LAWYERS FOR HUMAN RIGHTS SUBMISSION

ON THE IMMIGRATION AMENDMENT BILL, 2018

23 July 2018

For attention: Mr. Eddy Mathonsi
Secretary: Portfolio Committee for Home Affairs
National Assembly

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A. Introduction

1. Lawyers for Human Rights ("LHR") is an independent human rights organisation with a nearly 40 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's Refugee and Migrant Rights Programme sees between 10 000 to 15 000 asylum seeker and refugee clients per year in its four law clinics (in Pretoria, Johannesburg, Durban and Musina). The Programme has a dedicated Detention Monitoring Project which conducts monitoring and provides free legal representation of immigration detainees at detention facilities across South Africa.

2. LHR welcomes this opportunity to make submissions to the Portfolio Committee for Home Affairs on the Immigration Amendment Bill, 2018. LHR was the applicant in the matter of *Lawyers for Human Rights v Minister of Home Affairs* 2017 (5) SA 480 (CC) (hereafter referred to as *"LHR II"*) before the Constitutional Court of South Africa. In this case, LHR used its collective experience and litigation history to shed light on current immigration practices and violations of the Constitution. We hope to continue to participate in a constructive discussion regarding immigration detention in South Africa and request the opportunity to make **oral submissions** before the Portfolio Committee based on our written submissions to Parliament.

3. The Constitutional Court relied heavily on sections 12(1) and 35(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") in its findings requiring judicial oversight of immigration detention. However, it should be noted that the Constitution contains a number of values which are equally important when determining the appropriate protections to be set in place for immigration detainees. These include the values of human dignity, equality and freedom as found in section 1 of the Constitution. These values also include the imperative that migrants who are poor and have limited resources should not be unjustly excluded from the immigration system and disproportionately represented in immigration detention.

4. LHR welcomes the changes to the immigration detention system that require judicial oversight for all immigration detainees throughout the immigration detention process. We reiterate, however, the basic legal principle that the state must always prove the grounds and justification for detention. This principle and the protection of human dignity form the basis of our submissions.

B. Recommendations

5. Based on our submissions below, LHR makes the following recommendations

In re: Clause 1 –

- *Retain the specific reference to the Constitution and the Bill of Rights in the definitions of the Immigration Act.*

In re: Clause 2 –

- *Remove the phrase "to confirm" and replace with the term "to authorise" under section 34(1)(b) of the principal Act.*

- *Remove the additional two periods of 30-day detention in the case of non-cooperation under section 34(1)(d) of the principal Act. Replace with a criminal offence of non-cooperation of an individual. Remove any additional detention based on the non-cooperation of another state as a violation of section 12(1)(a) of the Constitution.*

- *Provide further guidance to what is "justified" detention in the interview process under section 34(1A) of the principal Act with reference to the principles given by the Supreme Court of Appeal in* Ulde*.*

- *Provide further reference to alternatives to detention which exist in the Immigration Regulations, 2015 including the use of Forms upon release and provision of documentation for non-nationals who cannot be deported under the principal Act.*

C. Relevant Law

4. A brief review of some of the fundamental principles of our law as enunciated by South African courts in the area of migration, and immigration detention in particular, is important for contextualising the current submissions.

5. The Constitution is at its heart a transformational document. It is intended to ensure that the gross human rights violations of the past do not find application in the modern South African legal system. In fact, the Constitutional Court referred to this past in its opening paragraphs of *LHR II*.[1] This protection is not only in the form of civil and political rights, but equally in ensuring that the law does not disproportionately exclude the poor. In LHR's experience, many of the detainees who are in detention are poor and unable to afford adequate legal representation to argue for their release. Many find themselves in immigration detention because of an excessively burdensome immigration system which does not take into account the realities of

[1] *Lawyers for Human Rights v Minister of Home Affairs,* 2017 (5) SA 480 (CC) at para 1 – 3

migration in the Southern African region. Others are arrested and detained due to the broken asylum system or corruption by immigration and police officers.

6. Once detained and in the system, most detainees are not able to access the few alternatives to detention which exist under the Immigration Act and Regulations. For example, detainees who are not able to afford their own transportation to their country of origin will not generally be considered for temporary release under a Form 23 of the Immigration Regulations, 2014.[2]

7. The Constitutional Court has repeatedly found that migrants are a particularly vulnerable segment of South African society and that vulnerability requires the protection of the courts. In the first LHR case of 2004 (*LHR I)*, the Court pointed out the particular vulnerabilities of migrants arriving at South African ports of entry:

> *"[20] The provisions challenged in the High Court are of immense public importance, being concerned with a delicate issue that has implications for the circumstances in and the extent to which we restrict the liberty of human beings who may be said to be illegal foreigners. The determination of this question could adversely affect not only the freedom of the people concerned but also their dignity as human beings. The very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.*
>
> *[21] Moreover, many of the people who arrive at a port of entry without being entitled to any of the large variety of residence permits allowed by the Act may be vulnerable and poor without support systems, family, friends or acquaintances in South Africa. Their understanding of the South African legal system, its values, its laws, its lawyers and its non-governmental organisations may be limited indeed. Finally, it is apparent that in most cases, the ship that brought the affected person into the country would depart within a few days, and in many cases in under twenty four hours of its arrival."*[3]

8. That judgment also confirmed the applicability of the Bill of Rights for non-nationals, even those who do not have any status in the country.

