REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF

PUBLIC PROTECTOR
SOUTH AFRICA

\textit{Allegations of undue delay and improper adjudication of applications for
naturalisation as a South African citizen by the Department of Home Affairs}

Report number 32 of 2017/18

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY TO
FINALISE AND THE IMPROPER ADJUDICATION OF APPLICATIONS FOR
NATURALISATION AS A SOUTH AFRICAN CITIZEN BY THE DEPARTMENT OF HOME
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Executive Summary

(i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (Public Protector Act).

(ii) This report communicates the Public Protector’s findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution following an investigation into the alleged undue delay to finalise and the improper adjudication of applications for naturalisation as a South African citizen (applications for naturalisation) by the Department of Home Affairs (DHA) lodged by different Complainants. The Public Protector received several complaints between 2014 and 2017 from a total of 18 Complainants whose full details appear under paragraph 2.2 below. Whereas most of the Complainants raised their concerns regarding the amount of time it was taking to finalise their applications for naturalisation, some of the Complainants complained of the DHA’s decision to reject their applications on the basis that their applications for naturalisation were lodged before the expiry of 10 years after obtaining Permanent Residence Permit (PRP).

(iii) In the main, the complaints received by the Public Protector were that: 1) the DHA unduly delayed to adjudicate upon the Complainants’ applications for naturalisation, and 2) the DHA adjudicated on the Complainants’ applications for naturalisation contrary to section 5(1)(c) of the South African Citizenship Act, 88 of 1995, as amended, (the Citizenship Act).

(iv) The DHA did not dispute that it delayed to adjudicate upon the Complainants’ applications for naturalisation. However, the DHA contended that its adjudication of the Complainants’ applications for naturalisation was in accordance with section 5(1)(c) of the Citizenship Act and its Regulations¹.

¹ The Regulations on South African Citizenship Act, 2012
(v) On analysis of the complaints received, the following issues were identified to inform and focus the investigation:

(a) Whether the DHA unduly delayed to adjudicate upon the Complainants’ applications for naturalisation;

(b) Whether the DHA improperly adjudicated upon the Complainants’ applications for naturalisation contrary to the provisions of the Citizenship Act; and

(c) Whether the Complainants were improperly prejudiced by the conduct of the DHA in the circumstances?

(vi) The investigation was conducted through interviews and correspondence with the Complainants and the relevant officials of the DHA as well as perusal of all relevant documents and the analysis and application of relevant laws, policies and related prescripts.

(vii) During the investigation process, the Public Protector served notices in terms of section 7(9)(a) of the Public Protector Act to both the Minister and the DG of the DHA on 29 November 2017 to afford them an opportunity to respond to the Public Protector’s provisional findings and intended remedial action. The Minister and the DG of the DHA were required to respond by 08 December 2017, but no response was received from either party.

(viii) Key laws and policies taken into account to determine if there had been maladministration by the DHA and prejudice to the Complainants were primarily those imposing administrative standards that should have been complied with by the DHA or its officials when processing the applications for naturalisation. Those are the following:

(a) The period of 12 months proposed on the DHA-63 form (application for naturalisation form) published with the Regulations on South African Citizenship
Act, 2012 (the Regulations) was relied upon to determine the timeline applicable in the adjudication of applications for naturalisation.

(b) Section 195(1)(e) & (g) of the Constitution which requires people's needs to be responded to and timeous information to be furnished by public administration was also relied on to determine whether the DHA unduly delayed to adjudicate the Complainants' applications.

(c) Section 5(1)(c) of the Citizenship Act was relied upon to determine whether the adjudication of the Complainants' applications for naturalisation was in accordance with this provision.

(d) Chapter 2 of the Constitution was relied on to determine whether the Complainants were prejudiced by the conduct of the DHA.

(ix) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Whether the DHA unduly delayed to adjudicate upon the Complainants’ applications for naturalisation;

(aa) The allegation that the DHA unduly delayed to adjudicate upon the Complainants' applications is substantiated.

(bb) Most of the Complainants’ applications for naturalisation were finalised after 24 months from the date of application, whereas those applications that appear in Table B of the report remain pending.

(cc) The Complainants’ applications for naturalisation were not adjudicated upon within the timeline of 12 months as ascribed on the DH3 form.
(dd) The DHA did not embrace the Batho Pele Principles of service standards, courtesy and value for money as expatiated in this report. Furthermore, the DHA did not comply with the basic values and principles governing public administration as espoused in section 195(1)(b)(e) & (f) of the Constitution.

(ee) Therefore, the above conduct by the DHA constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration and undue delay as envisaged in Section 6(4)(a)(i) & (ii) of the Public Protector Act.

(b) Whether the DHA improperly adjudicated upon the Complainants’ applications for naturalisation contrary to the provisions of the Citizenship Act;

(aa) The allegation that the DHA improperly adjudicated upon the applications for naturalisation of Mr Tshuma, Mr Faleyie, Mr Jules, Mr Nobanda, Mr Shafiq, Mr Mohamud, Mr Tshibasu, Mr KM Abdi, Mr Elesh and Mr Sabria is substantiated.

(bb) In terms of section 5(1)(c) of the Citizenship Act, a person making an application for naturalisation is required to have been ordinarily a resident of the Republic of South Africa for a period of five (5) years. Mr Tshuma, Mr Faleyie, Mr Jules, Mr Nobanda, Mr Shafiq, Mr Mohamud, Mr Tshibasu, Mr KM Abdi, Mr Elesh and Mr. Sabria had been ordinarily residents for a period of 5 years when they lodged their applications for naturalisation.

(cc) The DHA improperly adjudicated upon the Complainants’ applications for naturalisation contrary to section 5(1)(c) of the Citizenship Act in that the Complainants were required to have 10 years of ordinary residence post PRP contrary to the 5 year period specified in the Citizenship Act.
(dd) Therefore, the above conduct by the DHA constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration as envisaged by Section 6(4)(a)(i) of the Public Protector Act.

(c) Whether the Complainants were improperly prejudiced by the conduct of the Department in the circumstances:

(aa) The allegation that the Complainants were prejudiced by the conduct of the DHA is substantiated.

(bb) In terms of section 19(3) of the Constitution, every citizen has a right to vote in the elections. Had the DHA timeously and correctly adjudicated the Complainants’ applications, the Complainants would have had the opportunity to exercise the right to vote in the Local Government Elections which took place on the 3 August 2016.

(cc) The Complainants were denied an opportunity to enjoy the rights and benefits that are exclusively reserved for South African citizens.

(dd) Therefore, the conduct of the DHA amounted to improper prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act.

