



## **Comments on Draft Immigration Regulations to the Immigration Act 2002 (Act No. 13 of 2002)**

*Submitted by the South African Human Rights Commission to the Minister for Home Affairs on 2 June 2003 as per Government Gazette General Notice 1298 of 2003.*

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### **Introduction**

The South African Human Rights Commission (SAHRC) is placed in an invidious position of having to comment on Regulations to legislation that it finds inherently problematic from a human rights perspective. Despite the Commission having raised many of its objections and conceptual difficulties with the proposed Immigration legislation from when it was a White Paper through to the final Public Hearings held in Parliament, many of the concerns that the Commission has with the legislation were not addressed.

The Regulations provide an opportunity to address some of these concerns. However, legislation ought not and in many cases cannot be remedied by way of Regulations. These written comments shall thus highlight some aspects that have not been addressed in the Regulations. In particular, the issues of the rights of the child; detention centres; prevention of corruption, provision for identification amongst others will be discussed.

Finally, by way of introduction, the SAHRC reiterates that it supports the statements that were made at the time of the passing of the legislation in the joint sitting of the Portfolio Committee wherein it was stated that the legislation must go back to the Department of Home Affairs (the Department) and be redrafted in order to address the many concerns that various role-players have raised.

### **1. Regulation 39 fails to deal with the rights of the child.**

The Immigration Act 13/2002 (the Act) fails to make specific mention of the rights of children who are unaccompanied minors and children held in detention centres. The failure of the Act to make specific and adequate provision for the protection of the rights of these children may lead to situations where violations of our constitutional and international human rights law obligations occur. The

continued plight of children detained in the Lindela Detention Camp pertinently draws this to our attention

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*

As was stated in our submission to Parliament, the Act ought to be amended by the addition of a further subsection that 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.

As these concerns have not been addressed in the Act, the drafting of Regulations provides an opportunity for the Minister to include in the regulations guidelines as to how children shall be dealt with in terms of the Act, in order that the rights of the child are not violated.

The Regulations therefore need to address the following matters:

1. Places of detention for children.
2. Provisions to ensure that children are not detained with adults or criminals.
3. The interaction between the Child Care Act and the Immigration Act.
4. The conditions under which children will be detained in Detention Centres.

## **2. Regulations fail to address conditions of detention in Lindela 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 in 2000 and 2001 the need again for measures to mandate the control and monitoring of detention places was once again reiterated. Despite calling upon the drafters of the Bill to include these measures - this did not occur.

In the 2001 Bill, section 37(1) read in conjunction with Section 30(l) provided 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) it was argued that the legislation ought to provide for Regulations that provide strict guidance and control of the manner in which the places are administered. These comments were not addressed and in the final Act, the sections referred to in this paragraph are now sections 34 and 3(l) accordingly.

However, the SAHRC believes that some of its concerns around the Lindela Detention facility could be addressed through the regulation making process. 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 of 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 2/2000 (PAIA); and shall be defined as a public body in terms thereof.

The SAHRC has also called for the inclusion of an Inspectorate in our Immigration legislation. The Inspectorate should be an independent body charged with the responsibility to inspect and monitor Detention Centers. Although it is preferable that the Inspectorate is provided for in the main body of the Act, the Department and the Immigration Advisory Board is called upon to ascertain whether it would be possible to provide for an Inspectorate in terms of the Regulations.

These Regulations should provide 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.

### **3. Regulations fail to address the establishment of an anti-corruption unit as provided for in section 47 of the Act.**

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 appeared 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 failed to address the issue of corruption adequately.

In the interim new anti corruption legislation has been drafted by the Department of Justice. This legislation is still going through the parliamentary process. It would be appropriate to further examine section 47 of the Act 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 Regulations for the training of officials in order that they may carry out their duties with the necessary skill and knowledge of the law.

It is thus recommended that the Regulations address the following issues arising out of the provisions of section 47 of the Act:

1. The appointment, powers and functions of the anti corruption unit.

2. Measures to ensure that adequate training programmes are provided to the members of the unit.

#### **4. Regulation 42 fails to address concerns raised about Section 41- Identification**

In the SAHRC comments on the White Paper and the Bills, 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 known to be inhabited by foreigners, both legal and illegal. 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 41 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 Act as to what constitutes the *'reasonable 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. The powers contained in section 41 may only be exercised in accordance with section 9(3) of the Constitution, which prohibits the State from unfairly discriminating against anyone.

As section 41 currently stands, 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. The SAHRC is of the view that further research and consideration needs to be given to section 41 and its possible constitutional implications.

In the interim however, the Regulations provide an opportunity to temper the potential discrimination that may occur by the application of this section. In Canada for example, where new Immigration legislation has recently been passed, the immigration 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.

It is thus proposed that the Regulations set out on what basis an immigration officer or police official may request a person to identify him or herself and the basis upon which the official must be satisfied that the reasonable grounds required have not been satisfied. The Regulations should set out further what steps should be taken by the official to assist the person to establish their status before the drastic step is taken of detaining the person.

## **5. Conclusion - Continued concerns with the current Immigration Act**

Despite calling upon the drafters of the legislation revisit the issues listed below, little appears to have been done to address the Commission's concerns.

### **a) 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 account 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 were ignored. The SAHRC reaffirms its continued support of its previous comments on this issue.

### **b) 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.

### **c) Other specific problems with the legislation that were highlighted included:**

- ❑ The entrenchment of community based policing of persons suspected to be undocumented migrants (i.e. Section 39 - 40).
- ❑ The creation of criminal offences that shifts the onus of proof onto the accused.
- ❑ The broad provisions contained in section 41 relating to identification.
- ❑ The provisions to counter xenophobia and racism being insufficient.
- ❑ Proposed Appeal Procedure - section 8 of the Act
- ❑ Detention without a warrant - section 34 in the Act
- ❑ Section 34 of the Act still fails to provide for foreigners who seek asylum in South Africa.

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