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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION REGARDING THE ADJUDICATION OF THE PERMANENT RESIDENCE PERMIT OF MS FATUMA RAMAZANI
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Executive Summary

(i) This is my report 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).

(ii) This report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into a complaint lodged by Ms Fatuma Ramazani on 12 June 2014.

(iii) In the main, the complaint was that the Department of Home Affairs (DHA) improperly adjudicated the Complainant’s Permanent Residence Permit (PRP) application dated 30 September 2011 and the subsequent written representations related thereto.

(iv) Based on an analysis of the allegations, the following issues were identified to inform and focus the investigation:

(aa) Whether the DHA unduly delayed to adjudicate the Complainant’s PRP application dated 30 September 2011 and the subsequent written representations related thereto, and if so, whether this amounts to maladministration;

(bb) Whether the DHA irregularly and improperly adjudicated upon the Complainant’s PRP application dated 30 September 2011, and if so, whether this amounts to maladministration; and

(cc) Whether the Complainant was improperly prejudiced by the conduct of the DHA in the circumstances as envisaged by section 6(4)(a)(v) of the Public Protector Act.

(v) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. The investigation was conducted
through correspondence, meetings and interviews with the Complainant and the DHA.

(vi) Key laws taken into account to help me determine if there had been improper conduct by the DHA were principally the Immigration Act, the Constitution and the Service Delivery Charter of the DHA.

(vii) During the investigation process, I issued a Notice in terms of section 7(9)(a) of the Public Protector Act (Notice) to the DHA on 30 August 2019 to afford it an opportunity to respond to my provisional findings.

(viii) On 18 September 2019, the DHA further responded to my Notice indicating that the Complainant’s PRP was issued and advised the Complainant to collect it at the DHA office. The evidence revealed that when she collected the PRP at the DHA office on 30 September 2019, the Complainant and the DHA discovered an error on the PRP relating to her nationality. The DHA was in the process of rectifying the PRP at the date of this report.

(ix) Having considered the evidence obtained during the investigation, as against the relevant regulatory framework, the complaint received as against the concomitant response by the DHA I make the following findings:

(a) Whether the DHA unduly delayed to adjudicate the Complainant’s PRP application dated 30 September 2011 and the subsequent written representations related thereto, and if so, whether this amounts to maladministration:

(aa) The allegation that the DHA unduly delayed to adjudicate the Complainant’s PRP application dated 30 September 2011 and the subsequent written representations related thereto is substantiated.
(bb) The DHA took in excess of thirty six (36) months to adjudicate the Complainant’s PRP application dated 30 September 2011, as opposed to 8 months provided for in the SDC.

(cc) The DHA also took 16 months to respond to the Complainant’s first representation dated 30 September 2014. The DHA also failed to respond to the Complainant’s second representation dated 26 January 2016.

(dd) The conduct of the DHA is in violation of section 195(1)(b) and (g) of the Constitution, Batho Pele Principles of courtesy, redress and value for money; and section 9 of the DHA’s SDC.

(ee) The DHA’s conduct in this regard amounts to improper conduct as envisaged in section 182(1) of the Constitution and maladministration and undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act.

(b) Whether the DHA irregularly and improperly adjudicated upon the Complainant's PRP application dated 30 September 2011, and if so, whether this amounts to maladministration:

(aa) The allegation that the DHA irregularly and improperly adjudicated the Complainant's PRP application dated 30 September 2011 is substantiated.

(bb) The DHA irregularly rejected the Complainant's PRP application because there was “no police clearance certificate from her country of origin” and “no offer of permanent residence” in contravention of Regulation 24(11) of the Immigration Regulations which provides specific requirements for a section 27(d) PRP application. “Police clearance certificate from her country of origin” and “no offer of permanent residence” are not part of the requirements in Regulation 24(11).
(cc) The DHA’s conduct in this regard amounts to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(c) Whether the Complainant was improperly prejudiced by the conduct of the DHA in the circumstances as envisaged by section 6(4)(a)(v) of the Public Protector Act:

(aa) The allegation that the Complainant was improperly prejudiced by the conduct of the DHA is substantiated.