9. The Supreme Court of Appeal has had occasion to comment on the use of discretion by immigration officers in the area of detention. In *Ulde,*[4] the Supreme Court of Appeal found that a duty to deport an illegal foreigner under section 32(2) of the Immigration Act does not mean that there is an automatic duty to detain an illegal foreigner pending deportation. The immigration officer who encounters that person must interpret their discretion *in favorem libertatis* (in favour of freedom) and should not automatically detain:

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[2] This Form requires a person to report to the Director-General at a time and place as determined by an immigration officer. This Form has been used for illegal foreigners who have the means to pay for their own transportation and for whom detention is not necessary to ensure deportation from the country.

[3] *Lawyers for Human Rights v Minister of Home Affairs and others*, 2004 (4) SA 125 (CC) at paragraphs 20 – 21

[4] *Ulde v Minister of Home Affairs and another,* 2009 (4) SA 522

"[7] What the learned judge said about the nature of an immigration officer's discretion concerning an arrest of an illegal foreigner is clearly also applicable to the discretion to detain the foreigner concerned. But his description of the discretion not to arrest (or detain) as being 'limited' in that it allows the immigration officer to merely be humane is, however, misleading because this may be read to mean that the illegal foreigner ought presumptively to be arrested (or detained) unless the immigration officer decides not to do so for humane reasons. Bearing in mind that we are dealing here with the deprivation of a person's liberty (albeit of an illegal foreigner's), the immigration officer must still construe the exercise of his discretion in favorem libertatis *when deciding whether or not to arrest or detain a person under s 34(1) – and be guided by certain minimum standards in making the decision. Our courts have over the years stated these standards as imposing an obligation on the repository of a discretionary power to demonstrate that he has 'applied his mind to the matter' – in the celebrated formulation of Colman J in* Northwest Townships (Pty) Ltd v The Administrator of the Transvaal

> *'(A) failure by the person vested with the discretion to apply his mind to the matter (includes) capriciousness, a failure on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and the application of wrong principles.'*

[8] The approach I have outlined is now subsumed under s 12(1)(a) of the Constitution which provides that freedom may not be deprived 'arbitrarily or without just cause'. Simply put a person may not be deprived of his freedom for unacceptable reasons. However, once the decision-maker has demonstrated that the discretion has been properly exercised, a court will not interfere, even if it appears that the wrong decision was made."[5]

10. This principle is illustrative of a fundamental principle in our law: in all detention, the state must prove not only the lawful basis of a detention but also the *necessity* of that detention. If the discretionary power to be exercised by an immigration officer can take place without detaining the individual, the officer should exercise their discretion in favour of the person's physical liberty. This does not mean that the deportation process need end upon release, but only that the other means available in the Immigration Act (and future alternatives which may be introduced into legislation in the future) be considered.

11. This is the purpose of judicial oversight. To ensure that not only does the immigration officer have a lawful basis for detaining the individual, but that the detention is also necessary in order to fulfil the immigration officer's legislative duties. In order for the detention to be lawful, the Immigration Officer must apply his or her mind to these factors. We submit that this will require courts monitoring immigration detention to require evidence not only of the lawful basis for detention, but also that the Immigration Officer has applied his or her mind to whether detention is necessary for the purposes of the Immigration Act. This approach will not only give the court and immigration officers context as to what they are examining, but will also provide

[5] *Ulde*, para 7 – 8 (original footnotes have been removed)

an opportunity to a detainee to argue why detention is not necessary in their circumstances. This will prevent perceptions that courts are merely "rubber-stamping" the findings of immigration officers.

D. Submissions on the Bill

12. Following the legal context above and the primacy of the Constitution and the right to human dignity as a principle element of the role of courts in the oversight of detention, we will now make specific submissions on the Bill.

Clause 1:

13. LHR agrees with the inclusion of a specific reference to the Constitution. Although this does not affect the legal application of the Constitution to the Immigration Act, it does serve as an important reminder to all role-players of the primacy of the Constitution in all matters under the Act.

