

BEFORE THE PARLIAMENTARY PORTFOLIO COMMITTEE ON HOME AFFAIRS

RE:

**SUBMISSIONS BY THE
LAW SOCIETY OF SOUTH AFRICA**

IN RE:

SA CITIZENSHIP AMENDMENT BILL 2010

SOUTH AFRICAN CITIZENSHIP AMENDMENT BILL

The South African Citizenship Amendment Bill has been introduced to the National Assembly (Proposed Section 75).

Comment has been called for on the amendments proposed by the draft Bill to the South African Citizenship Act, 1995, as amended, [hereafter referred to as the '*principal Act*'] to be submitted to the Secretary of the Parliament of the RSA by latest 6 August 2010 at 12h00.

The Law Society of South Africa is the national body constituted of the following six constituent members:

- The Law Society of the Northern Provinces (representing the attorneys' profession in Gauteng, North West, Mpumalanga and Limpopo Provinces);
- The KwaZulu-Natal Law Society
- The Law Society of the Free State
- The Cape Law Society (representing attorneys in the Western, Eastern and Northern Cape)
- The Black Lawyers Association
- The National Association of Democratic Lawyers.

The Law Society of South Africa therefore, represents the organised attorneys' profession countrywide, currently 20 000 attorneys and 5 000 candidate attorneys.

The Law Society of South Africa (LSSA) is one of the major stakeholders interfacing with the Department of Home Affairs on a professional level in respect of matters relating to the South African Citizenship Laws of the country.

The LSSA Immigration & Refugee Law Committee is a specialist attorneys grouping dealing with, *inter alia*, nationality and citizenship law matters.

We have perused the draft Bill and would like to take this opportunity to comment on various aspects of the Bill.

1. AD SECTION 5 – DEFINITION: 'MARRIAGE' AND NATURALISATION

- 1.1. The term '*marriage*' is used in Section 5 of the principal Act where it provides that a foreigner, who is married to a South African, qualifies for naturalisation if he/she has been married and resident in SA for two (2) years. The prescribed period as set out in section 5(5)(a) of the principal Act as two years, is conspicuously absent from the Amendment Bill which refers only to 'a prescribed period'. The motivation behind this is not clear and the LSSA therefore suggests that the status quo be maintained, namely that the two-year period remain intact.
- 1.2. The Bill provides for Section 5 to be suitably amended with the result that the term 'marriage' will be deleted and replaced with the term 'spouse' which is supported.
- 1.3. Section 5 also protects widows and widowers. The LSSA proposes that the term 'spouse' should include a clause making provision for relationships terminated by death.

- 1.4. **Clause 5(f) and at 5(1)(c):** the term ‘**married**’ should be deleted and substituted with the words ‘*in a spousal relationship with*’ as per the motivation above on the definition of ‘spouse’. This phrase – and the relationship – is recognised by the Immigration Act, 13 of 2002.

2. AD SECTION 5 – DEFINITION: ‘CONTINUOUS’

- 2.1. The word appears in Clause 5(b). There is currently no statutory or regulatory definition. However, Department policy/practice has developed a definition which interprets the word literally – and as meaning something quite different from ‘ordinary’ residence. The effect of that definition serves to prevent permanent residents from seeking naturalisation where they have been absent from the country for periods of just a matter of months where their employers may have sent them overseas or they have been forced by, for example, financial circumstances, in order to support their families, to seek temporary employment overseas or pensioners who visit their children overseas during South Africa’s winter months.
- 2.2. Accordingly, the LSSA proposes that the term ‘*continuous*’ be deleted where it appears in Section 5(1)(c); alternatively, the situation must be clarified by providing a definition of the term ‘*continuous*’ so as not to prejudice persons who are, for example, absent from the country on assignment or for other reasons.

3. AD SECTIONS 2 AND 4 – CITIZENSHIP BY BIRTH AND BY NATURALISATION – DEFINITION: ‘MAJOR’

- 3.1. **The LSSA supports the overall revision of the definition of citizenship by birth, as currently proposed by the Bill.**
- 3.2. The LSSA in particular supports the proposals, as provided for in **Clauses 2 and 4 of the Bill**, to extend citizenship, whether by birth or naturalisation, to young adults who have lived their entire lives in South Africa in consequence of their parents moving to the Republic, for whatever reason.

