LAWYERS FOR HUMAN RIGHTS

REFUGEE AND MIGRANT RIGHTS PROGRAMME - JOHANNESBURG

Second Floor, Braamfontein Centre, 23 Jorissen Street, Braamfontein, 2001

Tel 011 339 1960 **Fax** 011 339 2665 **Web** www.lhr.org.za

LAWYERS FOR HUMAN RIGHTS' SUBMISSION TO PARLIAMENTARY PORTFOLIO COMMITTEE ON HOME AFFAIRS ON IMMIGRATION AMENDMENT BILL JANUARY 2011

Lawyers for Human Rights (LHR) welcomes the opportunity to make comments on the 2011 Immigration Amendment Bill. LHR is an independent human rights organisation founded in 1979 which uses the law as a positive instrument for change to deepen the democratisation of South African society. LHR's Refugee and Migrant Rights Programme was established in 1996 and uses the experience and knowledge from its work in this area to inform the submissions on this Bill.

1. INTRODUCTION

The Immigration Amendment Bill has been introduced to streamline the procedures of the Department of Home Affairs. The Bill seeks to encourage legal immigration by inter alia rationalising the permitting system, revising the requirements for a business visa and introducing a new critical skills category.

The Objects of the Bill include the amendment of the Immigration Act, 2002 (Act No. 13 of 2002) ("the Act"), to provide for the designation of ports of entry, to revise the provisions relating to the Immigration Advisory Board, to revise provisions relating to the making of regulations, to revise provisions relating to visas for temporary sojourn in the Republic, to provide for the mandatory transmission and use of information on advance passenger processing, to provide for the transmission of passenger name record information, to revise provisions relating to permanent residence, to revise penal provisions and to correct certain important technical aspects in the text of the Act.

LHR would like to bring particular attention to the affect these amendments will have on the human rights of individuals entering the country. In making our comments we will specifically focus on the amendment to Section 23(1) and the introduction of the Advance Passenger Processing (APP) system under Section 35 of the Immigration Amendment Bill.

2. SECTION 23(1) VALIDITY PERIOD FOR ASYLUM SEEKERS

LHR highlights its concern over the proposed amendment to Section 23(1) of the Act. This amendment adjusts the validity period for a transit permit allowing less time for an individual to travel to their nearest Refugee Reception Office (RRO) to apply for asylum. The previous time allowance of 14 days would be reduced to 5 days under an amended Act. Past experience indicates that this shortening of time allocation will result in a lot fewer individuals being able to make an application for asylum within the specified time period thereby rendering internationally protected refugees vulnerable to arrest and *refoulement* to their countries of origin. LHR opposes this amendment as many of our existing clients seeking asylum have difficulties making it to a RRO within the current 14 day time allowance.

The five permanent refugee reception offices ("RRO") are in Cape Town, Johannesburg, Pretoria, Durban, and Port Elizabeth each of them a significant distance from the borders where asylum seekers will cross into South Africa. In border towns temporary RRO's remain problematic. In Musina in March of 2009 the temporary Refugee Reception Offices at the showgrounds where 3,000 - 4,000 Zimbabweans queued to apply for asylum and seek refuge each night were closed down. [1] The current Musina RRO is inundated with asylum seekers crossing the border from Zimbabwe and it is not uncommon for people to wait days in order to be able to even gain entry into the premises. This results in daily detentions at the Soutpansberg Military Grounds ("SMG") detention facility operated by the South African Police Service.

In a roundtable discussion with the Forced Migration Studies Project the Centre Managers at each of the five permanent RRO's made clear that the reception offices do not have the capacity to meet the overwhelming demand, and that sufficient resources are lacking. As a result, thousands of asylum seekers arrive at these offices each day and are turned away, leaving them without any legal status.[2]

These delays and bottlenecks coupled with the difficulties and cost involved in getting transport to a RRO illustrate that the proposed reduction in time limit for an asylum transit permit is unjustifiable. It is LHR's suggestion that Section 23(1) remain unchanged to allow asylum seekers an adequate amount of time to travel to an RRO and legalise their entry into the country.

LHR is also concerned with the automatic determination that a holder of an expired transit permit who has not yet made, or has been unable to make, an application for asylum is an "illegal foreigner". This is particularly relevant given the harsher penalties that may be applied to asylum seekers under amendments made to Section 49 of the Act.

Other important changes to section 23 include a pre-screening process at the borders wherein it appears that an immigration officer will determine if the applicant has a *prima facie* claim to refugee status before granting a section 23 transit permit. This provision is in direct conflict with the Refugees Act where only a refugee status determination officer has the lawful authority, and expertise, to determine who is a refugee in terms of the Act and international law. The result will also be to discourage applicants from using border crossings and encourage irregular, yet lawful in terms of international law, movements across borders to RRO's. Such a pre-screening procedure will defeat the purposes of the Immigration Act and be in direct conflict with the Refugees Act.

