The immigration bill from a human rights perspective

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1. Introduction

The passing of new immigration legislation has been long awaited in South Africa. The Aliens Control Act ("ACA") is the last major piece of Apartheid era legislation that must still be redrafted. The drafting of new immigration laws provides us with an opportunity to erase discriminatory legislation from our statute books as well as the exciting opportunity of bringing our law in line with modern international trends and developments within the human rights sector that articulates the rights of immigrants more clearly now than in the past. This new legislation provides South Africa ("SA") with the opportunity to create a new and modern piece of legislation that is in keeping with our own constitutional democracy. Furthermore, it presents an opportunity to tackle the failings of the current system and address the challenges that will face us in the coming years. Lastly, it is important to stress that there is no better time than now to address the imbalances caused by racially based immigration laws and policies of the ACA.

The South African Human Rights Commission ("SAHRC") prepared submissions during 2000 on both the White Paper on International Migration as well as the draft Bill. We identified six major areas of concern.

i) The need to manage rather than control migration against the background of SA's international and regional obligations

ii) The fight against xenophobia and racism

iii) The application of the bill of rights to non-citizens

iv) The proposed appeal procedures

v) Places of detention

vi) The risk of corruption

2. Our International Obligations

In terms of the Universal Declaration of Human Rights[1] immigrants and migrants are afforded the protections as pledged by the member states. The pledge includes the intention to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms. Under international law, according to Article 2 of *The International Covenant on Economic, Social and Cultural Rights* and Article 13 of *The International Covenant on Civil and Political Rights*, once a state has admitted aliens into its territory (documented immigrants), it must treat them according to internationally determined standards. International human rights law gives many rights to lawful aliens. Some of these include:

[1] Articles 6, 9, 13, 15,

- the right to residence;
- freedom of movement; and
- economic and social rights.

This means that aliens should be given the same human rights as state nationals, with the exception of certain aspects of:

- political rights;
- participation in political or public life;
- ownership of property;
- employment; and
- the right to remain in the territory.

Illegal aliens are not lawfully in the territories of states other than their own. They can be removed once they are found to be illegal. However, because they are human beings, they are nevertheless entitled to some basic rights. These include the rights to:

- dignity;
- freedom and security of the person; and
- life.

South Africa has, since April 1994, ratified or acceded to several international human rights treaties that have a bearing on the treatment of aliens. These are:

- The Convention on the Rights of the Child (1989), ratified on 16th June 1995;
- The Convention on the Elimination of All Forms of Discrimination Against Women (1979), ratified on 15th December 1995; and
- The African Charter on Human and Peoples' Rights (1981) acceded to in January 1996.

South Africa has yet to sign and ratify the 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.[2] This Convention is based on the principles contained in the Universal Declaration of Human Rights.

3. The SAHRC's concerns with the bill

3.1 Management in the context of South Africa's obligation to the region

An informed approach to any legislation on immigration must be based on a clear understanding of current immigration trends in a given country's geographical region. In South Africa, this means that we must understand why people are attracted to come to this country. Much has been written

[2] The National Action Plan for the Promotion and Protection of Human Rights, Republic of South Africa, December 1998 at p 75

about the 'push-pull' factors[3], in short, factors that determine why people want to leave their country of origin and why they choose a particular destination. In our case there is a whole history to this phenomenon. This goes back to the discovery of minerals in South Africa in the last century, when, many people from neighbouring countries came to work in the mining industry. The mining sector continues to employ many people from our neighbouring countries. The economic situation coupled with high rates of unemployment in our neighbouring states has resulted in a great dependence on this form of employment, in the entire sub-region.

The Bill deals with migration by making provision for a number of temporary residence permits to be issued to appropriate foreigners. What stands out is the fact that the Bill does not take our historical reality into account. Rather, priority is on providing permits to investors, entrepreneurs and people who promote trade and are seen as bringing new knowledge, skills and expertise. None of the permits specifically deal with the position of migrant workers and traders. The permits provided for are as follows:

> Crewman permit; Medical permit (holder may not work); Relatives Permit; Work permit; Retired person's permit; Exceptional skill or qualifications permit; Intra-company transfer permit; Corporate permit; Exchange permit (only applicable to persons under 25 years of age); Asylum; and Cross-border and transit passes.

