

SUBMISSIONS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA)
ON PRIMARY ISSUES FOR SOUTH AFRICA'S MIGRATION POLICY

1. The Immigration and Refugee Law Committee of the LSSA is a committee comprised principally of specialists in the field(s) of immigration, nationality and refugee law. The Committee looks to protect the interest of the public and the development of this area of law generally.
2. It has been said all too often but it bears repeating - South Africa stands at a crossroads. We are all too aware that the country is sorely tested by the challenges of (amongst other things) unemployment, faltering development and failing service delivery.
3. Cabinet has identified various initiatives to address these massive obstacles to the stability of our democracy.
4. But where does - or should - our national immigration policy position itself within this theme?
5. And should it be so organized as to be able look beyond this point in time, to a period in our political life, where these problems are not so acute and we have moved on to a fresh set of challenges?
6. The challenge now is to see how our national immigration policy can help the country address these obstacles - rather than it being a silent witness which stands and watches from the sidelines – as if they are unrelated.
7. For purposes of the present hearings, our submissions will be divided into two distinct focus areas built around the Refugees Act, 130 of 1998, and the Immigration Act, 13 of 2002.
8. Whilst it is recognised that there are important areas of overlap between the two pieces of legislation, the law and policy regimes underpinning the two Acts are quite distinct.

THE IMMIGRATION ACT, 13 OF 2002.

POLICY:

1. Turning to immigration policy and the Immigration Act, the Act is (very broadly) divided - conceptually - into three (3) distinct components and as an organizational shorthand, our submissions will follow the same pattern:
 - a. Policy;
 - b. Permits; and
 - c. Policing (or the enforcement of immigration controls).

2. In terms of possible strategies for broad immigration policy, there is a spectrum of options available to South Africa:
 - a. Should our immigration laws serve to turn South Africa (SA) into a "*Fortress South Africa*" that keeps foreigners out of our country at all costs no matter why they seek to enter SA?
 - b. Should we instead manage an all but open-door process where people can enter for a range of purposes and with minimal oversight or control?
 - c. Or are we instead looking at something in between these two poles, something more subtle and sophisticated that recognizes our economic and political realities and challenges which seek to mobilise migration and migration management to support and contribute to measures to address the curses of unemployment and stagnating development?

3. The LSSA submits that we need to resist adopting an approach that can be summarized in the thinking one hears all too often - that for every foreign national allowed into the country there is one less job for a SA citizen:
 - a. It is not the reality internationally and it is not the reality in South Africa.

- b. International patterns can be vouched for by research conducted by organizations such as the International Labour Organization (ILO).
 - c. In our view, part of the problem faced by Parliament is the very dearth or shortage of good empirical research about migration patterns in South- and Southern Africa.
4. For example, certain countries know that in 20 years, X% of their nurses and Y% of their teachers, will reach retirement age. Plans need to be put in place to tackle this incrementally - combining both 'internal' programmes and migration initiatives to fill in the gaps. We have the benefit of having just finished a comprehensive census. The alternative is that "market forces" will manage the process applying some kind of Adam Smith economic logic. Whilst that logic might work, it is risky and poor management.
5. We need to develop medium and long term visions in the development of immigration policy based on our current socio-economic reality, where we are now, where we will or ought to be in 10 years and again in 20 years (we can pick whatever periods we want, bearing in mind that the current Act is over 10 years old).

TEMPORARY AND PERMANENT RESIDENCE PERMITS:

6. In terms of designing a way forward, and however unpalatable, we need to recognize a fundamental truth:
- a. This is that, with the best will in the world and for reasons that, all too often, are beyond our control, SA is not an A-list destination for A-list migrant populations. There is a song by David Bowie entitled, *"This is not America"* - the title is quite apt here.
 - b. So if "we" want these people to come here, we have to sweeten the pill, as it were. And "we" means a collective effort of both the private sector and government.
 - c. It may be understandable to say that *"If I want to visit America, I have to do A, B and C - therefore Americans should be required to do the same here"*. However

understandable and however politically popular, it ignores political and economic realities and we cannot wish those away.

