LAWYERS FOR HUMAN RIGHTS

LAWYERS FOR HUMAN RIGHTS SUBMISSION

ON THE DRAFT IMMIGRATION ACT REGULATIONS, 2014

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This submission has been endorsed by the following organisations:

- *The Consortium for Refugees and Migrants in South Africa (CORMSA)*
- *Coordinating Body of Refugee and Migrant Communities (CBRMC)*
- *Zimbabwe Exiles Forum (ZEF)*

1. Introduction

Lawyers for Human Rights is an independent human rights organisation with a 35-year track record of human rights activism and public interest litigation in South Africa. LHR uses the law as a positive instrument for change and to deepen the democratisation of South African society. LHR welcomes the opportunity to comment on the Draft Immigration Act Regulations. Our submission deals with practical concerns which we foresee as well as possible conflict with the Refugees Act[1].

2. Submissions

Definitions

Refer to Regulation 1

The definition of "custodian parent" is difficult to understand. The word "custodian" suggests that it is a parent who looks after the child – but the definition "a parent who has been granted full or specific parental rights and responsibilities" could mean a parent who has rights of care, primary residence, contact or even just one who pays maintenance - if one has regard to the wording of the Children's Act and the definitions of parental responsibilities and rights. We submit that clarity is required on who the custodian parent is, and what level of care/interaction with the child is needed.

Refer to Regulation 1

The definition section should distinguish between **unaccompanied minors** and **separated minors**. It is submitted that a definition of "child in need of care" should also be imported from the Children's Act since the treatment of unaccompanied minors, separated minors and children in need of care is different. The Regulations should also set out clearly how each of the three sections of minors should be dealt with. Unaccompanied minors and other children in need of care must be referred to the DSD and/or Children's Court and separated minors to be declared as dependants of the care-giver looking after them.

[1] Refugees Act 130 of 1998

Permanent homosexual or heterosexual relationship

Refer to Regulation 3

While the Regulations are dealing with permanent heterosexual and homosexual relationships and the proof thereof, it is submitted that it would be prudent to set out regulations and procedures regarding the recognition of customary and/or religious marriages for the purposes of declaring someone a "spouse". Customary marriages are recognised in South Africa, but the position of religious marriages- specifically Muslim marriages- is less solid and the Regulations could clarify the issue of proof and requirements for recognition. There is a trend in case law to afford piece-meal recognition and there is no reason why this cannot be another area where the position is developed or clarified.

Refer to Regulation 3 (2) (a) (i)

The requirement that the permanent or heterosexual relationship has existed for *at least five years* before the date of the application is unreasonable and unnecessarily harsh. There is already a five year waiting period in order for spouses and life partners to be able to apply for permanent residence. There should not be any additional waiting periods in order for applicants to prove that they have been in a relationship for at least five years to qualify to apply for a spousal visa.

Refer to Regulation 3 (2) (c)

A similar requirement exists in order to prove that cohabitation has been in existence for a period of not less than five years. This requirement is also unreasonable and unnecessarily harsh. We submit that in respect of Regulations 3 (2) (a) (i) and 3 (2) (c) a period of at least 2 years is more reasonable in respect of the spousal/life partner visa qualification requirement.

Refer to Regulation 3 (2) (d)

In the case where the relationship is concluded between two foreigners in a foreign country the draft regulations require that there is an official recognition of the relationship issued by the authorities of the relevant country. In the case of homosexual relationships this may be impossible

to prove. There are 83 countries in which homosexuality is declared illegal[2]. These anti-gay laws mean that same sex relationships are not recognised and are even criminalised. Obtaining proof of a relationship in these circumstances will be difficult or impossible. We submit that there needs to be a measure of flexibility in this requirement.

Refer to Regulation 3 (7)

The penalty for error, misrepresentation and fraud is withdrawal of the permit but there is no indication of applicable due process rights. There should be a right to make representations to the Director-General as well as an appeal process in these cases.

Operations of Board

Regulation 5

This Regulation has changed considerably from the 2005 Regulations. There is no indication as to the frequency of meetings or the required number of persons needed to constitute a quorum. This will have implications for good governance mechanisms of the board.

Admission and Departure

Regulation 6

In Regulation 6 (10) we observed that these new additions to the Regulations are clearly meant to guide and regulate the movement of children into and out of the country and to increase the mechanisms for the protection of children. While these are progressive developments, the mechanisms for compliance with the Act and Regulations are onerous and difficult.