(x) The appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) is the following:

The Minister of Home Affairs (The Minister)

(aa) The Minister must initiate the review of the Regulations, specifically the 10 year period to apply for naturalisation, which is inconsistent with section 5(1)(c) of the Citizenship Act, within three (3) months of the date on which this report is issued.
The Director-General of the DHA (The DG)

(bb) The DG must issue letters of apology to the Complainants within thirty (30) days of the date on which this report is issued.

(cc) The DG must review the applications of Mr Tshuma, Mr Faleyie, Mr Jules, Mr Nobanda, Mr Shafiq, Mr Mohamud, Mr Tshibasu Mr KM Abdi, Mr Elesh and Mr Sabria within 30 days, taking into account section 5(1)(c) of the Citizenship Act and all other similar applications within six (6) months of the date on which this report is issued.

(dd) The DG must, within 30 days of the date on which this report is issued, properly and in accordance with section 5(1)(c) of the Citizenship Act, adjudicate the applications of Mr AL Abdi, Mr Faarah, Mr Wangata, Mr Farah, Mr Y Abdi, Mr Lutumba and the Aakbani family.

(ee) The DG must, within 30 days of the date on which this report is issued, write to Mr Mongoli and advise him that his application for naturalisation was submitted prematurely and that he must re-apply.

(ff) The DG must, within 6 months of the date on which this report is issued, publish Standard Operating Procedures (SOPs) with turn-around times on how long it should take to adjudicate upon applications for naturalisation. The SOPs must be drafted in line with the “basic values and principles governing public administration”, as outlined in section 195 of the Constitution and the Batho Pele principles.

(gg) On the seventh (7) month of the date of issuing of the report, the DG must issue a statistical report to the Public Protector on the outcomes of all similar applications reviewed.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY TO FINALISE AND THE IMPROPER ADJUDICATION OF APPLICATIONS FOR NATURALISATION AS A SOUTH AFRICAN CITIZEN BY THE DEPARTMENT OF HOME AFFAIRS

1. INTRODUCTION

1.1. This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of this investigation:

1.2.1. The Minister of Home Affairs; and

1.2.2. The Director General of Department of Home Affairs (DHA).

1.3. Copies of the report are provided to the Complainants to inform them about the outcome of this investigation.

1.4. This report communicates the Public Protector’s findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution following an investigation into the alleged undue delay to finalise and the improper adjudication of applications for naturalisation as a South African citizen (applications for naturalisation) by the DHA lodged by different Complainants.

2. THE COMPLAINT

2.1. The Public Protector received complaints from a total of 18 Complainants whose full details appear in paragraph 2.2 below. The complaints were received between 2014 and 2017. Whereas most of the Complainants raised their concern regarding the
amount of time it took to finalise their applications for naturalisation, some of the Complainants complained of the DHA's decision to reject their applications on the basis that their applications for naturalisation were made before the expiry of 10 years after obtaining Permanent Residence Permit (PRP).

2.2 The complaints received from different Complainants by the Public Protector are as follows:

<table>
<thead>
<tr>
<th>No</th>
<th>Names</th>
<th>Details of complaint</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Mr. MM Tshuma (Mr Tshuma)</td>
<td>Alleged that on 06 October 2014 he lodged his application for naturalisation with the Edenvale office of the DHA. However, on 01 November 2016 the DHA advised him that he will only qualify to apply for naturalisation after 10 years from the date his Permanent Residence Permit (PRP) was issued. He received his study permit on 17 February 2004.</td>
</tr>
<tr>
<td>2</td>
<td>Mr. S Faley (Mr Faley)</td>
<td>Alleged that he lodged his application for naturalisation at the Pretoria Regional office of the DHA on 25 /01/2013. However, despite obtaining his PRP on 07 January 2008, the DHA advised him that his application was premature. He received his temporary asylum seeker permit on 02 July 2001.</td>
</tr>
<tr>
<td>3</td>
<td>Mr. LG Jules (Mr Jules)</td>
<td>Alleged that he lodged his application for naturalisation on 29 December 2014. However, on 21 September 2016 the DHA advised him that he will have to wait for 10 years from the date his PRP was issued to qualify for naturalisation. He was formally recognised as a refugee on 30 June 2001.</td>
</tr>
<tr>
<td></td>
<td>Mr. ATAT Elesh (Mr Elesh)</td>
<td>Alleged that he lodged his application for naturalisation on 27 July 2012, but the DHA informed him that he would only qualify to apply on or after 28 January 2013. He received his temporary residence permit (TRP) on 17 August 2003.</td>
</tr>
<tr>
<td>No</td>
<td>Names</td>
<td>Details of complaint</td>
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</tr>
<tr>
<td>5</td>
<td>Mr. AL Mongoli (Mr Mongoli)</td>
<td>Alleged that he lodged the same application on 7 August 2013 at the Johannesburg Regional office of the DHA. Despite obtaining his PRP on 01 December 2009, the DHA advised him that his application for naturalisation was premature. He was first recognised as a refugee on 20 May 2001.</td>
</tr>
<tr>
<td>6</td>
<td>Mr. G Nobanda (Mr Nobanda)</td>
<td>Alleged that he lodged his application for naturalisation in 2003 and again on 14 October 2013, but the DHA indicated that he will only qualify to lodge an application for naturalisation in 2018.</td>
</tr>
<tr>
<td>7</td>
<td>Mr. M Shafiq (Mr Shafiq)</td>
<td>Alleged that he first applied for naturalisation on 28 November 2011 at the Kimberley Regional office of the DHA. He received a letter dated 03 December 2015 from the DHA advising him that he would only qualify to re-apply on or after 24 November 2016. He again applied for naturalisation on 12 December 2016 and through a letter dated 04 January 2017, the DHA advised him that he will qualify to apply for naturalisation after ten years with PRP.</td>
</tr>
<tr>
<td>8</td>
<td>Mr. AN Mohamud (Mr Mohamud)</td>
<td>Alleged that he first applied for naturalisation on 19 January 2012. Through letters dated 18 June 2015 and 14 November 2016 respectively, the DHA rejected his application on the basis that it was premature. He was formally recognised as a refugee on 11 January 2001.</td>
</tr>
<tr>
<td>9</td>
<td>Mr. BEK Tshibasu (Mr Tshibasu)</td>
<td>Alleged that he applied for naturalisation on 07 April 2014. Through a letter dated 22 October 2016, the DHA advised him that he will qualify to apply for naturalisation after ten years with PRP.</td>
</tr>
<tr>
<td>No</td>
<td>Names</td>
<td>Details of complaint</td>
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<tr>
<td>10</td>
<td>Mr. KM Abdi (Mr KM Abdi)</td>
<td>Alleged that he applied for naturalisation on 26 November 2013. Through a letter dated 30 September 2016, the DHA advised him that he will qualify to apply for naturalisation after ten years with PRP. He was first issued with a TRP on 04 February 2001.</td>
</tr>
<tr>
<td>11</td>
<td>Mr. Al Abdi (Mr AL Abdi)</td>
<td>Alleged that he applied for naturalisation on 20 December 2013 and he has not received the outcome of his application from the DHA.</td>
</tr>
<tr>
<td>12</td>
<td>Mr AL Faarah (Mr Faarah)</td>
<td>Alleged that he lodged his application for naturalisation on 20 September 2013 and he has not received the outcome of his application from the DHA. He was first issued with a TRP on 04 August 1999.</td>
</tr>
<tr>
<td>13</td>
<td>Mr. M Wangata (Mr Wangata)</td>
<td>Alleged that he lodged his application for naturalisation on 22 December 2013 and he has not received the outcome of his application from the DHA. He was first issued with a TRP on 03 June 2000.</td>
</tr>
<tr>
<td>14</td>
<td>Mr. MR Farah (Mr Farah)</td>
<td>Alleged that he lodged his application for naturalisation on 19 December 2013 and he has not received the outcome of his application from the DHA. He was first issued with a TRP on 25 June 1998.</td>
</tr>
<tr>
<td>15</td>
<td>Mr. Y Abdi (Mr Y Abdi)</td>
<td>Alleged that he lodged his application for naturalisation on 07 August 2014 and he has not received the outcome of his application from the DHA. He was first issued with a TRP on 11 July 2000.</td>
</tr>
<tr>
<td>No</td>
<td>Names</td>
<td>Details of complaint</td>
</tr>
<tr>
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<tr>
<td>16</td>
<td>Mr. I Aakbani (Aakbani family)</td>
<td>Alleged that he lodged his application for naturalisation with the Bloemfontein Regional Office of the DHA on 27 October 2015 together with that of his wife, (Bano Aakbani 720505 2389184) and his child, (Tasnim Aakbani 940101 2200 185). The applications for his other two children, (Sadik Aakbani 910605 6520 188 and Amrin Aakbani 930105 1368 184) were lodged on 22 October 2015. To date he has not received any outcome to his family’s applications.</td>
</tr>
<tr>
<td>17</td>
<td>Mr. D M Lutumba (Mr. Lutumba)</td>
<td>Alleged that he lodged his application for naturalisation with that of his family on 23 December 2013. To date he has not received an official outcome to his family’s applications. He was formally recognised as a refugee on 25 May 2001.</td>
</tr>
<tr>
<td>18</td>
<td>Mr. O F Sabria (Mr. Sabria)</td>
<td>Alleged that he first applied for naturalisation on 19 January 2012. Through a letter dated 26 March 2015 the DHA rejected his application on the basis that he applied before time of qualification.</td>
</tr>
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3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1 The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has a power as regulated by national legislation—