- 3.3. The LSSA proposes, however, that the qualifying age threshold be reduced to seventeen '17 years' as having citizenship would greatly assist the affected minor to register for and write his/her matriculation examinations. In terms of the Bill's current provisions, minors could find themselves excluded from the matriculation examinations only to find that their problems are resolved on turning 18, when they qualify for citizenship in terms of the current proposals.
- 3.4. The LSSA also points out that **Clause 2(4)(a)** and **Clause 4(3)(a)** of the Bill use different formulae or wording to say the same thing to compute when the right to citizenship arises. The LSSA proposes that the same term be used and that the formulation in **Clause 4(3)(a)** recommends itself as being more precise.
- 3.5. It is our further submission that there are certain aspects which the Amendment Bill should have dealt with and the opportunity now presents itself to deal with these. The aspects relate to Section 6 of the principal Act relating to loss of citizenship, and are dealt with hereunder as 'Additional submissions'.

4. AD SECTION 6 – LOSS OF CITIZENSHIP

- 4.1. Clause 6(a) of the Bill proposes that a South African citizen shall cease to be a South African citizen if “.....**he or she engages in a war under the flag of a country that the Government of the Republic does not support.**” (Our underlining).
- 4.2. This represents a radical departure from the section as it is worded in the principal Act where Section 6(1)(b) already provides for the automatic deprivation or lapsing of citizenship where, in certain circumstances, a citizen engages in a war against the Republic.

- 4.3.** The LSSA proposes that the clause must make it clear that the term '*does not support*' is intended to qualify the '*war*' or the '*country*' such as to trigger the loss of citizenship.
- 4.4.** The LSSA is further concerned that the clause contemplates that a resolution of the Cabinet would be sufficient to constitute the Government of the Republic's support - or lack of it. Given the most extreme consequences intended by this clause and without provision for there to be warnings and clear notice given to the persons concerned, the lapsing of citizenship could well be a disproportionate and unlawful censure.
- 4.5.** The LSSA is also concerned that, as is the case with the remainder of Section 6 of the principal Act, the clause provides for an automatic lapsing of citizenship. Accordingly, the citizen might well be deprived of his or her right of access to court [Section 34 of the Bill of Rights] on the loss of his/her citizenship as no decision has actually been taken by a functionary in respect of the loss of his/her citizenship.
- 4.6.** The LSSA submits that whereas section 6(1)(b) of the principal Act requires that the ex-citizen-to-be must also have the citizenship of the affected country, Clause 6(a) does not provide for that safety net.
- 4.7.** The LSSA would point out that this provision will also engage and trigger a host of equally complex citizenship laws in other countries particularly where the citizenship and passport rights of another country are linked to lawful conscription duties involving the conscripted citizen in conflicts of which the Cabinet of South Africa might disapprove.
- 4.8.** In terms of section 233 of the Constitution, in assessing whether such a measure is constitutional, regard would have to be had to Article 8.1 of the 1975 Convention on the Reduction of Statelessness, which expressly prohibits such a measure.

- 4.9.** In addition, the LSSA points out, with respect, that section 20 of the Bill of Rights provides that ***'no citizen may be deprived of his or her citizenship'***. As is self-evident, the laws of the Republic must be compliant with the Constitution and cannot provide for the arbitrary deprivation of citizenship.
- 4.10.** The LSSA does not consider that Clause 6(b) can save the constitutionality of Clause 6(a) for the following reasons, in addition to the reasons given above:
- 4.10.1** The wording of Clause 6(b) and particularly the *phrase 'may apply ... prior to his or her loss'* runs counter to the language of Clause 6(a) which provides for an automatic deprivation of citizenship – there is no prior hearing or decision, of a functionary, in terms of Clause 6(a).
- 4.10.2** The Minister's discretion will still involve a weighing-up by the Minister of the citizen's reasons for wanting to retain his/her citizenship as against a decision of the Cabinet, which decision could be motivated by reasons ranging from political factors to issues of trade and finance, and must as such constitute an assault on various fundamental rights of the citizen such as his/her right to privacy, dignity, political opinion and religious freedom, to name but a few.
- 4.11.** In all the circumstances, the LSSA would recommend strongly that the status quo in respect of s 6(1) of the principal Act be retained in its current form.
- 4.12.** The recent attempts to introduce legislation to deal with mercenaries did not see the light of day, principally because of this reasoning.

