

SUBMISSION BY DEPARTMENT OF HOME AFFAIRS TO PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS BILL, 2010 – 15 NOVEMBER 2011

Mandate of the Department of Home Affairs (DHA)

The Department of Home Affairs is responsible for the administration of the Immigration Act, 2002 (Act No. 13 of 2002) and Refugees Act, 1998 (Act No. 130 of 1998), which provide, respectively, for the entry into, sojourn and departure from the Republic and the processing and granting of asylum to persons who qualify for refugee status.

Immigration Act, 2002

The Immigration Act provides for the granting of a permanent residence in circumstances set out in sections 26 and 27 to persons who-

- (a) is a holder of a work permit for a period of five years or has received an offer for permanent employment in certain skills category;
- (b) has been the spouse of a citizen or permanent resident for five years;
- (c) is a child under the age of 21 of a citizen or permanent resident;
- (d) is a child of a citizen;
- (e) is a refugee referred to in section 27 (c) of the Refugees Act, 1998 (Act No. 130 of 1998);
- (f) wishes to retire and sojourn permanently in the Republic; and
- (g) is the relative of a citizen or permanent resident within the first step of kinship.

Refugees Act

The Refugees Act provides that a person qualifies for refugee status if that person—

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- (c) is a dependant of a person contemplated in paragraph (a) or (b).

Prevention and Combating of Trafficking in Persons Bill, 2010

In view of the provisions of the above pieces of legislation, and having considered the Prevention and Combating of Trafficking in Persons Bill, 2010 (TIP), the Department's submission is that the TIP should be premised on the objective of assisting the victims of trafficking to re-unite with their families or be returned to their countries of origin.

In the event where victims decide to co-operate with law enforcement agencies, the Minister of Home Affairs may, in terms of section 31(2)(b) of the Immigration Act and subject to any terms and conditions, grant such a victim the **rights** of permanent residence for a specified or unspecified period, without granting permanent residence. These rights include the right to healthcare, education, housing, work etc., except the right to vote. Therefore, any person who is not willing to co-operate should be repatriated.

Whilst a victim of trafficking is reflecting and recovering, such a person may be issued with a visitor's visa for a maximum period of 90 days which is not extendable.

Section 31(2)(b) of the Immigration Act provides as follows:

"(2) Upon application, the Minister may under terms and conditions determined by him or her—

- (b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may—
 - (i) exclude one or more identified foreigners from such categories; and
 - (ii) for good cause, withdraw such rights from a foreigner or a category of foreigners;"

Thus there will be no need to amend either the Immigration Act or Refugees Act through the TIP, but rather make reference in the TIP to the exemption the Minister may grant in terms of section 31(2)(b) of the Immigration Act. Furthermore, to ensure proper co-ordination amongst the relevant Departments, a Protocol, Memorandum of Understanding or guidelines for facilitating the return of,

or granting of the mentioned exemption to victims of trafficking, should be developed which, amongst others, will cover the referral and approval procedure, turnaround times, etc.

In the light of the above, the following clauses in the TIP should be amended:

(a) Clause 17

To be deleted, as a person will be granted an exemption in terms of section 31(2)(b) of the Immigration Act];

(b) Clause 21

- (i) To indicate that a person will be issued with a visitor's visa in terms of section 11(1)(b)(iv) for a maximum period of 90 days which is not extendable for recovery and reflection period) as follows:

"(1) Despite the provisions of section 11(1) of the Immigration Act, the Director-General: Home Affairs may, in the prescribed manner and subject to the prescribed conditions, issue a foreigner in respect of whom –

- (a) a report has been made to a police official as provided for in section 15 or 16; and
 (b) the National Commissioner of the South African Police Service/a police official seized with the matter has, in writing, confirmed to be a person who might be able to assist in a police investigation relating to an offence under Chapter 2,

a visitor's visa in terms of section 11(1)(b)(iv) of the Immigration Act to remain in the Republic for a recovery and reflection period not exceeding 90 days for the purpose of accessing the programmes referred to in section 26 with the view to enabling the foreigner to make informed decisions regarding his or her cooperation with law enforcement and prosecuting authorities in the investigation and prosecution of a case of trafficking in persons as referred to in section 22(1)(b)."