3. **HARSHER PENALTIES IN TERMS OF SECTION 49**

LHR is further concerned with the extraordinary increase criminal penalties for violations of the administrative provisions of the Immigration Act. A brief study of migration in Southern Africa will reveal that such penalties will not decrease the number of migrants across South Africa's borders but will, again, increase the numbers of people choosing irregular migratory routes and

[1] Medicins Sans Frontiers - Press Release 'Forced closure of "Refugee Reception Office" further endangers health of Vulnerable Zimbabweans in South Africa' 4 March 2009

[2] Forced Migration Studies Project – Press Release 'Stakeholders chart way forward on refugee reception' March 2009

defeating the purposes of the Act in encouraging those persons to identify themselves at a border post.

A costing exercise of section 49 will no doubt reveal that the burden of such criminal provisions will fall on the shoulders of South African taxpayers who will be paying for such persons to remain in prison for at least half of their sentence.

LHR would rather encourage the Department to study alternatives to harsh penalties and explore policies which would encourage use of border crossings, identification and effective administrative procedures to discourage non-compliance with the Immigration Act.

4. CHANGE OF STATUS TO BE CONDUCTED OUTSIDE OF THE REPUBLIC

Amendments to section 10 of the Act will also make it more difficult for the lawful holders of visas issued in terms of the Immigration Act to change the conditions of their permits while in South Africa. This change of policy is non-sensical and will discourage professionals and other legitimate temporary residence holders from remaining in South Africa and contributing their skills to the South African economy. The Department has not yet indicated in which circumstances a change of status would be permitted within South Africa. LHR would seek clarity on those circumstances and the policy considerations behind the change in this provision.

5. ADVANCED PASSENGER PROCESSING

The proposed amendment to Section 35 of the Act requires reworking. Section 35 of the amended Act makes provision for mandatory Advance Passenger Processing (APP), including the submission of passenger name record information by owners or persons in charge of conveyances.
Mandatory APP systems have been introduced in other jurisdictions for the purposes of national security and passenger clearances. The Australian government introduced a mandatory APP system in 2003 and has produced a comprehensive information booklet containing operating instructions for service providers. The APP system in Australia was designed with a minimum requirement for data retention in recognition of passengers' privacy rights.[3]

A major concern with the introduction of a mandatory APP in South Africa is the possibility of misuse of people's private data and system abuse. During the 2010 World Cup the Department outsourced Advance Passenger Processing to a private commercial company called SITA Aero.[4] It is unclear whether this arrangement will continue or if there will be adequate data privacy and data protection measures in place.

Another important concern is the lack of appeals process for such a decision considering that section 8 of the Immigration Act does not make clear provision for such circumstances.

[3] Department of Immigration and Citizenship – Australian Government 'Australia's APP – Advanced Passenger Processing System – Check in Guide' October 2008
[4] SITA Aero 'South Africa enhances border security with iBorders Advance Passenger Processing' - http://www.sita.aero/content/south-africa

The Amendment Bill states that the Director-General shall adopt prescribed measures to safeguard the protection of that information.[5] LHR suggests that further legislation be enacted to ensure data privacy and protection. In accordance with the World Customs Organisation/International Air Transport Association/ International Civil Aviation Organization Guidelines on Advance Passenger Information[6] the legislation needs to require that personal data undergoing automated (computer) processing :

- Should be obtained and processed fairly and lawfully;
- Should be stored for legitimate purposes and not used in any way incompatible with those purposes;
- Should be adequate, relevant and not excessive in relation to the purposes for which they are stored;
- Should be accurate and, where necessary, kept up to date;
- Should be preserved in a form which permits identification of the data subjects for no longer than is required for the purposes for which that data is stored.[7]

LHR also raises concerns about the requirement found in Section 35(3)(a) for the owner or person in charge of a conveyance on a domestic flight to electronically transmit the prescribed passenger name record information. The Department of Home Affairs has no legitimate interest in obtaining such information. This provision is in direct conflict with the fundamental rights in the Constitution including the right to freedom of movement and the right to privacy and will no doubt lead to unnecessary and costly litigation with the Department. The subsection also fails to indicate for what purposes such information would be used. We would argue that this subsection is not in the interest of passenger clearance or national security and it should be removed.

6. CONCLUSION

LHR makes the following comments/suggestions on the Immigration Amendment Bill:

1. Section 23 of the Act should remain unchanged; the validity period for an asylum seeker travelling to the nearest Refugee Reception Office to apply for asylum should remain at 14 days;

2. If a mandatory APP system is to go ahead further legislation should be enacted to ensure that the system meets international standards and that there is adequate data protection measures in place;

3. The substantial increase in criminal penalties should be reviewed and considered next to migration policy in the region;

[5] Section 35(1)(c) of the Immigration Amendment Bill October 2010

[6] In 2003, the WCO, IATA and ICAO reviewed the Advance Passenger Information Guidelines. These developments include such items as security, data protection and mutual administrative assistance. The revised Guidelines were adopted during the Permanent Technical Committee (PTC) held in March 2003.

[7] WCO/IATA/ICAO 'Guidelines on Advanced Passenger Information' March 2003

4. The requirement found in Section 35(3)(a) for domestic airlines to transmit electronic passenger lists should be removed.

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