

REPUBLIC OF SOUTH AFRICA

IMMIGRATION AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); initiated by the
Portfolio Committee on Home Affairs; Bill and prior notice of introduction thereof
published in Government Gazette No. 39501 of 11 December 2015)
(The English text is the official text of the Bill)*

(PORTFOLIO COMMITTEE ON HOME AFFAIRS)

[B 5—2016]

ISBN 978-1-4850-0300-7

No. of copies printed 800

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Immigration Act, 2002, so as to provide for an adequate sanction for foreigners who have overstayed in the Republic beyond the expiry date on their visa; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 32 of Act 13 of 2002, as amended by section 33 of Act 19 of 2004

1. Section 32 of the Immigration Act, 2002 (Act No. 13 of 2002), (hereinafter referred to as “the principal Act”), is hereby amended by the insertion after subsection (1) of the following subsections: 5

“(1A) Foreigners who are illegal by virtue of having overstayed, as prescribed, do not qualify for a port of entry visa, a visa, admission into the Republic or a permanent residence permit during the prescribed period. 10

(1B) Upon application, as prescribed, from outside the Republic by the illegal foreigner contemplated in subsection (1A), the Director-General may waive the disqualification contemplated in subsection (1A) where exceptional circumstances, as prescribed, exist.”

Amendment of section 50 of Act 13 of 2002, as amended by sections 46 and 47 of Act 19 of 2004 and section 25 of Act 13 of 2011 15

2. Section 50 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Any foreigner who leaves the Republic after the expiry of his or her visa shall be dealt with in terms of section [30(1)(h)] 32(1A).”. 20

Short title and commencement

3. This Act is called the Immigration Amendment Act, 2016, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE IMMIGRATION AMENDMENT BILL, 2016

1. INTRODUCTION AND BACKGROUND

- 1.1 The Immigration Act, 2002 (Act No. 13 of 2002), (hereinafter referred to as the “principal Act”) in section 50(1), prior to its amendment by section 25 of the Immigration Amendment Act, 2011 (Act No. 13 of 2011), provided that foreigners who left the Republic after the expiry of their permits (now referred to as “visas” as per section 26 of the Immigration Amendment Act, 2011) would be liable to an administrative fine. However, such administrative fines imposed were no longer serving as a deterrent and hence a proposal was made to amend section 30 of the principal Act so as to declare such foreigners who overstayed as undesirable.
- 1.2 In order to give effect to this proposal, section 20 of the Immigration Amendment Act, 2011, amended section 30 of the principal Act by including a new paragraph (*h*) into subsection (1) of section 30. However, section 30(1)(*h*) of the principal Act (as amended by section 20 of the Immigration Amendment Act, 2011) provides that a foreigner may be declared undesirable where he or she has overstayed the prescribed number of times.
- 1.3 In practice, this current wording of section 30(1)(*h*) of the principal Act has created many interpretation challenges as some have interpreted it to mean that foreigners must have overstayed on more than one occasion in order to be declared undesirable. However, it has always been the intention to declare a foreigner undesirable even upon one instance of overstay. Hence, regulation 27 of the Immigration Regulations (dated 22 May 2014 and published in Government Gazette No. 37679) provides for a person who overstays after the expiry of his or her visa (even where such person has overstayed for the first time) to be declared undesirable for a certain period of time depending on the length of his or her overstay.

2. OBJECTS OF THE BILL

The purpose of the Bill is to provide for an adequate sanction for foreigners who have overstayed in the Republic beyond the expiry date on their visa. Hence, the Bill seeks to amend section 32 of the principal Act in order to more clearly provide that foreigners who have overstayed in the Republic beyond the expiry date of their visas, do not qualify for a port of entry visa, a visa, admission into the Republic or a permanent residence permit during the relevant prescribed period.

3. CONTENTS OF THE BILL

- 3.1 Clause 1 amends section 32 of the principal Act by inserting subsection (1A) and subsection (1B). The newly inserted subsection (1A) now clearly provides that foreigners who are illegal by virtue of having overstayed in the Republic, as prescribed, will not qualify for a port of entry visa, a visa, admission into the Republic or a permanent residence permit during the prescribed period. The newly inserted subsection (1B) provides that, upon application by the illegal foreigner who has been disqualified in terms of subsection (1A), the Director-General may waive such disqualification where exceptional circumstances, as prescribed, exists.
- 3.2 Clause 2 amends section 50(1) of the principal Act in order to effect a consequential amendment relating to cross-referencing following the insertion of section 32(1A).
- 3.3 Clause 3 provides for the short title and the commencement date.

4. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

None

5. FINANCIAL IMPLICATIONS FOR THE STATE

None

6. DEPARTMENTS, BODIES OR PERSONS CONSULTED

The following stakeholders were consulted—

- Department of Home Affairs

7. PARLIAMENTARY PROCEDURE

7.1 The Committee proposes that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provisions to which the procedures set out in section 74 or 76 of the Constitution apply.

7.2 The Committee is of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.