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,"
(b) to report on that conduct; and

(c) to take appropriate remedial action."

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the constitutional court, (in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following with own emphasis, when confirming the powers of the public protector:

3.5.1 The remedial action taken by the Public Protector has a binding effect, "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences" (para 73);

3.5.2 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);
3.5.3 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);

3.5.4 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.5.5 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (para 69);

3.5.6 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);

3.5.7 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71);

3.5.8 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (para 71(c));
3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.5.10 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.6 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017), the Court held as follows:

3.6.1 The Public Protector has power to take remedial action, which include instructing the Members of the Executive including the President to exercise powers entrusted on them under the constitution where that is required to remedy the harm in question (para 82);

3.6.2 The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective (para 85 and 152);

3.6.3 There is nothing in the Public Protector act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (para 91 and 92);

3.6.4 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (para 100 and 101):

(a) Conduct an investigation;
(b) Report on that conduct; and
(c) To take remedial action.
3.6.5 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);

3.6.6 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para105).

3.6.7 The fact that there is no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (para 107 and 108);

3.6.8 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action ( para 112);

3.7 The DHA is an organ of state and its conduct amounts to conduct in state affairs, as a result the complaints fall within the ambit of the Public Protector’s mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

3.8 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties in this investigation.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2 The complaints were initially classified as Early Resolution matters capable of resolution by way of a conciliation or mediation in line with section 6(4)(b) of the Public
Protector Act. However, after several attempts to mediate the matters, they were escalated into an investigation.

4.1.3. During the investigation process, the Public Protector issued a notice in terms of section 7(9)(a) of the Public Protector Act to both the Minister and the DG of the DHA on 29 November 2017 to afford them an opportunity to respond to the Public Protector’s provisional finding and intended remedial action. The Minister and the DG were both required to respond to the section 7(9) notice by 08 December 2017, but no submission was received from either party.

4.2. Approach to the investigation

4.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
   4.2.1.1 What happened?
   4.2.1.2 What should have happened?
   4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
   4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the DHA unduly delayed to process or adjudicate the Complainants’ applications for naturalisation and whether the subsequent adjudication was done in line with the provisions of the Citizenship Act.
4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the DHA to prevent maladministration and prejudice.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3. Based on an analysis of the complaints, the following issues were identified to inform and focus the investigation:

4.3.1 Whether the DHA unduly delayed to adjudicate upon the Complainants’ applications for naturalisation;

4.3.2 Whether the DHA improperly adjudicated upon the Complainants’ applications for naturalisation contrary to the provisions of the Citizenship Act; and

4.3.3 Whether the Complainants were improperly prejudiced by the conduct of the DHA in the circumstances?

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 Copies of the front page of applications for naturalisation of Mr. Tshuma dated 06 November 2014 and Mr. Jules dated 29 December 2014,

4.4.1.2 Copies of acknowledgement of receipts of the application for naturalisation of Mr. Tshuma dated 07 October 2014, Mr. Felaye dated 25 January 2013,
Mr. Mongoli dated 07 August 2013, Mr. A Faarah dated 20 September 2013, Mr. Wangata dated 22 December 2014, Mr. Farah dated 19 December 2013, Mr. KM Abdi dated 26 November 2013, Mr. Y Abdi dated 07 August 2014, Mr. I Aakbani family dated 22 and 27 October 2015, Mr. Elesh dated 29 August 2015 and Mr. AL Abdi dated 20 December 2013.

