IMMIGRATION BILL

Submission to the Portfolio Committee of Home Affairs – 23 April 2002

Introduction

The passing of new immigration legislation has been long awaited in South Africa. The Aliens Control Act 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 statutes book 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 with the opportunity to create a new and modern piece of legislation that is in keeping with our own constitutional democracy. It provides the opportunity to further promote diversity within the new South Africa and to address the imbalances caused by racially based immigration laws and policies in the past.

The South African Human Rights Commission (SAHRC)

Since 1994 there has been an alarming increase in xenophobic attacks and violent incidences against foreigners in South Africa. In response to this situation

the SAHRC in conjunction with the National Consortium of Refugee Affairs launched The Roll Back Xenophobia Campaign in December 1998.

The SAHRC has also been seized with many matters concerning the rights of undocumented migrants. In March 1999, the Commission published its report on the situation in the Lindela Detention Center, entitled *"Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act"* This report contained a number of recommendations aimed at government to address concerns about the human rights of persons held in detention centers in South Africa (recommendations are attached herewith marked "A").

The SAHRC prepared submissions during 2000 on both the White Paper on International Migration as well as the draft Bill. The comments contained in both these documents are pertinent to the present submission and they are attached as Annexures hereto (marked "B" and "C" respectively). The current submission will add to the previous Submission on the White Paper by further identifying specific clauses which in our view ought to be changed in order to take into account the SAHRC's previous comments on the Bill. The SAHRC previous comments on the Bill and White Paper provide the narrative and motivation for the more concrete proposal contained in this paper. We thus urge the Committee to consider the recommendations contained both within this paper as well as the recommendations contained in previous papers. The draft bill that in our view must be amended in order to bring greater realization to the rights contained in our constitution and the international human rights instruments that South Africa has ratified that pertain to immigrants and undocumented migrants.

This submission thus calls upon the considerable experience that the SAHRC has gained during the past years on human rights issues that should influence the drafting of new Immigration laws.

The process

Although the invitation to make a submission requests specific comment on clauses of the legislation, this submission would be incomplete if the SAHRC did not voice its dissatisfaction regarding the manner in which the drafting of this legislation has occurred. The legislation has taken an inordinate amount of time to reach this stage. There has been considerable comment in the media that the delay has been due to political disagreements that have occurred between various political parties. It is perturbing that such an important piece of legislation has been relegated to political disagreement when the focus should rather have been on the human rights implications of the Bill and drafting the best possible legislation to redress the past discriminatory practices contained in the Aliens Control Act.

It would now appear that it has been decided that the Bill shall be passed this parliamentary session. After over two years of the Bill being available for comment and further redrafting, recent versions of the Bill suggest that very few substantive amendments have been made to the Bill. The SAHRC is concerned that due to the number of criticisms that have been voiced against the Bill, that the current time framework for the passing of this legislation is too limited. Should Parliament proceed with the current process we will be left with a piece of legislation that will be riddled with legal uncertainty and subject to constant legal challenge. This would prove costly for the State. The SAHRC therefore calls on the Committee to seriously consider postponing this current process. The SAHRC would propose that legislation that complies with the constitutional court deadlines be fast tracked through Parliament this session. Further, the Committee should provide a clear time framework for the further redrafting of the Bill. It is clear that further interaction needs to also take place between the various government Departments, such as Justice, that will be charged with carrying out the duties contained in the Bill.

The SAHRC calls upon the Committee to seriously consider the suggestions set out in this submission. The SAHRC believes that the submissions contained herein are based upon our obligations in terms of the Constitution and thus cannot be ignored.

Submissions

In the SAHRC comments on the Bill in 2000, we identified six major areas of concern. In this submission we will address these six issues and provide greater input and clarity on how we believe the current Bill should be amended. The six areas are thus:

1. **Management of international migration**
2. **The fight against xenophobia and racism**
3. **The application of the bill of right to non-citizens**
4. **The proposed appeal procedures**
5. **Places of detention**
6. **The risk of corruption**

1. Management of International Migration

The SAHRC has previously stated that it does not support the control-oriented approach to migration as this fails to take into the position of migrant workers. Despite calls from the SAHRC and other civil society organizations for the Bill to be revisited and drafted from a management –oriented perspective, these calls have been ignored. The SAHRC reaffirms its continued support of its previous comments on this issue.

2. Xenophobia and racism

Both the SAHRC submissions on the White Paper and the Bill dealt at length with our concerns that the Bill promotes and institutionalizes xenophobia and racism by paying lip service to these issues. Specific problems that were highlighted included: the entrenchment of community based policing of persons suspected to be undocumented migrants (i.e. Section 41, 42 and 43), the creation of criminal offences that shifts the onus of proof onto the accused, the broad provisions contained in section 44 relating to identification and that the provisions to counter xenophobia and racism are insufficient. Despite calling upon the drafters of the Bill to revisit sections of the Bill, the calls appear not to have been heeded.

2.1. Community based policing (Section 41 Employers; Section 42 Learning institutions;)

2.1.1. Section 43 Overnight accommodation

The SAHRC commented in its submission on the White Paper that these provisions "… may be used by people to further their xenophobic tendencies and result in unstable communities." It is clear that the provisions will be more easily used to target poor and marginalized people who flee to South Africa. It would be unlikely that posh hotel staff would begin carrying out immigration duties and checking the passports and visas of their overseas clients! It can thus be argued that the section would be enforced in a discriminatory manner.

The provisions provide for private companies and institutions to carry out the immigration control function and duties of the State. These institutions have not received training in immigration control and thus are not in a position to correctly assess the documentation of people, as they do not possess the necessary expertise. They also have no obligation to protect human rights and have little knowledge of human rights standards but rather a self-interest in ensuring that they do not fall foul of the law which carries harsh penalties. The penalties for

failing to abide with these provisions are severe – 18 months imprisonment or a fine of R75 000,00.

Such clauses thus leave the door wide open for human rights abuses to occur against refugees and foreigners who posses one of the different permits referred to in the Act.

The clear purpose of this section is to detect illegal foreigners who are present in the country and to make their continued presence in the country intolerable by involving the broader community to assist the enforcement mechanism of the State. It is not convincing that such drastic provisions are necessary.

Submission

The potential misuse of the section and the human rights abuses flowing there from convinces the SAHRC that this section ought to be removed from the Bill.

2.1.2. Section 41 Employers

The provisions contained herein are too broad and the presumptions (to be dealt with in 2.2 below) may be subject to constitutional challenge. Whilst every employer may have a duty to make a good faith effort to ensure that they are not employing illegal foreigners, the presumptions contained in the section place the control/policing functions squarely in the domain of the employer. By so doing, the criticism pertaining to Section 43 applies to this section as well. It is uncertain that given the constitutional courts jurisprudence pertaining to the shifting of the onus onto the accused in criminal matters that this presumption would be upheld if challenged.

Of further concern is section 41(4)(b)(ii) which provides that an employer must report to the Department any breach on the side of the foreigner of his or her status. This provision is too broad as it places potential duties on the employer

that fall outside of the scope of the employment relationship. Employers are not necessarily educated in Immigration Law and it is thus placing a far too onerous duty on the employer considering the harsh penalty that is imposed for violation of this section. On the other hand, an employer could abuse this section by reporting in terms of this section in order to contravene the labor laws. For example, where an employer wishes to dismiss an employee for no reason in terms of labor laws, the employer could abuse this section and have the person arrested by home affairs officials.

Submission

a) Section 41(4)(b)(ii) must be removed.

2.1.3. Section 42 Learning institutions

The presumption contained in this section places far too great an onus on the learning institution to carry out the duties of immigration control. Further for the reasons set out in 2.2. below the presumption should be removed. In order though to place some duty on the learning institution to ascertain the status of a person, a similar section to that contained in section 41(2) should be contained.

Submission

a) A section similar to that set out in section 41(2) ought to be incorporated.

2.2 The shifting of the onus

Sections 41 - 43 create an onus on the accused to prove that he or she did not knowingly provide employment, a place of learning or accommodation to an illegal foreigner. The provisions thus place an onerous duty on the public to

ascertain whether a person is an illegal foreigner or not. They are a restatement of corresponding sections in the Aliens Control Act.

These provisions may well be subject to constitutional challenge based on the right to be presumed innocent, to remain silent, and not testify during the proceeding as set out in section 35(3)(h) of the Constitution.

In considering the constitutional court jurisprudence that has developed around presumptions that shift the burden of proof onto the accused in criminal matters, the SAHRC is of the view that these presumptions would not survive constitutional scrutiny. The *Manamele* decision of the constitutional court, (The State v Manamela, S, CCT 25/99) made it clear that there should be a pressing social need for the presumption to exist, that there must not be less restrictive means of identifying illegal foreigners before a provision can convict on the basis of a presumption.

Submission

b) The presumptions contained in Sections 41(3) and (5) ought to be removed from the section.

c) The presumption contained in Section 42(2) ought to be removed from the section.

d) The presumption contained in section 43 should be removed if the section is not deleted in its entirety.

2.3. Section 44 Identification

In the SAHRC comments on the White Paper it was argued that identification on demand harks back to those dark days of Apartheid when black South Africans had to constantly assert their right to be in South Africa. Since 1994, there have

been numerous dawn raids by the South African Police Services into areas that are known to be inhabited by foreigners, both legal and illegal, and in which many foreigners who are legally in the country have been arrested due to their failure to immediately produce the necessary identification documentation. The SAHRC has expressed concern about such raids as they promote racism and xenophobia.