- d. And the fact of the matter is that these “realities” are acknowledged on a day to day basis within immigration policy: We refer here to the system of visa exempt passports, which is not always based on reciprocity, and which recognises that-
 - i. Certain countries do not generate high risk movements of populations; and
 - ii. Politically, we have to recognize that some countries are more equal than others.
7. Our economy's needs do not stop with A-list jobs - indicatively, those listed in the current quotas - software engineers, auditors, coded welders and the like. And that is the point. The needs of the economy straddle the entire employment spectrum - from artisans and actuaries to mine- and agricultural workers and zoologists and in so many fields in between.
8. However, our economy's needs do not stop there. It is well-known and has been acknowledged by Cabinet that it is small business that creates more jobs - and that it does so more efficiently than do large corporations. We need to create a permit environment that will encourage entrepreneurs - whether South African or foreign - as well and, if properly managed, the establishment of small businesses. Currently, it is all but impossible for a one person business, to get a business permit, no matter how viable that business.
9. In designing the current Immigration Act, Parliament opted for a fundamental shift from the permit regime that applied under the Aliens Control Act of 1991. Under the current Act, we have a very structured system whereby if you want permit in category A (e.g. a general work permit), you must produce requirements 1 - 10. If you do, more often than not, you will get the permit requested for.
10. The rationale for moving to the current system was that it -
 - a. Introduced considerably more certainty into the application and adjudication processes;

- b. Reduced the opportunities for corruption; and
 - c. Affirmed the reality that policy is a matter for Parliament, Cabinet and Ministers and its execution is in the hands of civil servants. Leaving a wide discretion in the hands of lower-level, sometimes poorly trained and paid civil servants often result in 'the tail wagging the dog' as it said, with officials developing 'policy', under the guise of 'practice' and extorting or taking bribes.
11. In terms of the appropriateness of the current permit system - as a system and a specific option - the attitude of the LSSA is summed up in the old saying - *"If it ain't broke, don't fix it"*.
12. That said, by and large the permit issuing system does need fine tuning in terms of closing loopholes and tightening up definitions.
13. For example, the soon-to-be extinct exceptional skills work permit was not in itself flawed. The problem lay in defining its requirements and the discretion that was allowed officials to decide whether a person had "exceptional skills" which led to some quite remarkable decisions - whilst being entirely lawful.
14. Against that background - that we continue to work with the current system of permits - the LSSA proposes that we do need to create a gradation of permit processes recognising that in some cases we need to make SA more attractive than, e.g. Mauritius or the Seychelles. Some countries have done their SWOT analysis and have taken measures to ensure that the last thing that will trip up the importation of needed skills, is getting the appropriate permit for the person to take up employment. To that end, as they say, the government comes to the party.
15. We recommend that we take a leaf out of the permit system of some other economies - those that otherwise might seem unattractive as a place to work and to take one's family, such as in the Middle East:
- a. Some countries ensure that they can take in applications electronically and will process the application within days rather than weeks.

- b. It makes such a difference in developing the marketability of South Africa as a place to bring your company if at least, permits are not going to delay the process.
 - c. Currently it is a major exercise - from a permitting perspective - for an offshore company to set up and locate senior staff to start running the company in South Africa.
 - d. Mauritius, for example, does not make that mistake and markets itself as an alternative to South Africa with all its red tape.
16. Having just argued against vesting wide discretions in the hands of civil servants, we would however argue against ourselves (to a limited extent) and urge that, the permit system has a systemic flaw in its inability to address or respond to "grey areas" which can arise thanks to the never ending evolution of the world economy and the ingenuity of humanity - as a result of which there can be an entirely bona fide situation for which there isn't an appropriate permit.
17. The current 'device of choice' to respond to these cases that fall between the cracks, is to seek a Ministerial waiver of the 'offending' requirements in terms of section 31(2)(c) of the Act.
18. But there is more than a little measure of *'smoke and mirrors'* and of *"the Emperor's clothes"* with some of these waiver processes - where waivers are sought notwithstanding that the waiver sought contravenes statutory requirements.
19. A more elegant discretionary remedy needs to be incorporated into the legislation, but one which achieves a balance of practicality - in that the 'concession' can be granted within a reasonable period of time unlike the current period of months - whilst not giving too much of a discretion which can be abused.
20. Another specific area that does need consideration - as a matter of policy inasmuch as there is currently something of a vacuum - is that of the treatment of foreign spouses and children - and their rights - where the marriage or spousal relationship has come to an end.
- a. A typical problem arises with the foreign spouse needing to remain in SA and to find employment to support her- or himself and their minor children - especially if they are

South African - particularly where the foreign spouse has no specific skills and would not qualify for a work permit of any sort.