4.4.1.3 Copies of outcome letters from the DHA to Mr. Tshuma dated 11 November 2016, Mr. Faleyeye dated 02 November 2016, Mr. Jules dated 21 November 2016, Mr. Elesh dated 04 September 2014, 01 October 2014 & 15 September 2016, Mr. Mongoli dated 01 November 2016, Mr. Shafiq dated 03 December 2015 & 04 January 2017, Mr. Mohamud dated 18 June 2015 & 14 November 2016, Mr. Tshibasu dated 22 October 2016 and Mr. KM Abdi dated 30 September 2016,


4.4.2 Correspondence sent and received

4.4.2.1 Emails to DHA dated 24 June 2015 and 24 November 2016 from Adv. G Montwedi-Tshabalala (PPSA) requesting reasons for the delay in finalising Mr. Mongoli's application.

4.4.2.2 An email containing a spreadsheet of the DHA cases, including Mr. Tshuma matter, from Adv. A Dathi (PPSA) to Mr. Hennie Meyer of the DHA dated 19 November 2015.
4.4.2.3 An email from Adv. A Dathi (PPSA) to Mr. Lethuba of the DHA dated 6 June 2016 requesting him to report urgently on the expected turnaround times.

4.4.2.4 An email containing a spreadsheet of the DHA cases from Adv. J Singh (PPSA) to Mr. Hennie Meyer.

4.4.2.5 An email from Mr Hennie Meyer to Mrs S Van Wyk (PPSA) dated 31 January 2017 advising that Mr. Lutumba has not completed the qualifying period of application for naturalisation.

4.4.2.6 An email from Thobile Mapela dated 23 October 2017 to Adv. G Montwedi-Tshabalala (PPSA).

4.4.2.7 An email from Tsietsi Sebemetja to Adv G Montwedi-Tshabalala (PPSA) dated 16 November 2016 seeking to explain the 10 years period in the Regulations.

4.4.3 Legislation and other prescripts

4.4.3.2 South African Citizenship Act No. 88 of 1995 (as amended).

4.4.4 Case law

4.4.4.1 Sokhela & others v MEC, Agriculture & Environmental Affairs (KwaZulu – Natal) & others ([2009] JOL 23782 (KZP)
4.4.4.2 Islamic Unity Convention v Minister of Telecommunications and others 2008 (3) SA 383
4.4.4.3 Sizabonke Civils CC t/a Picon Projects v Zululand District Municipality and others Case No. 10878/2009

4.4.4.4 National Lotteries Board v Bruss and Others 2009 (4) SA 362 (SCA)

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Whether the DHA unduly delayed to adjudicate the Complainants' applications for naturalisation.

Common cause issues

5.1.1 It is common cause that the Complainants in Table A below lodged their applications for naturalisation and received the outcomes thereof from the DHA on different dates.

5.1.2 The evidence received by the Public Protector in relation to this issue is summarised in the Table A below, which amongst other things contain the dates when the applications for naturalisation were first lodged with the DHA and the total period it took the DHA to consider the applications.

Table A: Applications for naturalisation with outcomes

<table>
<thead>
<tr>
<th>Name of Complainant</th>
<th>Date of Permanent Residence</th>
<th>Date of Application for Naturalisation</th>
<th>Date of Adjudication</th>
<th>Total Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr. Tshuma</td>
<td>15/01/2008</td>
<td>07/10/2014</td>
<td>01/11/2016</td>
<td>25 months</td>
</tr>
<tr>
<td>Mr. Faleyé</td>
<td>07/01/2008</td>
<td>25/01/2013</td>
<td>02/11/2016</td>
<td>48 months</td>
</tr>
<tr>
<td>Mr. Jules</td>
<td>24/11/2009</td>
<td>29/12/2014</td>
<td>21/09/2016</td>
<td>21 months</td>
</tr>
</tbody>
</table>
Issues in dispute

5.1.3 The issue in dispute in relation to complaints as summarised in both Table A above and Table B below was whether the DHA unduly delayed to adjudicate upon the Complainants' applications.

5.1.4 The Complainants who appear in Table B below provided copies of the PRPs and proof relating to the submission of their applications for naturalisation to the DHA. However, the issue whether or not these applications have been adjudicated upon was in dispute.

Table B: Applications for naturalisation without outcomes

<table>
<thead>
<tr>
<th>Name of Complainant</th>
<th>Date of Permanent Residence</th>
<th>Date of Application for Naturalisation</th>
<th>Date of Adjudication</th>
<th>Total Duration until end of October 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr. Al Abdi</td>
<td>13/10/2008</td>
<td>20/12/2013</td>
<td>Pending</td>
<td>46 months</td>
</tr>
<tr>
<td>Mr. Faarah</td>
<td>15/08/2008</td>
<td>20/09/2013</td>
<td>Pending</td>
<td>49 months</td>
</tr>
<tr>
<td>Mr. Wangata</td>
<td>17/09/2009</td>
<td>22/12/2013</td>
<td>Pending</td>
<td>46 months</td>
</tr>
<tr>
<td>Mr. Farah</td>
<td>12/11/2009</td>
<td>19/12/2013</td>
<td>Pending</td>
<td>46 months</td>
</tr>
<tr>
<td>Mr. Y Abdi</td>
<td>09/12/2008</td>
<td>07/08/2014</td>
<td>Pending</td>
<td>38 months</td>
</tr>
</tbody>
</table>

2 This was Mr. Leash’s second application for naturalisation
<table>
<thead>
<tr>
<th>Name</th>
<th>Date Filed</th>
<th>Date Decision</th>
<th>Status</th>
<th>Delay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr. I Aakbani</td>
<td>07/04/2005</td>
<td>27/10/2015</td>
<td>Pending</td>
<td>24 months</td>
</tr>
<tr>
<td>Mrs. NB Aakbani</td>
<td>07/04/2005</td>
<td>27/10/2015</td>
<td>Pending</td>
<td>24 months</td>
</tr>
<tr>
<td>Mr. S Aakbani</td>
<td>07/04/2005</td>
<td>22/10/2015</td>
<td>Pending</td>
<td>24 months</td>
</tr>
<tr>
<td>Miss A Aakbani</td>
<td>07/04/2005</td>
<td>22/10/2015</td>
<td>Pending</td>
<td>24 months</td>
</tr>
<tr>
<td>Miss. T Aakbani</td>
<td>07/04/2005</td>
<td>27/10/2015</td>
<td>Pending</td>
<td>24 months</td>
</tr>
<tr>
<td>Mr. Lutumba</td>
<td>19/11/2008</td>
<td>23/12/2013</td>
<td>Pending</td>
<td>36 months</td>
</tr>
</tbody>
</table>

5.1.5 The Complainants in Table B submitted that they have not received any outcome from the DHA. On the other hand, the DHA submitted that all applications in Table B except that of Mr. Al Abdi, have been adjudicated upon and that the letters of outcome were sent to the respective Complainants. However, the DHA did not provide any proof to the Public Protector that the Complainants’ applications have been adjudicated upon. The Public Protector is not persuaded that the DHA has adjudicated upon the Complainants’ applications mentioned in Table B.

