CONSOLIDATED PUBLIC COMMENTS RECEIVED AND INPUTS BY THE DEPARTMENT

IMMIGRATION AMENDMENT BILL, 2015: PORTFOLIO COMMITTEE ON HOME AFFAIRS

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| **Clause** | **Clause description** | **Comments** | **Department’s submissions** | |
| *Long title* | To amend the Immigration Act, 2002, so as to provide for an adequate sanction for foreign nationals who have overstayed in the Republic beyond the expiry date on their visa; and to provide for matters connected therewith. | None | None | |
| *Clause 1* | Section 32 of the Immigration Act, 2002 (Act No. 13 of 2002), (hereinafter referred to as “the principal Act”), is hereby amended by the insertion after subsection (1) of the following subsection:  *“(1A) Illegal foreigners who have overstayed, as prescribed, do not qualify for a port of entry visa, a visa, admission into the Republic or a permanent residence permit during the prescribed period.”.* | **Agri SA**    The agricultural sector is affected in various ways by illegal foreigners gaining access to the country. This is a big safety risk for all of those residing in the country and especially so in the rural areas. The safety of farmers, farm workers and their families is compromised by those who are not documented.  However, the proposed amendment does not address the fact that these illegal foreigners gained access to the country through an unprotected border line. If the country’s borders are protected (fenced off), it will be able to control the influx of illegal or undocumented foreigners. The protection of the border lines should be the first priority.  The proposed amendment also does not address the current administrative challenges faced by those who are already in the country and are undocumented. It would be more helpful if those who are illegally in the country are regularised. We have seen two campaigns to regularise Zimbabwean workers during the past few years. If the influx of illegal foreigners cannot be stopped, they should instead be documented or regularised.  Lastly, the proposed amendment does not address instances where foreigners obtain forged documents. These illegal foreigners should be legally documented rather than remain illegally in the country. | The issues raised are administrative in nature as indicated in the submission itself and may be addressed outside of the Parliamentary legislative process | |
| **Banking Association South Africa (BASA)**  1. BASA understands the need for the Department of Home Affairs (“DHA”) to manage compliance with the visas or permits it issues to “foreigners”, and the problems or risks associated with such foreigners who abuse their visa or permit privileges.  2. Many banks in South Africa employ “foreigners” in their local banking operations, whether as scarce experienced or qualified human resources, or for training purposes. As such, these foreigners (and where necessary their immediate families) would comply with the necessary visa or permit requirements.  3. However, these visas or permits are usually subject to a finite term or period of validity. In some cases, the foreigner may leave the country before such expiry, but there may also be cases where extensions of the visa or permit are applied for. In the latter case, it is to be expected that such applications for extension would be submitted with sufficient time for the applications to be processed (say 3 months?), alternatively that any provisions for emergency relief in the regulatory framework are utilized.  4. We are aware of public commentary and court cases recently where, despite applications for extensions being submitted well before the expiring of a visa or permit, no responses were received from DHA. Efforts to expedite the renewal or extension failed. Despite this, the foreigner with an expired visa or permit was categorised as “undesirable” when exiting the country. This obviously results in an intenable, and, we believe, an undesirable outcome where the foreigner has acted in good faith to ensure compliance with visa extensions or renewals.  5. We therefore suggest that the proposed amendment in the Bill be further clarified by the addition of the following section: “where an application for an extension or renewal of an expiring visa (or permit) has been made in good time (i.e. at least 3 months before expiring), and no official response has been received from the Department, it can be presumed, until official notification of the contrary, that the extension applied for has been granted”.  6. This addition is, we believe, justifiable to protect the rights of individuals from irresponsible bureaucratic inefficiencies, as noted above. | In principle, we should not legislate for inefficiencies of administrative challenges as proposed by BASA.  The Department has introduced systems to improve adjudication turnaround times and is able to successfully adjudicate applications within 8 weeks period before expiry of the visa.  The major challenge is for applicants holding section 11(1)*(a)* visas who are on, for instance, holiday purposes, applying for extensions within a shorter period before expiry of the visa. | |
| **FIPSA**  **INTRODUCTION AND BACKGROUND**  There has been no factual evidence presented to support the notion that administrative fines no longer serve as a deterrent, therefore it is irregular to propose such a harsh sanction without factual evidence and/or statistics or data. This is not only an amendment of the immigration act as outlined in the Introduction and Background to clear up the number of times that the person has overstayed. If this amendment is allowed not even the Minister has the authority to override the decision of Undesirability as the person will loss the right of re-entry and ability to apply for Permanent Residence.  This is even if it was as the result of an error by the department or if the person is the wife or child of a South African. This has to be deemed as unconstitutional. This is ill informed as it violates the principles of our Constitution, in that one is innocent until proven guilty. In this instance foreigners are being sanctioned harshly by declaring their undesirable without due to circumstances beyond the person’s control, e.g. illness, hospitalisation, theft of documents, delay in flights, delays from Home Affairs or many other situations.  **CONTENTS OF THE BILL**  Please see above  **ORGANISATIONAL AND PERSONELL IMPLICATIONS**  The Department will no longer require a Section to deal with the overturning of the undesirability status, but will be taken to court, as I believe it is unconstitutional regard to the separation of families. If the department of Home Affairs makes an error the traveller will be jeopardised. There is no factual evidence that there are no implication, as this will automatically take away any discretionary decision making powers from the officials but might give rise to high incidents of corruption. Further this might cause further confusion as to how officials should deal with such cases.  **FINANCIAL IMPLICATION FOR THE STATE**  This will be vigorously challenged legally as it has serious constitutional implications, which will mean that the department of Home Affairs will be incurring huge legal costs that will have a huge burden on their functions. This will also mean extra personnel will have to be employed to manage this new burden of litigation and administration.  **DEPARTMENT, BODIES OR PERSONS CONSULTED**  Consultation is an integral part of legislative process. It is irregular that only one stakeholder was consulted but the other active stakeholders such as civil society, professionals in the field, professional bodies and organisations representing the foreigners have not been consulted. This renders the process procedural. The Portfolio committee has not sight of the implication this would have on other parties which means they have one side of the facts.  **PARLIAMENTARY PROCEDURE**  We cannot comment on the parliamentary procedures proposed. CONCLUSION It is submitted that the bill will have unintended consequence and will not pass the constitutional test of our laws. If this amendment is allowed to take place, many unforeseen consequences will occur with particular reference to the separation of families or with errors made by the Department. This amendment takes away the discretion of the Minister. | The Department briefed and presented information to Parliament during 2010 and 2011 when considering the Immigration Amendment Bill (now Amendment Act, 2011) regarding the issue of administrative fines not being a deterrent.  It is incorrect and misleading to say that there is nothing that may be done once a person is declared undesirable as there is a process of appeal. | |
| **Edinah Lidonde**  Would it be possible to include the following:  *A foreigner will be able to leave the Republic of South Africa within 10 days should their visa or appeal application be rejected without being declared undesirable.*  This would cover the Republic in scenarios where there was a backlog in the processing of applications resulting in foreigners overstaying whilst waiting for feedback on their applications. | The current SOP’s address this issue in that in the case of a person whose application has been rejected and has in his or her possession a rejection letter, the Control Immigration Officer determines whether the departure is within 10 working days of acknowledging the receipt of the notice of rejection. If that is the case, the person will not be declared undesirable;  If it is outside (beyond) the 10 working days period, the person will be declared undesirable and allowed to depart. | |
| **Rod Maxwell, CEO , SA Migration International**  We should highlight [to them] the unintended consequences of the overstay bans. Where Home Affairs have not resolved pending applications and people leave, should have a vehicle to exempt persons.  Legal Action for pending applications ‑ Home Affairs lose most times ‑ Cost to Taxpayer  Families separated ‑ frustration and bad publicity.  Follow international best practice where applicants present  themselves, pay a fine and fiscus benefits.  Corporate and their staff with applications pending for up to 3 years , i.e. Eskom | Anyone who is declared undesirable may appeal the declaration. Prior to the implementation of the Immigration Amendment Act, 2011 the Department was not declaring anyone with pending application on production of proof of application. However, the system was abused (making copies of proof of application of others) as the Ports do not have the system to verify the status of the application. Therefore, the said system was discontinued. | |
| **Wesley January, Compliance Officer, relocation@relocation‑online.com**  Regarding the current sanctions applicable to foreigners who have overstayed, I believe that the following circumstances should be taken into consideration for an exemption of undesirability:   1. Longstanding temporary residence visa applications‑ where the outcome of a visa application is not ready within 60 days and such foreigner leaves the country after his/her visa has expired but before receiving the outcome of his/her application. 2. In the event where a visa application has been rejected and the applicant no longer has a valid visa and wishes to leave the Republic. 3. If a foreigner has submitted an appeal application, considering appeal applications often take up to 12 months to be finalised 4. If a foreigner has overstayed as a result of: 5. Captivity/Hostage; 6. Trauma; 7. Emergency medical treatment; 8. Pregnancy (Where such foreigner may not fly, as decided by a medical practitioner). 9. Death of a relative within the 2nd step of kinship; 10. Any other exceptional circumstance.   In such a case, the illegal foreigner would be required to submit proof of the above mentioned circumstances to the official at the South African boarder, where the bo[a]rder control official may at his/her discretion allow such foreigner to leave the Republic without being declared undesirable. | Anyone who is declared undesirable may appeal the declaration and raise the reasons provided by mr Wesley January for consideration of lifting the declaration. | |