Section 44 provides for taking a person into custody where the immigration officer or police officer is not satisfied that the person is legally in the country. There is no provision in the Bill for the grounds that must exist prior to the officer requesting a person to identify him or herself, or procedures to be followed to avoid having to deprive the person of his or her freedom by taking the person into custody. It is suggested that powers contained in section 44 may only be exercised in accordance with section 9(3) of the Constitution, which states that the Sate may not unfairly discriminate against anyone.

As the provision stands currently, a person merely due to their appearance can be apprehended and detained by failing to identify him or herself. Such wide provisions leave room for racism and xenophobia to flourish.

Submission

Further research and consideration is needed to be given to this section. This could be achieved by either redrafting the section or providing in the Bill that regulations will be drafted that identify those instances in which an officer may make use of the section and the manner in which the section can be implemented. In Canada for example, where new Immigration legislation has recently been passed, the officer must have reasonable grounds to believe that the person is an illegal foreigner such as that the person is a danger to the public or that the person will not appear for a hearing on admissibility.

Given the documented abuses that have occurred through the use of this section, it is further recommended that the Regulations should be drafted taking into account the relevant section of the Promotion of Equality and Prevention of Unfair Discrimination Act 2/2000 (PEPUDA)

2.4. Provisions to counter Xenophobia and Racism

Both the SAHRC comments on the White Paper and our previous Submissions on the Bill (May 2000) stated that the current structure of the Bill and the lack of strong provisions to counter racism and xenophobia amount to paying lip service to a very serious issue.

The SAHRC once again calls on the Committee to effect amendments to the Bill that will address the issue adequately. Listed below are a number of suggestions.

Submission

a) That the Preamble to he Bill refer to South Africa's past and the discriminatory effects of the Aliens Control Act., affirms the drafters intention that this piece of legislation is intended to erase the past discriminatory legislation from our statute books, acknowledges that South Africa is adversely affected by xenophobia and racism and that this runs contrary to our constitutional democracy, acknowledges that the bill provides for measures to combat racism and xenophobia.

b) That an Objectives section be added to the beginning of the Act, which states clearly that one of the objectives of the Act is the eradication of Xenophobia and racism.

c) That the measures to combat racism and xenophobia as set out in s29(2)(e) (communities and organs of civil society) and (j)(investigative unit) specify that the training courses shall promote cultural sensitivity,

awareness of prejudice and knowledge of legal aspects of discrimination. Further, that all state officials involved in the implementation of this Act shall also attend such training courses.

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

In our submission on the Bill in 2000, the SAHRC confirmed it's position that there is a need for an express clause in the Immigration Bill that states that the Bill of Rights (Chap. 2 of the Constitution) applies to everyone and that this includes non-citizens. This clause should expressly state those rights to which non-citizens may not lay claim e.g. political rights and rights relating to freedom of trade, occupation and profession. This submission has not been included in the current Bill.

Submission

The SAHRC calls again upon the Committee to introduce such a clause into the bill.

4. Proposed Appeal Procedure

The SAHRC has previously stated its concern that section 34 of the Immigration Bill may not comply with the Bill of Rights (see Point 4 of the SAHRC Comments on the Draft Bill 2000). Despite raising these concerns it appears that they have not been considered.

In summary, the following provisions of this section concern the SAHRC:

a) That the right to appeal can be subject to the posting of a bond. This may infringe a person's right to just administrative action (section 33) and the right to access to courts (section 34). As previously stated, many persons who stand to be deported may not have access to funds. Thus making an

appeal conditional upon the posting of a bond would deny these people access to courts.

b) That the "deeming" or "default confirmation" provisions contained in section 34(2) may violate the right to just administrative action and a persons right to access to courts. Section 34(2) makes no provisions for a person to be informed of and given reasons in writing for the outcome of an appeal against a section 34(1) decision. It further makes no provision for informing a person of the further appeal procedures.

Further concerns about this section include:

c) Section 34(4) only makes provision for a person being informed in writing of any decision adversely affecting his or rights, if the decision is taken by the Department. This effectively excludes decisions taken by the Minister or the Director-General.

d) Section 34(4) fails to state that the person shall be given reasons for the decision. Our Bill of Rights (section 33(2)) entrenches the right to be given written reasons of any adverse decision affecting a persons rights.

Submission

a) Section 34(2) be amended by the deletion of references to the posting of a bond. Section 37(3) and (4) makes provision for the posting of a bond once the person is subject to deportation and thus it is unclear why a bond needs to be posted at this earlier stage. It would be appropriate for the State to recover these expenses once the person has had due recourse to the legal system and a final decision has been taken that he or she shall be deported.

b) Section 34(4) be amended to address the concerns set out in (a) – (d) above in the following manner

- by the removal of the word "… Department…" and the insertion of the words "… any decision in terms of this section…". This amendment would thus cover all decisions taken in terms of the section be they by the Department, the Director-General or the Minster.

- Inserting the words "… the reasons for the decision, the appeal procedures …" after the words "…his or her rights in terms of this section…".

- Removing the words deemed from Section 34(2)(a) and (b).

c) Finally, it is suggested that it would be more in line with our constitution should Section 34(1) refer to reasons rather related motivation.

5. Places of Detention

5.1. Judicial Inspectorate for Detention Centers

The SAHRC comments on the White Paper emphasized the unacceptable treatment standards of detainees held in detention camps. The SAHRC has conducted much research in this area and in its report on the Lindela Detention Center it made the following recommendations:

"Detention Centers

1. *A permanent Inspectorate should be established to visit persons held in terms of the Aliens Control Act in any police, prison or other detention facility in order to monitor compliance with arresting*

> *guidelines, the Act, and the constitutional provisions relevant to arrest and detention in terms of the Act. "*SAHRC Report "Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act" March 1999

In November 1999, this recommendation by the SAHRC was endorsed by Human Rights Watch, an international NGO, in their Comments on the White Paper on International Migration (see http://www.queens.ca/samp/HRW.htm)

In the SAHRC comments on the Bill the need again for measures to mandate control and monitoring of detention places was once again reiterated. Despite calling upon the drafters of the Bill to include measures to mandate the control and monitoring of places of detention, the Bill still does not include such measures despite reports of conditions in detention centers continuing.

The inclusion of an Inspectorate in the Bill will ensure that an independent body is charged with the responsibility that will be tasked with the duties to inspect and monitor Detention Centers.

Section 37(1) read in conjunction with Section 30(l) provides for detention centers to be controlled and administered by private contractors. In the light of numerous cases of human rights violations at the Lindela Detention Center (a private detention facility contracted out by the Department) the legislation ought to provide for Regulations that provide strict guidance and control of the manner in which the places are administered. These Regulations should address and provide for the following issues:

1. the management and administration of detention centers;
2. the rights and responsibilities of detainees;
3. clear performance standards that must be adhered to and achieved by the contractor;
4. guidance must be given for the drafting of a clear disciplinary code for both detainees and staff of the center;

5. the powers of detention custody officers (including powers relating to the use of force) must be regulated as well as publicly displayed in the Center. Details must be provided of reporting mechanisms that can be followed should these powers be violated or abused;
6. the private contractor must undertake to adhere to the provisions of the Promotion of Access to Information Act 2000 (POATIA); and shall be defined as a public body in terms thereof.

Submission

a) It is proposed that a further section be added to the Bill that provides for the establishment of a Detention Inspectorate, along the lines of the Judicial Inspectorate that is provided for in the Correctional Services Act 111/98 in Chap IX thereof at sections 85 – 89 . These sections provide for the establishment of the Inspectorate, the appointment of a Judicial Inspector, assistants and staff, conditions of service, powers functions and duties of the Inspectorate.
b) The provisions for the creation of an inspectorate could be contained in a further Chapter in the Bill.
c) It is further proposed that a new section is added to the Bill that makes provision for the suggestions set out in 1 – 6 above.

5.2. The rights of children

The SAHRC has previously stated that the Bill does not provide adequate protection for the rights of the child (*par.5.3 SAHRC, Submission 2000*) despite our constitutional and international law obligations. The plight of children detained in the Lindela Detention Camp pertinently draws to our attention that the Bill still fails to address the issue.

The South African Constitution provides in Section 28(1)(g) that:

"Every child has the right- not to be detained except as a measure of last resort, in which

case, in addition to the rights a child enjoys under sections 12 (Freedom and Security of the person) and 35 (Arrest, detained and Accused persons), the child may be

detained only for the shortest appropriate period of time, and has the right to be-

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner and kept in conditions, that take account of the child's age.

Section 28(2) provides further that:

"A child's interests are of paramount importance in every matter concerning the child."

The SAHRC in its report on the Lindela Detention Centre recommended that:

"1. The Inspectorate should examine the detention and treatment of children in the immigration system as there did not appear to be adequate documentation created or maintained in respect of children detained with their parents at Lindela. This investigation did not however examine the position of children comprehensively." ***SAHRC Report "Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act" March 1999***

a) **Submission**

Section 37 of the Bill be amended by the addition of a further subsection which reaffirms the constitutional rights of the child. Namely, that a child shall only be detained as a matter of last resort and that the best interests

of the child are of paramount importance in every matter concerning the child.

b) Further, that the Minister in consultation with the Board shall draft regulations, which will address the following matters:
places of detention for children; provisions to ensure that children are not detained with adults or criminals; the interaction between the Child Care Act and children detained in Detention Centers

5.3. Detention without a warrant

In the SAHRC previous Submission (May 2000) it was argued that the detention of foreigners without a warrant would be unconstitutional (*see Par 5.4. thereof*).

