* performed to gain a foreign citizenship as in the case of section 6 of the SA Citizenship Act of 1995 which merely states that under the specific circumstances:

"a South African citizen shall cease to be a South African citizen".⁶⁶

The actual s 26(4) exemption issued by the Department of Home Affairs would thus typically state as follows:

⁶⁵ Section 26(4) of the South African Citizenship Amendment Act 69 of 1997.

⁶⁶ Section 6(1) of the South African Citizenship Act 88 of 1995.

"It is hereby certified that the person whose particulars appear below has been exempted in terms of s 26(4) of the South African Citizenship Act No. 88 of 1995 from the loss of his South African citizenship and is therefore deemed to have remained a South African citizen when he acquired their foreign citizenship on (date)."⁶⁷

In contrast the section 13 resumption issued by the Department of Home Affairs would typically state as follows:

"Whereas the requirements laid down in s 13 of the South African Citizenship Act 88 of 1995, for the granting of a Certificate of Resumption of South African citizenship, have been complied with, in pursuance of the powers conferred on the Minister of Home Affairs by the said Act, the Minister grants this resumption and declares that the applicant shall henceforth be a South African citizen."⁶⁸

Whereas under the Amendment Act the South African citizen is deemed to have remained a South African citizen from the date when the foreign citizenship was acquired, the SA Citizenship Act provides that a person who loses his or her South African citizenship as a result of acquiring a foreign citizenship only becomes a South African citizen again once he or she has gone through the necessary application to regain such citizenship. From date of acquisition of the foreign citizenship until restoration of the South African citizenship the person remains in the condition of a foreigner. This clearly illustrates the situation where automatic loss occurs.

Obviously both the above process and the process under section 13 of the 1995 Act are still relevant. Many South African citizens who obtained foreign citizenship before 1995 were unaware at the time of the process they and now, when they wish to return to South Africa, discover that they are no longer South African citizens. For these persons the exemption process is still applicable.

In terms of the 1949 Act, when dealing with exemptions, s 15(1 A)(b) was undoubtedly the most clear on the issue of loss of citizenship as it provided:

"Any person or category of persons to whom the Minister has granted an exemption ... shall not cease or be deemed not to have ceased to be a South African citizen".

This would be the ideal scenario to have in place today considering that loss of citizenship is not

⁶⁷ This is contained in Home Affairs Application Form Z28.

⁶⁸ This is contained in Home Affairs Application Form BI-237.

widely known to those affected.

3.4 Travelling on a foreign passport

A further complication that arises as a result of the South African Citizenship Amendment Act⁶⁹ is that section 2 of the Act provides for an insertion into the SA Citizenship Act of section 26B to read as follows:

"A major citizen who - (a) enters the Republic or departs from the Republic making use of the passport of another country ... is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months."

As a result, an applicant who has discovered that he is no longer a South African citizen and therefore has a valid foreign passport and an expired South African passport that cannot be renewed, is locked within the confines of South Africa in that he or she cannot leave South Africa without a South African passport, on the one hand, and on the other hand, if he or she travels on his or her foreign passport he or she will be fined or imprisoned as a result of the above provision.

This situation clearly needs to be addressed as a matter of urgency. If this is not done in good time applicant's travel plans will be considerably delayed, especially since the formalities involved take such a long time to process, at the end of which process those concerned still have to apply for a new identity document and passport.

3.5 A practical example

Obviously numerous difficulties arise from loss of citizenship when acquiring foreign citizenship by a *voluntary and formal act*. An illustrative example will bring the relevant processes into some perspective.

In the case concerned the question arose whether acquisition of a foreign citizenship by descent results in loss of South African citizenship. Advice gained directly from Head Office of the

⁶⁹ Section 2 of Act 17 of 2004.

Department of Home Affairs was that if a person who acquires foreign citizenship by virtue of descent has a child who acquires the same foreign citizenship, again by descent, then the latter does not lose his or her South African citizenship.⁷⁰ This was indeed advice on a specific matter.

In this case the applicant was a South African citizen by birth. The applicant has lived in South Africa since birth, but because the applicant's father acquired foreign citizenship by descent the applicant had the same entitlement as a result of citizenship by descent. The applicant did not apply for a retention beforehand. A few years after the applicant had acquired the foreign citizenship a determination of status was sought from the Department of Home Affairs. This determination of status specifically stated that the applicant was indeed a South African citizen by birth, which is consonant with the information obtained from Home Affairs as stated above. In actual fact this confuses the matter, given that South African citizenship can be lost by a *voluntary and formal act* because surely this applicant should have lost his South African citizenship as a result of the formal application made for foreign citizenship. Details were requested from the Department of Home Affairs and the above response was obtained, confirming that the applicant's South African citizenship had not been lost in the circumstances. The matter was left there – end of investigation.

Recently when the applicant went to apply for the renewal of his South African passport the situation got very confused. The applicant duly completed the passport application form, including the part reflecting the acquisition of foreign citizenship (cf. par 3.3 above). At this point he was advised by the Home Affairs official that he had in fact lost his South African citizenship when he acquired his foreign citizenship.

Obviously this process makes absolutely no sense and epitomises the evidence that even the Department of Home Affairs does not understand South African citizenship laws. The applicant in this instance, having lived in South African since birth, now had to apply for a resumption of his South African citizenship. As stated earlier in this chapter, the previous dispensation under the 1949 Act specifically provided that South African citizenship would only be lost if the person acquiring the

⁷⁰ Information obtained on 12 December 2007 from the Department of Home Affairs following my electronic enquiry.

foreign citizenship was abroad at the time of acquisition.⁷¹ The unfortunate situation described above would not have arisen if the 1949 provision had still been in place.

In actual fact, the original determination and advice given by the Department of Home Affairs was incorrect. The acquisition of the foreign citizenship by the applicant was a *voluntary and formal act* and the applicant should have been advised that he had lost his South African citizenship when he acquired his foreign citizenship.

Further to the above, the applicant also had to apply for a new identity document. The entire process took close to a year to complete and only then could the applicant resume his South African citizenship. In the meantime, of course, the applicant was not a South African citizen for a total period of about 4 years while the matter was being settled as explained.

The above example epitomizes the process that South African citizens are subjected to as a result of vague provisions and poor understanding of procedure, process and law where loss of citizenship by way of a *voluntary and formal act* is concerned. The situation does not necessarily all for legislative change, but there should be a better understanding on the part of the Department of Home Affairs and a standard set of operating procedures to deal with such matters.

3.6 Conclusion

This chapter has provided a detailed outline of the processes and procedures in place that are still relevant today in respect of retaining South African citizenship and resuming or being exempted from the loss thereof. What needs to be considered now is the constitutionality of the loss of South African citizenship and whether such forfeiture falls within the realm of a justifiable limitation under section 36 of the 1996 Constitution of the Republic of South Africa.

⁷¹ Section 15(l)(a) of the South African Citizenship Act 44 Of 1949.

CHAPTER 4: PROBING INTO THE CONSTITUTION: A JUSTIFIABLE LIMITATION OF RIGHTS

- 4.1 Introduction
 - 4.2 Are rights being infringed?
 - 4.3 The nature of the right
 - 4.4 The importance of the purpose of the limitation
 - 4.5 The nature and extent of the limitation
 - 4.6 The relation between the limitation and its purpose
 - 4.7 Less restrictive means to achieve the purpose
 - 4.8 Conclusion
-

4.1 Introduction

The specific instances of how and when South African citizenship can be lost have now been considered. The discussion began with reference to the Constitutional provision contained in section 20 which states that no citizen may be deprived of citizenship.⁷²

Obviously all rights in the Bill of Rights are subject to the limitations clause contained in section 36 of the Constitution. This section, to be considered below reads as follows:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law

⁷² Constitution of the Republic of South Africa 1996.

may limit any right entrenched in the Bill of Rights."

The factors applicable where a right, in terms of a law of general application, limits and thereby infringes a right contained in the Bill of Rights are spelled out in the above section. If the infringement is justified it will not be unconstitutional. This is the test we need to utilise to determine if there is an infringement of a constitutional right, and if so, whether such infringement is a justifiable limitation of the constitutional right.

We are certainly dealing with a law of general application in the situation at hand. More importantly, the law we are dealing with provides a rather wide discretion to the Minister of Home Affairs and her staff. Furthermore the law operates on a national level and is equally applicable to all South African citizens.⁷³

Determining a justifiable limitation of rights is a two-stage process. The first stage looks at establishing whether a right in the Bill of Rights has been infringed. The second stage looks at determining whether the limitation is justifiable in an open and democratic society. In order to satisfy this portion of the test "it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purposes of the law)".⁷⁴

4.2 Are rights being infringed?

The critical consideration here is that the Constitution determines that no citizen may be *deprived* of his or her citizenship. The specific aspect of citizenship under discussion here is *loss*, as opposed to *deprivation* of citizenship. A clearer distinction needs to be drawn in this chapter between the two concepts in order to properly determine the constitutionality of loss of citizenship.

The dictionary definition of "loss" is "the state of no longer having something or as much of something".⁷⁵ The dictionary definition of "deprivation" is "the fact of not having something that you

⁷³ Currie & de Waal (2005) 169.

⁷⁴ Currie & de Waal (2005) 176.

⁷⁵ AS Hornby (2000) *Oxford Advanced Learners Dictionary* (6th Edition) Oxford: University Press p 702.

need".⁷⁶ So the main difference between the two is in the words 'no longer having' as opposed to 'not having' or mere possession of something as opposed to something that you need. Deprivation most certainly entails something more than mere loss. In Klaaren's opinion: 'Loss' of citizenship is constitutionally acceptable. 'Deprivation' is not.⁷⁷ The researcher believes that this statement regarding loss can be challenged. Whilst loss of citizenship does seem to be an internationally accepted concept, the contention offered here is that the procedure by which the loss of citizenship currently takes place within the South African context is not constitutionally acceptable. It may be more appropriate to see this contention in the context of administrative rather than constitutional law. Nonetheless, citizenship is a constitutionally entrenched right, thus making a constitutional argument a critical element in the present discourse.