The solution offered by the Bill is to accommodate farm and mining migrant workers under the corporate permit (White Paper, Chapter 7, paragraph 7 and Section 16 of the Bill). Upon application, domestic and foreign businesses intending to relocate human resources to South Africa could receive permission to import a certain number of people. Such business would be handling the visas as well as the work permits directly on the basis of a delegation from the Department of Home Affairs. In order to receive the delegation a corporation will have to meet certain requirements laid down by Section 16(2) of the Bill.

This sort of approach fails to take due regard of both our historical reality and regional obligations. It encourages both illegal migration and negates the reality of the existence of many migrant workers already active in the country. Research has shown that 'Costing' immigration implies that immigrants only consume resources: they do not create them. But anyone who engages in economic activity also creates wealth—and it is generally accepted that immigrants do engage in this activity. A Centre for Policy Studies report found, for example, that Mozambican immigrants in the Ivory Park informal settlement at Midrand are sought-after builders, and there is no shortage of evidence which indicates that many immigrants are engaged in trade and service industries. For some, the fact that immigrants are creating wealth is part of the problem because they are seen to be "taking" jobs or trading opportunities needed by South Africans—often at lower rates of pay or by evading trading regulations.[4]

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[3] Clarence Tshitereke *Revisiting the push-pull theory: Comment on the White Paper on International Migration* Southern African Migration Project; The White Paper at Chapter 6 paragraph 4.2.1; The Green Paper at section 2.2.

[4] Steven Friedman *Migration Policy, Human Rights and the Constitution* undated paper submitted to the Task Team drafting the Green Paper found at http://www.polity.org.za/govdocs/green_papers/migration/friedman.html

It appears then that the temporary residence chapter of the Bill merely restates the premise of the White Paper that South Africa is not in a position to address and alter conditions in the rest of the continent and therefore we are not in a position to develop a migration policy to deal with migrant workers. An obvious counter-approach, which the SAHRC maintains, is that we should adopt a management-oriented approach towards migration. Such an approach will not only be in line with South Africa's historical regional obligations, specifically towards Southern African Development Community ("SADC") countries, but will also be more in line with the governments stated policies on the New Partnership on African Development (" NEPAD") and the African Union.

Indeed, the Green paper stated that "International economic prospects for countries are increasingly tied to their ability to function within regional groupings of states. Many of these emerging regional blocs are also developing new migration regimes with preferential treatment and mobility rights for citizens of member states. The *European Union* represents the most advanced model of such arrangements. The 12-member SADC is at a far less advanced stage of integration and needs to develop its own policies of economic co-operation, integration and population movement.

South Africa is a closely integrated member of a functioning region. The neighbouring states are linked to South Africa by long-standing economic ties. One of the most important linkages of mutual benefit historically has been the existence of labour flows to and from South Africa. Immigration policy should be sensitised to this history of the region and South Africa's long-standing economic ties to the SADC states.[5]

A more effective approach would be to adopt a humane management-orientated approach to migration policy, which recognises both our moral and historical ties to the region. This could be achieved by ensuring that our development policies take into account our regional obligations, for example, the Maputo Corridor has benefits for both South Africa and Mozambique.[6] A further solution would be the implementation of bilateral agreements between South Africa and its neighbours, whereby migrant workers would be subject to the same labour standards, benefits and wage agreements as South African citizens. In this way, the notion of 'cheap, non-unionised' labour for certain sectors falls away as a benefit, and this incentive to prefer migrants over citizens is removed. The migrants would benefit from these agreements as they would be entitled to the protection of both the South African labour laws and wage agreements in the industry.[7]

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5 The Green Paper paragraphs 1.4.1. and 1.4.2.