Section 37(1)(b) continues to place the onus on a foreigner to request that his or her detention for purposes of deportation be confirmed by a warrant of a Court. Should this warrant not be issued in 48 hours, the foreigner shall be released. This onus should be removed and the foreigner should be brought before a court within 48 hours to have his/her detention confirmed.

Section 37(1)(d) provides that a foreigner may be detained for 30 days without a warrant from a court and that thereafter a court may extend the period of detention for a period not exceeding 90 days. As previously stated the SAHRC believes that these periods of detention are too long and are therefore unconstitutional.

Submission

a) Section 37 should be amended by providing that all persons detained in terms of section 37 shall be brought before a Court within 48 hours for the purposes of having his/her arrest confirmed by a warrant of the Court.

b) Section 37 should be further amended to provide that further detention periods are to be confirmed by a Court and may not exceed 14 days at a time.

5.8. Section 37still fails to provide for foreigners who seek asylum in South Africa.

The SAHRC pointed out in its previous comments on the Bill (May 2000) that section 37 in particular subsections (8) and (10) do not provide for asylum seekers. It was suggested that provision should be made for asylum seekers to be placed in separate reception areas and that they should not be detained aboard a ship.

By placing the illegal foreigner in detention under the auspices of the master of the ship, the person may be denied the opportunity to apply for asylum. This would violate the rights of the asylum seeker in terms of the Refugee Convention.

Submission

a) A further subsection should be added to this section that will provide an exception to the provisions for foreigners who seek asylum in South Africa and a reference to the Refugee Act.

b) This subsection shall provide further that facilities at ports of entry shall be provided to accommodate those persons wishing to apply for asylum and that these centers shall be staffed by properly trained immigration officers who shall assist the asylum seekers in terms of the Refugee Act.

6. Potential for corruption

The SAHRC comments on the White Paper recognized that corruption is endemic in the area of immigration and migration control. Considering the

seriousness of the problem, the solutions suggested in the White Paper appears to pay mere lip service to corruption. The SAHRC recommended that effective workable legislation was necessary.

In the SAHRC comments on the Bill (Feb 2000) it was stated that by failing to provide clarity on the appointment, powers and functions of the anti corruption unit established in terms of section 50 of the Bill, the legislation fails to address the issue of corruption adequately.

Since the drafting of our previous submission, new anti corruption legislation has been drafted by the Department of Justice. This legislation shall come before the Portfolio Committee on Justice and Constitutional Affairs for discussion during the course of this year. It would therefore be appropriate to further examine section 50 in light of this proposed legislation.

Compared to the current short Corruption Act, the new anti corruption legislation sets out twenty statutorily defined offences and reintroduces the common law crime of bribery into our law. The effectiveness of this legislation shall only be realized through the training of officials on these crimes in order that they may be detected and investigated properly. It would thus be appropriate to provide measures in the Immigration bill for the training of officials in order that they may carry out their duties with the necessary skill and knowledge of the law.

Submission

a) It is therefore proposed that a further subsection be added to Section 50 that states that the Minister in consultation with the Board shall draft regulation that provide for:

aa) the appointment, powers and functions of the anti corruption unit.

bb) A training programme for the members of the unit

Additional comments

In the previous SAHRC Submission (May 2000) a number of additional comments were made on the Bill. These comments related to the following sections of the bill:

7.1. **Section 26(1) The withdrawal of permanent residence**

7.2. Section 53 Administrative offences

7.3. Section 4(5) Special financial and other guarantees

7.4. Section 8(3) The holder of a crewman permit may not conduct work

7.5. Temporary and Permanent residence permits

7.6. Section 18 Asylum

7.7. Section 21(2) Permanent residence – Spouses

7.8. Section 23(1)(C) Prohibited persons

7.9. Section 28 The Immigration Board – appointment of members

7.10 Section 29 Objectives and functions of the service

7.11. Section 36(5)(b) Apprehension of illegal foreigners

7.12 Contextual errors

These comments do not appear to have been considered by the drafters of the Bill and the SAHRC calls upon the Committee to direct its attention to the matters raised therein.

7.13. The right to family life - Parents

A stated objective of migration control – section 29(j)(iii) of the Bill - is to regulate the influx of foreigners and residents in the Republic to enable family reunification.

The provisions for direct permanent residence (section 21) fails to provide for a parent of a citizen to be able to apply for permanent residence.

Section 22(e) of the Bill makes provision for those persons older than 60 years who wish to retire in the country. However, this fails to adequately provide for parents to have the right to reside based on the fact that their children are residents.

This violates the right to family life and the equality clause of the constitution, which states that no person may be discriminated against on the basis of age.

Submission

a) That a further subsection be added to section 21 that stipulates that a permanent residence permit shall be issued to a parent of a foreigner.

7.14. Regulation making – Section 33

The Bill makes provisions at numerous places for the drafting of Regulations. In fact, many important aspects of implementation of the Bill are not contained in

the Bill but shall be the subject of regulations.

If the drafters of the bill are serious about encouraging public participation in the drafting of these regulations then a longer period of time ought to be given for the public to comment on the Regulations. By submitting the Regulations to Parliament for approval, public participation will be further encouraged.

Submission

a) The time periods set out in the section should be extended from 21 days to 60 days.

b) The Minister should table the Regulations before Parliament to be considered by the Portfolio Committee on Home Affairs. This would facilitate Parliament having an input into the Regulations and could facilitate the involvement of the broader public in the process.

This submission was prepared by:

South African Human Rights Commission

Parliamentary Officer / Legislation Monitor
Judith R Cohen
Cape Town

Tel: 021 426 2277

Fax: 021 426 2875

E-mail:jcohen@sahrc.org.za

Annexure "A"

Extract from *"Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act", SAHRC Report, March 1999*

Recommendations

The recommendations that follow are intended to deal with many of the unacceptable practises we have highlighted in our report. They also must be seen in the context of contributing to a legal regime that remains consistent and loyal to our obligations under international and national human rights norms and standards.

We are particularly pleased that both the Department of Home Affairs and the proprietors of the Lindela Repatriation Centre have reacted positively to the various recommendations made and we do believe that collectively we can ensure the speedy implementation of the recommendations we have put forward.

1. The Department of Home Affairs should prepare and disseminate concise guidelines to arresting officers to ensure clear and consistent criteria for determining the existence of 'reasonable grounds'. The number of persons arrested and subsequently released is unacceptably high and clearly suggests the lack of clear and consistent criteria to found an arrest and the random nature of how arrests are effected.
2. All suspects should be advised that reasonable grounds exist that they are an alien and should be advised of their right to satisfy the arresting officer that they are entitled to be in the country. Arresting officers should assist such suspects, within reasonable means, to obtain or retrieve documentation from their place of residence, employment or otherwise that would evidence their right to be present in the country. While this appears to be the official policy of the South African Police Services, arresting officers are not applying it with consistency.
3. In the arresting guidelines that we recommend above, random pedestrian checks or area sweeps should be excluded as a modus operandi in the apprehension of suspected aliens. Such methods fail to satisfy the criteria of reasonable grounds and contribute to the high rate of unfounded arrests.

4. Arresting officers should, simultaneously with arrest or as soon as is practically possible thereafter, document the date, place and reasons for

arrest as well as any explanation advanced by the detainee, including details of any documentation produced. This should take the form of a sworn statement, a copy of which should be presented to Home Affairs at Lindela upon the admission of the detainee to Lindela. This recommendation aims to ensure compliance with arresting guidelines as well as to create a proper record of the arrest.

5. Where a person claims to be an asylum seeker (or where it appears to an arresting, immigration or detention officer that the person may well have a claim to asylum) the officer shall forthwith advise such a person of his/her right to apply for asylum and shall render all reasonable assistance to such a person in this regard.

6. Persons detained in terms of the Aliens Control Act should be held separately from criminal suspects during the period that they are in police custody.

7. As is required by section 55(1) of the Aliens Control Act, all persons arrested in terms of the Act should be examined in terms of Section 7 within 48 hours. Where an immigration officer conducting a Section 7 examination realises that the person was in detention for a period in excess of 48 hours before the Section 7 examination commenced, the immigration officer should immediately cause the release of such a person.
8. No person should be detained pending removal for longer than 30 days unless specifically reviewed as provided for in Section 55 (5) of the Aliens Control Act. The period of 30 days must be reckoned from the date of first arrest.

9. All detainees should be informed of their rights and obligations upon admittance to Lindela. Among other methods of information, appropriate notices detailing the rights and obligations of detainees should be displayed in prominent places in the detention facility in all the main languages of the detainee population.
10. A permanent Inspectorate should be established to visit persons held in terms of the Aliens Control Act in any police, prison or other detention facility in order to monitor compliance with arresting guidelines, the Act,

and the constitutional provisions relevant to arrest and detention in terms of the Act.

11. The Inspectorate should examine the detention and treatment of children in the immigration system as there did not appear to be adequate documentation created or maintained in respect of children detained with their parents at Lindela. This investigation did not however examine the position of children comprehensively.