5.1.6 The other issue in dispute was whether or not the DHA unduly delayed to process the Complainants’ applications for naturalisation. In this regard, the DHA did not make substantive submissions to the Public Protector as to why it took long to consider and adjudicate upon the Complainants’ applications. The DHA through an email dated 23 October 2017 to the Public Protector, attributed the delay in a number of applications to the centralisation of the adjudication process. However, this submission should be rejected as it was advanced as a general reason for the delay and not specific to each individual application submitted to the DHA.

5.1.7 The issue whether or not the DHA unduly delayed to adjudicate upon the Complainants’ applications as highlighted in the tables above will be determined by the application of law hereunder.

**Application of the relevant law**

5.1.8 The issue regarding whether or not the DHA unduly delayed the adjudication of the Complainants’ applications was considered through having regard to minimum
service standards, values and principles that should characterise public administration. In as far as minimum service standards were concerned, the DHA-63 form (application for naturalisation form) which was published with the Regulations on South African Citizenship Act, 2012 (the Regulations) contain the following ascription:

“Kindly note that this application may take a period of (twelve) 12 months to consider and finalise”

5.1.9 The above ascription on the DHA-63 form appeared to require the DHA to consider and finalise an application for naturalisation within 12 months. Save in the case of Mr. Elesh where his last application was considered within 13 months, the DHA took between 18 months and as long as about 49 months to adjudicate upon the Complainants’ applications for naturalisation.

5.1.10 In as far as values and principles are concerned, section 195 of the Constitution adopted basic values and principles which should characterise a public administration and are discussed hereunder.

5.1.10.1 Section 195(1)(b) of the Constitution calls for the public administration to be efficient, economic and effective in their use of resources. In this regard, the DHA was expected to dispense with the adjudication of the Complainants’ applications in an efficient and effective way. This would have been achieved if the applications were dispensed with without delay.

5.1.10.2 The Complainants submitted that the DHA was not responsive to their needs as advocated for in section 195(1)(e) of the Constitution. The DHA was also not transparent in the manner in which it handled the applications in that it never reported progress or explained why there was a delay in the adjudicating of the applications as required by section 195(1)(g) of the Constitution.
5.1.11 Based on the discussion above, the DHA did not adhere to some of the principles and values espoused in section 195(1) of the Constitution.

5.1.12 The White Paper on Transforming Public Service Delivery issued by the Government in 1997 identified eight Batho Pele Principles for transforming public service delivery. The Batho Pele Principles relevant to the present matter are canvassed below:

5.1.12.1 Service Standards: “Citizens should be told what level and quality of public service they will receive so that they are aware of what to expect”. In view of what is discussed in paragraph 5.1.9, the Complainants expected their applications to be finalised within 12 months. In this instance, the DHA failed to meet the services standards expected by the Complainants.

5.1.12.2 When the above principle was not met by the DHA, the Complainants expected the DHA to be courteous. Courtesy means “Citizens should be treated with courtesy and consideration”. The Complainants in this instance should have been treated with courtesy and consideration by being informed regularly on the progress of their applications and/or why their applications could not be finalised within reasonable time. Except for enquiries made by the Complainants, there is no evidence at the Public Protector’s disposal that the DHA provided regular feedback to the Complainants regarding their applications.

5.1.12.3 Another principle considered was that of value for money which means “Public services should be provided economically and efficiently in order to give citizens the best possible value for money”. This principle required the DHA to operate economically and efficiently by ensuring that the Complainants’ applications were adjudicated upon without delay. It cannot be argued that the DHA dealt with the Complainants’ applications in the most efficient way if it took as long as 49 months to finalise some of the applications.
5.1.13 It is evident from the evidence presented above that the Complainants' applications for naturalisation were not considered and finalised in line with the Batho Pele Principles.

5.1.14 The case law considered by the Public Protector was Gqwetha v Transkei Development Corporations Ltd and Others\(^3\) (Gqwetha case). In this case, the Supreme Court of Appeal held that an assessment of an undue delay involves the examining of firstly, a factual enquiry upon which a value judgment is made in the light of all the relevant circumstances, and if so, secondly, whether, in the discretion of the court, such delay should be excused or overlooked. In the first leg of the enquiry, any explanation offered for the delay is considered. The second part of the enquiry, however, cannot be evaluated in a vacuum, but must be assessed with reference to its potential to prejudice the affected parties. In other words, the examination of whether a delay is undue or not, requires that a value judgment be made, where the reasons provided for the delay is weighted up against the possibility of prejudice as a result of the delay.

5.1.15 The DHA did not provide reasonable explanation why it took long to consider and adjudicate upon the Complainants' applications in compliance with the above judgement.

Conclusion

5.1.16 In the circumstances, the adjudication of the Complainants' applications which took place within the time periods highlighted in the tables above cannot be considered to be in line with the minimum service standards identified, Batho Pele principles and with the basic values and principles governing public administration as set out in section 195 of the Constitution.

\(^3\) [2005] ZASCA 51; 2006 (2) SA 603 (SCA)
5.2 Whether the DHA improperly adjudicated on the Complainants’ applications for naturalisation contrary to the provisions of the Citizenship Act;

*Common cause issues*

5.2.1 It is common cause that the Complainants’ applications were submitted and adjudicated under the Citizenship Act as amended by Act 17 of 2010⁴.

5.2.2 It is common cause that the applications mentioned in the Table C below were lodged with the DHA after the Complainants had attained 5 years of permanent residence.