Has there been consultation and agreement with the Department of Social Development as to the requirement of the authorisation letter referred to in this Regulation?

[2] http://76crimes.com/76-coun tries-where-homosexuality-is-illegal/

Regulation 6 (12) (a) stipulates onerous and difficult requirements. In addition to holding a passport the parents/guardians of a child will also have to produce unabridged birth certificates, consent letters/affidavits or court orders as appropriate. Are these Regulations meant to apply to South African citizens and foreign nationals equally?

There are also special considerations which are meant to apply to refugees. If a person travels to South Africa for the purpose of applying for asylum, they do not need to produce any specific documents in order to gain admission to the country.

This Regulation is in conflict with Section 2 of the Refugees Act[3] and with the principle of non-refoulement.

Regulations 6 (10) - (12) needs to be weighed up against the Children's Act[4] and in particular with the best interest of the child standard. We submit that there should be a level of discretion and flexibility placed on the immigration officer on how to deal with cases for admission/departure where all the requirements are not satisfied.

Regulation 6 (13) – (17) must make reference to section 23 of the Immigration Act if the intention of the holder of a false or fraudulent document was to travel to the Republic with the intention of seeking asylum. The automatic referral for detention under Regulation 6(15) may violate South Africa's obligations against detaining asylum seekers in terms of the Refugees Act and international law relating to the protection of refugees.

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3 Section 2 of Refugees Act General Prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances[3]

4 Children's Act 38 of 2005 (assented to 8 June 2006)

Appeals and Reviews

Regulation 7

While the Act provides for stringent time periods within which a detainee may make representations to the Director-General (10 days) or the Minister (3 days) and provides for detention pending the outcome of those reviews, it does not provide for the time limits within which the DG or Minister must take a decision. In our experience, a section 8 decision can take over one year to be communicated to a person whose rights have been adversely affected. This is especially important for individuals in detention. The regulations should provide for a time period (for example 14 days) within which the Minister or Director-General must take a decision and communicate that decision to the individual concerned. Extensions of that time period may be provided for in the regulations, but those extensions must be communicated to the person concerned and should be limited to one extension of an appropriate time period.

Study Visa

Regulation 12 (2) (a)

There is a maximum period of validity for study visas without any provisions or considerations for longer study periods. Medical degrees and similar courses of study are for periods longer than 4 years. We submit that there needs to be some flexibility in the maximum period of validity of the visa if good grounds and justification are shown.

Business Visa

Regulation 14 (1) (b)

The Regulation requires that at least 60% of the total staff complement shall be South Africans or permanent residents. We submit that there needs to be a level of flexibility on the percentage of South African citizens/residents. There are businesses which are dependent on the skills of foreign nationals who would be unable to satisfy this requirement for example restaurants offering a particular kind of cuisine and companies offering language translation and interpretation services.

Regulation 14 (2) (e) (i) and (ii)

There are obligations imposed on the Department of Trade and Industry to conduct feasibility studies and issue letters of recommendation. Has the DTI been consulted on their ability and capacity to be able to render this service?

".. the contribution to the national interest of the Republic" is open to interpretation. Is there a working definition available?

Regulation 14 (3) (c)

This issue has already been raised elsewhere in this submission. Has the Department of Labour been consulted and do they have the necessary capacity and resources to be able to assess businesses and issue these letters confirming the required information?

Medical Treatment Visa

Regulation 16 (1) (iii)

We submit there should be no requirement that a disease or ailment for which treatment is sought should be 'curable'. This is an outrageous requirement. At the minimum, medical treatment should be effective or able to prolong a person's life without necessarily being able to cure the disease/ailment. The fact that an illness/ailment is not curable should not constitute grounds to refuse a medical treatment visa. Further, it would prove difficult for medicals doctors to state categorically that an illness is curable or not curable.

Work Visa

Regulation 18 (3)

The requirement that the Department of Labour assess the merits of each case and issue a certificate to accompany the work visa application is an onerous one. This is likely to increase the delays in the already long work visa application process.

Has the Department of Labour been consulted on this process and do they have a procedure in place in order to facilitate access to this certificate?

Regulation 18 (45) (a)

There are not always accredited bodies in place for every professional qualification. We submit that there needs to be a measure of flexibility in the event that no appropriate professional body exists.

We also raise a serious shortcoming in the change from the **exceptional skills permit** to the **critical skills permit**. It is not humanly possible for the Minister to develop and regularly update the list of critical skills to be able to cater for all possible cases where permits may be sought in this category.