Clause 2:

i) Changes to s 34(1)(b) and s34(1A)

14. LHR is satisfied that section 34(1)(b) has been amended to ensure that there is court oversight over the initial 30-day period of detention. This will ensure that those who are unlawfully detained are able to make their case to a magistrate as to why he or she should not be detained. The relief is immediate release.

15. However, it should be noted that the use of the term "to confirm" may ring back to the previous version of the section in which a court would merely "confirm" the decision to detain by an immigration officer without any substantive engagement with the merits of the detention, which could occur by hearing the submissions of the detainee.

16. We suggest that the term "to confirm" is too restrictive as outlined in the case-law above. According to the case law, the court must not only look at the legal or procedural basis for detention, i.e. that the person is an illegal foreigner as defined in section 1 of the Act, but must also consider whether, substantively, the detention is justified or necessary in the circumstances. By using the term "to confirm" the section, as proposed, conceals that the court must consider the merits of the continued detention; and that the detainee has a right to challenge the lawfulness of the detention in person in accordance with section 35(2)(d) of the Constitution.

17. We further rely on the inclusion of the prescribed interview under subsection 34(1A) of the Act. We see the inclusion of this requirement in the principal legislation as a positive step to ensuring that immigration officers exercise their discretion *in favour of freedom* as required by the Supreme Court of Appeal in *Ulde* above. It is worth noting that the regulations in terms of section 34(1A) will be critical to giving effect to the principles and case law enunciated herein.

18. We submit, therefore, that the court reviewing the detention under section 34(1)(b) will not be limited to the legal basis but will also be able to decide on whether the detention is justified in the circumstances. This will have the benefit of requiring the immigration officer who is exercising her or his discretion to detain to justify the detention as per the circumstances of the individual.

19. We would guard against using poverty as a reason for justifying detention out of fear that they will go "under the radar". People with limited means should not be automatically placed under suspicion of not complying with orders to report to the DG under a Form 23. This would be an affront to the principles of human dignity, equality and freedom upon which the Constitution is based.

20. In light of our submissions above, we would therefore suggest changing the phrase "to confirm" to "to authorise". This change of wording would signal to the court that the decision is not just to repeat the immigration officer's findings, but to analyse the justification behind the detention.

21. The phrase "to authorise" would also signal to the court that the court is in control of the detention process and that an immigration officer's decision to detain for 30 days is not binding. It can be reduced to any period *not exceeding* 30 days. For example, a detainee may have family who can prove their lawful status in a period of less than 30 days. The court can authorise detention for that lesser period in order for the evidence to be presented.

ii) <u>Changes to s34(1)(d)</u>

22. LHR is also satisfied that the amendment to section 34(1)(d) will ensure a personal appearance before a court should the detainee's detention exceed a maximum period of 30 days. It should be noted that if the detainee is not brought before a court by that time authorised by a court (to a <u>maximum</u> of 30 days), the detention becomes unlawful. The only remedy for unlawful detention is release. Subsequent court orders will not cure an unlawful detention.[6]

23. We further rely on the wording in this section that detention beyond 30 days will only be permitted "on good and reasonable grounds". Again, this is not a confirmation of the immigration officer's decision, but rather an independent judicial decision based on the evidence before the court. The principle that the state must always justify detention applies.

24. We are aware of the concerns of certain members of the Portfolio Committee that the wording of section 34(1)(d) may permit indefinite detention by a court authorising repeated periods of detention of no more than 90 days each. This was addressed by the Supreme Court of Appeal in the case of *Arse,*[7] where the court found that the wording only permitted one period of 90 days

[6] *CORMSA v Minister of Home Affairs,* (unreported) case no 6709/08 (WLD) as recorded in Khan F., and Schreier, T., "Refugee Law in South Africa," chapter 13, p. 245 (ftn 33)

[7] *Arse v Minister of Home Affairs,* 2012 (4) SA 544

or multiple periods adding up to no more than 90 days.[8] We submit that the new wording would not change this finding.

25. We are concerned, however, with the inclusion of two additional periods of 30-day detention in the case where a detainee or their country of origin is not cooperating and would recommend the removal of this clause.

    25.1. Firstly, we are concerned with the concept of the "lack of cooperation". This term is vague and requires further description in the Act. Non-cooperation could be based on a wide range of motivations, including fear of removal to face persecution or torture to intentionally withholding information to avoid deportation.

    25.2. There are times when the person's country of origin is at issue between the detainee and the Department of Home Affairs. Where an individual states that they are from Country A, but they do not have any proof of that and Country A refuses to accept them, that does not necessarily mean that they are being uncooperative. The lack of proof, particularly in a region that has been marked by discrimination and civil war, should not result in additional 60 days' "punishment".