6 The Green Paper paragraph 1.4.5.

7 Dr Jonathan Crush in *Temporary Work and Migration Policy in South Africa* in a Briefing paper for the Green Paper Task Team on International Migration, February 1997 stated that "Undocumented temporary workers in the agricultural sector, construction, transportation and services, have either entered the country clandestinely or overstayed their temporary residence permits or secured false documentation. Employers in those sectors using temporary workers have traditionally been able to exert sufficient power over the central or local state to avert large-scale prosecution for their use of this labour. This is a calculated risk on the part of employers who either do not enquire too closely about the origins of their workers or do not particularly care as long as the labour is available and cheap. South African employers of temporary labour undoubtedly want to continue to employ workers from outside the country. Ironically, it is their very illegality that makes them attractive as employees although employers tend to claim that South Africans will not accept the work at the wage rates they can afford. It is this situation that

4. Xenophobia and racism

The Bill fails to address the issue of xenophobia and how it interacts with migration policy, in any substance. Section 29(1) of the Bill lists the obligations of the Department of Home Affairs, which include the prevention and deterrence of xenophobia within the Department of Home Affairs, the government, all organs of state and at community level. Moreover, one of the functions of the Department of Home Affairs according to subsection (2) is to educate communities and organs of civil society on the rights of foreigners, illegal foreigners and refugees, and to conduct other activities to prevent xenophobia.

Laudable as these objectives and functions are, however, the Bill pays lip service only to the eradication of xenophobia and racism, as is apparent from certain draconian and xenophobic provisions of the Bill. Paragraph 12 of the SAHRC submission 2000, reads as follows:

> 'The Bill contains no substantive provisions to address xenophobia and racism other than the vague statements set out above; The policy background of the Bill, as set out in paragraph 1 above, implicitly enforces the public perception that foreigners, particularly from Africa, "steal jobs" from South Africans, are criminals and only deplete our already exhausted natural and other resources. As long as the government persists with a migration policy to the effect that South Africa's sovereignty is under threat and that it must isolate itself from its SADC neighbours in order to protect its citizens and resources from exploitation by outsiders, xenophobia will be encouraged rather that eradicated; In its original submission, the SAHRC raised the concern that "community based policing will result in a form of institutionalised racism, reminiscent of apartheid"'.

The Bill dedicates an entire chapter to the duties of various natural and legal persons to police the enforcement of its provisions. A number of legal presumptions are also created that shift the burden of proof from the state to the accused person, in certain cases.

It is unfortunate that the Bill introduces a community based enforcement policy thereby moving emphasis away from border control to community and workplace inspection.[8] Although the SAHRC understands the notion that to tighten up the borders has proved to be ineffectual in the United States of America and expensive to implement, the community based policing proposal will result in a form of institutionalised racism, reminiscent of apartheid.

South African policy makers are increasingly concerned about. The concern is not so much with the working and living conditions of temporary workers per se, but with the impact that undocumented workers have on unemployment and wage levels among South Africans. There is a widespread perception, amongst the general public as well as a broad spectrum of policy makers, that "illegal" temporary workers deprive South Africans of jobs and depress wage levels, as well as cause a whole host of other social problems. In fact, there is little or no concrete evidence to substantiate these claims." Found at http://www.polity.org.za/govdocs/green_papers/migration/crush2.html

[8] The White Paper, Chapter 1.

The history of migration policy in South Africa is deeply steeped in racism: To start with, it is necessary to recall that the Aliens Control Act, which makes residence here a gift bestowed by the authorities, was originally a racial law, since it stipulated that those granted permanent residence or citizenship must be "readily assimilable by the white inhabitants"; the authorities also had to satisfy themselves that immigrants did not threaten "the language, culture or religion of any white ethnic group". Even after this clause was abolished, the application of the law often excluded black immigrants.[9]

It could, therefore, be argued that many black immigrants have failed to acquire legal status simply because of their race, since their length of residence and role in the job market would have ensured their legality were they white. While the amnesty implemented by the government last year attempted partly to rectify this, its effect has been limited. The fact that most immigrants against whom control is currently exercised are black can—and has—been seen as an indication that aspects of apartheid remain in force.[10]

For example, in terms of Section 41 all employers shall make good faith efforts to ascertain that he or she employs no illegal foreigners and to ascertain the status of all his or her employees. If it is proven that an illegal foreigner was employed, it is presumed that the employer knew that the person was an illegal foreigner, unless the employer proves differently. Furthermore, if an illegal foreigner is found on any premises where a business is conducted, it shall be presumed that such foreigner was employed by the person who has control over such premises, unless that person proves the contrary. Upon conviction in terms of these provisions, a person may by jailed for 18 months or fined R75 000,00.