A measure of discretion or flexibility may be required to deal with cases which were not contemplated at the time of the drafting of the critical skills list.

Corporate Visa

Regulation 20 (1) (b)

We submit that this is again an onerous requirement which will require the Department of Labour's input in the application process.

Has the Department of Labour been consulted and are they on board and prepared to carry out the functions as detailed in the Regulations?

Regulation 20 (2)

We have raised this issue elsewhere in this submission. The requirement for 60% of the total staff complement to be citizens or permanent residents may not always be possible. We recommend for some flexibility to be introduced into the Regulations in this respect.

Regulation 20 (6) (a)

This requirement is burdensome and oversteps the bounds of the employer-employee relationship. Surely an employer cannot be expected to ensure that all their employees' passports are valid. Corporate permits are issued to persons working in the agricultural sector and an individual farmer may employ hundreds of farm workers. This would make compliance very difficult and could mean that the employer is may be unable to source sufficient labour for the needs of his/her business.

Asylum Transit Visa

Regulation 22 (2) (b) and (c)

It may not always be possible for an official at a port of entry to determine whether a person seeking admission already has refugee status in another country or is a fugitive from justice. This may be possible in high profile cases but may be practically impossible in other cases.

In addition, the Refugees Act does not permit an immigration officer to determine the merits of an application for asylum. For example, if the individual is fleeing from politically motivated charges, he or she may be a fugitive from justice, but may have a valid asylum claim.

Form 17 is a very complicated form and will be difficult for many asylum applicants to fill in. There is also the threat of criminal sanction if it is wrongly completed which may intimidate asylum applicants. We submit that the regulation should make provision for translations of the form to be made available at ports of entry to ensure that asylum applicants are able to properly fill in the forms without the threat of sanction. This will also ensure that the correct information has been captured and is retained by the Department.

Permanent Residence

Regulation 24(3) relates to permanent residence based on "extraordinary skills and qualifications" and is not limited to persons who fall within the 'critical skills' list. This is an attempt by the Department to legislate and restrict the ambit of section 27(b) of the Act where no such restriction was contemplated by Parliament.

Prohibited persons

Regulation 26 (3)

We submit that a person should not be prohibited entry for the reason that a port health officer is not present at a port of entry. This is an arbitrary reason for refusing to admit persons. Persons seeking admission should not be refused entry on indiscriminate and random grounds. This is particularly a concern where the person seeking admission wishes to apply for asylum.

Undesirable persons

Regulation 27 (3)

We submit that the penalties laid out in this regulation are overly harsh particularly for persons who have overstayed for a period of 0- 30days and 30- 90 days. There is no exemption from the declaration of undesirability even where they may be good grounds or sufficient justification for this or where fault lies with the department in not processing applications within a reasonable time period. LHR has observed that visa processing times are excessively long. Even in cases where an application is submitted well in advance of the expiry of a visa the processing time may be delayed resulting in a person not being able to travel and effectively being without any status while the processing is ongoing. This does not take into consideration the numbers of applications which get lost and need to be re-submitted without any investigations or fast tracking from the department.

Illegal Foreigners

Regulation 30(4) should rather make provision for an extension of the time period of 14 days for good cause shown, for example in the event that a foreign national must organise transit visas to travel through other countries where there are no direct flights to his or her country of origin. It may be appropriate to make this application directly to the Director-General in order to avoid the possibility of corruption and the revolving door.

Arrest, detention and deportation of illegal foreigners

Regulation 33

In light of the decision in **Ulde v Minister of Home Affairs and Another 2009 (4) SA 522 (SCA)**, an immigration officer must determine the individual circumstances in each case compelling the detention of an illegal foreigner. The use of the officer's discretion must be *in favorem libertatis*. This is an opportunity to give direction to the immigration officer as to what elements to examine when deciding whether it is appropriate in the circumstances to detain the individual or if alternatives to detention, such as the order to leave provided for under section 32(1) of the Act and Regulation 30(4), would be as effective.

In the experience of Lawyers for Human Rights and the near weekly cases brought before the High Court, it is the incorrect use of this discretion which often leads to unlawful detention and an order for release, accompanied by the concomitant legal costs against the Department of Home Affairs.

Regulation 33(2)

Form 29 must be modified to inform an alleged illegal foreigner *how* to proceed with a review or appeal under section 8 of the Immigration Act. It should make specific reference to the forms contemplated by Regulation 7 and should be detailed enough to indicate the individual (e.g. "the immigration officer attending to you") to whom the forms should be given and remind the individual that he or she has the right to a copy of all forms signed. The time limits suggested under our submissions to Regulation 7 should also be explained to the detainee.