- b. Equally, there can be cases where the foreign spouse has given the best years of her / his life to be with her / his spouse only for the marriage to end through the infidelity or cruelty of the SA spouse and she / he has no home anywhere else any longer.
 - c. Another situation is that of the SA spouse using that residence status to pressure the foreign spouse to agreeing to maintenance or custody arrangements in order that he or she is not forced out of the country.
21. Issues relating to another and similarly 'vulnerable' group of people, need to be addressed at this juncture.
22. It is well known that the South African economy dwarfs those of its neighbours. It is equally well known that South Africa - in a different era - played no small part in ensuring that those economies were and remained under-developed. This has a very human cost to it.
23. The LSSA submits that careful consideration should be given to developing a system of permits for under- or unskilled persons.
24. The reality is that this principle has already been acknowledged and given statutory acknowledgment in making provision for the importation of agricultural and mine workers from neighbouring states.
25. However, this arrangement needs to be expanded upon. South Africa is, in a sense, to Southern Africa what the United States and Canada are to South and Central America (obviously though on a completely different scale). In the USA and Canada, so-called "illegals" underpin many of the less 'glamorous' jobs like working in the construction, tourism and agricultural sectors; all too often, Americans and Canadians cannot be persuaded to take those jobs (and it is not just a matter of salary or work conditions). Turning to our own country, we all know anecdotally that there are many foreign nationals working illegally in the Republic. In many instances, their employers are forced to look the other way because they cannot find South Africans with the same work ethic or enthusiasm - or whatever the quality might be.

26. Under the same heading, the LSSA would invite Parliament to consider the idea of expanding or rolling out the Zimbabwean amnesty to other neighbouring states. That said, the LSSA would urge that this last amnesty be carefully reviewed because it came with deep flaws built into it, which may still mean that any further amnesty program will die before it starts.
27. The Portfolio Committee has said that it is not looking to have a gripe session and that we need to be forward looking. Whilst the LSSA wholly endorses that position, it would nevertheless point out that, as was said many years ago, "those who ignore history are doomed to repeat it." This forward looking initiative must not forget to learn from our history - of mistakes that have been made and of the successes that there have been.

POLICING & ENFORCEMENT:

28. People are moving like never before. This can be both across borders (in some countries it can be whole armies and communities) as well as within the country.
29. The language of South Africa's current enforcement model - the language in the Act - is 100 years old. Literally, if you look at the 1913 Act, some provisions are word for word. Surely we can be more creative.
30. In terms of enforcement models, the question must be posed: do we accept that we have a porous border.
31. There is no great shame in conceding that. Not only is it fact, even the US with all its technology cannot stop illegal migration across its Southern border.
32. The point instead is to work with that reality and to design a response that is within our means and that works to our advantage.
33. One approach is to start from the premise (which was identified in the original Green Paper), that the object of illegal migration is to secure jobs and that therefore, the enforcement focus should be on employers.

34. For the most part, employers cannot hide under the radar screen - nor do they have the time to do so. And there are only so many employers - far less than there are illegal or undocumented and economic migrants. Employers are required to register with all manner of authorities in SA.
35. It's not a quick fix strategy. It requires time for the message to get across to the "sending countries" that opportunities within the SA economy are very limited - if one does not have the correct permit.
36. This strategy has been looked at closely in a number of countries. No-one has it completely right and watertight - and given the human condition, no-one will.
37. But perhaps we can usefully look to learn from a mix of economies which have tried to better manage illegal immigration and to learn from those mistakes.
38. This is not to suggest we should slavishly copy one model over another, we must be picky, choosy and eclectic. We want a South African solution to a South African challenge.
39. The same consideration should apply, we submit, as regards undocumented self-employment.
40. One final consideration that has been left to the end of this section, precisely because it really straddles the entire immigration 'sector', is that of the desperately urgent need to address xenophobia:
 - a. It is one issue which can cause untold harm and damage to our country, unless brought under control.
 - b. The obligation falls on us all, but the Department of Home Affairs (Home Affairs), together with other Departments in the security cluster, must lead the way.
 - c. However, as the saying goes, we must sweep our own front yard first. It helps none of us to hear rampantly xenophobic comments being uttered by Home Affairs officials.