12. Complaints of assault, corruption or degrading treatment should be given priority and fast-track treatment during both the investigation and prosecution stages, under a similar process to that used when visiting tourists are crime victims. The fact that complainants in the immigration system are usually in the country for a very limited period of time renders them unavailable as witnesses if the criminal justice system were to handle their complaints in the normal course.

13. The Department of Home Affairs and the South African Police Service should put in place effective strategies and should use all appropriate legal means (including the investigation, prosecution and suspension of officials) to identify and eradicate corrupt practices.

14. All reasonable assistance should be rendered to persons facing deportation to allow them to retrieve personal belongings.

15. Appropriate training programmes should be formulated and presented to all persons involved with the arrest and detention of persons in terms of the Aliens Control Act, including the personnel of Lindela.

South African Human Rights Commission
19 March 1999
Parktown

Annexure "B"

South African Human Rights Commission
Submission to the Home Affairs Portfolio Committee
On the White Paper on International Migration

Introduction

The South African Human Rights Commission (SAHRC) welcomes the government's move towards revisiting policy and legislation affecting International Migration. The White Paper on International Migration[1] (the White Paper), however, is filled with inconsistencies, and we take this opportunity to place the SAHRC's views before the Home Affairs Portfolio Committee. The SAHRC, in its four years of existence, has had extensive involvement with both the immigrant, refugee and migrant populations in this country.[2] This submission is informed by our experience.

Our International Obligations

In terms of the Universal Declaration of Human Rights[3] 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:

- the right to residence;

[1] GG 19920 Notice 529 of 1999
[2] The Draft Green Paper on International Migration dated 13 May 1997 used these three terms and defined them as follows at page 2 in the Executive Summary: There are three streams of people crossing our borders. The first are ***immigrants,*** individuals who would like to settle here permanently. The second stream are ***refugees***, people who flee persecution in their own country and seek asylum here. The third and most controversial stream of people is ***migrants,*** many of whom are not authorised to be here.
[3] Articles 6, 9, 13, 15,

- 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*.[4] This Convention is based on the principles contained in the Universal Declaration of Human Rights.

The SAHRC's concerns with the White Paper

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

We have identified four areas of concern for discussion in this document. The SAHRC has identified many other areas of concern in the White Paper, but has chosen these four themes for specific attention.

The four areas of concern

1. South Africa's obligation to the region;
2. Xenophobia and Racism;
3. General human rights violations; and
4. Potential for corruption.

1. South Africa's obligation to the region

Much has been written about the 'push-pull' factors[5], which have great impact on International Migration. In short, they determine why people want to leave their country of origin and why they are attracted to South Africa. With the discovery of minerals in South Africa, 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 region. It is further proposed that unskilled migrants will undertake employment in sectors where South African employers would prefer not to employ South Africans and citizens would prefer not to work for example the mining industry and seasonal farm work.[6] The White Paper proposes that:

> The people who can add value to our growth and development are those who invest, are entrepreneurs and promote trade, those who bring new knowledge and experience to our society, and those who have the skills

[5] 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.
[6] The White Paper Chapter 6 paragraph 4.4.6. and 4.4.7.

> and expertise required to do the things we cannot properly do at this stage.[7]

This sort of policy formulation, as proposed by the White Paper, fails to take due regard of both the historical reality and our 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.[8]

The solution proposed by the White Paper, that is, to criminalise this form of migration, can only fail. History has shown us that it has already proved to be an ineffective and inhumane way of approaching migration issues in the region. The revolving door approach taken by migrants has undermined this policy and proved it to be no more than a momentary solution, benefiting those involved in the repatriation of these migrants alone.

> 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

[7] The White paper, Chapter 4 paragraph 3.
[8] 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

> 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 the history of the region and South Africa's long-standing economic ties to the SADC states.[9]

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.[10] 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.[11]

The Southern African Development Community Council of Ministers recently considered the *Draft Protocol on the Free Movement of Persons* prepared by the

[9] The Green Paper paragraphs 1.4.1. and 1.4.2.
[10] The Green Paper paragraph 1.4.5.

[11] 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 South African policy makers are increasingly exercised 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

SADC Secretariat. The *Protocol* is based on the European Union model and proposes that member states move towards the free movement of all citizens in a series of inflexible stages. Because of the enormous economic disparities between member states, the threat to national sovereignty and the uncertain consequences of the *Protocol,* a number of states including South Africa do not support it in its current form. Instead, the South African government proposes a separate streamlined channel of entry for SADC citizens at border and airport points.[12]

The SAHRC is of the view that that we should be opening our borders to the SADC member states in a responsible manner. We should avoid the "control" mentality in migration policy and rather enhance "management" of migration. This suggests a more open policy with a view to meeting the country's needs and a collaborative policy in cooperation with SADC neighbours.

Under the circumstances, the following assertion in the White Paper is, with all due respect, flawed and must be revisited:

> Therefore, this White Paper has accepted the following additional main policy parameter: u*nder present circumstances it is not possible for South Africa to deal with the "push" factors acting in the rest of the continent nor build a migration system predicated on the improvements of these factors.*[13]

[12] The Green Paper paragraph 2.4.2.
[13] The White Paper, Chapter 6 paragraph 4.2.3.

2. Xenophobia and Racism

The SAHRC is currently involved in an advocacy programme entitled "Roll Back Xenophobia" which has been running since December 1998 and was initiated in response to the high levels of xenophobia currently found in South Africa.[14] Xenophobia is defined as an irrational deep dislike of non-nationals. Our experience has shown us that xenophobia in South Africa is deeply steeped in prejudice and racism. The White Paper identifies that most illegal immigrants come from the rest of the African continent, therefore xenophobia is most keenly directed at Africans.[15] The increase of foreigners into South Africa has resulted in an apparent rise in xenophobia, which has become increasingly evident since the April 1994 national election. Anti-foreigner sentiment at times expresses itself in violent attacks on those who are assumed by South African citizens to be illegal immigrants. No longer able to blame an unrepresentative government for their ills, the poor, homeless and unemployed are shifting the blame to alleged illegal persons who are also harassed by state officials and police, imprisoned without trial, and subject to corrupt practices.[16]

The White Paper fails to address the issue of xenophobia and how it interacts with migration policy, in any substance. Reference is made to education of communities and immigration officials to avoid xenophobia.[17] There is a proposal that a special campaign against xenophobia should accompany the Immigration Services' on-the-ground presence.[18] Xenophobia has a destabilising impact, both domestically and regionally. It is a little understood concept and the White Paper

---

[14] Friedman op cit. note **8** notes that The high level of xenophobia amongst the general populace, as well as in some official quarters, is revealed in studies such as C. de Kock, C. Schutte and D. Ehlers, *Perceptions of Current Socio-political Issues in South Africa* Pretoria: Human Sciences Research Council, 1994; Craig Charney, *Voices of a New Democracy: African Expectations in the New South Africa* Johannesburg: Centre for Policy Studies, 1995; Chris Dolan and Maxine Reitzes, *The Insider Story? Press Coverage of Illegal Immigrants and Refugees* Johannesburg: Centre for Policy Studies, Research Report No 48, 1996; see also Maxine Reitzes, "Debunking Some of the Myths" In Richard de Villers and Maxine Reitzes, Eds. *Southern African Migration: Domestic and Regional Policy Implications* Johannesburg: Centre for Policy Studies, 1995, 77-81.

[15] The White Paper, Chapter 6 paragraph 4.2.2.

[16] Maxine Reitzes *Towards a Human Rights-Based Approach to Immigration Policy in South and Southern Africa* January 1997 found at http://www.polity.org.za/govdocs/green_papers/migration/reitzes.html

[17] The White Paper, Chapter 6 paragraph 5 and Chapter 11 paragraph 2.1.1.

[18] The White Paper, Chapter 11 paragraph 13.

takes the concerns no further. Firm policy considerations aimed at countering xenophobia should inform any legislation passed relating to International Migration.

The European Commission against Racism and Intolerance (ECRI)[19] is a body of the Council of Europe which was set up by the Summit of Heads of State and Government of the member States of the Council of Europe held in Vienna in October 1993. The Commission forms an integral part of the Council of Europe's action to combat racism, xenophobia, anti-semitism and intolerance. In the course of its work, ECRI has started to build up a collection of examples of good practices[20] existing in the member States to combat racism and intolerance. Some further examples of proposals, to combat racism, xenophobia anti-semitism and intolerance, made by the ECRI include:

- Ensuring that the national legal order at a high level, for example in the Constitution, enshrines the commitment of the State to the equal treatment of all persons and to the fight against racism, xenophobia, anti-semitism and intolerance;
- Signing and ratifying the relevant international legal instruments;
- Ensuring that national criminal, civil and administrative law expressly and specifically counter racism, xenophobia, anti-semitism and intolerance, *inter alia* by providing:
  - that discrimination in employment and in the supply of goods and services to the public is unlawful;
  - that racist and xenophobic acts are stringently punished through methods such as:
    - defining common offences but with a racist or xenophobic nature as specific offences;
    - enabling the racist or xenophobic motives of the offender to be specifically taken into account;
- Taking measures in the fields of education and information in order to strengthen the fight against racism, xenophobia, anti-semitism and intolerance;
  - Adopting policies that enhance the awareness of the richness that cultural diversity brings to society;

[19] CRI (99) 56 final Strasbourg, September 1999
[20] The basket of "good practices" as proposed by ECRI can be found at http://ecri.coe.int/en/04/02/01/e04020101b.htm

- Undertaking research into the nature, causes and manifestations of racism, xenophobia, anti-semitism and intolerance at local, regional and national level;
- Ensuring that school-curricula, for example in the field of history teaching, are set up in such a way to enhance the appreciation of cultural diversity;

- Setting up and supporting training courses promoting cultural sensitivity, awareness of prejudice and knowledge of legal aspects of discrimination for those responsible for recruitment and promotion procedures, for those who have direct contact with the public and for those responsible for ensuring that persons in the organisation comply with standards and policies of non-discrimination and equal opportunity;
- Ensuring, in particular, that such training is introduced and maintained for the police, personnel in criminal justice agencies, prison staff and personnel dealing with non-citizens, in particular refugees and asylum seekers;
- Ensuring that the police provide equal treatment to all members of the public and avoid any act of racism, xenophobia, anti-semitism and intolerance;
- Developing formal and informal structures for dialogue between the police and minority communities and ensure the existence of a mechanism for independent enquiry into incidents and areas of conflicts between the police and minority groups;
    - Encouraging the recruitment of members of public services at all levels, and in particular police and support staff, from minority groups.[21]

International Migration policy in South Africa should be informed by the European experience, in order to enrich our own legislation and to ensure that we are in line with international thinking in this arena.