    25.3. Secondly, the decision by a government not to accept a non-national should not create legal burdens on an individual detainee. This should not be a ground to deprive someone of liberty because of the actions of their government. The Working Group on Arbitrary Detention, a subsidiary body of the United Nations, recognised that detentions ought to be considered unlawful where the cause for same is beyond the control of the migrant. To illustrate this point, the Working Group specifically refers to a case where "the consular representation of the country of origin does not cooperate".[9] We submit that this would amount to arbitrary detention without just cause and a violation of section 12(1)(a) of the Constitution.

    25.4. The inclusion of "country of origin or nationality" also points to a problem which has been pointed out by members of the Portfolio Committee: stateless individuals whose countries of habitual residence will not accept them. This is subjecting a group of some of the most vulnerable among migrants to further and unnecessary detention.

26. Importantly, the rationale for the additional 30-day periods has not been included in the Act or in the Memorandum to the bill. Unless the rationale is to punish, the additional 30-day periods will not likely result in cooperation or further the purposes of deportation. As this section is likely to be struck down as unconstitutional for its vagueness and lack of a just cause (particularly where a state is being uncooperative), we would suggest that it be removed and replaced with a more structured tool. Another possibility is the inclusion of a criminal offence of non-cooperation similar to section 34(4) of the Act where the state will have to prove beyond a reasonable doubt that the detainee is being uncooperative. This may prevent a situation where

[8] *Arse* at para 9

[9] Working Group on Arbitrary Detention, Annual report, 16 February 2009, U.N. Doc. A/HRC/10/21, para. 67

an administrative dispute is translated into being uncooperative resulting in additional and unjustified detention.

E. Post-Detention Processes

27. It should be borne in mind that release from detention does not necessarily end the deportation process under section 32(2) of the Act. It simply means that for long-term detentions, such as any detention that exceeds 120 days, alternatives to detention must be found. Unfortunately, the Immigration Act offers few alternatives to detention. One alternative that has been identified above is the use of Forms 21 and 23 of the Immigration Regulations, 2015.

28. An important consideration for the Portfolio Committee will be the use of what has been described as "gating". This is where a person is released from detention only to be immediately re-arrested at the gates to re-start the detention stopwatch. [10] While judicial oversight should stop the most egregious use of gating, the use of forms may create the risk of this practice.

29. Another important consideration for the Committee will be the documenting of individuals who are released from detention. While the Forms may be an alternative to detention, they are not a long-term solution. For individuals who cannot be deported, such as stateless persons, a long-term permitting solution will be necessary.

30. Various groups who has been affected by a lack of clarity regarding long-term undocumented residents, include people whose extradition to their country of origin have been denied by the Minister of Justice or the courts as well as persons whose governments refuse to issue travel documents. In many instances, such individuals will be released from detention, but without any documentation. This makes them both vulnerable in society and difficult to trace. We suggest that future consideration should be given to long-term documentation for such individuals.

F. Conclusions

31. Detention is an expensive business and the costs of unlawful detention have been estimated in the millions of rands.[11] However, its most fundamental danger is in the violation of the human dignity of individuals caught in the system. This was the primary reason for ensuring court oversight over all detentions under the Immigration Act.

32. It is often the most poor and vulnerable who are caught up in the immigration detention process. This is a process where all the power resides in the hands of the state. They have the information, records and the use of force which is how many people find themselves in immigration detention.

[10] Khan & Schreier, p. 245.

[11] Amit, R., "Breaking the Law, Breaking the Bank," ACMS report (September, 2012). Available online: http://www.migration.org.za/wp-content/uploads/2017/08/Breaking-the-Law-Breaking-the-Bank-The-Cost-of-Home-Affairs%E2%80%99-Illegal-Detention-Practices.pdf

33. Part of the decolonisation project must be to revisit how society sees migrants: not as one mass of people with ill-intent, but as individuals with their own motivations, life stories and circumstances. By ensuring that individual detainees appear before a court, the legal system gives an opportunity for individuals to explain their circumstances. It is for this reason that the *justification* is just as important as the legal basis of detention. Immigration officers must be able to verbalise and explain why they need to detain an individual for the purposes of deportation.

34. Not everyone needs to be detained. Poverty should not be a justification for detention. The process of deportation can continue without detention. We trust that the wording of the Act will reflect this very basic principle of our constitutional dispensation.

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This submission has been endorsed by the Consortium of Refugees and Migrants in South Africa [CoRMSA]

The Consortium for Refugees and Migrants in South Africa (CoRMSA), formerly known as the National Consortium for Refugee Affairs, is a registered Non Profit Organisation tasked with promoting and protecting refugee and migrant rights. It is comprised of a number of member organisations including legal practitioners, research units, and refugee and migrant communities. CoRMSA's mandate involves strengthening the partnerships between refugee and migrant service providers to provide improved co-ordination of activities. This includes developing working relationships with other concerned organisations to provide an effective forum for advocacy and action.