(bb) Had the DHA properly and without delay adjudicated the Complainant’s PRP application, she would have qualified to apply for naturalisation during 2017, thereby enjoying full rights like any national of South Africa.

(cc) The DHA’s conduct in this regard amounts to improper prejudice as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(x) I have taken note that the DHA has accepted my findings referred to in my section 7(9)(a) notice which was addressed to the Acting Director-General of the DHA. I have also noted that the DHA has issued the Complainant’s PRP, but it was subsequently discovered that it reflected an error relating to her nationality and the DHA has undertaken to rectify the said error.

(xi) The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following:

(aa) The Acting Director-General of the DHA must, within thirty (30) working days from the date of this report, ensure that the error in the Complainant’s PRP is rectified; and
(bb) The Acting Director-General of the DHA must, within thirty (30) working days from the date of the report, apologise in writing to the Complainant for the undue delay to process her PRP application and irregular adjudication of her applications.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION REGARDING THE ADJUDICATION OF THE PERMANENT RESIDENCE PERMIT OF MS FATUMA RAMAZANI

1. INTRODUCTION

1.1. This is my report 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. This report is submitted in terms of section 8 of the Public Protector Act to the following people to note the outcome of this investigation and implementation of the remedial action:

1.2.1 Dr Pakishe Aaron Motsoaledi, the Minister of Home Affairs;

1.2.2 Mr Thulani Mavuso, the Acting Director-General of the Department of Home Affairs; and

1.2.3 The Complainant, Ms Fatuma Ramazani.

1.3 This report relates to an investigation into allegations of maladministration by the Department of Home Affairs (the DHA) regarding the adjudication of the Permanent Residence Permit (PRP) of Ms Fatuma Ramazani.

2. THE COMPLAINT

2.1. The complaint was lodged on 12 June 2014 by Ms Fatuma Ramazani (the Complainant). The Complainant alleged as follows:
2.1.1 She arrived in the Republic of South Africa (the RSA) from the Democratic Republic of Congo (the DRC) as an asylum seeker on 19 January 2004;

2.1.2 She approached the Immigration Services of the DHA to apply for an asylum seekers' permit. She was furnished with a temporary asylum seeker permit issued in terms of section 22 of the Refugees Act, 130 of 1998 (the Refugees Act) on 23 January 2004;

2.1.3 On 20 April 2004, the DHA furnished her with a Formal Recognition of Refugee Status in the RSA (Refugee Status) issued in terms of section 24(3)(a) of the Refugees Act;

2.1.4 On 25 February 2011, the Standing Committee for Refugee Affairs (SCRA) certified that she will remain a refugee in the RSA indefinitely;

2.1.5 On 30 September 2011, she applied for a Permanent Residence Permit (PRP) in terms of section 25 of the Immigration Act, 13 of 2002 (the Immigration Act);

2.1.6 She received the outcome on her PRP application on 29 September 2014. According to the outcome, her application was refused because she did not provide a police clearance certificate from her country of origin;

2.1.7 She submitted an appeal application on 30 September 2014;

2.1.8 She followed up on her appeal application and further when she visited the Cape Town Office of the DHA on 25 January 2016, she was given another outcome dated 25 January 2016. Her application was refused on 25 January 2016 on the basis that she did not have an offer of permanent residence;

2.1.9 She submitted another appeal application on 25 January 2016 and to date she has not received an outcome on this application from the DHA;
2.1.10 Whilst she continued making constant enquiries with the Cape Town Office of the DHA on her appeal application, a DHA official informed her that according to the record on the system, her application for PRP is approved and as soon as the actual certificate arrives, it would be handed to her; and

2.1.11 At the time of lodging her complaint with my office, she had not received an outcome from the DHA.

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 the 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 national 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(a));

3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d)); and

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 constitutional power is curtailed in the circumstances wherein there is a conflict with the obligations under the Constitution (para 71);

3.6.2 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);

3.6.3 The Public Protector, in appropriate circumstances, has 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 Public Protector’s power to take remedial action meaningless or ineffective (para 85 and 152);

3.6.4 There is nothing in the Public Protector Act or Ethics Act that prohibits 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);

3.6.5 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords 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.
3.6.6 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (para 104);

3.6.7 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 (para 105);

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

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

3.7 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute 'special circumstances', some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the complainants persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitutes as 'special circumstances' depends on the merits of each case.