Form 29 should also be far more specific about the rights under section 34(1)(b) to have the detention confirmed by an order of the magistrate's court. It should explain how to make that request (by ticking the box on the proceeding page) but also make provision for the detainee to appear "in person" before the magistrate as provided for under section 35(2)(d) of the Constitution (see below).

Regulation 33 (4)

We submit that there is no reason why a person arrested in terms of the Immigration Act needs to wait for 20 days in order for an immigration officer to serve on that person a notification of intention. We submit that *48 hours* is a more than reasonable time period within which to do this. There is no reason why the same amount of time and protection afforded a detainee under section 35 of the Constitution of the Republic of South Africa Act, 1996, cannot be afforded an immigration detainee under the Immigration Act and the Immigration Regulations. A similar protection should be afforded detainees who are not provided with this right that they must be immediately released from detention. This does not prevent the immigration officer from using alternatives to detention (such as making use of an order to depart and the criminal sanctions imposed should the individual fail to depart as ordered). In our experience, the protections afforded by Regulation 33(4) are illusory as detainees are not allowed paper or writing utensils. Most are also excluded from the process due to a lack of sufficient English language skills to plead their case.

In addition:

- Form 30 should be modified and the *nota bona* be removed. It is an unlawful endorsement on the warrant as it creates the impression that only section 34(7) allows for the release of an individual who has been detained, however there are many circumstances where an illegal foreigner may be released without the further need of a magistrate's court. This includes where the detention has become unlawful (for example, detentions beyond 120 days), where the detainee has proven to the satisfaction of an immigration officer that he or she will leave voluntarily or where the detainee has indicated his desire to apply for asylum.

- Form 31 should be modified to include an acknowledgement of receipt by the detainee to avoid an immigration officer avoiding informing the detainee of his or her rights. The immigration must depose under oath as to whether the detainee was explained his or her rights as well as the steps taken to allow the detainee to make representations to the magistrate.

Further we submit that a person detained in terms of the Immigration Act should be brought physically before a magistrate in order to make oral representations. Currently detainees are not permitted to make any representations (oral or written) and the extension of detention periods take place in chambers and not in open court as a matter of course without due regard for any administrative rights. Oral representations before a magistrate should be mandatory and no

detention warrants may be extended without these representations. After all section 34 of the Constitution guarantees access to court to *everyone*, including immigration detainees.

Regulation 33(7)

Form 33 should be modified to include all of the methods use to assist the detainee to prove his lawful identity, including the grounds stipulated in the current Regulation 32 of the Immigration Regulations, 2005 (see below).

Regulation 33(8)

Form 34 should be modified to include an acknowledgement of receipt. There have been incidents in the past where immigration officers over charge the amount asked for in deposit as a bribe. Ensuring that the detainee has also confirmed the amounts contemplated will reduce the scope for corruption where that form is filed with the Clerk of the Court.

Administrative Fines

Regulation 39

We submit that in respect of any administrative fine imposed on a foreigner, that person should have the ability to have the fine formally issued to them; they should be able to challenge the fine by making representations to a judicial officer (Magistrate or Prosecutor). It should however be borne in mind that administrative fines are different from admission of guilt fines. Theoretically the person should be able to review / appeal the issuance of a fine to the DG or Minister under section 8.

Change of address

Regulation 40

What is the process to inform the department of change of address? Is there a specific form available and will a person be issued with proof of having submitted change of address details to the department?

Identification

Section 41 of the Immigration Act (which has not been amended) states:

> **41. Identification.**—(1) When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and

> if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.
>
> (2) Any person who assists a person contemplated in subsection (1) to evade the processes contemplated in that subsection, or interferes with such processes, shall be guilty of an offence.

It appears that the "reasonable steps" that were prescribed under Regulation 32 of the Immigration Regulations 2005 have been completely removed and no steps are now contemplated to ensure that a foreigner (or in well publicised incidents, a citizen) is not taken into unlawful custody. These steps were written in peremptive language. Ensuring compliance with section 12(1) of the Constitution is not only in the public interest *per se*, it is extremely important in the fight against corruption and xenophobic law enforcement tendencies. This will no doubt lead to further litigation against the Department of Home Affairs and the South African Police Service.

Drafted by Lawyers for Human Rights

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