The Department of Home Affairs highlights the difference between *loss* and *deprivation* as follows: *Loss* occurs in the situation where “any person who renounced or automatically ceased to be a South African citizen when he/she acquired the citizenship of another country upon application”, whereas *deprivation* occurs, for instance, where a naturalized South African citizen obtained such naturalization “by means of fraud, false pretences or the concealment of a material fact or the certificate of naturalization was granted in conflict with the provisions of the Act/any prior law”.⁷⁸

Obviously a large influencing factor in this regard will always be the impact on society. Citizenship and loss thereof will always play a large role in any person's life. The present aim is not to question the judgement of the legislators who drew up the Citizenship Act; rather the object is to seriously consider whether and how the rights of South African citizens are affected by the process currently utilised in terms of this Act, and to determine accordingly whether the measures involved in the process can be seen as a limitation of the Constitution.

Various aspects of the social impact of loss of citizenship were dealt with in the preceding chapter. Loss of citizenship as a result of acquiring a foreign citizenship by way of a *voluntary and formal act* has severe consequences for society, especially because the public are unaware of this contingency.

⁷⁶ AS Hornby (2000) *Oxford Advanced Learners Dictionary* (6th Edition) Oxford: University Press p 313.

⁷⁷ Klaaren in *Constitutional Law of South Africa* V 4 (2009) p 60-12.

⁷⁸ This distinction drawn was obtained from a Question and Answer session with RL Krüger from Head Office of the Department of Home Affairs: Citizenship Section.

The consequences are as follows:

- The affected person is no longer a South African citizen and only holds citizenship of the relevant foreign country.
- The affected person retains a right to permanent residence in South Africa but only physically obtains such permanent residence when a formal application is made to the Department of Home Affairs. It is important to remember that South African citizenship can only be resumed where the individual is living in South Africa and that obtaining permanent residence is the only option available to the person if he or she is living abroad.
- Since the affected person is no longer a South African citizen he or she is no longer entitled to a South African identity document or a South African passport. As a permanent resident the person is only entitled to apply for and hold a non-South African citizen's identity document, which will be issued with a new identity number (ie. identity number of a non-South African citizen).
- Although the affected person has actually never left South Africa and merely managed to obtain foreign citizenship by descent, the person now needs to go through the lengthy process of a resumption or exemption application (see previous chapter) in order to resume South African citizenship and now also needs to obtain a new South African identity document and passport, a lengthy process that could take some months to finalise.
- Since the affected person is no longer a South African citizen he or she may no longer vote in general elections although he or she may permanent residence.
- Where the affected person has lost his or her South African citizenship and has a child while in that condition, the effect on the child is that at the time of his or her birth the parent/s does/do not have South African citizenship and the child therefore has no claim to South African citizenship since citizenship by birth is contingent upon being born in/outside South Africa

while the parent/s does/do have South African citizenship.⁷⁹

- Arguably the worst consequence is that during the period of the affected person's loss of his or her South African citizenship, when the person is living in South Africa but has not yet resumed such citizenship or obtained permanent residence, he or she no longer has legal status in South Africa.

In light of the difference between loss and deprivation indicates above, no longer having and not having, it seems that both conditions apply in the context under review. Although the issue we are considering is termed loss of citizenship, the person concerned effectively no longer has, and also does not have South African citizenship, an identity document, a South African passport, the right to vote, or possibly even the right to be in South Africa, thus indicating something more than loss.

There seems to be a fine line between loss and deprivation, given what is at stake for the person concerned. In the researcher's view the argument presented above is sufficient to conclude that section 6(1) of the SA Citizenship Act does infringe on section 20 of the 1996 Constitution of the Republic of South Africa.

In an investigation in order to determine whether the factors contained in section 36 of the Constitution constitute a justifiable limitation of the right not to be deprived of citizenship it is necessary to consider each factor from all angles in order to determine if the loss of South African citizenship is a justifiable limitation of s 20 of the Constitution.

4.3 The Nature of the Right

The right not to be deprived of citizenship is obviously important. Conversely, this section of the Constitution affirms every South African's entitlement to South African citizenship. It is important to note here that this is one of the rights in the Bill of Rights that has been specifically listed to be applicable only to South Africans.⁸⁰ However, it is not only a right in South African law but a universal right throughout the world. The Universal Declaration of Human Rights, which specifically states in its preamble that it is a "common standard of achievement for all peoples and all nations",

⁷⁹ Section 2 of the South African Citizenship Act 88 of 1995, as amended.

⁸⁰ Van Zyl and others v Government of RSA and others (2005) 4 All SA 96 (T) at para 23.

proclaims that "everyone has a right to a nationality".⁸¹ It further proclaims that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".⁸² Furthermore, exactly the same principles are enunciated in the European Convention on Nationality.⁸³ A consensus seems to be in place in respect of the importance of the right to citizenship worldwide.

In *Van Zyl and others v Government of RSA and others*⁸⁴ it was stated that "in a world consisting of nation states, citizenship (or nationality) creates a legal link between a state and the people who are its nationals".⁸⁵ This epitomises the importance and the nature of the right to citizenship. It is a fundamental right in any and every society.

As noted, the Constitution of South Africa enshrines the right to citizenship in the Bill of Rights,⁸⁶ and it is also specifically mentioned in the founding provisions. Section 3 of the Constitution proclaims that "there is a common South African citizenship"⁸⁷ and that "National legislation must provide for the acquisition, loss and restoration of citizenship".⁸⁸ The Bill of Rights and the founding provision are in conflict here. One says you cannot be deprived and the other that provision needs to be made for loss.

In the European Convention on Nationality one of the reasons for allowing the loss of citizenship is the voluntary acquisition of another citizenship.⁸⁹ So it would seem that, in general, all countries in the world would have to provide their citizens with a right to citizenship, and at the same time most countries in the world have a process in respect of loss of citizenship. Like the right to freedom or equality though, the right to a citizenship is inviolable.

Whilst the above holds true one cannot necessarily compare the right to citizenship to the right to life or the right to freedom. This factor in determining a justifiable limitation of a constitutional right needs consideration of the weight of the right to citizenship. The greater weight the right carries the

⁸¹ Article 15(1).

⁸² Article 15(2).

⁸³ Article 4 of the European Convention on Nationality Strasbourg, 6.XI.1997.

⁸⁴ (2005) 4 All SA 96 (T).

⁸⁵ *Van Zyl and others v Government of RSA and others* (2005) 4 All SA 96 (T) at para 23.

⁸⁶ Section 20 of the Constitution of the Republic of South Africa 1996.

⁸⁷ Section 3(1).

⁸⁸ Section 3(3).

⁸⁹ Article 7(1)(a).

less likely it will be that the limitation will be easily justified. The right to citizenship tends to be a right that is assumed as a steady presence in the background and does not command much prominence in the Bill of Rights, nor in case law, which may be indicative of its lesser importance compared to the other rights contained in the Bill of Rights.

Nonetheless, the question remains: can this right be justifiably limited?

4.4 The Importance of the Purpose of the Limitation

It seems unlikely to the researcher that obtaining a foreign citizenship can be a good reason for loss of citizenship. It is understandable that a person should not be allowed to take up citizenship as, where and when he or she pleases. Legal limits to obtaining citizenship are regulated by relevant legislation. But there seems to be no logical reason why a state would not want a citizen to retain his or her citizenship if that citizen acquires a foreign citizenship by regular means. The right to citizenship is applicable to all South African citizens, including those who may no longer be South African citizens according to the Citizenship Act, hence there should certainly be a reasonable purpose for the limitation of such right. As explained in the previous chapter, there are processes in place to retain or regain citizenship in order to prevent loss of citizenship, but the question remains: Is there a purpose to the limitation?

As noted earlier, this is a standard process that is followed worldwide, but as will be seen in the chapter on Comparative Law, the procedures and processes and way of handling such cases differ dramatically from those followed in South Africa.

Currie and De Waal have stated that "[j]ustifiability requires th[e] purpose to be one that is worthwhile and important in a constitutional democracy".⁹⁰ It seems incredible that any country would need to limit the number of citizens that it has by putting a law in place to ensure they lose their citizenship if they acquire another. For some reason this is the standard practice, but the purpose of the limitation remains elusive.

⁹⁰ Currie & De Waal (2005) 179.

4.5 The Nature and Extent of the Limitation

The limitation has far reaching implications. First there is the automatic loss of the basic entitlement to citizenship. The purpose of this part of the proportionality test is to ensure that the infringement dealt with should not do more damage than is necessary to achieve the purpose of the limitation.⁹¹ A person is born with a certain citizenship and should be able to retain that citizenship for the duration of a lifetime. A reason that is listed in the 1995 Citizenship Act that is understandable in respect of loss of citizenship is where a South African joins the armed forces of a foreign country of which he or she has citizenship at a time when that country is at war with South Africa.⁹²

Under the SA Citizenship Act of 1995 the limitation of the right not to be deprived of citizenship results automatic loss of citizenship that in turn results in numerous unfair and unlawful processes in terms of South African Administrative law concerning the process followed to be informed of such loss. This contingency will be discussed further elsewhere in this text.