3.8 The DHA is an organ of state and their conduct amounts to conduct in state affairs, as a result, the complaint falls 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.

3.9 My power and jurisdiction to investigate and take appropriate remedial action was not disputed by the DHA 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 Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

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 amounts to improper conduct or maladministration?
4.2.1.4 In the event of improper conduct or maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where he 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 the roles played by the DHA when it adjudicated the PRP application of the Complainant.

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 officials of the DHA when adjudicating the PRP and its subsequent appeal applications by the Complainant.

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

4.3 Notice issued in terms of section 7(9) of the Public Protector Act:

4.3.1 During the investigation process, I issued a notice in terms of section 7(9)(a) of the Public Protector Act (Notice) to the Acting Director-General (ADG) of the Department of Home Affairs on 30 August 2019 to afford it an opportunity to respond to my provisional findings. The response of the DHA is incorporated in this report.

4.4 Based on analysis of the allegations, I identified the following issues to inform and focus this investigation:

4.4.1 Whether the DHA unduly delayed to adjudicate the Complainant’s PRP application dated 30 September 2011 and the subsequent written representations related thereto, and if so, whether this amounts to maladministration;
4.4.2 Whether the DHA irregularly and improperly adjudicated upon the Complainant’s PRP application dated 30 September 2011, and if so, whether this amounts to maladministration; and

4.4.3 Whether the Complainant was improperly prejudiced by the conduct of the DHA in the circumstances as envisaged by section 6(4)(a)(v) of the Public Protector Act.

4.5 The Key Sources of information

4.5.1 Documents:

4.5.1.1 Complaint form received from the Complainant dated 12 June 2014;

4.5.1.2 A copy of Formal Recognition of Refugee Statuses in the RSA valid for the period 2005/04/20 to 2007/04/19;

4.5.1.3 A copy of Formal Recognition of Refugee Statuses in the RSA valid for the period 2007/01/19 to 2009/01/18;

4.5.1.4 A copy of Formal Recognition of Refugee Statuses in the RSA valid for the period 2008/11/07 to 2010/11/07;

4.5.1.5 A copy of Formal Recognition of Refugee Statuses in the RSA valid for the period 2010/11/08 to 2012/11/08;

4.5.1.6 A copy of Formal Recognition of Refugee Statuses in the RSA valid for the period 2013/11/07 to 2017/11/07;

4.5.1.7 A copy of Formal Recognition of Refugee Statuses in the RSA valid for the period 2017/11/07 to 2021/11/07;
4.5.1.8 A copy of the Certification in terms of section 27(c) of the Refugees Act 130 of 1998 indicating that she will remain a refugee indefinitely in the RSA dated 2011/02/25;

4.5.1.9 A copy of the PRP application form, the earliest date stamp of the DHA on the form is 2011/09/30 and the latest is 2014/01/27;

4.5.1.10 A copy of the South African Police clearance certificate dated 2011/09/16;

4.5.1.11 A copy of the letter of outcome regarding the Complainant’s PRP application dated 2014/09/29;

4.5.1.12 A copy of the affidavit dated 29 September 2014 which was done with the SAPS wherein the Complainant indicated that the law does not allow her to be in contact with the country that she fled from;

4.5.1.13 A copy of the letter of the outcome regarding the Complainant’s PRP application dated 2016/01/25;

4.5.1.14 A copy of the PRP, reflecting an erroneous nationality of the Complainant;

4.5.1.15 A notice issued in terms section 7(9) of the Public Protector Act submitted to the Department dated 30 September 2019; and

4.5.1.16 An email from the Department dated 18 September 2019 responding to the notice issued in terms section 7(9) of the Public Protector Act.

