

SEMINAR ORGANISED BY
Lawyers for Human Rights, the Southern African Migration Project and the
Southern African Regional Poverty Network
ON
Southern African Migration

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It is a privilege for me to open this seminar organized by LHR, SARPN & SAMP to address the important issues of regional integration, migration and poverty. This seminar takes place at a crucial time in the history of South Africa's migration reform. As we speak here today, the Standing Committee on Social Services and the Portfolio Committee on Home Affairs of Parliament, are deliberating on the Immigration Bill, which after seven years of a long, extended and all-inclusive process of policy formulating, will be launching a reform of our entire system of migration control. This seems to be a point of arrival, yet we all know that it is but a point of departure.

The adoption of the Bill will need to be followed by an extensive process of policy formulation aimed at supporting the drafting of the extensive regulations, which are called for by the Bill. What is unusual and indeed highly praiseworthy about this Bill, is that the regulations are not going to be issued by the competent Minister, but merely through the exercise of ministerial directions. As you all know, regulations are often formulated by a department and issued by the Minister.

In the case of the regulations adopted in terms of the Immigration Bill, regulations will need to be adopted through a special process of regulation making, which calls for the advice of a vastly representative Immigration Advisory Board. As many of you who have been involved in this excruciating process may recall, in the original versions of the Bill, which has been debated for almost a year, it was indeed the Immigration Board, which issued the regulations. The Immigration Board was provided with executive powers. However Cabinet, in its wisdom, decided to transform the Immigration Board into an advisory body. Nonetheless its inputs are necessitated in the drafting of regulations and one can expect that it will maintain policy formulation and regulation drafting as its major functions. In fact, the Bill provides some guarantee that the role of the Immigration Board will have the necessary pre-eminence.

In terms of the Bill, regulations must not only be within the area of discretion of the statute, but also not arbitrary and not capricious. This is an additional constraint on the discretion of the entity formulating the regulations. The primary criteria against which arbitrariness and capriciousness will be assessed, is indeed the relationship between the recommendation of the Immigration Advisory Board and the text of the regulations.

Furthermore, the regulation making process is based on an extensive requirement for public consultation. We will first need to issue a notice of intention to adopt regulations on any given subject matter under the Bill. We are required to publish such notice as well as sending it by mail and email to all those who wish to be on our contact list. We are then required to publish the draft regulations to elicit public comments, and when we publish the final regulations, to make mention of the summary of the inputs we received and the reasons why we took them or did not take them into account. That effectively creates the record of our decision and places our regulations on the same level as an administrative decision which will need to be reviewed on the basis of its record, enabling a court to strike down any regulation which appears to be arbitrary or capricious against the record of its inputs.

I say all this because the many stakeholders and role-players who have convened in this prestigious seminar, must realise that their input in the formulation of a new system of migration control has just begun. We will require them to continue to be involved. Many of the entities represented at this seminar may end up being called upon to serve on the Immigration Advisory Board. Those who will not have such privilege or, differently regarded, such burden, will also have the continuing opportunity to remain involved and continue to shape the unfolding of the new system.

What I must plead is that all those who have involved in this process of policy formulation for this long, will continue to provide inputs at a very early stage of the drafting of regulations. It is important that inputs are provided in a constructive manner and as early as possible, rather than as an afterthought or an opportunity for political grand-standing. We have seen some of the presentations, which were made to Parliament in respect of the Immigration Bill in the past few days. I reviewed some of the written text and I was impressed by how some people who premised that they have no specific expertise in migration control techniques or in law, would stand up to pontificate on the constitutionality of the Bill or its merits.

Having said that, I must praise our organizers, Lawyers for Human Rights. I have been a human rights advocate all my life and I can relate to them. Many of the inputs they made in the process have been very valuable. Many of these were taken on board and I was pleased to personally introduce the amendment which they suggested that places of detention should operated on the basis of minimum prescribed standards which guarantee the foreigners' relevant constitutional rights. They also made additional inputs, which were considered and more will be considered in the future.

Obviously, however, not all inputs will be considered, as one must accept that there is an eternal tension between government and human rights advocates.