| **Commission or Gender Equality (CGE)**  The CGE notes the following :   1. Reference is made to a prescribed period which is defined in Regulation 27 of 2014, which speaks to Section 32. The regulation is intended to deter foreign nationals from overstaying but seeks to achieve this in an unreasonable manner because repeat offenders are subjected to a period of two year sanction while a person who overstays for more than 30 days is given a sanction of five years. 2. In instances where an “illegal” foreigner is accompanied   by minor children, the minors are not excluded from the sanction. This may prejudice any minor who wishes to return to a parent resident in the Republic or for study purposes.  Accordingly, the CGE proposes a revision to the proposed amendment to Section 32 of Act 13 of 2002 as amended by Section 33 of Act 19 of 2004 to read as follows :  (1A) Illegal foreigners who have overstayed , as prescribed , do not qualify for a port of entry visa, a visa , admission into the Republic or a permanent residence permit during a general period of two years and additional periods may be prescribed where necessary, which sanction is not applicable to any minor that is accompanied by any adult illegal foreigner. | The current Regulations will be amended to be in line with the amendments to the Act as proposed by the Immigration Amendment Bill, 2015.  There are challenges with this proposal in that it is going to encourage people not to apply for extensions or renewals of visas issued to minors knowing they will not have any consequences. | |
| *Clause 2* | Section 50 of the principal Act is hereby amended by the substitution for subsection (1)  of the following subsection:  *“(1) Any foreigner who leaves the Republic after the expiry of his or her visa shall be dealt with in terms of section* ***[30(1)(h)]*** *32(1A).”.* | **Commission or Gender Equality (CGE)**  The above proposed amendment is supported because the CGE does not support the exacting of an administrative fine on detection which is usually on departure as this may cause prejudice to the person concerned as well as any minor who accompanies the person concerned. Furthermore, legitimate reasons may exist, such as illness and injury. Therefore, an action such as imposing an administrative fine is tantamount to finding a person guilty without following due process and amounts to arbitrary action. | Noted | |
| *Short title and commencement* | *This Act is called the Immigration Amendment Act, 2015, and comes into operation on a date determined by the President by proclamation in the Gazette.* | None |  | |
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| *General Comments* | **Mongeze Bomela**  I support the bill | | | Noted |
| **Law Society of South Africa**  Having perused the draft Bill we have no comment at this time. The detail will obviously appear in the draft regulations, which we hopefully will have an opportunity to peruse and comment upon. | | | Noted |
| **Eben Spannenberg, ACDP Witbank Chairperson**  I hereby wish to also voice my concern regarding this matter.I am of firm believe that we should close all entrance into S A by immigrants who have overstayed by not re applying beforehand. My reason is because we are taking working opportunities from our own citizens and this does not help the course of us looking to wipe out unemployment as well as poverty amongst our own citizens.. | | | Noted |
| **Sisa Hlazo Thebe**  In 2013 they was an introduction of Zimbabwe Special Permit [Section 31(2)(b)] which was an extension of DZP permits. On the re‑application of the introduced ZSP in 2014 only DZP permit holders were supposed to apply for the new ZSP which meant our families(wifes & children) could not apply since they were not DZP permit holders. They were under our permits (Accompaning Spouse).  We thought they was going to be a privilage given to ZSP accompanying spouse permit holders to accommodate our families that we were already living with us here in South Africa but to date we don't know what to do with since they permits have expired.  My submission and contribution to the Bill Amendment Section 32 of Immigration Act, 2002(Act No. 13 of 2002) is may they be pardon given to our Spouses and Children in regard to their overstay. | | | *The issue raised is irrelevant to the provisions of the Bill and may be dealt with outside of the Parliamentary legislative process* |
| **Neville South, Imminent Travel and Immigration**  The current Departmental Policy of being strict when adjudicating applications, in itself leads to more and more applicants becoming illegal whilst in SA. A balance of assisting and encouraging foreigners to remain legal whilst controlling the inflow of foreigners and protecting our own people, has to be found. The current Home Affairs policies miss this point totally and has directly resulted in many foreigners becoming illegal. The procedure should be inclusive and clear as to the exact requirements and procedures to be followed by applicants. The procedure should be corruption free.  More often than not it is the Departments own delays that cause foreigners to become illegal, this needs to be address as a whole within the Department and obviously the necessary allowances should be made in these cases. It should be kept in mind that encouraging illegal foreigners to legalize their stays and be included in the recorded and controlled Home Affairs system should be an absolute priority of the Department. They are failing their own mandate but have systems that are not trying to include as many foreigners as possible in the controlled Home Affairs system. Illegal foreigners should not be scared to come forward and to have their details included in the controlled Home Affairs system.  Deportations and repatriations, as they are carried out now by Home Affairs are completely ineffective, often these illegal persons are back in the cities they were arrested in, before the deporting Immigration Officer. The current growing illegal foreigner problem in SA should be weighed‑up against the lifting of travel restrictions in Africa and more specifically in the SADC Region and the introduction of an all‑African passport, being hard fought for by some. Immigration officers should be assisting illegal persons and encouraging them to have their details recorded and controlled on the Home Affairs system.  Financially it simply does not make any sense for the Department to follow these policies, the measure of results and the riding of SA, of illegals, is simply not happening, why then are we wasting massive amounts on these futile efforts. | | | *The issues raised are administrative and irrelevant to the provisions of the Bill and may be dealt with outside of the Parliamentary legislative process* |