4.5.2 Legislation and other prescripts

4.5.2.1 The Constitution;
4.5.2.2 The Public Protector Act;

4.5.2.3 The signed, but undated Service Delivery Charter of the DHA; and

4.5.2.4 The Immigration Act 13 of 2002 and its Regulations.

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 Regarding whether the DHA unduly delayed to adjudicate the Complainant’s PRP application dated 30 September 2011; and the subsequent written representations related thereto, and if so, whether this amounts to maladministration:

Common cause issues

5.1.1. The Complainant submitted her PRP application to the DHA on 30 September 2011 together with an original police clearance certificate issued by the South African Police Service (SAPS).

5.1.2. The DHA furnished the Complainant with an outcome of the application three (3) years later dated 29 September 2014, notifying her that the application had been refused. The reason for the rejection of the application was stated as follows:

"No police clearance certificate from country of origin."

5.1.3. The letter further advised that she “may within 10 working days from date of receipt of this notice, make written representations to the Director-General to review the decision.”
5.1.4. In compliance with the DHA’s advice, the Complainant submitted written representations against the above decision a day later on 30 September 2014. Two (2) years later, the DHA issued the Complainant with a letter, dated 25 January 2016, similar to the one dated 29 September 2014 referred to above, but with a totally different reason of rejection of her application. The letter of 25 January 2016 provides as follows:

"With reference to your/your client’s application for a permanent residence permit(s), you are, in terms of provisions of section 8(3) of the Act, hereby, notified that the application had been refused. The reason(s) for the decision is/are the following:

a. No offer of permanent residence.

You may within 10 working days from the date of receipt of this notice, make written representations to the Director-General to review the decision."

Issues in dispute

5.1.5. The issue for my determination is whether the DHA unduly delayed to adjudicate the Complainant’s PRP application dated 30 September 2011; and the subsequent written representations related thereto and if so whether this amounts to maladministration.

5.1.6. The Complainant argued that upon receipt of the DHA’s response of 25 January 2016, she submitted her written representations on 26 January 2016 in compliance with the DHA’s notice and the DHA failed to furnish her with an outcome.

5.1.7. My office raised the matter with the DHA from 07 August 2014 and subsequent correspondences, but it remained unresolved.
5.1.8. The DHA did not provide my investigation team with the reason for the delay to adjudicate the matter.

_The DHA’s response to my section 7(9)(a) notice_

5.1.9 I issued a notice in terms of section 7(9)(a) of the Public Protector Act (Notice) to the DHA on 30 August 2019 to afford it an opportunity to respond to my provisional findings.

5.1.10 The DHA was served with the Notice, with a response date of 16 September 2019. On 18 September 2019, Mr Adziliwi Muravha, the DHA’s Assistant Director: Central-Adjudication, emailed my investigation team indicating that the Complainant’s PRP was issued and the Complainant could collect it from the DHA office.

5.1.11 The Complainant reported to my investigation team that she went to the DHA office on 30 September 2019, but could not collect the PRP certificate as it was wrongly written that she is a national of the Congo instead of the DRC.

5.1.12 Mr Muravha confirmed the error with my investigation team on the same date of 30 September 2019 and indicated that the DHA was already in the process of rectification of the PRP at the time of this report.

_Application of the relevant legal framework_

_The Constitution_

5.1.13. Section 195(1)(b) of the Constitution calls for public administration to be efficient, economic and effective in the use of its resources. Section 195(1)(g) further provides that transparency must be fostered by providing the public with timely, accessible and accurate information. In this regard, the DHA was expected to
dispense with the adjudication of the Complainant's applications in an efficient and effective manner and provide timely responses to the Complainant. This would have been achieved if the applications were processed and adjudicated timely and without delay.

_Batho Pele Principles_

5.1.14 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 principles relevant to the present complaint are:

"**Courtesv:** Citizens should be treated with courtesy and consideration.

**Redress:** If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response.

**Value for money:** Public services should be provided economically and efficiently in order to give citizens the best possible value for money".