That tension should never cease because it is unthinkable that a government will ever be perfect or beyond reproach, as it is equally unthinkable that a government may comply with the full measure of advocacy of any issue. Unfortunately, our role is one balancing conflicting interests and reconciling different wants, needs and aspirations which, even though in total juxtaposition, are nonetheless of equal worth.

Migration control is a typical field in which such a difficult balance of interests is constantly required. There is not always an absolute right and wrong, but often a conflict of things, which are right at the same time. It is right to promote our economic growth by maximizing any contribution, which foreigners may make towards it. It is also right to maintain a certain degree of control over who is in the country.

The world is changing and at a pace which is more rapid than any of us really keep up with. There is beauty in this change, but there is also pain. In respect of the system of migration control in South Africa, I almost feel that this change is a painful metamorphosis. I do not know whether it is a metamorphosis of the ugly caterpillar into the beautiful butterfly, or whether this butterfly will be short-lived. The fact is that things are changing. But the intention is that of getting ahead of world change, I have often stated that I believe that the issue of migration will engage the 21st century in a manner never experienced before.

The issue of migration may be to the 21st century what human rights protection was to the 20th century. The 20th century developed the concepts, parameters and legislation relating to human rights, leaving to our century the legacy to implement them fully throughout the world. However, one may accept that little remains to be developed in the field of human rights even though new issues may arise within established framework at all times. However, in respect of migration control, the very conceptual parameters of what we are trying to do and why we do it, are still to be determined. There is an entirely new universe of concepts, policy dictates and vision which remains to be developed.

Beneath these there are fundamental unresolved questions which become taboo in debates across the world. The first question is why we have national frontiers in the first place, rather than allowing people to circulate freely across the world. In all probability, this cosmopolitan dream will not be realized within the lifetime of anyone present here, but I am sure it will be engaged as the 22nd century dawns upon us, and they might look back at our efforts to try to control the movement of people with the same eyes with which we now look at the efforts made in the 19th century to control the movement of goods.

It is significant that the 21st century opens under the auspices of a new international agreement, the General Agreement on Trade in Services, which has pushed forward the World Trade Organisation agenda to deal with the issue of migration of people. The migration of people is now being equated in certain

respects to the circulation of goods and products. It is being realized that the services of people are goods themselves and that the present needs of globalisation require people to circulate freely across the world on the same basis as their products do. What is now referred to internationally as “Mode 4” which is a reference to Article 2 sub-paragraph 4 of GATS, is indeed a new framework for the free circulation of people under World Trade Organisation parameters on a world-wide basis. This is a revolutionary change of which we need to take cognizance.

The world is moving fast around us. We are required not only to keep track of it but not to get ahead of change. We cannot take a step longer than our leg, for we will fall. The new Immigration Bill is not the panacea of all ailments, but will go a long way to begin a process in which we will continue to work together to accommodate present needs and future circumstances.

We must also contemplate the future of the SADC dimension. There has been discussion about two different things, namely the consideration of the draft SADC protocol on the free circulation of people, and the need to provide preferential access to South Africa, or special facilities under the Immigration Bill for SADC citizens. In respect of the SADC protocol, it must be pointed out that the Bill cannot register it because the Protocol is a mere draft which has been placed on hold. It is the responsibility of the Presidency, the Department of Foreign Affairs and other responsible line functions, to decide whether and when to discuss this Protocol further. If the Protocol were to be approved in a form that allows for the free circulation of people, it would need to be implemented by a law of parliament, which, *inter alia*, would need to create an exemption for SADC citizens from the application of all, or mostly all, the provisions of the immigration laws. Therefore, it is not a matter of the Bill to consider.

In respect of preferential access to South Africa for SADC members, one must acknowledge the limitations of the General Agreement on Trade in Services, of which South Africa is a member. The GATS prohibits any member from providing a more favourable access to certain citizens or other members, than to citizens from other member countries. The GATS called for the equal application of the most favourable treatment clause in respect of all its members and on the same basis as GATS does in respect of goods. Under the GATS the circulation of people, or MODE 4-compliance auditing during a World Trade Organisation Symposium held in Geneva in April 2002.