THE REFUGEES ACT:

1. At the outset, we must record that our submissions under this heading have drawn heavily on the excellent analysis by *Lawyers For Human Rights* entitled "*Policy Shifts in South Africa*" which is to be launched shortly. We are indebted to them.
2. While conscious of the need not to focus on current administrative failures, we must stress again, as we did above, that reference to current problems will assist the Portfolio Committee in making recommendations for an improved policy.
3. We wish to stress that Act 130 of 1998 is a fine piece of legislation and that the amendments imposed by the still-to-be-implemented Amendment Act, are by no means all desirable.
4. We strongly recommend a Green Paper / White Paper process, as premature implementation of anticipated policies has caused unnecessary and in some instances inhumane difficulties for asylum seekers in particular. It is essential to formulate, communicate and allow meaningful engagement on policies and practices before they are implemented.
5. We submit that any new policy must address at least some of the following issues:
 - a. A coherent and acceptable exposition of the so-called "first / third country of safety principle"; and
 - b. Proper protection for persons who may not qualify as convention refugees should also be incorporated to ensure they are not repatriated in violation of the provisions of the Convention Against Torture and other international instruments or the Constitution – so-called complementary protection.
6. It is submitted that Refugee Reception Offices in urban areas should be reinstated and ideally expanded.
7. Provision should be made for the independent monitoring of border crossing processes for asylum seekers at land borders.

8. The imposition of discriminatory conditions regarding shops and businesses owned by asylum seekers, refugees and other such migrants should be jettisoned.
9. The right to work and study and freedom of movement for asylum seekers should be retained. This is particularly important as the restriction of such rights will impose a heavy consequential financial burden on the State.
10. Most importantly, provision should be made for permanent residence to be automatically granted to migrants who have been in South Africa uninterruptedly for 8 years or more unless there is good cause not to, such as criminal convictions within South Africa – bearing in mind that in terms of settled law in South Africa and in other countries, when a person is recognised as being a refugee, it means that he or she was a refugee from the date they first crossed the South African border.
11. It is also submitted that it would be inhumane if Angolan refugees who have lived in South Africa for up to 16 years be required against their will to be returned to Angola this year. It would also be extraordinarily expensive to do so. The majority of recognised refugees from Angola have integrated into South African society, contribute to the economy and have no meaningful links with their home country.
12. There is a backlog in appeals of tens of thousands of applications – as was reported to the Portfolio Committee last year. Many of these appeals date back 5 years or more. For these appeals to be re-heard would be an enormous expense to the State, quite apart from all other undesirable consequences. It is submitted that all the appellants identified for appeal re-hearing because of the termination of the contracts of the previous Appeal Board should be granted residence in South Africa.
13. It would be most undesirable if the present functions of the Standing Committee For Refugee Affairs were to devolve upon the Director-General. It is of crucial importance that the Standing Committee for Refugee Affairs retain its independence as presently provided for under the Refugees Act, whatever form the Committee is to take under new legislation.
14. It is of vital importance that a new policy recognize refugee status once and for all until cessation.
15. The inconsistent allocation of validity for a status certificate for periods of 2 years or less - or 4 years more recently and less consistently - is incompatible with the right to refugee status as

provided for in the International Instruments to which South Africa is a party or in the present Refugees Act.

16. The significant attempt by the previous Deputy Minister to make the period of validity of a status certificate for 4 years is most praiseworthy, but it appears not to be implemented at present.
17. There should be synchronicity between status certificates and refugee identity documents or the one document should replace the other.
18. The failure by Home Affairs to provide refugee identity documents has caused untold inconvenience, more acutely recently because of FICA regulations, hospital admissions and schooling.
19. Finally, provision should be made for properly qualified and trained refugee status determination officials.

CONCLUDING REMARKS:

1. In South Africa - indeed globally - immigration and refugee laws, policy and management are all a means to an end. They are not ends in themselves.
2. We submit that the challenge facing Parliament is identifying what those ends are, or should be.
3. The LSSA would like to express its deepest gratitude to the Portfolio Committee for having been granted this opportunity to address it.
4. The LSSA hopes that it will be able to extend an invitation to some of the members of the Portfolio Committee to be able to engage in further debate on these issues.
5. The LSSA would also like to record its willingness to put at the disposal of the Portfolio Committee, the skills and expertise of its members in this field, a number of whom are in fact recognised internationally as being experts in the field.