The crux of the matter in this instance is the extent of the infringement and whether it can be rectified. Viewed in this light, although the extent of the limitation of the right to citizenship is indeed far-reaching, it is a process that can be rectified. Whilst the limiting statute makes provision for loss we have to remember it also makes provision for retention to avoid such loss and for resumption and exemption to rectify the loss. Thus, although the harm is far-reaching, it is remediable. This does create a balancing of interests, albeit by extraordinarily painful means.

4.6 The relation between the limitation and its purpose

If a reasonable purpose for the remediable limitation has yet to be found it would be futile to try and describe the relation between the limitation and its purpose. Assuming that the purpose is to limit the number of citizenships that citizens can obtain, it appears that the limitation is not meeting its purpose because the limitation, though real enough, does not remove the applicants' rights and it is remediable in any case – at greater cost for some than others. The unlucky few who are no longer living in South Africa when the loss of citizenship comes to their knowledge have to face the fact that

⁹¹ Currie & De Waal (2005) 181.

⁹² Section 6(1)(b) of Act 88 of 1995.

their loss is irredeemable unless they return to South Africa permanently. So the situation is dependent upon the facts.

Although the law achieves its set purpose of imposing a justifiable limitation on a constitutional right to citizenship there is no recognisable advantage to this provision. A limitation has to serve a purpose that benefits society, but there is none in this instance. So we have a law that limits a constitutionally entrenched right, that serves the purpose for which it was created, but that has no logical reasoning behind it.

4.7 Less restrictive means to achieve the purpose

It seems justifiable in the absence of a logical reason for the limitation to consider the option of less restrictive means to achieve it. In South African citizenship law there are much better ways to achieve the same purpose if South African citizenship must be limited. These contentions will be discussed fully later in this text. Just to name one though, it would be helpful to notify prospective applicants for foreign citizenship of their rights.

Possibly the most important way that the purpose could be achieved less restrictively would be to remove the automatic contingent loss of citizenship by reverting to the arrangement prevailing under the SA Citizenship Act of 1949. This would be effectively conducive to better compliance with the Constitution in that actual loss would be eliminated. Although the relevant procedures would still need to be followed to resume or retain South African citizenship, once these procedures were followed the applicant would resume his or her South African citizenship, thereby sealing the rift in his or her citizenship as if it had never been lost. This means of avoiding loss does not exist under the current the SA Citizenship Act. South African citizenship lost after 1995 can only be regained by applying for it and therefore enduring the condition of not being a South African citizen for the period from the acquisition of the foreign citizenship until local citizenship is regained. This period in limbo, so to speak, remains a gap in the record of the affected person's South African citizenship. The proposed removal of automatic loss would take away the additional requirements of having to apply for a new identity document and a new passport, which would otherwise become effective after acquiring the foreign citizenship and losing South African citizenship, thus necessitating

the issuance of new identification documents when South African citizenship is eventually regained.

4.8 Conclusion

To sum up then: the outstanding questions that need to be answered are : Is it a justifiable limitation if it is a worldwide practice? Is it a justifiable limitation if there is a less restrictive way to go about it? Is it a justifiable limitation if the law is in place already? Is it safe to assume these tests have already been passed? One would have to say yes but it begs for some logical explanation that does not seem to be provided anywhere.

Is it that the State believes that the citizen is no longer worthy of citizenship if he or she wishes to acquire foreign citizenship? Does the State believe that applicants for foreign citizenship are willing to trade their South African citizenship for another and are therefore willing to lose the right to be a South African? Obviously, there are procedures that can be followed to regain citizenship but is it possible that this is the State's way of punishing applicants for foreign citizenship for being "disloyal"? Is the State worried that the citizen might take advantage and hold three or four or five passports and gain too many advantages out of that? The problem with this last rationale is that limited reasons for acquiring foreign citizenship would naturally impose limits on the number of citizenships that can be acquired. The average person may acquire the entitlement to two citizenships in the course of a lifetime, given the implications, such as limitations imposed by other countries on acquisitions of citizenship. No rationale seems to come closer to accounting for the official position on the matter at issue.

As mentioned above, the fact that section 3(3) of the Constitution of South Africa 1996 makes provision specifically for the acquisition, loss and restoration of citizenship begs the legitimisation of the citizenship and its limitation in terms of section 20 of the Constitution. If the founding provisions specifically require the creation of legislation that limits a right in the Bill of Rights then perhaps there is no need for a legitimate purpose for the limitation. Perhaps this is sufficient reason in itself.

Currie and De Waal state that "[t]he conferment of discretionary power to deprive a person of a fundamental right like citizenship, without laying down any guidelines or even statutory objectives, will be difficult to justify under the limitation clause".⁹³

⁹³ Currie & De Waal (2005) 472.

CHAPTER 5: AN ANALYSIS OF SOUTH AFRICAN ADMINISTRATIVE LAW

- 5.1 Falling within the realm of administrative action
 - 5.2 Procedural fairness
 - 5.3 The right to written reasons
 - 5.4 Reasonableness - vagueness or uncertainty
 - 5.5 Conclusion
-

It is important in any legal research, specifically where decision-making is taking place at government level, to also include a discussion of an investigation into administrative law. This chapter will contain just such an investigation into determining the lawfulness, procedural fairness and reasonableness of the loss of citizenship.

Section 33 of the Constitution of the Republic of South Africa 1996 provides for the right to just administrative action. The constitutional requirement for just administrative action is utilised in situations where the relevant action does not fall within the application of the Promotion of Administrative Justice Act (PAJA).⁹⁴ It is thus important to first determine whether the relevant action will fall under the PAJA or not.

First and foremost it will be necessary to determine whether the action taken to cause the loss of a person's South African citizenship when the person acquires a foreign citizenship by way of a *voluntary and formal act* is an administrative action.

5.1 Falling within the realm of administrative action

Section 1(i) of the PAJA provides a definition in broad terms of administrative action is:

"a decision or proposed decision of an administrative nature made in terms of an empowering provision that is not specifically excluded by PAJA, made by an organ of state or a private person exercising public power or performing a public function, that adversely affects rights and has a direct external legal effect".

This definition raises a number of issues that need to be decided in order to determine whether the action concerned is administrative.

⁹⁴ Act 3 of 2000.

If the Department of Home Affairs informs a person in writing of the loss of his or her South African citizenship it seems natural to conclude that loss proceeded from a decision. Often certain statutory provisions are not regarded as an opportunity to exercise administrative discretion, but rather as a set of rules that have to be applied to come to a conclusion. No choice or discretion is expected of the administrator. Decision-making, that is, administrative action, is therefore deemed to be excluded from the administrator's task.⁹⁵ Due to the fact that the Department of Home Affairs is empowered to remove a South African citizen of their South African citizenship the removal does seem to presuppose a decision as a prerequisite for the removal.

The argument could be proffered that a removal of citizenship requires no discretion and therefore no decision from the Department, which means that it is not subject to administrative action. At first glance the argument seems to be validated by section 6(1) of the SA Citizenship Act. However, if we consider the problems with this section of the Act as discussed in previous chapters, it becomes obvious that the situation is not clear-cut. Most importantly, the crux of the matter lies with reference to a *voluntary and formal act* on which the loss of South African citizenship hinges although nothing is said in the Act about the purport of the phrase, thus raising the question whether such a *voluntary and formal act* involves discretion on the part of the administrator. The unspecified purport of the phrase suggests that the administrator must apply his mind to every case in order to determine whether the act referred to has taken place, and therefore that the administrator has to take a decision in each case, which has to be administrative to the exclusion of executive, legislative and judicial aspects.⁹⁶ The critical element in action taken by a state department (executive action) is the nature of the action and not the person who takes it.⁹⁷ Loss of citizenship occurs at the discretion of the Minister of the Department of Home Affairs which forms part of the executive, but nevertheless, as indicated, the critical element is the action rather than the person taking it. In any event, the decision needs to be made by an organ of state which certainly is the case. The required empowering provision enabling the decision maker to authorize loss of citizenship has been dealt with. In order for a decision to be administrative it needs to adversely affect rights by way of a direct external legal

⁹⁵ *Phenithi v Minister of Education and Others* 2006 (11) BCLR 1314 (SCA).

⁹⁶ Section I (i)(b)(aa) - (dd) of Act 3 of 2000.

⁹⁷ Moran, G. 2009. *Promotion of Administrative Justice Act - Legal Advisors Guide*. Pretoria, South Africa: Law Society of South Africa and Legal Education and Development at 18.

effect that imposes a burden or has a negative effect on all South African citizens' right to citizenship, and the loss of citizenship as well as how it occurs, in particular, are a burden with a negative impact in that the affected person has to go through the cumbersome process and inconvenience required to regain his or her citizenship.

The administrative nature of the action involved in the loss of South African citizenship seems inarguable in light of the above. The next step would therefore be to proceed with the investigation in terms of the PAJA as to whether the action involved in loss of citizenship is lawful, procedurally fair and reasonable.

5.2 Procedural fairness

The concept of procedural fairness as enunciated prescriptively in the Constitution and the PAJA proceeds from prior founding principles of common law such as *audi alteram partem* and *nemo iudex in sua causa*.⁹⁸

Section 3(1) of the PAJA requires that:

"[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair".

Obviously the specific circumstances involved will depend on the facts of each case.⁹⁹ In light of the quoted section 3(1) of the PAJA a determination is required as to whether the relevant action materially and adversely affects the individual. The discussions above point conclusively to an affirmative answer. The right to citizenship is constitutionally entrenched in the Bill of Rights and forms the basis of one's identity.

The next question is whether the action was performed in a procedurally fair manner. Section 3(2)(b) of the PAJA in fact prescribes the process to follow to ensure that administrative action is

⁹⁸ Moran, G (2009) 44.