- (ii) Delete paragraph (b) of subsection (1);
- (iii) Indicate in subsection (3) that a person who is unwilling or is unable to co-operate shall be dealt with in terms of the Immigration Act as an illegal foreigner as there should be no extension of the reflection period follows:

"(3) A foreigner referred to in subsection (2) who is still unwilling or unable to co-operate with law enforcement and prosecuting authorities in the investigation of

and the prosecution of a trafficker upon the expiration period shall be dealt with in terms of the Immigration Act as an illegal foreigner."

(iv) Delete subsection (4); and

(v) Amend the words preceding paragraph (a) in subsection (5) to be as follows:

"The issuing of a visitor's visa for the purpose contemplated in subsection (1) does not—"

(c) Clause 22

(i) To reflect that the Minister of Home Affairs may grant exemption in terms of section 31(2)(b) of the Immigration Act and further that such exemption may be withdrawn if the victim of trafficking fails to comply with the conditions thereof (e.g. when victim no longer co-operates) or for good cause, as well as when the prosecution has been

(ii) Substitute the word "permit" of the word "visa" in the words preceding paragraph (a);

(iii) Delete "/" between the words "National" and "Director" in the words preceding paragraph (a); and

(iii) Delete words "is needed by and" in paragraph (b) of subsection (1).

(d) Clause 23

To be deleted as no permanent residence should be granted to a victim of trafficking.

(e) Clause 27

To insert the words "and the visitor's visa contemplated in section 21(1)" after the word "recognition");

(f) Clause 28(1)

(i) Insert the words "and the visitor's visa contemplated in section 21(1)" after the word "recognition");

(g) Clause 31(1)(b)

(i) To indicate that the Department of Home Affairs will facilitate as the Department cannot issue a travel document to a foreigner; and

(ii) Delete the words after the full stop to the end of the paragraph).

(h) Clause 33

- (i) Remove the word “suspected” in the heading and the body of the provisions, as the repatriating country would have already declared a person to be a victim;
- (ii) Delete subparagraph (i) and move subparagraph (iii) to be subparagraph (i) and renumber all subparagraphs; and
- (iii) In current subparagraph, delete “child protection organization” and insert “parents or legal guardian”;

(i) Clause 35(2)

Insert “: Social Development” after the words “Director-General”.

(j) Clause 44(5)

Delete paragraph (a)(i) and (ii), as there is no need to publish the directives which will serve as guidelines for officials within the Department in the *Gazette*. This will be a costly exercise which is not necessary.

(k) Clause 47(4)

Reference to section 16(9) and (10) should be 16(10) and (11).

(l) Schedule 1 – Laws repealed or amended

- (i) Delete amendment of Refugees Act;
- (ii) Delete amendment to section 29(1) of the Immigration Act in paragraph (a), as the amendment has already been effected through section 19(b) of the Immigration Amendment Act, 2011 (Act No. 13 of 2011);
- (iii) Amend paragraph (b) which seeks to insert subsection 1A in section 29 of the Immigration Act by inserting the words “port of entry visa” before the word “visa” and deleting the words “temporary residence permit”;
- (iv) Reference to section 35(3) of the Immigration Act should be to section 35(5) as section 35 of the Immigration has been amended by section 21 of the Immigration Amendment Act, 2011 to now be section 35(5).

- (v) Delete amendment to section 49(15)(a) and (b) of the Immigration Act, as the amendment has already been effected through section 24 of the Immigration Amendment Act, 2011;
- (vi) The addition of paragraph (c) to section 49(15) of the Immigration Act should be amended to be as follows, as the latter part thereof has been amended by section 24 of the Immigration Amendment Act, 2011 and the sentence has been increased to 15 years from four years:

“(c) has in his or her or its possession or intentionally destroys, confiscates, conceals or tampers with any actual or purported passport, travel document or identity document of another person in furtherance of a crime,”.