



Submission on the Draft Immigration Amendment Bill

Submitted by

Consortium for Refugees and Migrants in South Africa (CoRMSA)

To

Portfolio Committee on Home Affairs

Attention: Mr. Eddie Mathonsi. email: emathonsi@parliament.gov.za

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A. Introduction:

The Consortium for Refugees and Migrants in South Africa (CoRMSA) is pleased to make this submission on the published Draft Immigration Amendment Bill 2018 - **Amendment of section 34 of Act 13 of 2002, as amended by sections 35 and 47 of Act 19 of 2004**) to the Department of Home Affairs for the attention of Portfolio Committee on Home Affairs. The Consortium for Refugees and Migrants in South Africa (CoRMSA) is a national network of organisations working with asylum seekers, refugees and other international migrants. CoRMSA currently has 25 member organisations across the country. It was established in 1996 as a loose network of organisations working with refugees as the National Consortium for Refugee Affairs (NCRA) and was later registered as an NPO. In 2007 NCRA's mandate was extended to include the protection of international migrants. Our members are made up of direct legal and social service providers; research institutions and refugee and migrant community groups. The CoRMSA model is such that through our members and partners, collectively we cover work at local, provincial, national, sub-regional, regional and global levels to ensure that the daily challenges faced by non-nationals are addressed through policy and practices. CoRMSA has over fifteen years of experience working on migration engaging in advocacy and lobbying; coordination and network building; capacity building; rights awareness and information sharing. CoRMSA's overall objective is the protection and promotion of asylum seekers, refugees and migrant's rights in South Africa, regionally and internationally.

CoRMSA welcomes this opportunity and below makes recommendations on specific sections of the Draft Immigration Amendment Bill 2018. CoRMSA is available to make an oral presentation regarding this submission should such an opportunity arise.

B. Comments on specific sections of the Draft Immigration Amendment Bill 2018:

Page 6, Amendment of section 1 of Act 13 of 2002, as amended by section 2 of Act 19 of 2004, section 1 of Act 3 of 2007 and section 2 of Act 13 of 2011.

CoRMSA welcomes the continuing commitment of the South African Government to recognise the South African Constitution as the principal and supreme law of the republic. CoRMSA believes that with this recognition of the Constitution, the rights set out under chapter 2 of the Constitution will be respected and upheld as the

cornerstone of democracy in South Africa. The bill enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom with no prejudice based on nationalities, race or gender.

- **Page 7. Amendment of section 34 of Act 13 of 2002, as amended by sections 35 and 47 of Act 19 of 2004.**

CoRMSA welcomes the decision by the Portfolio Committee on Home Affairs to follow and honour the recommendations made by the Constitutional Court of South Africa on the matter concerning the *Lawyers for Human Rights v Minister of Home Affairs* 2017 (5) SA 480 (CC) (hereafter referred to as “*LHR II*”).

Amendment on section 34(1)(b) and 1 (a).

CoRMSA is satisfied that section 34 (b) is amended to make sure that the Court process and oversight is recognised and followed accordingly. This will also serve the constitutional mandate that of “*Everyone is equal before the law and has the right to equal protection and benefit of the law*” stated on section 9 of the Constitution.

This amendment also gives rise to section 35 (d) (i) of the Constitution that “*Everyone who is arrested for allegedly committing an offence has the right- to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest*”.

CoRMSA recommends that the words “*ordinary court day*” be clarified on the final amendment to prohibit an immigration officer from subjecting the detainee to the denial of access to justice based on the ambiguity of the phrase ordinary court day. CoRMSA also recommends that the Court on reviewing the detention should not only look at the legal basis but also consider the peculiarity of detention.

Amendment on section 34 (1) (d).

CoRMSA is further pleased with the amendment to section 34(1)(d) especially with the fact that the detainee will be offered an opportunity to appear in person before the court of law. This will definitely ensure that access to justice is upheld and respected. It should be noted that the detainee/s that is not brought before the court on the specified time frame by the court (30 calendar days) should be **released** with immediate effect and that detention should be considered unlawful.

However, CoRMSA is concerned about the “*two further extensions of detention*” based on the “*lack of cooperation –(from the relevant authority)*” as this may subject the detainee to a further detention on a matter beyond his or her control. Some of the detainees are forced to leave their place of origin to another country for safety reasons and the relevant authority may be the cause of their forced migration. We

recommend that this part of the section be removed or deleted from the section as it may subject the detainees to further oppression and denial of access to justice. The phrase “*lack of cooperation*” can be interpreted in different ways to suit the definers in many occasions hence we recommend the deletion of removal of the phrase.

We further recommend that subjecting the forced migration detainees to their country of origin (*through lack of cooperation*) may cause further victimisation on the detainee/s and they are already victims of maltreatment and unhuman actions such as torture, persecution etc. We recommend that the Committee take into account the length of the detainee/s incarceration, that may subject them to hardship going beyond the unavoidable level of suffering inherent during their detention because of their country of origin.

On insertion after subsection (1)

CoRMSA welcomes the proposed insertion on section 1 (a) with the following recommendations to be considered; Arrest and Detention is carried out in accordance with section 35 (2) (A to E) of the Constitution of the republic which indicate that: Everyone who is detained, including every sentenced prisoner, has the right to be informed promptly of the reason for being detained; to choose, and to consult with, a legal practitioner, and to be informed of this right promptly; to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released; to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

C. Conclusion and recommendations:

CoRMSA believes that the right to humane treatment in detention necessitates that persons are deprived of their freedom be treated compassionately and with dignity. CoRMSA recommends that the right to humane treatment in detention needs to be considered not only based on legal processes but also on merit. Lawyers for Human Rights Report on “Policy Shift in the South African Asylum System-Evidence and Implications” argued that “*It is important to note that international research has shown that **detention does not deter irregular migrants***” and that detention fails to impact on the choice of destination country and does not reduce numbers of irregular arrivals.

Furthermore, CoRMSA believes that well-managed migration can yield benefits to both countries of origin and destination especially in terms of labour migration, which can offset labour shortages in destination countries, and generate remittances



targeted towards national development in the countries of origin. However, many African countries including South Africa have had challenges in managing migration issues owing to a poor collection and management of data; lack of capacity to handle migration issues as well as limited knowledge about migration-related issues.

Department of Home Affairs should investigate and address cases of abuse and improve conditions at the Lindela detention centre and put mechanisms in place to ensure that detainees are not held in indefinite detention without legal process or subjected to any form of detention that may amount to cruel and unusual treatment.

When addressing migration and detention, we should all remember that no individual or human being is illegal. It is the actions that an individual commit that breaks the policies and laws of one country are the ones that are illegal.

We thank you.

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