⁹⁹ Section 3(2)(a) of Act 3 of 2000.

procedurally fair. In essence the process entails two notices to the affected person,¹⁰⁰ the first to advise the person of the intended action, and the second to inform the person that a decision has been taken. Moran states:

"The idea that a person must be given an opportunity to make representations (either orally or in writing) before any decision is taken that could adversely affect them is integral to procedural fairness and was part of the '*audi alteram*' principle."¹⁰¹

Moran draws a distinction between someone who already has something that can be taken away and someone who applies to gain possession of something. He states further that in a situation of the first category, which is pertinent for the present discussion of persons who lose the citizenship that they have already have and must therefore be fortified of a coming decision to that effect.¹⁰² However, the second category is also at issue in that people are applying for a foreign citizenship of their own free will and run the attendant risk of losing their citizenship as a result of such voluntary action. It is in cases like this where we can better understand the words *some voluntary and formal act*. The act is referring to the actual application. However, the problem here is that very few foreign citizenships are conferred automatically at the present juncture. Even the exclusion of marriage is hardly applicable any more since it still involves an application regarded as a *voluntary and formal act*.

The discussion so far of how the loss of South African citizenship is handled shows that the process clearly runs counter to the principles of procedural fairness, first in that the loss of citizenship is automatic, and second in that the affected person is not notified in advance of the impending decision that will cause the loss. The problem here is that there is no procedure in place to ensure that the Department of Home Affairs is aware that a particular South African citizen has acquired or is about to acquire a foreign citizenship.¹⁰³ This fact only comes to the Department's notice when the person concerned applies for a new South African passport or for a determination of status, at which point, as noted, the automatic loss of citizenship has already occurred and the Department

¹⁰⁰ Moran, G (2009) 51.

¹⁰¹ *Supra*.

¹⁰² *Supra*.

¹⁰³ The fact that such a system would not be possible to put in place was confirmed by the Department of Home Affairs in a Question and Answer session with RL Krüger from Head Office of the Department of Home Affairs: Citizenship Section.

can only let the affected person know at that late stage that the decision was made and the loss of South African citizenship incurred at the date when the foreign citizenship was acquired.

Procedural fairness is thus precluded by the absence of a timely first notice. It seems advisable in this regard to send out a timely first notice to enable the affected person to make appropriate representation towards forestalling a loss of citizenship and the attendant cumbersome inconvenience of reinstatement. The irregularities attending confirmation of a loss of citizenship as noted in Chapter 3 are a good reason for this suggestion. There are certain exclusions, which are not defined in their process, which provide for where citizenship will not be lost but these do not seem to affect the actual loss of citizenship and can only be dealt with by issuing an appropriate directive to ensure procedural fairness by enabling the affected person to make representations to the Department of Home Affairs.

The further problem in respect of the notice issued by the Department of Home Affairs is the timing of the decision. The loss of South African citizenship effectively coincides with the acquisition of foreign citizenship, but the Department of Home Affairs only issues notice to that effect when the person concerned applies for a Determination of Status, or in some instances, when the person applies for renewal of his or her South African passport (having indicated acquisition of a foreign citizenship on the renewal form). The question here is whether the decision is taken at the time of acquisition of the foreign citizenship or when advice of the loss of the citizenship is issued. Several years may elapse between the former and latter. The date on which South African citizenship was lost is reflected in the Determination of Status as that on which foreign citizenship was acquired.¹⁰⁴ This is certainly a unique situation. The most logical position would be to assume that the decision is taken when the notice of loss of citizenship is issued by the Department of Home Affairs, but that the notice has retrospective effect and for practical purposes applies from the date of acquisition of the foreign citizenship.

The worst consequence of the handling of loss of citizenship as a result of obtaining foreign citizenship pertains to the "permission" letters issued under section 9(2), which has been repealed. In this case the Department would have had on record lists of all the persons in possession of such

¹⁰⁴ This is contained in the Home Affairs Form BI-1155.

letters allowing them to hold dual nationality, but when the section was repealed these persons were not advised accordingly. A procedurally fair alternative would have been to issue written notification in advance to inform them that these letters would be discontinued as a defunct practice and that holders of such letters would have to follow the appropriate procedure to retain or regain their South African citizenship within the period of grace allowed for the purpose, failing which they would be notified in a second notice of the automatic loss of their South African citizenship. No such remedy was devised or followed, however.

What is required of the second notice is a clear statement of what was decided, notice of the person's right to appeal or review and notice of the right to request written reasons.¹⁰⁵ In essence the first and last requirements are for the loss of local citizenship complied with though not entirely because no reason beyond acquisition of foreign citizenship, is given in the document reflecting the determination of status. Furthermore, besides the lack of specific reasons, no provision is made for review or appeal.

Departure from the above process is allowed in terms of section 3(4) of the PAJA which provides for reasonable and justifiable departures, and in terms of section 3(5) which provides for fair but different procedures. It seems unlikely that these provisions cover the matter at hand, given the nature of the right involved and the wording of the SA Citizenship Act.

The evidence above points to an inevitable conclusion that the handling of loss of citizenship by the Department of Home Affairs is procedurally unfair.

5.3 The right to written reasons

The right to request written reasons is contained in section 5 of the PAJA. This section requires that persons whose rights have been materially and adversely affected by administrative action have the right to request that acceptable reasons for such action be provided in the event of organizational failure to do so.

In the situation under review a formal decision is indicated by the fact that a Determination of Status has been issued to give notice of the loss of South African citizenship as a result of acquiring a

¹⁰⁵ Moran, G (2009) 56.

foreign citizenship on a particular date. The reason for the loss is therefore given as required.

Moran observes in this regard that if administrators have to provide reasons for their administrative actions they would have to consider applications properly and give proper reasons for refusals, thus ensuring fair procedure is followed.¹⁰⁶

A problem presented by the SA Citizenship Act is that it confers significant discretionary powers on the Minister of Home Affairs without laying down guidelines for the exercise of such discretionary power, which is naturally open to abuse. Some of the relevant discretionary provisions, specifically those relating to loss of citizenship, have been described as possibly overbroad and unconstitutional.¹⁰⁷

Distinct from section 33 of the Constitution, which requires written reasons where rights are adversely affected, section 5 of the PAJA requires written reasons where rights are materially and adversely affected. Obviously the PAJA requires such reasons in light of the material and adverse effect on the rights of a person as a result of a decision whereby the person incurs the loss of his or her citizenship (see consequences discussed earlier).

The fact that a reason is given for the loss of citizenship, as indicated above opens the question whether the reason is adequate. The Act does not indicate what is meant by adequate but it is reasonable to assume that an adequate reason must give a satisfactory explanation for the decision.

Woodward J set out the requirement most appropriately as follows:

"A decision maker must explain their decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me, I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging'."¹⁰⁸

Obviously the circumstances of the case and the reasons already provided will be the determining factor, and adequacy of reasons will have to be decided individually.

In a perfect world where legislation is never unambiguous and standard procedures cover every imaginable situation there would be no reason to doubt the adequacy of reasons given in the

¹⁰⁶ Moran, G(2009) 75.

¹⁰⁷ Currie & de Waal (2005) 471.

¹⁰⁸ Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 48 ALR 500 at para 50.

determination of status for the loss of a person's citizenship, but in South Africa the SA Citizenship Act is by no means clear on this matter. Moreover, considerable uncertainty in law is caused by the lack of standard operating procedures or guidelines to which the Department of Home Affairs should adhere in dealing with this matter. As a result of this situation more detailed reasons need to be given than merely advising that citizenship has been lost due to the acquisition of foreign citizenship. If such additional reasoning was available, or if there was some sort of standard operating procedures which defined when citizenship would be lost, was available this would nullify the need for further reasoning. The lack of clarity in the legal position and the lack of standardized operating procedures clearly need to be addressed.

5.4 Reasonableness - vagueness or uncertainty

In determining whether the decision to deprive a person of his or her South African citizenship would stand in Court the main possible grounds and defences of judicial review that would be applicable have already been considered. Another ground for review in administrative law that might be applicable is that of vagueness or uncertainty. On this point Hoexter is of the opinion that:

"Here the unreasonableness emerges from the failure of the legislation to guide the public effectively; its failure to inform citizens of what they must and must not do. The requirement is one of reasonable rather than perfect lucidity."¹⁰⁹

Elaboration is required in light of the above statement. The SA Citizenship Act is in place to offer guidance on matters of citizenship. The preamble to the Act states that its purpose is to "provide for the acquisition, loss and resumption of South African citizenship..." The problem in the context under review lies with the interpretation of the pertinent legal provisions in terms of the practical processes and procedures involved in the loss of citizenship. The actual words *some voluntary and formal act* are certainly not clear and unambiguous. Their meaning is not specified in the Act, with the result that they can be interpreted almost at will by administrators who, as indicated in chapter 3, are often more confused than the public and tend to give conflicting advice, thus causing further uncertainty.

¹⁰⁹ Hoexter, C (2007) 298.

The first step towards eliminating the confusion and uncertainty about loss of citizenship would be to clarify the SA Citizenship Act by making explicit provision for specific instances of loss of citizenship or even by indicating specifically what is meant by a *voluntary and formal act*. This step alone would greatly relieve the predicament of administrators and the public at large, even though the fundamentally flawed procedures would be left largely intact. Relief would come from better understanding by all concerned, since everybody would have recourse to the same clear text.

5.5 Conclusion

It seems justifiable to conclude that the administrative process involved in loss of citizenship cases would not stand well before a court of law if it were to be challenged on legal grounds. As indicated in exhaustive discussion above, the process could be challenged on deficiencies in the categories of procedural fairness, the right to reasons and vagueness or uncertainty, which amounts to deficient reasonableness. In light of the established grounds, therefore it is recommended that procedures actually be instituted with a view to offering relief to the many people who are adversely affected by loss of citizenship issues.