**Table C: Applications lodged after 5 years (yrs) of permanent residence**

<table>
<thead>
<tr>
<th>Name of Complainant</th>
<th>Date of Permanent Residence</th>
<th>Date of Application for Naturalisation</th>
<th>Period from the date of obtaining permanent Residence and date of application for naturalisation</th>
<th>Date of Adjudication</th>
<th>Total Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr. Tshuma</td>
<td>15/01/2008</td>
<td>07/10/2014</td>
<td>6yrs 9 months</td>
<td>01/11/2016</td>
<td>25 months</td>
</tr>
<tr>
<td>Mr. Faleyeye</td>
<td>07/01/2008</td>
<td>25/01/2013</td>
<td>5yrs</td>
<td>02/11/2016</td>
<td>48 months</td>
</tr>
<tr>
<td>Mr. Jules</td>
<td>24/11/2009</td>
<td>29/12/2014</td>
<td>5yrs 1 month</td>
<td>21/09/2016</td>
<td>21 months</td>
</tr>
<tr>
<td>Mr. Nobanda</td>
<td>07/10/2008</td>
<td>14/10/2013</td>
<td>5yrs</td>
<td>17/10/2016</td>
<td>35 months</td>
</tr>
<tr>
<td>Mr. Shafiq</td>
<td>05/04/2011</td>
<td>12/12/2016</td>
<td>5yrs 8 months</td>
<td>04/01/2017</td>
<td>01 month</td>
</tr>
<tr>
<td>Mr. Mohamud</td>
<td>16/08/2008</td>
<td>20/01/2016</td>
<td>7yrs 5 months</td>
<td>14/11/2016</td>
<td>09 months</td>
</tr>
<tr>
<td>Mr. Tshibasu</td>
<td>03/04/2009</td>
<td>07/04/2014</td>
<td>5yrs</td>
<td>22/10/2016</td>
<td>30 months</td>
</tr>
<tr>
<td>Mr. KM Abdi</td>
<td>08/11/2008</td>
<td>26/11/2013</td>
<td>5yrs</td>
<td>30/09/2016</td>
<td>34 months</td>
</tr>
<tr>
<td>Mr. Sabria</td>
<td>26/11/2009</td>
<td>26/03/2015</td>
<td>6yrs 4 months</td>
<td>20/09/2016</td>
<td>18 months</td>
</tr>
<tr>
<td>Mr. Eliesh</td>
<td>28/01/2008</td>
<td>29/08/2015</td>
<td>7yrs 8 months</td>
<td>15/09/2016</td>
<td>13 months</td>
</tr>
</tbody>
</table>

⁴ Came into operation on 1 January 2013 through a proclamation published in the Government Gazette dated 28 December 2012.
5.2.3 It is common cause that the DHA eventually adjudicated upon the Complainants’ applications for naturalisation and the outcomes thereof were communicated to them through letters.

5.2.4 It is also common cause that the PRPs issued to the Complainants by the DHA did not contain any comments or notes under “endorsements / conditions”.

5.2.5 Furthermore, it is common cause that the Complainants complied with all the requirements listed in section 5 of the Act, specifically section 5(1)(c) of the Citizenship Act.

Issues in dispute

5.2.6 The issue in dispute was whether the reasons given to reject the Complainants’ applications were consistent with section 5(1)(c) of the Citizenship Act. In other words, the question was whether the DHA adjudicated upon the Complainants’ applications for naturalisation in line with the provisions of the Citizenship Act?

5.2.7 The DHA, through an email dated 23 October 2017 to the Public Protector, submitted that “The Amendment Act, 2010, prescribes through the Regulations that a person must be 10 years with Permanent Residence Permit before they can apply for naturalisation. This put differently, the Act stipulates that one must be with a minimum of five years with permanent residence permit preceding the application of naturalisation. Which further explained indicates that when after five years you become a full PR holder you now have five years minimum to an application for naturalisation and in total gives you a period of 10 years”.

5.2.8 The DHA, through an email dated 16 November 2016 to the Public Protector, further contended that the calculation of the 5 years specified in section 5(1)(c) of the Citizenship Act looked at the period from which an applicant has fulfilled the
requirements of the PRP and not the date he or she obtained it. The DHA’s reasons for rejecting the Complainants’ applications were also crystallised in the letters of outcome that were sent to them. In this regard, the Public Protector will refer to the letters that were sent to Mr Tshuma, Mr Faleyie, Mr Jules, Mr Shafiq, Mr Mohamud, Mr Tshibasu, Mr KM Abdi, Mr. Elesh and Mr. Sabria.

5.2.9 In the case of Mr Tshuma, his outcome letter from the DHA read as follows:

"On the assessment of the contents case file in the Department’s possession, it has been established that you have applied before time of qualification.

You obtained your Permanent Residence on 15 January 2009. You will qualify to apply for naturalisation after ten years with Permanent Residence and if for five years towards application for naturalisation you have not been outside the Republic of South Africa for a period longer than 90 days per year as stipulated in the South African Citizenship Amended Act, 2010 (Act 17 of 2010) and its regulations".

5.2.10 Mr Tshuma challenged the correctness of the date “15 January 2009” cited in the letter above as the date on which his PRP was issued by the DHA. In this regard he submitted a copy of his PRP with permit number JNB679/07 to the Public Protector which showed the date of issue as 01 January 2008 and in the category of “dependent”.

5.2.11 In the case of Mr Mohamud, the DHA’s second outcome letter dated 14 November 2016 stated that he obtained his PRP on 16 March 2009. However, a copy of the PRP with permit number DBN20/07 submitted to the Public Protector showed the date of issue as 16 August 2008.

5.2.12 It is clear from the evidence traversed above that the PRPs of Mr Tshuma and Mr Mohamud were issued on 15 January 2009 and 16 March 2008 respectively. In this regard, the DHA’s version contained on the outcome letters must be rejected.
5.2.13 Except where the DHA cited the date on which a PRP was issued to a Complainant, the outcome letters from the DHA to Mr Tshuma, Mr Faleyie, Mr Jules, Mr Tshibasu, Mr Sabria and Mr KM Abdi and second outcome letters to Mr Shafiq and Mr Mohamud and the third outcome letter to Mr. Elesh read as follows:

"On the assessment of the contents case file in the Department’s possession, it has been established that you have applied before time of qualification.

You obtained your Permanent Residence on {07 January 2008}. You will qualify to apply for naturalisation after ten years with Permanent Residence and if for five years towards application for naturalisation you have not been outside the Republic of South Africa for a period longer than 90 days per year as stipulated in the South African Citizenship Amended Act, 2010 (Act 17 of 2010) and its regulations".

5.2.14 In the case of Mr Shafiq, the DHA rejected his first application after lodging it on 28 November 2011, the same year he obtained his PRP. However, the DHA advised through the outcome letter dated 03 December 2015 that Mr Shafiq will qualify to re-apply on or after 24 November 2016. This was the clearest indication to Mr Shafiq that the qualifying period for the application is 5 years post PRP. Mr Shafiq re-applied for naturalisation on 12 December 2016 as per the DHA’s advice. However, the DHA’s letter of outcome to Mr. Shafiq dated 04 January 2017 was as quoted above.

5.2.15 In the case of Mr Mohamud, the DHA rejected his application for naturalisation after lodging it on 19 January 2012, within 4 years of obtaining his PRP. However, the DHA’s letter of outcome dated 14 November 2016 to his second application was the same as quoted above.