The unfortunate tendency in the White Paper is to introduce a community based enforcement policy whereby the emphasis moves away from border control to community and workplace inspection.[22] 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. Plainly put, the White Paper proposes that communities assist the Immigration Service monitors to identify illegal immigrants and perform the role of 'whistle blowers'. This system is open to abuse and has little scientific foundation. It may

[21] The full policy proposals suggested by ECRI are located at http://ecri.coe.int/en/02/02/03/e02020301.htm
[22] The White Paper, Chapter 1.

be used by people to further their xenophobic tendencies and result in unstable communities.

The history of migration policy in South Africa is deeply steeped in racism:

> To start, 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.[23]
>
> 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.[24]

The White Paper makes no attempts to address this historical legacy as it has chosen to approach migration policy by looking at its form as opposed to its substance. It is only when we look at a substantively fair migration policy that we can begin to address both the historical racist policies and ensure that indirect racism does not persist.[25]

An even more alarming aspect of the community-based participation is the suggestion that citizens must produce their proof of citizenship, on demand.[26] 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

[23] 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.
[24] See Friedman op cit. at note 8.
[25] Report of the SAHRC *Illegal? Report on the Arrest and detention of Persons in Terms of the Aliens Control Act* March 1999 at p xv
[26] The White Paper, Chapter 11 paragraphs 4 and 4.1.

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 migrants 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.[27]

The promotion of a 'dawn raid' policy whereby communities are policed in this harsh manner will promote both antagonism towards the SAPS, the proposed Immigration Services and foreigners: be they immigrants or migrants.

3. General Human Rights violations

Application of the Bill of Rights to non-citizens

It is well documented that most of the rights in the Bill of Rights, with the exception of political rights and the right relating to freedom of trade, occupation and profession are guaranteed to "everyone." Immigration and migration policy should affirm that, with the exception of those rights, the Bill of Rights does apply to all persons who are affected by government action, including non-citizens. The only legitimate way that one can derogate from the rights contained in the Bill of Rights is by reference to the limitations clause.[28] The exercise of limiting rights in the Bill of Rights should not be conducted by the legislature when enacting this legislation, but should be left up to the courts. The White Paper proposes that the limitation of rights in the Bill of Rights be conducted by the legislature and that the limitation on migrants' rights may be contained in this legislation.[29] This must clearly be contrary to the precepts of a constitutional democracy.

[27] For example, section 9(3) of the Constitution states that: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."
[28] Section 36 of the Constitution
[29] The White Paper, Chapter 6 paragraphs 2.1. to 2.9.

> [T]he South African government is confronted with two sets of claimants: those defined outside its borders whom it attempts to keep there; and newly enfranchised citizens inside its borders. Both claim restitution against the legacy of apartheid. Responses to these two sets of claims cannot be mutually exclusive. As indicated previously, given the historical and current configuration of the southern African region, the socio-economic and political stability of South Africa is inextricably tied to that of the region as a whole. There are also those who claim the right to at least permanent residence if not citizenship, on the grounds that their families have lived and worked in South Africa for generations, contributing to its economic development. The question they raise is whether or not it is just - and we are talking of creating a just society - for a state to benefit from peoples' political and economic contributions without a corresponding obligation to guarantee their human rights.[30]

In essence any migration policy should be informed by a basic respect of individual human rights, not state sovereignty. The State should be compelled to guarantee the human rights of all those within its territorial domain. Subjecting illegal immigrants to harassment, bribery and corruption; divesting them of their property and earnings; imprisoning them without trial, and deporting them amounts to an undermining of their rights enshrined in the Constitution.[31]

The Constitutional Court in *Larbi-Odam v MEC for Education (North-West Province)*[32] had occasion to weigh up the rights of citizens versus temporary and permanent residents in the field of employment in education. The Court held that foreigners who have temporary and permanent residence permits have as much right and protection of the Constitution as do citizens. The Court held that distinctions on the basis of citizenship could be discriminatory, even though citizenship was not a listed ground of prohibited discrimination in the Constitution. Three reasons were given for this: first, foreign citizens are a minority with little political muscle; secondly, citizenship is a personal attribute, which is difficult to change; and thirdly there were specific threats and intimidation that the foreign teachers in this case faced. All of these reasons made foreign citizens a

[30] See Reitzes op cit. Note 16
[31] Report of the SAHRC op cit. note 25 at p xxxii
[32] CCT 2/97Constitutional Court 27 November 1997

vulnerable group.[33] Justice Mokgoro, in handing down the judgment, went further by stating:

> Permanent residents should, in my view, be viewed no differently from South African citizens when it comes to reducing unemployment. In other words, the government's aim should be to reduce unemployment among South African citizens *and permanent residents.* As explained above, permanent residents have been invited to make their home in this country. After a few years, they become eligible for citizenship. In the interim, they merit the full concern of the government concerning the availability of employment opportunities. Unless posts require citizenship for some reason, for example due to the particular political sensitivity of such posts, employment should be available without discrimination between citizens and permanent residents. Thus it is simply illegitimate to attempt to reduce unemployment among South African citizens by increasing unemployment among permanent residents. Moreover, depriving permanent residents of posts they have held, in some cases for many years, is too high a price to pay in return for increasing jobs for citizens.[34]

Enforcement mechanism

Another concern raised in the White Paper is the proposed enforcement mechanism. It is suggested that an immigration court be established to hear all immigration matters.[35] Prior to a hearing in the immigration court, one may appeal a decision to the functional head of the Immigration Services who must confirm the decision of the functionary. The decision of the functional head of the Immigration Services may be appealed to the Minister of Home Affairs who is afforded "a matter of days"[36] to make a decision, failing which the appeal is rejected. In order to appeal a decision, the accused must post an amount equivalent to the cost of deportation.[37] The inequity in this procedure is self-evident and undermines the right to just administrative action, as found in the Constitution. The prospect of a person being able to afford the costs of an appeal is slim; thereby amounting to a process deeply steeped in discrimination.

[33] See *Larbi-Odam* at paragraph 19
[34] See *Larbi-Odam* at paragraph 31
[35] The White paper, Chapter 11 paragraph 9.1.
[36] The White Paper, Chapter 11 paragraph 9.2.
[37] The White Paper, Chapter 11 paragraph 9.2.

Detention

The SAHRC has conducted much research into the treatment of immigration detainees.[38] The White Paper proposes that immigration detainees be kept separate from those accused of criminal offences[39] and that a short period of detention of immigration detainees, without warrants of arrest, is consistent with the Constitution.[40] The SAHRC is in agreement with these proposals, but is concerned with the further proposal that detention services be privatised with no mechanism in place to monitor these detention facilities.[41] We are firmly of the view that monitoring of these detention centres be mandated and controlled. From our research we have established that the detention centres are rife with bribery, [42] refugees are treated as immigration detainees, they are assaulted,[43] inadequate medical care and food are supplied and detainees are subject to degrading treatment and intimidation.[44] They are also subject to detention which extends beyond the legal time periods and have no right of recourse.[45]

Our research indicates that over 10% of the immigration detainees in the Lindela Repatriation Centre[46] in Krugersdorp were in fact released because they were either citizens or legally resident non-citizens.[47] This statistic represents a grossly unacceptable rate of wrongful detention and it is only by close monitoring of these repatriation centres, that this problem can be meaningfully addressed.

The SAHRC is of the view that the drafters of the International Migration Bill must bear in mind the Constitution and its ready application to all persons within our borders.