These however are just aspects of the law. Undoubtedly, the law is a very significant element in the overall field of migration and in fact the law is both the cause and effect of many phenomena which are observed in this field more than in any other. Migration adjusts its patterns to provisions of law, and yet the law itself needs to register the reality on the ground and cannot have the presumption of trying to shape it. People will continue to move across the borders, pushed by desperation, aspirations, interests or other reasons, irrespective of any laws

which may be adopted. The human spirit cannot be abridged. For this reason, in the field of migration, it essential that we maintain a constant interaction between legality and reality and that policy emerges as the fruit of this interaction.

For this reason, I am particularly pleased that organizers of this seminar have adopted an inter-disciplinary approach which stresses the issue of poverty, which is the most important issue in our country, and indeed on this continent. The relationship between migration and poverty is known to everyone and yet is studied by few. We all know that poverty is one of the main causes of migration, but there are a few studies and little awareness in government of how these dynamics really operate. There is even less policy to deal with this issue. Seminars of this nature are extremely important to move the debate forward and for us to create a platform of inter-disciplinary discourse which will support further discussions and deliberations in the Immigration Advisory Board.

I feel South Africa is at the forefront of new thinking and we have the opportunity to develop notions and ideas which may be of interest to the entire world. We are forced to do this by events and circumstances, rather than by choice. Colonialism and apartheid left us ill-equipped to deal with migration control in an age of globalisation and therefore we had to start from scratch. Similarly, because of our context, we are finding ourselves in a very peculiar situation when dealing with issues at the interface of poverty and migration. We are facing the difficulties experienced by many countries in the first world which receive refugees but have none of their financial resources to deal with it. Because of its relative greater prosperity on this continent, South Africa will remain a destination for refugees and economic migrants.

The harsh fact is that people are moved by desperation and extreme need to escape conditions which no longer protect their human rights. Poverty, starvation and disintegration of social communities are not grounds on which refugee protection could be extended. Yet in the eyes of anyone who can think with his heart, as I happen to often do, there is little difference between someone who is escaping death for fear of political retaliation or for fear of starvation. This reality is reflected by the fact that our system of asylum has been abused and around 70% of the applications we process are unfounded. This means that we spend the bulk of adjudication resources on dealing with cases of people who are not entitled to the benefits of refugee protection and are abusing the system. It is obvious that the system is becoming restrictive and we need to think beyond the present day parameters to conceive something which is larger than and different from what we already know.

For this reason, when I was at the UN high-level conference celebrating 50 years of the implementation of the Geneva Convention on Refugee Affairs, I was one of the few voices who suggested that we should go beyond the present definition refugees to have a broader approach to what is becoming a global problem. It is a fact that desperation forces people to cross the entire continent to seek asylum

in South Africa whether or not they are entitled to it. This happens in respect of many other receiving countries. I suggested that we should begin thinking about a system where receiving countries can be offered financial assistance at the international level to accommodate people who are moved by desperation and effectively no longer have any type of human rights protection in their countries of origin also because of social and economic conditions.

The present system in which there is a direct relationship between an asylum seeker and a recipient state which is underpinned by a direct international law entitlement, could not be extended beyond the definition of those who are technically refugees. We would need to begin a new world order in which all the children of God could be accommodated in God's creation and this must be a shared responsibility of all countries so that the financial burden can be equally spread and shared, enabling countries like to do more.

There are also other issues which are very important to our South African debate. I know that our trade unions have unsuccessfully tried to table on the agenda of policy making of the Departments of Labour and Foreign Affairs the thorny issue of compulsory deferred pay. It is an issue which affects poverty in our neighbouring countries as well as in our own, and elicits a variety of human rights longer keep our eyes closed to this reality which we inherited from the past and internal standards and foreign labour needs, as well as the wishes and needs of our partners in SADC. It is not my line function but somehow falls within that which we need to administer even though the actual decision on this issue will depend on whatever direction my Cabinet colleagues will give. However, seminars like this can provide valuable policy inputs also in this respect.

In conclusion, I recognize that now more than ever a variety of issues are open in the debate relating to migration. Now more than ever it is necessary to approach issues with an open mind and a willingness to learn and listen. For this reason I am very pleased that this seminar has been organized and look forward to participating in its deliberations.