5.2.16 In the case of Mr. Elesh, the DHA also rejected his application for naturalisation on the basis that he applied before the qualifying time. Mr. Elesh first lodged his
application on 27 July 2012 after obtaining his PRP on 28 January 2008. Through an outcome letter dated 04 September 2014, the DHA informed Mr. Elesh that he will qualify to apply on 27 August 2015. Mr. Elesh again received another outcome letter dated 01 October 2014 advising that "according to your Permanent Resident Permit, you qualified to apply on or after 28 January 2013, however you may re-apply on 26 August 2015 as prescribed on section 8 of the Act provided you did not exceed 90 days outside South Africa for each year in the 5 years preceding your new application and comply with requirements as prescribed in the Citizenship Act, Act 17 of 2010 as amended" (own emphasis).

5.2.17 Whereas there cannot be an argument that Mr Elesh's application on 27 July 2012 was lodged prematurely, he contended that the different dates communicated to him regarding the date on which he ought to qualify left him completely confounded. Notwithstanding the three conflicting dates that were mentioned in the two letters of outcome, Mr Elesh submitted another application for naturalisation on 29 August 2015 and the DHA's letter of outcome dated 15 September 2016 to this application read the same as quoted above.

5.2.18 In reference to the outcome letters received by the Complainants, the DHA's submission was that the Complainants did not qualify to lodge the applications for naturalisation at the time of lodgement. On the contrary, the Complainants believed that they had qualified to lodge the said applications.

5.2.19 The Public Protector noted that the DHA's outcome letters to the Complainants centred around section 5(1)(c) of the Citizenship Act and not any other ground listed in the section. The issue whether or not the Complainants qualified to apply for naturalisation is an issue which will be determined by the application of law hereunder.

Application of the relevant law
This issue is regulated by section 5 of the Citizenship Act which prescribes requirements that must be met when the Minister considers an application for naturalisation.

Section 5 of the Citizenship Act provides that:

1. "The Minister may, upon an application in the prescribed manner, grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the Minister that-

   (a)
   (b) he or she has been admitted to the Republic for permanent residence therein; and
   (c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application; and
   (d) ...."

Regulation 3(2) of the Regulations provides that:

"The period of ordinary residence referred to in section 5(1)(c) of the Act is 10 years immediately preceding the date of application for naturalisation".

The Regulations above ascribe a period of ordinary residence as 10 years contrary to the 5 year period specified in the Act. There is nothing in the reading of section 5(1)(c) of the Citizenship Act that suggest that the period of ordinarily resident can be a minimum of 10 years. All the applicants in the Table C were in possession of the PRPs and had met the minimum requirements of 5 years immediately preceding the date of their applications as stipulated in section 5(1)(c) of the Citizenship Act. Despite meeting these requirements, the DHA disqualified them on the basis that their applications for naturalisation were premature.
5.2.24 The letters quoted above categorically mentioned that the Complainants will qualify to apply for naturalisation after 10 years (as specified in the Regulations) post PRP and not after 5 years (as specified in the Citizenship Act) post PRP.

5.2.25 In view of the above, this must be seen as a direct contradiction between the Citizenship Act and the Regulations. Section 23 of the Citizenship Act specifically empowers the Minister to make regulations not inconsistent with the Citizenship Act (own emphasis).

5.2.26 In Islamic Unity Convention v Minister of Telecommunications and others⁵ the court held in par 57 that “The disputed paragraphs cannot aid to interpret the impugned provisions, in the same way that regulations made in terms of legislation cannot be used as an aid to interpret that legislation”.

5.2.27 In Sizabonke Civils CC t/a Picon Projects v Zululand District Municipality and others⁶, the High Court declared the regulations that were inconsistent with the act to be invalid. The court further held that the Minister did not have original legislative powers but his power to make regulations were administrative and therefore reviewable in terms of PAJA⁷.

5.2.28 In National Lotteries Board v Bruss and Others⁸ the court held in para 37 that “It is not permissible to use a definition created by a Minister in regulations to interpret the intention of the legislation in an Act of Parliament, notwithstanding that the Act may include the regulations”

5.2.29 It is evident from the court decisions cited above that when interpreting an Act, one must always begin with the provisions of the Act in question and not the regulations promulgated in terms of the said Act. Regulations are intended to regulate the process or procedure, to give effect to the provision of the Act and not to amend the

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⁵ 2008 (3) SA 383
⁶ Case No. 10878/2009
⁷ Promotion of Administrative Justice Act, 3 of 2000
⁸ 2009 (4) SA 362 (SCA)
Act. Accordingly, regulations are administrative action that is reviewable under PAJA.

5.2.30 Furthermore, it follows that whenever there is a contradiction between a statute and a regulation, the former takes precedence. However, the DHA opted to implement the 10 years period stipulated in the regulations instead of the 5 years in the Citizenship Act.

5.2.31 The evidence traversed above indicates that the reasons for rejecting the Complainants’ applications was based on the incorrect application of section 5(1)(c) of the Citizenship Act. The DHA’s contention that the Complainants’ applications for naturalisation were premature is inconsistent with section 5(1)(c) of the Citizenship Act and should therefore be rejected.

5.2.32 It then follows the Complainants’ applications for naturalisation were not premature.

**Conclusion**

5.2.33 In the circumstances, the DHA improperly applied section 5(1)(c) of the Citizenship Act and the 10 years period prescribed in the Regulations is therefore inconsistent with section 5(1)(c) of the Citizenship Act.

5.3 **Whether the Complainants were improperly prejudiced by the conduct of the DHA in the circumstances:**

5.3.1 The Mr Tshuma submitted that for the last two years he had remained honest and loyal to the advice he received from some DHA officials not to travel outside the Republic. He also indicated that the delays in processing his application even affected his ability to travel outside the Republic for work purposes. The work visits required him to utilise an official passport which could only be granted if he was a citizen of the Republic. In June 2016 he missed out on a study tour to the United Kingdom because he could not be part of the delegation without an official passport.
He has not been able to secure scholarships or bursaries only reserved for citizens for his Doctor of Philosophy (Econ) studies.

5.3.2 Mr Nobanda submitted that he lost valuable time to live together as a family due to the undue delay to finalise the application by the DHA. He missed out the critical formative years of his children, one of whom was only five years old when he lodged his application. At the moment his son is languishing alone in Bulawayo, Zimbabwe while his wife and daughter are in Windhoek, Namibia.

5.3.3 All the Complainants indicated that the delay in adjudicating their applications for naturalisation had denied them an opportunity to enjoy the rights and benefits only reserved for citizens in terms of the Constitution and other legislative prescripts. For instance all the Complainants were disqualified from participating in the Local Government Elections which took place on 3 August 2016 due to the undue delay and the subsequent improper adjudication of their applications for naturalisation.