Learning institutions are under a similar obligation to ascertain the status of all persons employed by, or associated with the institution. Section 42(2) provides that where an illegal foreigner is found on any premises, it shall be presumed that such foreigner was receiving instruction or training from, or allowed to receive instruction or training by the person who has control over such premises, unless the contrary is proven. A conviction in terms of Section 42(2) also carries the penalty of 18-month incarceration or a fine of R75 000,00.

Places offering overnight accommodation are under an obligation to make a good faith effort to identify the status of its guests and must report to the IS any failure to effect identification (Section 43(2)). In the event that an illegal foreigner is found on such premises it shall be presumed that the foreigner was harboured by the person who has control over such premises, unless the contrary is proven. Penalties are the same as in the above three cases.

These provisions are aimed at galvanising South African citizens and residents into action in order to remove illegal foreigners from the country. When these detailed and rather daunting duties and

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[9] Migrant miners, for example, did not qualify for permanent residence—more generally, a stipulation that self-employed immigrants require cash assets of R50 000 excludes most immigrants from neighbouring countries who lack these funds.

[10] See Friedman op cit. at note 8.

obligations are weighed against the meagre anti-xenophobia policy statements contained in the Bill, it becomes clear that the Bill sanctions rather than eradicates xenophobia at all levels in South Africa. Moreover, the legal presumptions the Bill creates may be unconstitutional and contrary to the right to remain silent and not to testify during proceedings, as guaranteed by Section 35(3)(h) of the Constitution.

Of even greater concern is the proposed requirement that any person shall identify him or herself on demand. However, Section 44 goes even further to provide that if, when requested to do so by an immigration officer or police officer, the person is not able to satisfy the officer that he or she is entitled to be present in South Africa, such officer may take that person into custody without a warrant and detain him or her until that person's *prima facie* status or citizenship has been ascertained.

Section 48 of the Bill goes further to state that any institutions or persons other than organs of state may be required by regulations to endeavour to ascertain the status of any person with whom they enter into commercial transactions and shall report illegal foreigners to the Department of Home Affairs.

In response to these draconian provisions we can only repeat and endorse the SAHRC's earlier comments on this aspect of the Bill:

> "This policy is firmly based on the apartheid policy where people were constantly harassed to assert their right to be in South Africa. Because of the nature of xenophobia in South Africa, as practised by both citizens and authorities, the largest number of people falling foul of this enforcement policy will be black South Africans. In particular, people who are darker skinned will more often be 'accused' of being illegal immigrants and therefore subject to institutionalised harassment. To enact legislation which institutionalises this policy will fall foul of the Constitution and be open to Constitutional challenge."

5. Application of the Bill of Rights to non-citizens

In its submission to the Portfolio Committee the SAHRC called for migration policy to affirm that all of the rights contained in the Bill of Rights, with the exception of political rights, the right relating to freedom of trade, occupation and profession, apply to all persons who are affected by government action, including non-citizens. The reasons for this call by the SAHRC are clear: any immigration policy should be informed by a basic respect for human rights and the state should be compelled to guarantee the human rights of all those within its territorial domain. Unfortunately, the drafters of the Bill have not expressly followed this recommendation. In the Chapter dealing with the Department of Home Affairs, the following is listed as one of the objectives of the Department of Home Affairs:

> "29(1) In the administration of the Act, the Department of Home Affairs shall pursue the following objectives: 'promote a human-rights based culture in both government and civil society in respect of migration control'. Later on in the same

> section, the Department of Home Affairs is given the function of educating communities and organs of civil society on the rights of foreigners, illegal foreigners and refugees and conduct other activities to prevent xenophobia (Section 29(2)(d)).