Before a court could rule on this kind of issue, though, it would have to order the Department of Home Affairs to sort out its endemic organizational disarray of which there seems to be little prospect for the foreseeable future. The most helpful measure that can probably be held in prospect for the moment would be to enlist the court's assistance to clarify the legal context in which matters involving loss of citizenship are administered.

CHAPTER 6: SPYING ON OTHER COUNTRIES

- 6.1 The United Kingdom
 - 6.2 Germany
 - 6.3 United States of America
 - 6.4 Zimbabwe
 - 6.5 A Comparison
-

South African citizenship law should be compared with its counterparts in other countries, given the international aspect of citizenship issues (eg. gaining or losing citizenship and dual citizenship). The comparative survey offered here of citizenship regulation in a variety of countries is intended to contextualise South Africa internationally with particular reference to the United Kingdom, Germany, the United States of America and Zimbabwe, all of which tend to assume exceptional prominence in matters of changing dualising of citizenship. Each country will be discussed separately first with particular reference to its regulation of citizenship before proceeding to a detailed comparison. Given the similarity across the board in the process of acquiring citizenship focus will be on the opposite process of the loss of citizenship.

6.1 The United Kingdom

The United Kingdom is probably the most lenient country in allowing its citizens to acquire as many foreign citizenships as they desire. Loss of citizenship is not even mentioned in the law of this country.¹¹⁰ The original confirmation of the fact that the United Kingdom did not consider loss of citizenship to be of any importance is evident from the British Nationality Act, 1948 which came into operation on 1 January 1949. No provision was made for loss of citizenship as a result of acquiring obtained a foreign citizenship. There are also no restrictions under the British law as to obtaining foreign citizenship. At the same time, there is no requirement that a foreign citizenship has to be

¹¹⁰ British Nationality Act, 1948 and 1981.

relinquished to become a British citizen.¹¹¹

What the British law does make provision for in this regard is renunciation, deprivation and resumption. It is important for the present purpose to consider these provisions. Renunciation of citizenship is an entitlement that any citizen in any country in the world has and the United Kingdom is no exception.¹¹² In British law a renunciation of citizenship will only be refused if it results in statelessness.¹¹³

Deprivation of citizenship is the prerogative of the Secretary of State, provided that "he is satisfied that it is not conducive to the public good that that person should continue to be a Citizen of the United Kingdom and Colonies".¹¹⁴ A similar provision is contained in South African law under the 1995 Citizenship Act.¹¹⁵

Finally, in respect of resumption, provision is made in terms of s 13 of the 1981 Act, for a British citizen to resume British citizenship at any stage after renouncing it as mentioned above. One of the specific requirements listed in this regard is that the renunciation must have been for purposes of acquiring a foreign citizenship or nationality. The option of resumption may only be utilised once. For example, a British citizen who wishes to acquire a foreign citizenship but is required him to renounce his or her British citizenship to do so is allowed to renounce and later resume his or her British citizenship, but this process cannot be repeated.

On balance British citizenship law seems to be grounded in the liberal principle that British citizenship is not affected by the foreign citizenships acquired and held by British citizens except in the unlikely

¹¹¹ This fact is obviously implied since no provision is made in any of the Nationality Acts for having to give up your foreign citizenship upon acquiring British citizenship.

¹¹² Section 12(1) of the British Nationality Act, 1981.

¹¹³ Section 12(3) of the British Nationality Act, 1981 which sets out that if on date of application for renunciation, if the applicant is not already in possession of a foreign citizenship, or does not acquire a foreign citizenship, then such application for renunciation is ignored and the applicant is deemed to have remained a British citizen.

¹¹⁴ Section 20(5) of the British Nationality Act, 1948.

¹¹⁵ Section 8(2)(b) of the South African Citizenship Act 88 of 1995.

event where they renounce their British citizenship twice. Only then would they have difficulty in regaining their citizenship.

The situation in Germany will now be considered.

6.2 Germany

Germany is on the opposite side of the spectrum. Compared to the United Kingdom in that, in principle, dual citizenship is not recognized there and loss of citizenship is dealt with extensively under no less than six categories which definitely include acquisition of foreign citizenship (cf. German Nationality Act).^{116 117}

First, the German Nationality Act provides for loss of citizenship by release, for which German citizens can apply if they can prove that they have applied for a foreign citizenship and that the authority petitioned for such citizenship will accede to the request.¹¹⁸ The Act also provides for release from German citizenship where a child has been entrusted into the custody or guardianship of a foreign citizen.¹¹⁹ A release of this nature needs the approval of the German guardianship Court. Where German citizenship differs quite radically is on the issue of refusal of release from citizenship. Certain categories of persons are not allowed to be released from their German citizenship, including civil servants, members of the federal armed forces and other persons employed in a service or official capacity under public law.¹²⁰ Their German citizenship is inalienable for the duration of their term of official service; and in any event, an application to be released from citizenship is deemed invalid if it will leave the applicant stateless.¹²¹

¹¹⁶ Also known as Staatsangehörigkeitsgesetz, StAG.

¹¹⁷ Section 25 of the German Nationality Act.

¹¹⁸ Section 18 of the German Nationality Act.

¹¹⁹ Section 19 of the German Nationality Act.

¹²⁰ Section 22 of the German Nationality Act - this section also refers to persons who are liable for military service not being allowed to renounce their German citizenship.

¹²¹ Section 24 of the German Nationality Act -here the citizen is provided with one year from date of request for release to obtain the relevant foreign citizenship or else the release will be deemed to have been null and

Apart from this, in German law renunciation is treated as separate from release although the difference is not specified.¹²² Logically, however, it follows that renunciation implies a more drastic measure than release. The Act merely states that a renunciation may be granted to a person with several nationalities, which is an unlikely situation, given the difficulty of obtaining even a single foreign citizenship.

In respect of loss of citizenship as a result of acquiring a foreign citizenship: although German law does not recognise dual citizenship, it does provide for a form of retention of citizenship.¹²³ Applying for a foreign citizenship, whether in person or through a representative, is tantamount to losing German citizenship, unless prior assurance is gained in writing from the German authorities that the applicant will be exempt from the statutory forfeiture. Exemption depends on the weighing of public and private interests. "With regard to an applicant who is ordinarily resident abroad, special consideration shall be accorded to the question of whether he or she is able to furnish credible evidence of continuing ties with Germany."¹²⁴

The difficulty of proving entitlement to retain German citizenship on acceding to a foreign citizenship is evident since continuing ties with Germany would not be readily demonstrable, apart from having family in Germany, for example. Germany is clearly an example of an extremely strict citizenship regime, quite the opposite of Britain.

A more balance regime will not be considered.

6.3 United States of America

The United States occupies the middle ground between strict and liberal in its citizenship regime.

void.

¹²² Section 26 of the German Nationality Act.

¹²³ Section 25 of the German Nationality Act.

¹²⁴ Section 25(2) of the German Nationality Act.

Section 349 of the United States Immigration and Nationality Act¹²⁵ specifies the instances where US citizenship may be lost. This section originally identified the following instances: becoming a naturalised citizen of another country, or declaring allegiance to another country on reaching the age of 18; serving in the military of another country that is engaged in hostilities with the US; working for a foreign government; after a formal renunciation of citizenship; and committing treason against, or attempting or conspiring to overthrow the US government.

What is interesting here, is the specific mention of the last instance of loss of citizenship. Whilst most other countries merely mention that citizenship will be lost if it is in the public interest to do so,¹²⁶ the Americans give specific content to the category of public interest that shows special emphasis on allegiance to the American state.

It is also interesting to note the wording of the first instance of loss of citizenship which makes loss of US citizenship contingent on naturalisation as a citizen of a foreign country. This precondition for loss of citizenship obviously places it in a category that excludes loss of citizenship by other means. For instance, a person who is born as a dual national will have no problem in retaining both nationalities.

Recent US law on loss of citizenship has added the requirement that loss of citizenship has to be contingent on showing that the person in question intended to give up his or her citizenship when he or she voluntarily performed one of the relevant acts already listed.¹²⁷ Before the relevant case law eventuated the performance of any of the above actions automatically resulted in the loss of US citizenship.

In addition the US law takes the loss of citizenship issue one step further by providing that when loss

¹²⁵ Immigration and Nationality Act -TITLE 8, CHAPTER 12, SUBCHAPTER III, Part 111, § 1481 of the United States Code.

¹²⁶ As per the SA Citizenship Act 88 of 1995 at Section 8(2)(b).

¹²⁷ Immigration and Nationality Act - TITLE 8, CHAPTER 12, SUBCHAPTER III, Part III, § 1481 (a) of the United States Code.

of citizenship does become an issue the onus will be on the party claiming that the loss did in fact occur to "establish such claim by a preponderance of the evidence". Further, when dealing with any of the listed instances of loss of citizenship it will be presumed that the relevant action was taken voluntarily, but this "presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily".¹²⁸

Further to this requirement, two US cases have predominantly aided the changes made in loss of citizenship law. The first was *Afroyim v Rusk, Secretary of State*.¹²⁹ The facts of this case are briefly as follows: Afroyim was a naturalised US citizen who moved to Israel more than 20 years after naturalization. Ten years later, upon applying for a renewal of his US passport, he was advised that he had lost his US citizenship by voting in an Israeli election Afroyim then brought the matter to court and was found to be still a US citizen despite the fact that at the time the Immigration and Nationality Act provided that, among other grounds such as serving in a foreign army etc, voting in a foreign election was grounds for loss of citizenship. The Court in this case held that both the action of serving in a foreign army and voting in a foreign election to be invalid grounds for loss of citizenship unless accompanied by an intention of the person in question to give up his or her US citizenship.