Application of the relevant law

5.3.4 Whereas many sections in the Constitution, particularly the Bill of Rights which afford rights to “everyone”, the rights enshrined in sections 19, 20, 21(3) & (4) and 22 are only reserved for South African citizens. In this regard, the Complainants whose applications were delayed and subsequently been rejected would not have been able to enjoy any of the rights contained in these sections.

5.3.5 To be more specific, section 19(3)(a) of the Constitution provides that every citizen has the right to vote. However, the Complainants would not have been able to exercise this right because their applications for naturalisation were improperly rejected and some had not been finalised.

5.3.6 The Complainants’ applications were adjudicated between 15 September 2016 and 04/01/2017 after the Local Government Elections had taken place on 3 August 2017.
Conclusion

5.3.7 In the circumstances the Complainants suffered improper prejudice.

6 FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

6.1 Whether the DHA unduly delayed to adjudicate upon the Complainants' applications for naturalisation;

6.1.1 The allegation that the DHA unduly delayed to adjudicate upon the Complainants' applications is substantiated.

6.1.2 Most of the Complainants' applications for naturalisation were finalised after 24 months from the date of application, whereas those applications that appear in Table B of the report remain pending.

6.1.3 The Complainants' applications were not adjudicated within the timeline of 12 months as ascribed on the DHA-63 form.

6.1.4 The DHA did not comply with the basic values and principles governing public administration as espoused in section 195(1)(b)(e) & (f) of the Constitution. Furthermore the DHA did not embrace the Batho Pele Principles of service standards, courtesy and value for money as stated in this report.

6.1.5 Therefore, the above conduct by the DHA constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration and undue delay as envisaged in Section 6(4)(a)(i) & (ii) of the Public Protector Act.
6.2 Whether the DHA improperly adjudicated upon the Complainants' applications for naturalisation contrary to the provisions of the Citizenship Act;

6.2.1 The allegation that the DHA improperly adjudicated upon the applications for naturalisation of Mr Tshuma, Mr Faleyie, Mr Jules, Mr Nobanda, Mr Shafiq, Mr Mohamud, Mr Tshibasu, Mr KM Abdi, Mr Elesh and Mr Sabria is substantiated.

6.2.2 In terms of section 5(1)(c) of the Citizenship Act, a person making an application for naturalisation is required to have been ordinarily a resident of the Republic of South Africa for a period of five (5) years. Mr Tshuma, Mr Faleyie, Mr Jules, Mr Nobanda, Mr Shafiq, Mr Mohamud, Mr Tshibasu, Mr KM Abdi, Mr Elesh and Mr. Sabria had been ordinarily residents for a period of 5 years when they lodged their applications.

6.2.3 The DHA improperly adjudicated upon the Complainants applications for naturalisation contrary to section 5(1)(c) of the Citizenship Act in that the Complainants were required to have 10 years of ordinary residence post PRP contrary to the 5 year period specified in the Citizenship Act.

6.2.4 Therefore, the above conduct by the DHA constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration as envisaged by Section 6(4)(a)(i) of the Public Protector Act.

6.3 Whether the Complainants were improperly prejudiced by the conduct of the Department in the circumstances:

6.3.1 The allegation that the Complainants were prejudiced by the conduct of the DHA is substantiated.

6.3.2 In terms of section 19(3) of the Constitution, every citizen has a right to vote in the elections. Had the DHA timeously and correctly adjudicated on the Complainants applications, the Complainants would have had the opportunity to exercise their right to vote in the Local Government Elections which took place on the 3 August 2016.
6.3.3 The Complainants were denied an opportunity to enjoy the rights and benefits that are exclusively reserved for South African citizens.

6.3.4 Therefore, the conduct of the DHA amounted to improper prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act

7. REMEDIAL ACTION

7.1 In the light of the above, the appropriate remedial action the Public Protector is taking in terms of section 182(1)(c) of the Constitution in order to address the systemic deficiencies in the DHA, is the following:

The Minister of Home Affairs (The Minister)

7.1.1 The Minister must initiate the review of the Regulations, specifically the 10 year period to apply for naturalisation, which is inconsistent with section 5(1)(c) of the Citizenship Act, within three (3) months of the date on which this report is issued.

The Director-General of the DHA (The DG)

7.1.2 The DG must issue letters of apology to the Complainants within thirty (30) days of the date on which this report is issued.

7.1.3 The DG must review the applications of Mr Tshuma, Mr Faleyie, Mr Jules, Mr Nobanda, Mr Shafiq, Mr Mohamud, Mr Tshibasu, Mr KM Abdi, Mr. Elesh and Mr Sabria within 30 days, taking into account section 5(1)(c) of the Citizenship Act and all other similar applications, within six (6) months of the date on which this report is issued.

7.1.4 The DG must, within 30 days of the date on which this report is issued, properly and in accordance with section 5(1)(c) of the Citizenship Act, adjudicate the applications of Mr AL Abdi, Mr Faarah, Mr Wangata, Mr Farah, Mr Y Abdi, Mr. Lutumba and the Aakbani family.
7.1.5 The DG must, within 30 days of the date on which this report is issued, write to Mr Mongoli and advise him that his application for naturalisation was submitted prematurely and that he must re-apply.

7.1.6 The DG must, within 6 months of the date on which this report is issued, publish Standard Operating Procedures (SOPs) with turn-around times on how long it should take to adjudicate upon applications for naturalisation. The SOPs must be drafted in line the “basic values and principles governing public administration”, as outlined in section 195 of the Constitution and the Batho Pele principles.

7.1.7 On the seventh (7) month of the date of issuing of the report, the DG must issue a statistical report to the Public Protector on the outcomes of all similar applications reviewed.

8. MONITORING AND IMPLEMENTATION OF THE REMEDIAL ACTIONS

8.1 The Minister of Home Affairs must, within 30 days of the date on which this report is issued, submit an implementation plan with timelines to the Public Protector indicating how the remedial action referred to in paragraph 7.1.1 above will be implemented.

8.2 The DG of the DHA must, within 15 days of date on which this report is issued, submit an implementation plan with timelines to the Public Protector indicating how the remedial action referred to in paragraphs 7.1.2 to 7.1.7 above will be implemented.

8.3 Unless the remedial actions taken by the Public Protector are reviewed and set aside by the Court of law, compliance is not optional and same must be complied with within the stated period.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 28/02/2018

Assisted by: Adv A Dathi and Adv G Montwedi-Tshabalala