5.1.15 It was expected of the DHA to treat the Complainant with courtesy and consideration by processing her application and written representations on time. Failure by the DHA to process the Complainant would be in violation of the Constitution and the spirit of the _Batho Pele_ Principles. Failure to provide services on time would also amount to lack of efficiency on the part of the DHA.

5.1.16 Evidence at my disposal indicates that since 2011, the Complainant's PRP application had not been processed timeously and efficiently by the DHA.
The DHA Service Delivery Charter

5.1.17 Despite the DHA legislation and regulations not prescribing the timelines within which various permits should be processed, section 9 of the DHA's Service Delivery Charter (the SDC) provides as follows:

"Application of residence-on-other-grounds permit will be adjudicated within eight (8) months for applications collected within the Republic of South Africa from the date of receipt of application until outcome is known."

5.1.18 It was expected of the DHA to adjudicate upon the Complainant's application within eight (8) months as stipulated by the SDC. However, evidence obtained by my office indicates that since lodging her application with the DHA on 30 September 2011, the DHA took well over 36 months before issuing her with an outcome on 29 September 2014. The DHA took sixteen (16) months to consider and issue an outcome to the Complainant's representation dated 30 September 2014.

Conclusion

5.1.19 Based on evidence at hand, it can be concluded that the DHA did not comply with the legal prescripts dealing with the processing of the PRP within the prescribed timelines.

5.2 Regarding whether the DHA irregularly and improperly adjudicated the Complainant’s PRP application dated 30 September 2011, and if so, whether this amounts to maladministration:
5.2.1. The Complainant applied for a PRP at the DHA on 30 September 2011. On 29 September 2014 and 25 January 2016, she received two (2) written responses from the DHA that it had been refused.

5.2.2. The issue for my determination is whether the Complainant’s PRP application and the subsequent representations were appropriately adjudicated upon by the DHA.

5.2.3. The Complainant argued that she submitted her PRP application, together with an original police clearance certificate issued by the SAPS on 30 September 2011.

5.2.4. According to the DHA’s response of 29 September 2014, her application was refused because she did not submit a police clearance certificate from her country of origin. The response further advised the Complainant that she “may within 10 working days from date of receipt of this notice, make written representations to the Director-General to review the decision…”

5.2.5. In the notice of 25 January 2016, the DHA once again advised her that she “may within 10 working days from date of receipt of this notice, make written representations to the Director-General to review the decision”.

5.2.6. She further reported that she subsequently submitted her written representations on 30 September 2014 in compliance with the DHA’s notice of 29 September 2014.
5.2.7 She indicated that the DHA responded only on 25 January 2016 in which she was advised that her application had been refused again on the basis that she did not provide "an offer of permanent residence", a totally different reason to the one provided as per the letter of 29 September 2014.

5.2.8 In compliance with this advice, the Complainant indicated that she again submitted her written representations on 26 January 2016 to which no response was received.

5.2.9 My office raised the matter with the DHA, but no response was received in this regard, except when I issued the Notice referred to above. In the response of 18 September 2019 to the Notice, Mr Muvavha did not indicate whether the DHA irregularly and improperly adjudicated the Complainant's PRP application. The response merely provided as follows:

"Please be informed that the above matter has been resolved and outcome dispatched to Provincial Office Cape Town this morning. Client may make follow up after four working days."

Application of the relevant legal framework

The legislative process of an application for a PRP

The Immigration Act 13 of 2002

5.2.10 The Complainant applied for a PRP in terms of section 25(2) of the Immigration Act, 2002 (the Immigration Act) which provides that:

"Subject to this Act, upon application, one of the permanent residence permits set out in sections 26 and 27 may be issued to a foreigner."
5.2.11 Section 27(d) of the Immigration Act provides that:

"The Department may issue a permanent residence permit to a foreigner of good and sound character who is a refugee referred to in section 27(c) of the Refugees Act, 1998 (Act No. 130 of 1998), subject to any prescribed requirements".

5.2.12 The Complainant, a lawful Refugee, accordingly applied for the PRP at the DHA on 30 September 2011 in compliance with the provisions of section 27(d) of the Immigration Act.