The second case was that of *Vance, Secretary of State v Terrazas*.¹³⁰ In this case Terrazas held dual citizenship of Mexico and the US. During a period of tertiary study he signed a document reaffirming his Mexican citizenship. This document contained a stipulation which referred to renunciation of his US citizenship. As a result the US authorities issued him with a certificate of loss of nationality advising that he had lost his US citizenship: but Terrazas argued that in signing the document his intention had never been to renounce his US citizenship. The court disagreed and

¹²⁸ Immigration and Nationality Act-TITLE 8, CHAPTER 12, SUBCHAPTER III, Part III, § 1481 (b) of the United States Code.

¹²⁹ 387 U.S. 253 (1967).

¹³⁰ 444 U.S. 252 (1980).

ruled that he had lost his US citizenship as a result of signing the document and that he had been aware at the time of the purport of what he was signing. The Court showed in this case that only a preponderance of evidence was required to prove intent, as opposed to evidence that was clear cut.

In this case the court also agreed that the state could not simply declare that a loss of citizenship would follow automatically in the event of a specific action. The facts and circumstances of the case would have to be considered because a voluntary action did not necessarily imply an intention to relinquish US citizenship.

It is very interesting to see the major differences so far between the surveyed countries, although they proceed from similar premises.

6.4 Zimbabwe

Quite surprisingly, Zimbabwe seems to be one of the strictest countries when it comes to laws of citizenship. Section 9 of the Citizenship of Zimbabwe Act¹³¹ very clearly and plainly states that "no citizen of Zimbabwe who is of full age and sound mind shall be entitled to be a citizen of a foreign country".¹³² This uncompromising condition of citizenship has been deliberately stated in language calculated to remove any possibility of confusion. However, the exclusions relating to this condition are spelled out in more detail in the same section of the Act. What seems to be a standardised set of exclusions worldwide are seen in section 9(2) which advises that, with the exception of marriage, a voluntary act performed by a citizen of full age, resulting in the acquisition of a foreign citizenship, will immediately result in loss of Zimbabwean citizenship. Thus minors and persons who acquire citizenship by way of marriage are possible exclusions from automatic loss of citizenship in this instance, and the issue of an unspecified voluntary act is again raised without further clarification.

¹³¹ Act 23 of 1984, as amended.

¹³² Section 9(1).

The Zimbabwean law seems to take matters a step further than the loss of citizenship structure as indicated above (cf. subsections 1 and 2 of the Act) by stipulating that if foreign citizenship is acquired through marriage the citizen concerned will cease to be a Zimbabwean citizen one year from date of marriage, unless he or she renounces the relevant foreign citizenship in a formal declaration made to that effect before the Zimbabwean authorities before expiry of that year.¹³³

The section also determines that a Zimbabwean citizen who acquires a foreign citizenship by other means than a voluntary act or marriage will cease to be a Zimbabwean citizen within a year of the date of acquisition of such citizenship, unless he or she renounces the foreign citizenship in a formal declaration made to that effect before the Zimbabwean authorities before expiry of that year in question.¹³⁴ Thus in Zimbabwean citizenship law loss of citizenship can also be incurred as a result of acquiring foreign citizenship by means of an involuntary act. This stipulation opens a new prerequisite on the regulation of citizenship.

Zimbabwean citizens are entitled to acquire foreign citizenship as minors and to hold dual nationality, on condition that they renounce the foreign citizenship within one year from the date on which they attain majority, failing which they will automatically cease to be Zimbabwean citizens.¹³⁵

Interestingly the Act further provides for the position prevailing at the effective date of the Citizenship of Zimbabwe Amendment Act,¹³⁶ which determines that citizens of full age who held a foreign citizenship at the effective date of the Amendment Act, as well as citizens who had foreign citizenship at that date and had renounced or tried to renounce such foreign citizenship but failed to do so, would cease to be Zimbabwean citizens within six months of the date of the amendment, unless the relevant formal renunciation of the foreign citizenship could be proven to the Zimbabwean

¹³³ Section 9(3).

¹³⁴ Section 9(4).

¹³⁵ Section 9(5).

¹³⁶ Act 12 of 2001.

authorities.¹³⁷

It is surprising to see how Zimbabwe has laid down the law to eliminate the possibility of holding dual nationality as a Zimbabwean citizen, even to the extent where time restrictions are imposed on instances where it is permitted.

Like other countries, Zimbabwe makes provision for renunciation of its citizenship at the behest of its citizens,¹³⁸ provided that those who request it are of full age and sound mind. Special provision is made for Zimbabweans who have acquired citizenship of a country that is at war with Zimbabwe and wish to renounce their Zimbabwean citizenship.¹³⁹ An added requirement in such instances would be that the declaration of renunciation would not be registered without the authority of the Minister.

The approach towards resumption, or restoration as referred to in the Citizenship of Zimbabwe Act, is very different from what has been broached so far. Zimbabwean citizens who have lost their citizenship in one of the above-mentioned ways may apply to the Minister for restoration of their Zimbabwean citizenship,¹⁴⁰ on condition, however, that if the Minister agrees the citizen has to take the oath of loyalty before his or her Zimbabwean citizenship can be reinstated, provided further that - given the strict operation of citizenship law in Zimbabwe – reinstatement is subject to the consent of the President if the applicant still holds the citizenship of a foreign country.^{141 142} This last requirement exemplifies the unrelenting stance of the Zimbabwean state towards dual citizenship. Finally on the issue of restoration, the most dramatic departure from the citizenship conditions that are generally applicable in other countries is embodied in section 14(3) of the Citizenship of Zimbabwe Act where it is stated that in the above circumstances Zimbabwean citizenship will not be restored to its former status as acquired in the first place (eg. citizenship by birth or descent), but to

¹³⁷ Section 9(7).

¹³⁸ Section 10(1).

¹³⁹ Section 10(4).

¹⁴⁰ Section 14(1).

¹⁴¹ Section 14(2)(i).

¹⁴² Section 14(2)(ii).

citizenship by registration as from the date that the oath of loyalty is taken.¹⁴³ This highlights again the recalcitrance of the Zimbabwean state towards the holding of dual nationality.

"It is apparent that the specific wording in section 9 ... by deliberately using "acquires" ... and by deliberately using "becomes", demonstrates that the clear intention of the legislature is to prevent a citizen of Zimbabwe having another citizenship. It is the "acquisition" and "becoming" of a foreign citizenship that is required to be renounced so as to retain one's citizenship of Zimbabwe. These provisions are not concerned with any entitlement or claim to foreign citizenship."¹⁴⁴

An important point to take note of here, albeit readily inferable, is that an entitlement to a foreign citizenship does not have sufficient substance to constitute a case of dual nationality. The fact that this issue even had to be taken to court again shows the stiff Zimbabwean opposition to dual nationality, which seems to be the strictest by far.

Since this survey clearly cannot be all-encompassing the specifics of comparison will now be dealt with.

6.5 A Comparison

So far South African citizenship law has been considered in detail with reference to the subject at issue. Moreover, salient points have been considered concerning loss of citizenship in the United Kingdom, Germany, the United States of America and Zimbabwe. The same basic principles apply in each case, but each country follows its own processes and procedures. Some countries are quite lenient on the issue of dual citizenship while others tend to be outwardly stringent.

¹⁴³ Section 14(3).

¹⁴⁴ *Tsvangirai v Registrar – General & Others* (2002) JOL 9588 (ZH) at 46 - This case hinged on the issue whether a Zimbabwean citizen would still be considered a voter after losing his or her Zimbabwean citizenship. It is especially important for the present purposes to note that a Zimbabwean citizen need only renounce an actually acquired foreign citizenship and not a mere entitlement to a foreign citizenship. As in South Africa, the right to vote in the Zimbabwean elections is obviously lost with the loss of citizenship of Zimbabwe.

Zimbabwe is by far the stricter on fending off dual citizenship while the United Kingdom goes to the opposite extreme, giving its citizens free reign to hold foreign citizenships as they please.

Even after studying the law on dual citizenship of numerous countries, it is difficult to decide which of them offers the best example to follow. Would it be best not to restrict the acquisition of foreign nationalities, or should the practice be banned altogether? As discussed in the chapter on constitutional law, if there is no logical reason to limit the acquisition of foreign citizenships the first option may be the best.

South African law is very strict compared to the United Kingdom, but adoption of the British approach would obviously entail major changes in South African law. There is a vast difference between British and South African law that may prove to be irreconcilable. As can be seen from the approach adopted in this text, the object is not necessarily to change the law on dual citizenship, but rather to determine whether better processes are available for procedural purposes. The prospect of emulating the British example seems uncertain at best, given the history of South Africa. There may not be a specific purpose for restricting dual citizenship in South Africa, but the change required to remove the restriction may be too drastic.

Two interesting points arose from the study of British nationality law. The first is that the absence of case law on dual citizenship in the United Kingdom suggests that the system must be working, which seems logical given the absence of restrictions that could give rise to litigation.

The second point of interest is that in British law citizenship can be resumed once after being renounced, that is, renunciation and resumption cannot be repeated. This restriction, literally the only one, seems at odds with the otherwise indulgent British stance, and it is especially notable compared to South Africa where the restriction does not exist. There seems to be no intrinsic reason for the restriction and therefore no reason to impose it in South Africa, but if the process of renouncing and resuming citizenship is repeated several times the Department of Home Affairs would surely notice

the fact and try to find the reason for it, but it is unlikely that the Department would refuse a resumption application without good grounds for doing so.

