

**COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE**  
**IMMIGRATION BILL, AMENDING THE IMMIGRATION ACT, 2002 (ACT NO. 13**  
**OF 2002)**

**PROPOSED AMENDMENTS TO SECTION 34**

**1. Introduction and General Overview**

The Select Committee on Security and Justice has invited interested parties to comment on the Immigration Bill. The Bill primarily amends section 34 of the Immigration Act, Act 13 of 2002 (the Act) to bring it into line with two key Constitutional Court decisions:

- *Lawyers for Human Rights v Minister of Home Affairs* (2017),
- *Ex parte Minister of Home Affairs v Lawyers for Human Rights* (2023).

Both judgments declared aspects of section 34 of the Act unconstitutional for failing to provide adequate judicial oversight and procedural safeguards for detained foreigners.

The proposed legislative amendments thus aim to:

- Mandate judicial appearance within 48 hours of arrest;
- Introduce an “interests of justice” test for detention and release;
- Ensure access to legal representation and the right to make representations before court.

While the Bill represents a welcome attempt to align immigration detention practices with the Constitution, significant ambiguities and omissions remain, particularly in its implementation framework.

## 2. Clause-by-Clause Analysis

### Clause 1 – Amendment of Section 34

#### Positive Aspects

- Automatic judicial oversight: The requirement that all detained foreigners appear in person before a court within 48 hours is a direct and necessary alignment with section 35(2)(d) of the Constitution.
- Recognition of legal representation rights: The explicit inclusion of the right to state-funded legal assistance (where substantial injustice would result) is commendable and constitutionally compliant.
- Introduction of “interests of justice” as a guiding criterion: This replaces the vague “good and reasonable grounds” test, providing clearer constitutional guidance for both immigration officers and courts.

#### Concerns and Recommendations

1. Undefined “interests of justice” factors:

The Bill delegates to the Minister the power to “prescribe” the factors to be considered under this criterion. This risks broad administrative discretion without parliamentary oversight.

**Recommendation:** The Bill should itself specify key factors, such as:

- Risk of absconding or interference with deportation proceedings;
- Vulnerability of the detainee (children, asylum seekers, pregnant women, etc.);

- Availability of less restrictive alternatives (e.g. reporting conditions or bail-like mechanisms).
2. Absence of procedural guidance for interviews under section 41(1) of the Immigration Act 2002. The Bill refers to an “interview” preceding detention but does not clarify its procedural safeguards—such as language interpretation, recording and access to legal advice.

**Recommendation:** The regulations should explicitly ensure that such interviews comply with fair administrative action under section 33 of the Constitution and PAJA.

3. Court appearance logistics

The 48-hour requirement, while constitutionally sound, may overburden lower courts, especially in high-volume detention areas such as Musina and Lindela.

**Recommendation:** Consider introducing specialised immigration courts or designated magistrates to streamline compliance and prevent systemic delays.

4. Maximum detention periods remain vague in effect.

Although the Bill mirrors the Constitutional Court’s guidance (30 days + 90 days extension), it does not require ongoing judicial oversight beyond this period.

**Recommendation:** Insert a clause limiting total detention to a maximum of 120 days, beyond which continued detention must be expressly authorised by a High Court.

## 5. Access to interpretation and communication

The Bill states that rights must be communicated “in a language that he or she understands, when possible, practicable and available.” The qualifying phrase risks undermining the rights effectiveness.

**Recommendation:** Replace “when possible, practicable and available” with “must be ensured through interpretation services where necessary.”

### **Clause 2 – Substitution of “Court” with “court”**

This is purely technical and unobjectionable.

### **Clause 3 – Short Title**

No comment.

## **3. Constitutional and Human Rights Perspective**

The Bill reflects genuine progress towards compliance with sections 12(1) and 35(2) of the Constitution, but its success depends on practical enforceability and regulatory clarity.

Without detailed procedural guarantees in the regulations:

- There remains a risk of arbitrary or prolonged detention;
- Vulnerable groups (such as asylum seekers and minors) could still be detained without meaningful judicial scrutiny;
- Legal aid and interpretation services may remain inconsistently available.

The Bill’s silence on alternatives to detention, such as community supervision or electronic monitoring, also places South Africa out of step with international standards, including UNHCR and IOM guidelines.

#### 4. Broader Administrative Implications

- The Department of Home Affairs must ensure that immigration officers receive mandatory constitutional training before implementation.
- The Legal Aid Board will require expanded funding to handle the increased volume of representation.
- The Border Management Authority should coordinate detention records and judicial scheduling through a national case management system, to prevent unlawful detention beyond statutory periods.

#### 5. Conclusion and Summary of Recommendations

| <b>Issue</b>  | <b>Concern</b>                           | <b>Recommendation</b>  |
|---|--|--|
| “Interests of justice” undefined                    | Too much ministerial discretion          | Define core criteria in the Act itself                             |
| Section 41 of the Immigration Act interview process | Lack of procedural safeguards            | Include interpretation, written record, and legal advice rights    |
| Court capacity                                      | Possible bottlenecks in 48-hour hearings | Establish designated immigration courts                            |
| Detention period                                    | No overall cap beyond 90+30 days         | Limit total detention to 120 days unless High Court authorises     |
| Language qualification                              | Weakens right to understand charges      | Require interpretation where necessary                             |
| Alternatives to detention                           | Not addressed                            | Introduce statutory requirement to consider non-custodial measures |

## **6. Concluding Remarks**

While the Immigration Amendment Bill [B8B—2024] is a constitutionally necessary step in reforming immigration detention practices, its effectiveness hinges on clarity, oversight and procedural fairness.

It should not only comply with the Constitutional Court judgments but also embody the spirit of humane, proportionate, and accountable immigration enforcement envisioned by the Constitution.