

**REPUBLIC OF SOUTH AFRICA**

---

**DRAFT IMMIGRATION AMENDMENT BILL**

---

*(As initiated by the Portfolio Committee on Home Affairs, as a Committee Bill, for introduction in the National Assembly (proposed section 75); prior notice of introduction published in Government Gazette No. .... of ..... 2018)*

*(The English text is the official text of the Bill)*

---

(PORTFOLIO COMMITTEE ON HOME AFFAIRS)

[B— ..... 2018]

**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 insert a definition; to revise and align the provisions relating to the detention of illegal foreigners for purposes of deportation with constitutional principles; to provide for further extensions of detention of an illegal foreigner in certain circumstances; to provide guidance to an immigration officer as to when he or she may arrest and detain an illegal foreigner for purposes of deportation; and to provide for matters connected therewith.**

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

**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**

1. Section 1 of the of the Immigration Act, 2002 (Act No. 13 of 2002) (hereinafter referred to as the “principal Act”), is hereby amended by the insertion after the definition of ‘citizen’ of the following definition:

“**‘Constitution’** means the Constitution of the Republic of South Africa, 1996;”.

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

2. Section 34 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“Without the need for a warrant, but subject to subsection (1A), an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General[,]; **[provided]** Provided that the foreigner concerned—”;

(b) by the substitution in subsection (1) for paragraphs (b), (c) and (d) of the following paragraphs:

“(b) **[may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner]** shall be brought before a court in person within 48 hours from the time of his or her arrest, or not later than the first court day after the expiry of the 48 hours if the 48 hours expired outside an ordinary court day, for the court to determine whether to confirm the detention, for a period not exceeding 30 calendar days, for the purposes of deportation, failing which such foreigner shall immediately be released;

(c) shall be informed upon arrest or immediately thereafter of the rights set

out in section 35(2) of the Constitution and the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

“(d) may not be held in detention for longer than 30 calendar days without [**a warrant of a Court**] appearing in court in person, which court on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; Provided further that the court may grant no more than two further extensions of detention, for a period not exceeding 30 calendar days at a time, where the deportation of such foreigner cannot be effected as a result of lack of cooperation, as prescribed, from such foreigner or the relevant authority of his or her country of origin or nationality; and”;

(c) by the insertion after subsection (1) of the following subsection:

“(1A) An immigration officer may arrest and detain an illegal foreigner for purposes of deportation if—

(a) the immigration officer has determined that the foreigner is an illegal foreigner in terms of the Act; and

(b) following the outcome of the prescribed interview, the immigration officer is of the view that the arrest and detention is justified in the circumstances.”.

### **Short title and commencement**

3. This Act is called the Immigration Amendment Act, 2018, 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,  
2018**

**1. INTRODUCTION**

- 1.1 On 29 June 2017, the Constitutional Court, in the *Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22 matter (“the Constitutional Court judgment”), declared sections 34(1)(b) and (d) of the Immigration Act, 2002 (Act No. 13 of 2002), (“the principal Act”), inconsistent with sections 12(1) and 35(2)(d) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) in that these sections of the principal Act do not allow for automatic judicial intervention when an illegal foreigner is detained for purposes of deportation, and do not allow for a detained illegal foreigner to challenge the lawfulness of his or her detention in person in court.
- 1.2 The declaration of invalidity was suspended for a period of 24 months from the date of the order to enable Parliament to correct the defect in sections 34(1)(b) and (d) of the principal Act. Pending the correction of the defect within 24 months (namely, by 28 June 2019) or upon the expiry of this period, the Constitutional Court ordered that any illegal foreigner detained under section 34(1) of the principal Act must be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days. The Constitutional Court also ordered that illegal foreigners who were in detention at the time the order was issued, must be brought before a court within 48 hours from the date of the order or on such later date as may be determined by a court.
- 1.3 The Department of Home Affairs has also experienced many challenges pertaining to the deportation of illegal foreigners within the maximum period of detention provided for in the principal Act, particularly in instances where the foreigner does not cooperate with regard to the process of identifying his or her country of origin or nationality, or where the relevant authority of the country of origin or nationality of the illegal foreigner does

not provide the necessary assistance regarding the identification of the foreigner or the necessary documentation to facilitate the deportation process.

## **2. OBJECTS OF THE BILL**

- 2.1 The Immigration Amendment Bill, 2018 (“the Bill) addresses the Constitutional Court judgment by seeking to amend sections 34(1)(*b*) and (*d*) of the principal Act, so as to ensure that any illegal foreigner detained under section 34(1) of the principal Act is brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if the 48 hours expired outside ordinary court days, in order for the court to determine whether to confirm the detention for purposes of deportation. The Bill also provides that any detained illegal foreigner may not be held in detention for longer than 30 calendar days without appearing in person in court. The Bill further seeks to provide guidance to an immigration officer as to when he or she may arrest and detain an illegal foreigner for purposes of deportation.
- 2.2 The Bill also provides for further extensions of detention to be granted by a court, beyond the maximum period of detention provided for in the principal Act, in certain circumstances.

## **3. CONTENTS OF THE BILL**

- 3.1 Clause 1 inserts a new definition into the principal Act.
- 3.2 Clause 2 amends sections 34(1) of the principal Act. This clause substitutes section 34(1)(*b*) so that it now provides for any illegal foreigner detained under section 34(1) of the principal Act to be brought before a court in person within 48 hours from the time of his or her arrest, or not later than the first court day after the expiry of the 48 hours if the 48 hours expired outside an ordinary court day, for the court to determine whether to confirm the detention, for a period not exceeding 30 calendar days, for the purposes of deportation, failing which the foreigner must be released.

This clause also amends section 34(1)(c) of the principal Act to provide that a detained illegal foreigner is informed of the rights set out in section 35(2) of the Constitution.

This clause further amends section 34(1)(d) of the principal Act to provide that any detained illegal foreigner may not be held in detention for longer than 30 calendar days without appearing in court in person, which court may then extend the detention for a period not exceeding 90 calendar days. A further amendment to section 34(1)(d) of the principal Act is to provide for further extensions of detention to be granted by a court, beyond the 90 day period, where the deportation of the illegal foreigner cannot be effected as a result of lack of cooperation from such foreigner or the relevant authority of his or her country of origin or nationality.

This clause also inserts a new subsection (1A) into section 34 which provides guidance to an immigration officer as to when he or she may arrest and detain an illegal foreigner for purposes of deportation.

3.3 Clause 3 provides for the short title and commencement date.

#### **4. ORGANISATIONAL AND PERSONNEL IMPLICATIONS**

None.

#### **5. FINANCIAL IMPLICATIONS FOR THE STATE**

The Department of Home Affairs is currently implementing the Constitutional Court order and hence the Bill will not lead to any additional expenditure for the state.

## **6. DEPARTMENTS, BODIES OR PERSONS CONSULTED**

The following stakeholders were consulted:

- The Department of Home Affairs

[Further information will be added following the publication of the Draft Bill]

## **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.