While at first glance German law on dual citizenship may seem more restrictive than South African law, it is actually quite similar. Dual citizenship is not allowed in either case, but retention of citizenship is allowed, except that in German law retention is subject to the condition that continuing ties with Germany after adopting foreign citizenship must be shown while in South Africa reasons for retention are not required.

The biggest difference between German and South African law is the fact that German law does not allow a resumption, with the result that citizenship is lost unless the person concerned knows about the provision made for retention and applies for it, provided the person knows about the proof required of continued ties and offers sufficient proof to that effect. On the other hand, South Africa does offer the option of resumption or permanent residence, obviously depending upon whether or not the person is permanently residing in South Africa.

It seems prudent and even indispensable to maintain the option of resumption in South Africa, but proof of continuing ties with South Africa as a condition for retention seems unjustifiable and illogical since birth in South Africa, or prolonged (or lifetime) residence in South Africa, should be sufficient proof of a tie that renders retention justifiable. Other ties (except family members living in South Africa) may be difficult to prove. The fact that Germany requires proof of ties with that country is indicative, as with Zimbabwe, of the allegiance it expects from its citizens. The requirement is not necessarily cause for concern in itself but it seems unnecessary, in principle, to demand that people prove their entitlement to retain their citizenship.

The American stance on the issue of loss of citizenship is very different from the South African approach. The fact that the Americans specifically provide for loss of citizenship to be applied exclusively in the event of a proven intention to give up such citizenship raises interesting new issues.

For example, unless it can be proven that a person acquiring a foreign citizenship intended to give up his or her US citizenship in doing so the person will not lose his or her US citizenship.

Furthermore, in this instance, there are two burdens of proof on the loss of citizenship. First, the party claiming loss of citizenship has to prove the loss. Secondly, the person who is the subject of the claim needs to prove that the loss of his or her US citizenship was intentional. The comparable burden of proof in this regard is a balance of probabilities.

It is interesting to note the large amount of case law on this issue in the United States of America. The fact that intention on the part of the person acquiring a foreign citizenship needs to be proven is bound to invite litigation since intent is bound to be a contentious issue that the parties concerned cannot be expected to resolve effectively without legal assistance. Nonetheless, the issue of intention may be important in the situation at hand.

The Zimbabweans have taken a very clear and unequivocal stance on the issue of loss of citizenship that exemplifies their unwillingness to accept dual citizenship. Further proof of Zimbabwean recalcitrance in this regard is the risk of losing the privilege of being a Zimbabwean. The imposition of time limits in this regard is a unique stricture in the present context.

The most important factor in Zimbabwean law is its clarity on what it prescribes. There is not much room for argument as almost every eventuality is provided for, which implies that contingencies would probably be met by a similar strict approach.

On balance emulation of the British framework example in South Africa does not seem feasible given South Africa's strict history of restricting dual citizenship. Germany could probably benefit from the South African example which is better designed to serve its public's needs (in the researcher's opinion). The required proof of intent to give up citizenship is an element that could be imported from America to enhance the current South African legislative framework. Emulation of the over strict Zimbabwean example would be counterproductive for South Africa and would not serve the object

of this study, which is to discover ways of improving citizenship regulation in South Africa.

The foreign practices considered above will be utilized in discussing some solutions in the next chapter.

CHAPTER 7: DEMYSTIFYING THE MYSTERY

- 7.1 The road so far
 - 7.2 A pattern of events
 - 7.3 Constitutional and administrative conclusions
 - 7.4 Foreign law summation
 - 7.5 The problem and the solutions
-

7.1 The road so far

This research has centred on the issue of loss of South African citizenship as a result of acquisition of a foreign citizenship by way of a *voluntary and formal act*. The discussion ranged over how citizenship is acquired, lost and regained, covering other options available to South African citizens, such as retention, exemption and the right to retain permanent residence. The constitutional and administrative implications of current law were also dealt with. Finally, comparisons were made *vis à vis* other countries that exemplify wide-ranging differences in their handling of issues concerning loss of citizenship.

It is necessary to draw conclusions from the research as reported and discussed in this dissertation.

7.2 A pattern of events

As noted at the beginning of this research, it was deemed necessary to determine some kind of pattern in order to gain a better understanding of the issue at hand. The fact is that although the SA Citizenship Act states that citizenship will only be lost as a result of acquiring a foreign citizenship by way of a *voluntary and formal act*, the reality is that over time the words – *voluntary and formal act* – have come to include most, if not all, acts of acquisition of foreign citizenship.

At present, the only real possibility that remains under the current SA Citizenship Act where South African citizenship will not be lost as a result of acquiring a foreign citizenship is where the South African citizen in question is a minor at the time of acquisition.¹⁴⁵

According to the 1949 SA Citizenship Act, which still applies for persons who acquired foreign citizenship before 1995, the issue of loss of South African citizenship does not arise if foreign citizenship was acquired during the South African citizen's residence in South Africa.¹⁴⁶

In reality, these are the only two instances where it is certain that South African citizenship will not be lost when acquiring a foreign citizenship. Bar these exceptions it is clear that in most instances South African citizens will lose their citizenship if they acquire a foreign citizenship unless by some stroke of luck they are aware of the implications of such acquisition under the provisions of the SA Citizenship Act. The issue of loss of citizenship could certainly be avoided if South African citizens were merely aware that they need to apply for a retention before applying for a foreign citizenship.

Whilst ignorance of the law cannot be considered an excuse (*ignorantia juris non excusat*)¹⁴⁷ it is most certainly one of the largest causes of loss of South African citizenship. The issue of loss of citizenship is an internationally recognised concept in law throughout the world, hence, in view of its common relevance it should form part of every citizen's general knowledge, but the fact is that ignorance is rife on this matter.

There is a ray of hope for people who have lost their South African citizenship, however, in

¹⁴⁵ Section 6(1)(a) of the South African Citizenship Act 88 of 1995.

¹⁴⁶ Section 15(1)(a) of the South African Citizenship Act 44 of 1949.

¹⁴⁷ <http://www.glossary.com/reference.php?q=Ignorantia+legis+non+excusat> – accessed 17 March 2010.

that the processes discussed in Chapter 3 make provision for resumption of citizenship,¹⁴⁸ exemption from the loss of citizenship¹⁴⁹ or assumption of permanent residence in South Africa. The disadvantage of these remedies, however, is that they are time-consuming, which detracts considerably from the benefit that could otherwise accrue from them. For a person who was born in South Africa and has lived here all his life, this does not seem like a fair and workable solution.

7.3 Constitutional and administrative conclusions

The difference between *loss* and *deprivation* rose to prominence in the discussion of the constitutionality of a justifiable limitation of South Africans' constitutional right not to be deprived of their South African citizenship.¹⁵⁰ The point was made that although *loss* is a less drastic concept than *deprivation* its implications are nevertheless unjustifiable in that it implies something more than ordinary *loss*. There are a number of factors that seriously affect the rights of South African citizens who lose their citizenship, including the possibility that they may never be able to regain their South African citizenship. In reality it is difficult to prove that the loss of South African citizenship, as a result of acquisition of a foreign citizenship, is justifiable under the limitation clause of the Constitution.

In considering issues relating to Administrative law the requirement was broached of two notices and the implications for procedural fairness. It would certainly make quite a difference to the process if South Africa could automatically determine whether its citizens have acquired or are about to acquire foreign citizenships so that they could be informed beforehand of the likelihood of losing their South African citizenship if they proceed with such action, in which case (if they do proceed) a second notice could be issued to inform them

¹⁴⁸ Section 13 of the South African Citizenship Act 88 of 1995.

¹⁴⁹ Section 15(1A) of the South African Citizenship Act 44 of 1949; Section 26(4) of the South African Citizenship Amendment Act 69 of 1997.

¹⁵⁰ As contained in section 20 of the Constitution of the Republic of South Africa 1996.

that the likelihood has become a certainty. Unfortunately the systems in place at the Department of Home Affairs are nowhere near the level of sophistication required to maintain such a regimen of notification.

7.4 Foreign law summation

Chapter 6 comprised a survey of other countries' systems of citizenship with particular reference to loss of citizenship as a result of acquiring foreign citizenship. One of the surveyed countries is far more lenient than South Africa and another is far stricter. The most useful information gleaned from the comparative survey is that the best way to deal with the issue is either to take the stance that dual citizenship is allowed with very minor restrictions (eg. in British law), or that it is out of the question, as in Zimbabwean law. As noted, there is no case law on the issue where the United Kingdom is concerned, which indicates that the system in place there is effective. However, the object of this research, as noted, is not necessarily to change South African citizenship law as this would have drastic implications. Zimbabwean law has taken a strong stance against dual nationality,¹⁵¹ which has generated a significant body of case law, but again, at least their law is clear-cut and to the point.

The basic principles of American and German law on the issue are largely the same as those applied in South Africa. The problem in this regard is that the Americans have introduced the issue of intention¹⁵² which would not be feasible in the South African legal context. If a definition cannot be provided for one of the most critical terms in South African citizenship law there seems to be little prospect, if any, of establishing a standard of proof. However, an element of American citizenship law that is worthy of adoption is the condition that American citizenship can only be lost if the citizen concerned becomes naturalized as a foreign citizen.

¹⁵¹ Section 9 of the Citizenship of Zimbabwe Act 23 of 1984.

¹⁵² Immigration and Nationality Act – TITLE 8, CHAPTER 12, SUBCHAPTER III, Part III, § 1481 (a) of the United States Code.

If such an inclusion were made in South African law it would automatically exclude loss of South African citizenship where the entitlement to foreign citizenship eventuated by birth or descent, no matter whether the person concerned was or is a minor at the time.

As for German law, it should be noted again that it is unreasonable to require that citizens prove a tie to their own country in order to allow them to keep their citizenship upon acquiring a foreign citizenship.¹⁵³ Adoption of such a requirement would push South African citizenship law in a completely counterproductive direction.