5.2.13 The evidence gathered indicates that upon receipt of the Complainant’s PRP application of 30 September 2011, the DHA responded to her as per a letter dated 29 September 2014 notifying her, irregularly, that "in terms of section 8(3) of the Immigration Act", her application had been refused.

*Reason(s) for rejection of the Complainant’s application for PRP*

*The Immigration Regulations No. R413 of 22 May 2014 (the Immigration Regulations)*

5.2.14 Section 7 of the Immigration Act provides that:

"(1) The Minister shall have the power to make regulations called for, or conducive to, the implementation of this ACT…"

5.2.15 In compliance with the above provisions, the Immigration Regulation No R413 of 2014 (Immigration Regulations) were published for the implementation of the Immigration Act.
5.2.16 Regulation 23 of the Immigration Regulations regulates the applications for PRP referred to in section 25(2) of the Immigration Act.

5.2.17 Regulation 23(1) provides as follows:

"An application for a permanent residence permit contemplated in section 25(2) of the Act shall be made on Form 18 illustrated in Annexure A and shall be submitted by the applicant in person."

5.2.18 The Complainant, in compliance with the provisions of Regulation 23(1) above, submitted her PRP application on Form 18 at the DHA.

5.2.19 Regulation 24(11) of the Immigration Regulations regulates the requirements needed to consider a section 27(d) PRP application. It provides as follows:

"The requirements contemplated in section 27(d) of the Act shall be-
(a) the submission of the certification contemplated in section 27(d) of the Refugees Act…;
(b) where applicable, the submission of affidavits with regard to aliases used by the applicant and family members; and
(c) the submission of the information and documentation contemplated in regulation 23(b), (f), (g), (h) and (i): Provided that in the case of documents issued by the country from which he or she fled not being available, a sworn affidavit."

5.2.20 The information and documentation in Regulation 23(2) of the Immigration Regulations are the following:

"The application contemplated in sub regulation (1) shall be accompanied by-
(b) a copy of a birth certificate in respect of the applicant…;"
(f) medical and radiological reports...;
(g) the documentation...relating to dependent children...;
(h) the documents relating to the applicant's marital status...; and
(i) an unabridged birth certificate in respect of each dependent child...”

5.2.21 Similarly, as per a letter dated 26 January 2016, the DHA responded to the Complainant’s second review/appeal application notifying her, irregularly, that her application had been refused because she did not provide an offer of permanent residence, a requirement not provided for in the Immigration Act or the Regulations.

5.2.22 Evidence obtained by my investigation team revealed that the two notifications from the DHA informing her of the reasons for refusal of her application, that is “no police clearance certificate from country of origin” and “no offer of permanent residence” were irregular because the reasons provided for by the DHA are not the requirements provided for in the Immigration Act nor its Regulations.

5.2.23 On 18 September 2019, the DHA responded to my Notice indicating that the Complainant’s PRP was issued and advised the Complainant to collect it at the DHA office. The findings revealed that when she collected the PRP at the DHA office on 30 September 2019, the Complainant and the DHA discovered an error on the PRP relating to her nationality. The DHA was in the process of rectifying the PRP at the date of this report.

Conclusion

5.2.24 Based on the evidence gathered, it can be concluded that the DHA did not comply with its legal prescripts in adjudicating the Complainant’s PRP application.
5.3 Regarding whether the Complainant was improperly prejudiced by the conduct of the DHA in the circumstances, as envisaged by section 6(4)(a)(v) of the Public Protector Act:

5.3.1 The issue for my determination is whether the Complainant was improperly prejudiced by the conduct of the DHA.

5.3.2 The Complainant indicated that as a result of the DHA not adjudicating her PRP application to its conclusion since January 2016, she is improperly prejudiced in that she cannot apply for a green bar coded identity document which is recognised by most institutions, including the financial sector.