Whilst the affirmations are welcomed it is regrettable that they were relegated to the Chapter dealing with the Immigration Services ("IS") and that they were not afforded the weight due to them by inclusion of an opening "objectives" section of the Bill. In so doing, the drafters would have gone a long way towards addressing the perception that the Bill is in the first place an "anti-migrants" statute.

6. Potential for corruption

The Bill recognises that the risk of corruption exists in the current proposals.[11] It proposes that an internal checks and balances system be implemented in order to oversee and eliminate the prospect of corruption. This is a welcome move. Migrants are particularly vulnerable to the activities of corrupt officials as they are disempowered as a result of their migrant status and have no form of recourse.[12] Corruption in the area of migration is endemic and any new legislation must tackle this issue head on and make constructive and effective proposals to rid society of it. Our history of corruption in this field is well documented.

Our immigration control regime is highly open to corruption. Reports show that some officials sell documents to immigrants who do not qualify—in one case, they are said to do so in a way which binds labourers to farmers in a feudal relationship. Allegations have been made that political parties register immigrants as voters to increase their share of the vote. It has been suggested that there is a widespread perception that anyone can become a legal immigrant if they pay an official enough money. Any system, which gives latitude to officials to regulate people's lives, is open to corruption. But immigration control is particularly susceptible since it requires officials to implement a form of control, which is unenforceable.[13]

In order to address the issue of corruption it is essential to understand the context in which it occurs. It has been reported that [a] member of the Western Cape Aliens Investigation Unit [has] suggested that a possible reason for corruption in the police force when dealing with immigrants is that the police feel demoralised by their attempts to implement an unenforceable policy. Some have therefore given up, and instead attempt to use it to their own advantage.[14]

It is incumbent that we work towards an effective, workable piece of legislation that will be enacted to ensure that the future Immigration Act is not undermined due to its lack of enforceability.

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[11] The White Paper, Chapter 11 paragraph 2.1.2.

[12] Report of the SAHRC op cit. note 25 at p xxviii ff

[13] See Friedman op cit. note 8 above; see also Report of the SAHRC op cit. note 25 at p xli ff

[14] Maxine Reitzes *Undocumented Migration: Dimensions and Dilemmas* Paper prepared for the Green Paper Task Group on International Migration, March 1997 found at http://www.polity.org.za/govdocs/green_papers/migration/taskt.html

7. Conclusion

I began this presentation with the comment that this new legislation provides us with an opportunity to change our approach from a control orientation to managing the movements of people based on an understanding of migration dynamics. The SAHRC asserts that legislation on International Migration must have an emphasis on a clear and coherent policy that is applicable, understood and where management systems are in place. If properly effected, this should ensure pre-entry, on-entry and after-entry systems such that information on migrating to South Africa is available from South African missions abroad; immigration officers are trained to be more welcoming and informative about migration policy. In this way it may not be necessary to "avoid" legal entry if one is assured of appropriate and clearly understood consideration.

Attention should be paid to improving Department of Home Affairs procedures, speed up processing and address corruption within the system. Penalties must be directed as much towards those who employ undocumented migrants as to the illegal immigrants themselves. What all this implies is that there can be no short-term quick fix solutions to how we go about this. We need a long term, comprehensive and integrated approach that addresses all elements of the migration chain. Addressing the management of migration this way will be in keeping with present and future government policies such as NEPAD and the African Union.

In the National Action Plan[15] (HR's) South Africa has publicly committed itself to the following further challenges:

- We must sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
- We need to align legislation with international instruments and treaties.
- South Africa is struggling with the problems of a large number of undocumented immigrants.
- There is a need to address the rights of undocumented immigrants especially in view of international human rights provisions, while at the same time protecting the interests and rights of South African citizens.
- There is increasing xenophobia, especially against other Africans.
- We need to create greater public awareness among service providers and law enforcement officers on the rights of aliens and undocumented immigrants/migrants.
- The eradication of corruption and fraud.
- Trading and small business documentation.[16]

[15] National Action Plan op cit. note 4

[16] National Action Plan op cit. note 4 at p 76