4. Potential for corruption

[38] Report of the SAHRC op cit. note 25
[39] The White paper, Chapter 11 paragraph 10
[40] The White Paper, Chapter 11 paragraph 9.4.
[41] The White Paper, Chapter 11 paragraph 11
[42] Report of the SAHRC op cit. note 25 at p xxviii ff
[43] Report of the SAHRC op cit. note 25 at p xlvii ff
[44] Report of the SAHRC op cit. note 25 at p iii and p xlix ff
[45] Report of the SAHRC op cit. note 25 at p xxxvii ff and p xlvi ff
[46] A privately funded repatriation centre under contract with the government.
[47] Report of the SAHRC op cit. Note 25 at p xix

The White Paper recognises that the risk of corruption exists in the current proposals.[48] It proposes that an internal check and balance system be implemented in order to oversee and eliminate the prospect of corruption. The SAHRC welcomes measures to eliminate corruption within the system but is of the view that the White Paper does no more than pay lip service to this scourge. Migrants are particularly vulnerable to the activities of corrupt officials as they are disempowered as a result of their migrant status and have no rights of recourse.[49] 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.[50]

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.[51]

---

[48] The White Paper, Chapter 11 paragraph 2.1.2.
[49] Report of the SAHRC op cit. note 25 at p xxviii ff
[50] See Friedman op cit. note 8 above; see also Report of the SAHRC op cit. note 25 at p xli ff
[51] 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

It is incumbent on this Committee to ensure that an effective, workable piece of legislation is enacted to ensure that the policy decisions of the South African government are not undermined due to their lack of enforceability.

Conclusion

The SAHRC asserts that legislation on International Migration must have an emphasis on clear and coherent policy that is applicable, understood and where management systems are in place. This will ensure that information and counseling on migrating to South Africa is available from South African missions abroad; immigration officers should be 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 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.

In the National Action Plan[52] South Africa 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. These are currently estimated at between 2.5 and 8 million.
- 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.

[52] National Action Plan op cit. note 4

- 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.[53]

Any legislation on International Migration must take into account our public commitments, in particular, our intention to sign and ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. The SAHRC has had many years of experience in the problems surrounding International Migration issues. We are supportive of government revisiting our current policies and legislation, which are clearly steeped in the history of this country. We would like to offer our assistance, by way of supplying the Committee with copies of our documented research into this area, and, if the Committee requests, by making oral presentations on the issues. We would like to emphasise that we are available to supplement the Committee's resources by offering our expertise on the enormous task with which this Committee is charged. We trust that our above comments will prove useful to this Committee and we welcome the opportunity to comment on any proposed Bills which may have bearing on this area of law.

January 2000

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

Annexure "C"

Submission by the South African Human Rights Commission The Immigration Bill

---

In a written submission to the Home Affairs Portfolio Committee ("the Portfolio Committee) dated January 2000, the South African Human Rights Commission ("the SAHRC") commented on the White Paper on International Immigration ("the White Paper"). While the SAHRC welcomed the move toward legislative reform with regard to International Migration, it raised a number of concerns about inconsistencies contained in the White Paper. In particular, the SAHRC submitted detailed comments on the following points to the Portfolio Committee:

1. **The need to manage, rather control migration against the background of South Africa's international and regional obligations;**
2. **The fight against xenophobia and racism;**
3. **The application of the Bill of Rights to non-citizens;**
4. **The proposed appeal procedure;**
5. **Places of detention; and**
6. **The risk of corruption.**

The recommendations contained in the White Paper have largely been incorporated into the Immigration Bill ("the Bill"), which was published for public comment by the Minister of Home Affairs on 15 February 2000 (General Notice 621 of 2000, Government Gazette number 20889). However, at the same time, the Portfolio Committee has scheduled public hearings on the White Paper

during the course of May 2000. It would appear, therefore, that the Department of Home Affairs is proceeding with the Bill at the same time as the Portfolio Committee is still debating the very foundations upon which the Bill has been drafted. This state of affairs had led to uncertainty amongst the public, members of civil society as well as Chapter IV institutions such as the SAHRC as to the status of the Bill and the White Paper, the consideration given to earlier submissions on the White Paper, the purpose of present submissions on the Bill, the apparent lack of communication and co-ordination of legislative procedures between the Department and the Portfolio Committee and, most disturbingly, the commitment of both these organs of state to well recognised and established law making practice in South Africa. The SAHRC is most concerned by these developments and call on the Department and the Portfolio Committee to clarify their respective positions regarding the status of the Bill and White Paper and to make clear their intentions regarding the further legislative process to be adopted with regard to the passage of this statute.

It would appear that the drafters of the Bill have ignored most of the recommendations of the SAHRC and adopted others in one form or another. However, the policies contained in the White Paper have largely been incorporated wholesale into the Bill without significant amendment. Below follows a review of the Bill with an emphasis on the provisions dealing with the points raised by the SAHRC in its submission and certain additional issues arising from the Bill.

1. Management of international migration

1.1 At the outset, the SAHRC emphasises that it does not support the overall premise of the Bill and our comments below should not be interpreted as indicative of our support of the Bill's **control-orientated approach to migration**. This approach becomes particularly clear when regard is had to the position of migrant workers.

1.2 In its submission on the White Paper, the SAHRC emphasised the vulnerable position of migrant workers, and proposed a more humane, **management-oriented approach to migration policy**. Specifically, the SAHRC proposed that development policies take into account South Africa's regional obligations and 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. The SAHRC proposed that South Africa's borders should be opened to the SADC member states in a responsible manner.

1.3 The Bill deals with migration by making provision for a number of temporary residence permits to be issued to appropriate foreigners. None of the permits specifically deals with the position of migrant workers but the proposed solution put forward in the White Paper has been followed. The Bill does not follow the recommendations of the SAHRC and adopts the solution proposed by the White Paper, namely to criminalise the position of most migrant workers.

1.4 The permits provided for are as follows:

1.4.1 Crewman permit;
1.4.2 Medical permit (holder may not work);
1.4.3 Relatives Permit;
1.4.4 Work permit;
1.4.5 Retired person's permit;
1.4.6 Exceptional skill or qualifications permit;
1.4.7 Intra-company transfer permit;
1.4.8 Corporate permit;

1.4.9 Exchange permit (only applicable to persons under 25 years of age);

1.4.10 Asylum; and

1.4.11 Cross-border and transit passes.

1.5 The solution offered by the White Paper and 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 Immigration Service (the "IS"). In order to receive the delegation a corporation will have to meet certain requirements laid down by Section 16(2) of the Bill, namely:

1.5.1 The establishment of training programmes for citizens and residents and/or financial contributions to a training fund established for the development of the employment capacity of citizens and residents;

1.5.2 Certification by a chartered accountant that the terms and conditions of the foreigners will not be inferior to those in the market place and compliance with collective bargaining agreements and other standards, if any;

1.5.3 An undertaking by the corporation that it will take measures to ensure that all foreigners employed comply with the provisions of the Act and the corporate permit and that the corporation will immediately notify the IS if it has reason to believe that a foreigner employee is no longer in compliance with the Act and/or the permit;

1.5.4 Financial guarantees to defray deportation expenses;

1.5.5 Corroborated representations by the corporation in respect of the need to employ foreigners, their job descriptions, the number of citizens or residents employed, their positions and other matters.

1.6 While the corporate permit may be appropriate in the case of large mining houses or commercial farms, it is clear that medium and small businesses without the resources and infra-structure to administer and implement the requirements of Section 16 will be left out in the cold and will be unable to employ migrant workers.

1.7 The approach adopted appears to be that foreign migrant labour is a necessary evil that South Africa will have to abide in the short to medium term. However, domestic and foreign businesses should be encouraged to reduce their reliance on foreign employment with the long-term goal in mind, namely to eliminate dependency of South African and foreign businesses on foreign employees. This goal appears clearly from the following words in the White Paper:

> "Through negotiations between the I.S. and mining houses, it should become possible to begin reducing such dependency so that more South Africans could take up mining jobs."
> **(Chapter 7, paragraph 7.2)**

1.8 In the medium term, however, the drafters acknowledge our dependency on foreign migrant workers. In terms of Section 16(5) of the Bill certain industries may be exempted from some of the conditions precedent for corporate permits. Moreover, Subsection (5)(c) provides for the Minister of Labour to apply the subsection in respect of foreigners required for seasonal or temporary peak period employment and Section 16(5) confers on the Minister the power to

enter into agreements with one or more foreign states and set as a condition of a corporate permit that its holder:

1.8.1 employs foreigners partially, mainly or wholly from such foreign countries; and

1.8.2 That a portion of the salaries of such foreigners be remitted to such foreign countries.

1.9 The provisions of Section 16(5) would appear to be in compliance with the proposals of the SAHRC as set out in paragraph 1.1 above. However, seen against the background of the policy contained in the White Paper, which seeks to reduce our dependency on foreign employment, the practice is not encouraged and through the imposition of onerous conditions, such as the compulsory remittance of a portion of the foreigner's salary to his or her country of origin, the prohibitive cost of this option may act as a deterrent against employing foreign labour.

1.10 It is also not clear how the provisions of Section 16(5) are to be reconciled with Section 7. Treaty permits (as provided for by Section 7 of the Bill) relate to persons who are admitted into South Africa under government-to-government exchange programmes and in fulfilment of international agreements. It will therefore be possible to admit a migrant worker on the strength of a bilateral agreement between South Africa and one of its neighbours, on a treaty permit.

1.11 Treaty permits are issued by the IS or the Department of Foreign Affairs. Section 16(5), on the other hand, which also deals with employment arising out of international

agreements, confers on the delegated corporation the power to issue visas and work permits. It would seem that treaty permits extend beyond the limited application of Section 16(5) corporate permits and that the drafters intended for migrant workers, working in South African on the strength of a bilateral agreement between South Africa and their home countries, to be dealt with in terms of Section 16. However, the Bill gives no clarity in this regard.