5.3.3 She also indicated that her eligibility to qualify for South African citizenship is impacted upon by the continued undue delay by the DHA to adjudicate her application. She indicated that she applied for a PRP on 30 September 2011 and at the time of her application, she met the requirements to qualify for a PRP. Had the DHA adjudicated the application properly and on time, she would have obtained her PRP in July 2012. She would have qualified to apply for naturalisation in July 2017 and would have casted her vote for the first time as a South African citizen in the 2019 national elections.

5.3.4 The Complainant also indicated that she is suffering emotionally, financially and physically because of the delay to properly and fairly adjudicate her PRP application. She has to renew her status, her refugee’s identification and travel document and these impact on her financially. She indicated that often at times she had to stand in long queues and at times be turned back to come back the next day.
Conclusion

5.3.5 Based on the evidence above it can be concluded that the Complainant was improperly prejudiced by the conduct of the DHA.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I hereby make the following findings:

6.1 Regarding whether the DHA unduly delayed to adjudicate the Complainant’s PRP application dated 30 September 2011 and the subsequent written representations related thereto, and if so, whether this amounts to maladministration:

6.1.1 The allegation that the DHA unduly delayed to adjudicate the Complainant’s PRP application dated 30 September 2011 and the subsequent written representations related thereto is substantiated.

6.1.2 The DHA took in excess of thirty six (36) months to adjudicate the Complainant’s PRP application dated 30 September 2011, as opposed to 8 months provided for in the SDC.

6.1.3 The DHA also took sixteen (16) months to respond to the Complainant’s first representation dated 30 September 2014. The DHA also failed to respond to the Complainant’s second representation dated 26 January 2016.

6.1.4 The conduct of the DHA is clearly in violation of section 195(1)(b) and (g) of the Constitution, Batho Pele Principles of courtesy, redress and value for money; and section 9 of the DHA’s SDC.
6.1.5 The DHA’s conduct in this regard amounts to improper conduct as envisaged in section 182(1) of the Constitution and maladministration and undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act.

6.2 Regarding whether the DHA irregularly and improperly adjudicated the Complainant’s PRP application dated 30 September 2011, and if so, whether this amounts to maladministration:

6.2.1 The allegation that the DHA irregularly and improperly adjudicated the Complainant’s PRP application dated 30 September 2011 is substantiated.

6.2.2 The DHA irregularly rejected the Complainant’s PRP’s application because there was “no police clearance certificate from her country of origin” and “no offer of permanent residence” in contravention of Regulation 24(11) of the Immigration Regulations which provides specific requirements for a section 27(d) PRP application. “Police clearance certificate from her country of origin” and “no offer of permanent residence” are not part of the requirements in Regulation 24(11).

6.2.3 The DHA’s conduct in this regard amounts to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.3 Regarding whether the Complainant was improperly prejudiced by the conduct of the DHA in the circumstances, as envisaged by section 6(4)(a) (v) of the Public Protector Act:

6.3.1 The allegation that the Complainant was improperly prejudiced by the conduct of the DHA is substantiated.
6.3.2 Had the DHA properly and without delay adjudicated the Complainant’s PRP application, she would have qualified to apply for naturalisation in 2017, thereby enjoying full rights like any national of South Africa.

6.3.3 The DHA’s conduct in this regard amounts to improper prejudice as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

7.1 I have taken note that the DHA has accepted the findings referred to in my section 7(9)(a) notice which was addressed to the Acting Director-General of the DHA. I have also noted that the DHA has issued the Complainant’s PRP, but it was subsequently discovered that it reflected an error relating to her nationality and the DHA has undertaken to rectify the said error.

7.2 The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following:

7.2.1 The Acting Director-General of the DHA must, within thirty (30) working days from the date of this report, ensure that the error in the Complainant’s PRP is rectified; and

7.2.2 The Acting Director-General of the DHA must, within thirty (30) working days from the date of the report, apologise in writing to the Complainant for the undue delay to process her PRP application and irregular adjudication of her applications.
8. MONITORING

8.1 The Acting Director-General of the DHA must, within ten (10) working days of issuing this report, submit an Implementation Plan indicating how the remedial action mentioned above will be implemented.

8.2 Compliance with the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in my report.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 25/10/2019