Unfortunately, although these foreign laws are most certainly more clear-cut and to the point than South African law, a workable solution remains a distant prospect.

7.5 The problem and the solutions

The biggest problem that remains in respect of South African citizenship law is ignorance of the law among the public as well as officialdom and the lack of clarity in the formulation of the SA Citizenship Act, more specifically where the purport of a *voluntary and formal act* is concerned.

Technically there are only so many ways that citizenship can be acquired – by birth, by descent, by marriage and by naturalisation. This being the case, a possible solution to cure the uncertainty introduced by the expression a *voluntary and formal act* is to simply omit the expression and rather just provide set conditions for each of the various categories under which foreign citizenship can be acquired. For instance, since birth is an involuntary act a standard ruling could be adopted to the effect that citizenship by birth is automatically excluded from grounds for loss of South African citizenship. Acquiring citizenship through marriage is already listed as an exclusion, but its effect has been vitiated by the words

¹⁵³ Section 25(2) of the German Nationality Act.

voluntary and formal act. If it were determined by Government and the legislators that acquiring citizenship by way of marriage either did or did not result in loss of citizenship the words – *some voluntary and formal act* – could no longer confuse the situation. All categories of acquisition of citizenship could be specified to the exclusion of the offending phrase.

Ruling out automatic loss of citizenship, and thereby reinstating the situation under the SA Citizenship Act of 1949 (cf. chapter 3), would assist in making the issue of loss of citizenship less troublesome. The said Act of 1949 provided that once a person was exempted from the loss of South African citizenship the person was deemed to have never lost his or her South African citizenship.¹⁵⁴ The South African Citizenship Amendment Act had a similar provision which referred to the 1949 SA Citizenship Act and also stated that where a South African had lost their South African Citizenship as a result of acquisition of a foreign citizenship by way of a *voluntary and formal act* such person could apply for an exemption under the Amendment Act and would be “deemed to have remained a South African citizen”.¹⁵⁵ This meant that once an exemption had been applied for it was as if the South African had never lost their citizenship. Whereas the current SA Citizenship Act merely provides that once a South African has lost his or her South African citizenship and subsequently applies for a resumption of such citizenship, he or she is allowed to resume such citizenship once approval of the Minister of Home Affairs has been received.¹⁵⁶ This obviously leaves a gap, according to the current dispensation, where a South African citizen is not a South African citizen for the period from acquisition of foreign citizenship until resumption is sought, even after the resumption process is completed. A cause for concern is the fact that the current SA Citizenship act provides that during the period from the date of acquisition of a foreign

¹⁵⁴ Section 15(1A)(B) of the South African Citizenship Act 44 of 1949.

¹⁵⁵ Section 26(4) of the South African Citizenship Amendment Act 69 of 1997.

¹⁵⁶ Section 13(3)(b) of the South African Citizenship Act 88 of 1995.

citizenship until the date of resumption of South African citizenship the person concerned is not a South African citizen. The previous dispensation made more sense.

Another piece of legislation that was included in the 1949 Citizenship Act but not carried over into the 1995 Citizenship Act was the stipulation that loss of citizenship as a result of acquisition of a foreign citizenship by way of *voluntary and formal act* would only result in loss of South African citizenship where the person concerned was outside South Africa when acquiring such foreign citizenship.¹⁵⁷ Especially in a situation where a South African citizen never had the intention to leave South Africa but merely wished to take up a foreign passport that he or she was entitled to, the suggested additional wording in the current Act would certainly lessen the unnecessary removal of South African citizenship where it is obvious that the person involved wishes to remain a South African citizen.

What is also done in some countries in the world, such as India, is that whenever a new passport is obtained a stamp is immediately placed in the new passport by the officials concerned that advises the passport holder that the possibility exists that they will lose their current citizenship if they acquire the citizenship of another country. This would certainly be a realistic and inexpensive way to inform all South African citizens that they will lose their South African citizenship if they take up the citizenship of another country. Upon seeing such information in their South African passports they would be alerted to the need, if they were planning to take up a foreign citizenship, to obtain prior information on ensuring that they would not lose their South African citizenship.

7.6 The reality

The unfortunate reality is that the issues discussed in this report are by no means important in the eyes of the State. This is obvious in light of the fact that despite submissions made to

¹⁵⁷ Section 15(1)(a) of the South African Citizenship Act 44 of 1949.

Parliament about the problems that were pertinent at a time when Parliament was attending to the amendment of the current SA Citizenship Act, nothing was done about these problems.¹⁵⁸

Despite the confusion in this area of the law it seems that the Department of Home Affairs is quite content with the *status quo* despite all the conflicting advice, lack of clarity and proper legal processes.

The researcher is convinced that the SA Citizenship Act, as amended, could quite easily be challenged in court as being, at the very least, procedurally unfair in terms of South African administrative law. Bearing in mind what is at stake for the South African who loses his or her citizenship, the researcher is confident that a case challenging the relevant citizenship law and the applicable processes and procedures would not be taken lightly.

In the meantime South African citizens are losing their South African citizenship on a daily basis. Some will be able to reclaim their citizenship. Some will not. Some have no idea that they have lost their citizenship. And so the investigation continues...

¹⁵⁸ The writer assisted in submissions made to Parliament on 17 August 2010 by the Law Society of South Africa, as a result of public hearings made on the South African Citizenship Amendment Bill 17 of 2010, to put forward a submission that a definition should be given to the words *a formal or voluntary act*.

Bibliography

Dictionaries

AS Hornby (2000) *Oxford Advanced Learners Dictionary* (6th Edition) Oxford: University Press

Acts/Bills

Attorneys, Notaries and Conveyancers Admission Act 23 of 1934

Births and Deaths Registration Act 51 of 1992

British Nationality Act, 1948

British Nationality Act, 1981

Citizenship of Zimbabwe Act 23 of 1984

Citizenship of Zimbabwe Amendment Act 12 of 2001

Constitution of the Republic of South Africa Act No 108 of 1996

European Convention on Nationality Strasbourg, 6.XI.1997

German Nationality Act (Staatsangehörigkeitsgesetz, StAG) In the version published on 22 July 1913

(Reich Law Gazette I p.583 – Federal Law Gazette III 102-1), as last amended by article 5 of the Act on the implementation of residence- and asylum-related directives of the European Union of 19 August 2007 (Federal Law Gazette I p.1970)

Immigration Act No 13 of 2002

Immigration and Nationality Act – TITLE 8, CHAPTER 12, SUBCHAPTER III, Part III, § 1481 of the United States Code

Memorandum on the Objects of the South African Citizenship Amendment Bill 2003

Promotion of Administrative Justice Act No 3 of 2000

South African Citizenship Act No 44 of 1949 (now repealed)

South African Citizenship Act No 88 of 1995

South African Citizenship Amendment Act 17 of 2010 (including Amendment Bill and detail of Public

Hearings on the Bill)

South African Citizenship Amendment Act No 17 of 2004

South African Citizenship Amendment Act 69 of 1997

Status of Bophuthatswana Act 89 of 1997

The Universal Declaration of Human Rights

Case Law

Afroyim v Rusk, Secretary of State 387 U.S. 253 (1967)

Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 48 ALR 500

Green v Minister of the Interior 1968 (4) All SA 298 (A)

Ebrahim v Minister of the Interior 1976 (1) SA 878 (D)

Ebrahim v Minister of the Interior 1977 (1) SA 665 (A)

Ex Parte Moseneke 1979 (4) All SA 891 (T)

Phenithi v Minister of Education and Others 2006 (11) BCLR 1314 (SCA)

Tsvangirai v Registrar-General & Others (2002) JOL 9588 (ZH)

Vance, Secretary of State v Terrazas 444 U.S. 252 (1980)

Van Zyl and others v Government of RSA and others (2005) 4 All SA 96 (T)

Forms and Certificates

Application Form BI – 175: Application for Resumption of South African Citizenship

Form BI – 237: Certificate of Resumption of South African Citizenship

Application Form BI – 288: Late Registration of Birth Affidavit

Application Form BI – 529: Determination of Status

Form BI – 1155: Certificate of Exemption in terms of section 9(2) of Act 88 of 1995

Application Form BI – 1664: Application for Retention of South African Citizenship

Form Z28: Certificate of Exemption in terms of section 6(2) of Act 88 of 1995

Books

Currie I & de Waal J (2005) *The Bill of Rights Handbook* (5th Edition) Lansdowne: Juta

Hoexter C (2007) *Administrative Law in South Africa*. Cape Town: Juta

Moran, G. 2009. *Promotion of Administrative Justice Act – Legal Advisors Guide*. Pretoria, South Africa:

Law Society of South Africa and Legal Education and Development

Woolman S, Roux T & Bishop M (2009) *Constitutional Law of South Africa*. Second Edition. Cape

Town: Juta

Emails

Krüger, PF. [Elsie.Engelbrecht@dha.gov.za] 2010. Re: MASTERS THESIS IN RESPECT OF TARRYN. Email to: Pokroy, T. [tarryn@immigration.org.za]. 11 January. In accordance with approval from the University of Pretoria's Ethics Committee Approval.

Shaik, L. [Lance.Shaik@dha.gov.za] 2007. Re: Application for Determination of Status. Email to: Pokroy, T. [tarryn@immigration.org.za]. 12 December.

Travern, Y. [Yogie.Travern@dha.gov.za] 2005. Re: Citizenship by Marriage Enquiry. Email to: Pokroy, J. [jpokroy@iafrica.com]. 29 March.

Websites

<http://www.glossary.com/reference.php?q=Ignorantia+legis+non+excusat> – accessed 17 March 2010