1.12 **A migrant worker would, of course, be able to apply for a work permit as stipulated in Section 17 of the Bill. However, the Section imposes a heavy onus on both prospective employers and migrant employees, rendering the granting of a work permit to a migrant worker not employed in terms of a corporate permit a theoretical possibility only. For example, the prospective employer will have to obtain certification from the Department of Labour that the terms and conditions of employment of the migrant worker will not be inferior to those prevailing in the market for citizens and residents, taking into account applicable collective bargaining agreements and other applicable standards. Furthermore, the employer will have to pay into the training fund an amount as a ratio of the foreigner's remuneration. These conditions are onerous and will directly impact on the ability of midsize to small businesses to acquire much needed skills in sectors where local expertise is lacking. Instead of encouraging the acquisition of these skilled persons, the Bill effectively entrench the monopoly of large corporations in certain sectors at the expense of smaller businesses.**

1.13 **At first blush, Section 19 appears to provide some assistance to migrant workers from neighbouring countries who may apply for "cross border passes". However, Section 19(1) makes it clear that such a pass will have the same effect as a multiple admission** general permit**, which prohibits its holder from conducting any work (Section 4(2)).**

1.14 **A general concern that we raise in the context of work permits, but which equally applies to other provisions dealing with the IS, is the capacity and infrastructural problems facing migration authorities in South Africa at present. The establishment of the IS can only be supported to the extent that it will be adequately empowered to perform its functions and exercise its powers effectively. For example, the creation of a training fund, the administration of payments into the Fund, monitoring of training programmes and the determination of exemptions in terms of Section 12(4) can only hope to achieve the goal of capacity building within the South African labour market if the IS has adequate resources, institutional infrastructure and capacity.**

1.15 **In conclusion it appears that the temporary residence chapter of the Bill is merely a restatement of Chapter 7, paragraph 17.1 of the White Paper which is based on the premise 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. We call on the Department and the Portfolio Committee to revisit the premise of the Bill and White Paper in order to investigate and adopt a management-oriented approach towards migration. The aforesaid management approach will not only be in line with South Africa's historical regional**

obligations, specifically towards SADC countries, but will also be more realistic and achievable in terms of present resources and constraints suffered by all law enforcement agencies.

2. Xenophobia and racism

2.1 "The White Paper fails to address the issue of xenophobia and how it interacts with migration policy, in any substance"
(SAHRC submission to Portfolio Committee, p.6: January 2000)

2.2 The drafters of the Bill have unfortunately not heeded the aforesaid caution, taken from the SAHRC's submission to the Home Affairs Portfolio Committee.

2.3 Section 29(1) of the Bill lists the obligations of the IS, which include the prevention and deterrence of xenophobia within the IS, the government, all organs of state and at community level. Moreover, one of the functions of the IS 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.

2.4 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:

2.4.1 The Bill contains no substantive provisions to address xenophobia and racism other than the vague statements set out above;
2.4.2 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;

2.4.3 In its original submission, the SAHRC raised the concern that “community based policing will result in a form of institutionalised racism, reminiscent of apartheid” (Page 12, SAHRC submission, January 2000). The Bill has not deviated from the White Paper in this regard. To the contrary, 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;

2.4.4 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;

2.4.5 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;

2.4.6 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;

2.4.7 The aforesaid 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 obligations are weighed against the meagre anti-xenophobia policy statements contained in the Bill, it becomes clear that the Bill sanction rather than eradicate xenophobia at all levels in South Africa;

2.4.8 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;

2.4.9 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, when requested to do so by an IS 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. ;

2.4.10 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 the enter into commercial transactions and shall report illegal foreigners to the IS;

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

> **"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."**

2.6 The aforesaid provisions should be revisited and amended to comply with the Constitution.

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

3.1 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.

3.2 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.

3.3 Unfortunately, the drafters of the Bill have not expressly followed this recommendation. In the Chapter dealing with the IS the following is listed as one of the objectives of the IS:

> **"29(1) In the administration of the Act, the Service shall pursue the following objectives**
>
> **(a) promote a human-rights based culture in both government and civil society in respect of migration control;**
>
> **(b) …"**

3.4 Later on in the same Section, the IS 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)).

3.5 Whilst the affirmations are welcomed it is regrettable that they were relegated to the Chapter dealing with the 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. For example, extending the affirmation of the rights of permanent residents, as contained in Section 20(1), to all foreigners would be an encouraging step towards addressing xenophobia in South Africa. It is trusted that the drafters will heed this call and affect amendments to the Bill to ensure that the rights of all persons within the South African territory are affirmed in the appropriate manner.

4. Proposed appeal procedure

4.1 Section 34 of the Bill creates adjudication and review procedures in respect of determinations adversely affecting a person. The procedures provided for are as follows:

4.1.1 Before making a determination the IS should notify the affected person of the contemplated decision and afford the person at least 10 days to make representations, whereafter the decision will become effective unless it is appealed;

4.1.2 A person may appeal an effective decision to the Managing Director of the IS within 20 days of being notified thereof. The Managing Director may reverse or modify the decision within 10 days, **failing which the decision shall be deemed to have been confirmed**;

4.1.3 If the affected person is not satisfied with the outcome, he or she may appeal to the Board of the IS within 20 days of the modification or confirmation of the decision by the Managing Director. The Board may reverse or modify the decision within 20 days, **failing which the decision shall be deemed to have been**

confirmed and final, provided that in **exceptional circumstances** or **when the person stands to be deported** as consequence of such decision:

4.1.3.1 The Board may extend the deadline; and

4.1.3.2 **At the request of the IS, the Board may request such person to post a bond to defray deportation costs, if applicable**;

4.1.4 Within 20 days of the decision by the Board, the person may appeal to an Immigration Court, which may suspend, reverse or modify the decision.

4.2 In its submission to the Portfolio Committee in January 2000, the SAHRC expressed the concern that requiring a bond would be iniquitous and undermine the right to just administrative action, as guaranteed by the Bill of Rights. The Bill has taken heed of these comments to the extent that a bond may only be required in exceptional circumstances or when the person stands to be deported and the IS has requested that a bond be obtained.

4.3 However, the underlying concern, raised by the SAHRC remains; a person who stands to be deported is unlikely to be have access to funds, and therefore, to make the right to appeal conditional upon the posting of a bond, may be discriminatory and in violation of Section 34 of the Bill of Rights, which guarantees **everyone's** right to access to courts.

4.4 Moreover, the SAHRC does not support the "deeming" or "default confirmation" provisions contained in Sections 34(2)(a) and (b) of the Bill and submit that these may be unconstitutional. According to these sections a decision that has been appealed may be confirmed or modified by either the Managing Director or the Board of the IS within 10 and 20 days respectively (depending on who considers the appeal), failing which

the decision shall be deemed to have been confirmed. However, by virtue of their origins a large number of foreigners are not proficient in English or any of South Africa's other official languages and may not understand a written of verbal explanatory notice of the above. A more likely scenario is that the vast majority of appellants will regard the adverse determination to have been suspended pending the outcome of their appeal and may therefore be unaware that their appeal has failed and that the adverse decision has been confirmed. We respectfully submit that all appellants in terms of Sections 34(2)(a) and (b) have the right to be notified of the outcome of their appeal, regardless of whether it was successful or not. Failure to notify the appellant of the confirmation of an adverse determination will result in the majority of appellants being unaware that their appeals have failed and will consequently deprive them of the right to a higher appeal to the Board or a Court, as the case may. We call on the drafters to delete the deeming provisions from these subsections and to provide that the relevant appeal authority must "confirm modify or reverse" the decision and advise the appellant of the outcome of the appeal within 10 days after the confirmation, modification or reversal of the decision.

5. Places of detention

5.1 In its submission, the SAHRC called for measures to mandate control and monitoring of places of detention to be included in the Bill. Unfortunately, the Bill contains no such measures.

5.2 The need for monitoring measures where highlighted again recently by the sweep raids carried out in Johannesburg, Pretoria and the Western Cape. Investigation undertaken by the SAHRC after the raids revealed the following disturbing facts:

5.2.1 During the raids a number of persons with valid South African identity documents were held as suspected undocumented migrants despite producing their identification documents;

5.2.2 A number of persons holding genuine refugee exemptions were arrested as suspected undocumented migrants despite producing their identification documents;

5.2.3 A large number of persons holding valid section 41 permits were arrested despite producing their permits;

5.2.4 Pedestrians were stopped randomly and asked for their identification. Commercial taxis (kombi taxis) were stopped randomly, and the passengers asked for identification. In each instance anyone unable to produce an identity document was summarily arrested;

5.2.5 Entire residential blocks were cordoned off and searched. Persons waiting in queues at Department of Home Affairs offices were arrested;

5.2.6 In many instances persons who had *prima facie* valid documentation, whether South African identification documents or refugee or asylum seeker permits, were nonetheless arrested and documentation confiscated and sometimes destroyed;

5.2.7 Looting and loss of personal belongings of detained persons were reported;

5.2.8 Unaccompanied minors were arrested and detained as undocumented migrants Conditions of detention;

5.2.9 Most of those held as a result of the raids were held at Lindela Repatriation Centre, which is designed to hold a maximum of 2 500 persons, yet large numbers exceeding that were apparently held there. The result is an inevitable worsening of conditions. Media reports quoted Lindela officials as saying that they had been taken by surprise and were not equipped for such a massive influx. These reports indicated that people had been taken straight from

> the point of arrest to Lindela without being taken via a police holding cell. This again raised questions regarding the procedures followed and whether all arrested persons were provided with the opportunity to prove that they were residing legally in the country or not.
>
> (Letter from SAHRC to Minister of Home Affairs, 29 March 2000)

5.3 Moreover, the recent raids brought to light further shortcomings of the Bill. During the raids, unaccompanied minors were arrested and detained as undocumented migrants only on the basis that they were unable to produce the identification. Section 28 of the Constitution provides that such persons should only be detained as a last resort and for the shortest possible time and must be kept separately and treated in accordance with their age. Article 22 of the UNCRC, which South Africa has ratified, calls for appropriate measures to be taken by the state to ensure that children seeking refugee status whether accompanied or not shall receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights in the Convention and other international human rights and humanitarian instruments to which this country is a Party. According to the complaints, the Children's Court and the Department of Welfare were not informed of the detention of these minors, thus the Child Care Act was not used to their benefit (Letter from SAHRC to Minister of Home Affairs, 29 March 2000).

5.4 Furthermore, Section 37(1)(d) of the Bill provides that a person may be detained without a warrant for a period of up to 30 days, which may be extended by a court for a period of up to 90 days. Due to the vulnerable position of foreigners, we respectfully submit that detention without a warrant would be unconstitutional, particularly in the light of Section 37(1)(b) which places the onus on the foreigner concerned to request that his or her detention be confirmed by a warrant of a court. To assume that

all detained foreigners will firstly be informed of their right to demand a warrant and secondly, that such persons will comprehend a written or verbal notice in this regard is to overlook our history of xenophobia, disregard for the most basic rights of foreigners and corruption. We respectfully submit that these provisions should be amended to require a warrant of a court in all cases of arrest/detention for the purpose of deportation.

5.5 Moreover, the 30-day detention period is excessive and is not supported. The recent raids only confirmed that the potential for abuse under these circumstances is too high to permit such a long period of detention without a warrant.

5.6 The failure of the Bill to deal with the rights of minor detainees, particularly in view of the inadequacy of protection offered by other legislation such as the Child Care Act, the absence of any provisions for the monitoring of detention and detention facilities and the provisions relating to detention without warrant, leave the Bill open to Constitutional challenge.

5.7 Due to the danger of abuse and corruption it is suggested that the Bill should provide for monitoring and reporting of detention centres by an independent body, such as the SAHRC. It is submitted that outside monitoring is the only effective way to limit abuse of power, violation of rights and corruption inside detention centres.

5.8 We note with concern the absence from Section 37 of any clarity on the establishment, administration, monitoring and control of places of detention. When regard is had to Section 37(1) it appears that the drafters had in mind that places of detention will resort under the IS. The Managing Director of the IS may determine the “manner and place” of detention. This construction is confirmed by Section 30(g) which

empowers the IS to apprehend, detain and deport illegal foreigners. However, no detail is provided in this regard. For the reasons that appear above in paragraph 5.2 The SAHRC is opposed to detention of foreigners in prisons and calls for the establishment of places of detention that do not resort under the authority of the Department of Correctional Service or the South African Police Department and independent monitoring of these centres as set out above.

5.9 Finally, we note that Sections 37(8) to (10) do not accommodate foreigners who seek asylum in South Africa in a manner different from illegal foreigners. We call on the drafters to reconsider these sections with a view to providing for asylum seekers not to be detained by masters of ships and for the establishment of separate reception centres for asylum seekers in order to ensure that they are afforded a reasonable and adequate opportunity to apply for asylum in South Africa.

6. Potential for corruption

6.1 Section 50(1) of the Bill creates an internal anti-corruption unit charged with he task of preventing, deterring, detecting and exposing any instance of corruption, abuse of power, xenophobia and dereliction of duty within the IS.

6.2 The proposed anti-corruption unit should be applauded and is in line with the recommendations of the SAHRC in its submission on the White Paper. However, it is regrettable that the Bill gives no clarity on the appointment, powers and functions of the anti-corruption unit. In its present form, Section 50 pays no more than lip service to the elimination of corruption.

6.3 Section 50 should be expanded to include full details of the appointment of members, the powers, functions and duties of the unit. It is proposed that

the unit should consist of independent persons from civil society with relevant experience and that the unit should report directly to Parliament on an annual basis.

7. Additional Comments

In addition to the points raised by the SAHRC in its original submission, certain provisions of
the Bill require closer scrutiny:

7.1 Section 26(1): The withdrawal of permanent residence:

Section 26(1) provides that the IS may withdraw a permanent residence permit if its holder, within three years of the issuance of the permit, has been convicted of any offence listed in Schedule 1. It is proposed that the list of offences be amended to include a protection order issued against the holder of a permanent residence permit in terms of the Family Violence Act, No. 116 of 1998.

7.2 Section 53: Administrative Offences

Section 53 authorises the IS to impose a range of administrative fines for certain offences, such as failure to depart from the country after the expiry of a permit and incorrect certification of information contemplated by the Bill. The rational behind administrative penalties is that the offences they address are of a relatively minor nature and that in the interests of justice and expediency to dispose of the matters without delay. However, the Bill provides for the imposition of fines ranging between R3000-00 and R10 000-00 and makes no provision for further legal recourse.

It is also regretted that Section 40, which deals with the powers of immigration courts, does not include the review of the imposition of administrative fines in terms of Section 53. Although it can be argued that the power falls within the inherent jurisdiction of the court, it should be borne in mind that the Immigration Court is a creature of statute and has no inherent or common law powers. The Bill should be amended in this regard to avoid uncertainty.

7.3 **Section 4(5): Special financial and other guarantees**

To avoid confusion, arbitrary determinations and to limit the potential of corruption, the SAHRC proposes that this section, which arguably amounts to unfair discrimination against illegal foreigners or classes of foreigners, to include guidelines or detail of the circumstances under which the special financial or other guarantees may be imposed.

7.4 **Section 8(3): The holder of a Crewman Permit may not conduct work**

We respectfully submit that this clause is confusing. It appears to prohibit all crewmen form working in South Africa, even while on the vessel carrying them. We do not believe to have been the intention of the drafters and call for an amendment to Section 8 to limit the work prohibition to work other than the normal duties of the crewman upon the carrying vessel.

7.5 **Temporary and Permanent Residence Permits**

The Bill contains no time limits for the finalisation of applications for the above-named permits. Existing backlogs and delays experienced by the Department of Home Affairs in this regard make is clear that consideration

must be given to the inclusion in the Bill of appropriate wording to mandate the finalisation of applications within a reasonable time, as determined by the Minister from time to time.

7.6 **Section 18: Asylum**

As we have pointed out above in paragraph 5.9, the Bill draws no distinction between asylum seekers and illegal foreigners. The SAHRC is particularly concerned that asylum seekers should not be held with illegal foreigners while applications for asylum is being considered. In this regard we refer to the provisions of the Refugee Act and note with approval that asylum permits may be issued only subject to the Refugee Act.

7.7 **Section 21(2): Permanent Residence – Spouses**

We note with regret that the drafters have not affirmed the right of a spouse of a South African citizen or permanent resident to conduct work. As a permanent resident, a spouse should be entitled to "all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations legally prescribed to citizenship" (Section 20(1) of the Bill). To grant a spouse permanent residence but prohibit him or her from conducting work is akin to giving with the one hand and taking away with the other. Such a limitation will, in the vast majority of cases, deny the person concerned the right to residence itself, because only a small percentage of South African spouses can afford to support their foreign spouse financially. We respectfully submit that Section 21 should be amended to affirm of the right of spouses with permanent residence to conduct work. Failing to do so would amount to an unconstitutional limitation of the right of the South African spouse to a family life, human dignity, freedom of association and freedom of movement.

7.8 **Section 23(1)(c): Prohibited Persons**

The exclusion of citizens of certain prescribed countries appears arbitrary and open to abuse. We call for the inclusion of a framework and guidelines for a determination in terms of Section 23(1)(c) to be included in the Bill.

7.9 **Section 28: The Immigration Board – appointment of members**

The SAHRC proposes the amendment of this section to provide that the Minister is bound by the recommendations of the Portfolio Committee when appointments are made to the Board. This will facilitate accountability and transparency of the appointment process.

7.10 **Section 29: Objectives and functions of the Service**

The following words should be included at the end of Section 29(1)(c):

"…with strict regard to the rights of such illegal foreigners."

7.11 **Section 36(5)(b): Apprehension of illegal foreigners**

Pursuant to the Bill, the IS may obtain a warrant to:

"(a) …;

(b) apprehend an illegal foreigner subject to section 37(1);

…."

Section 37(1) provides as follows:

"Without the need for a warrant, an officer may arrest an illegal foreigner …, and shall deport him or her…., and may detain him or

her… in a manner and at the place determined by the Managing Director."

The Aforesaid quotations are contradictory. Section 37(1) clearly sanctions arrest without a warrant**. Therefore it is misleading and confusing to include a reference to this section in Section 35(5)(b), which deals with arrest** with a warrant**. The SAHRC proposes that Section 37(1) be amended to require a warrant for** all **arrests.**

7.12 Contextual errors

Finally, the Bill contains a number of typographical errors. It is trusted that these will be corrected in due course and before the Bill is finalised.

This submission was prepared by:
Victor Southwell
Legislation Monitor / Parliamentary Officer
South African Human Rights Commission
CAPE TOWN
Tel: 021 426-2277
Fax: 021 426-2875
Email: victor@ct.sahrc.org.za