ADDITIONAL SUBMISSIONS

1. DEFINITION REQUIRED – ‘VOLUNTARY AND FORMAL ACT’

1.1. **Problem:** The phrase ‘**voluntary and formal act**’ – contained in section 6(1)(a) of the South African Citizenship Act, 88 of 1995 – is not, nor has it been, defined in this Bill or in any previous Citizenship Acts.

1.2. **Details:** The interpretation as to what therefore constitutes a ‘formal and voluntary act’ vis-à-vis the acquisition of the citizenship status of another country is, therefore, left in the hands of Home Affairs officials, precisely because of this absence of a definition.

There is also often no consistency in the way that this term is applied to actual or potential loss of citizenship issues, again due to the fact that there is no definition of this term.

1.3. **Submission:** The LSSA submits that if a definition of the term ‘formal and voluntary act’ is provided in the Bill, this would clear up much confusion as to when South African citizenship is lost as a result of the acquisition of foreign citizenship. The suggestion by the LSSA is that this term could be defined as follows:

‘any act which requires an applicant to complete a formal application for naturalisation of a foreign country where foreign citizenship is not automatically conferred on the individual’.

2. EXCLUSION FROM LOSS OF CITIZENSHIP – MARRIAGE

2.1. **Problem:** Section 6(1)(a) refers to ‘*marriage*’ as an exclusion to the loss of South African citizenship through the acquisition of dual nationality. This section currently states as follows:

'a South African citizen shall cease to be a South African citizen if- (a) he or she, whilst not being a minor, by some voluntary and formal act other than marriage, acquires the citizenship or nationality of a country other than the Republic'. (Our underlining)

Where the citizenship of another country is acquired as a result of marriage to a foreigner, the South African citizen should not lose his/her South African citizenship. However, such acquisition of another citizenship through marriage is generally acquired through a naturalisation process which is deemed by the Department of Home Affairs to be a '*voluntary and formal act*'. South African citizens have lost their South African citizenship in consequence of this Departmental interpretation. (Vide paragraph 1 above)

2.2. Details: The Department of Home Affairs still views this naturalisation process to be a 'voluntary and formal act' thus making the exclusion in the Act no longer an exclusion, and defeating the obvious intent of Parliament. This is also very confusing to the lay person as, on a plain reading of the 1995 Act it seems that they will be excluded from losing their South African citizenship as a result of acquisition of foreign citizenship through marriage.

2.3. Submission:

The LSSA submits that either the Amendment Bill can confirm that acquisition of foreign citizenship by marriage is excluded from loss of citizenship under section 6 of the 1995 Act, no matter whether the process undertaken is a voluntary or formal act OR this exclusion should be removed altogether to avoid confusion on this issue OR FURTHER, that the term 'formal and voluntary act' should be suitably defined.

3. RIGHT TO RETAIN PERMANENT RESIDENCE

3.1. Problem: A practice of the Department of Home Affairs dictates that where a South African citizen has lost his/her South African citizenship by virtue of section 6 of the 1995 Act, he/she retains his/her right to permanent residence

in South Africa in consequence of what is termed a 'birthright' by the Department. This is, however, not confirmed anywhere in the Citizenship Act.

- 3.2. Details:** A South African citizen who has lost his South African citizenship as a result of the acquisition of a foreign citizenship retains his right to Permanent Residence in South Africa. This right to have or retain Permanent Residence is confirmed by the Determination of Status as issued by the Department of Home Affairs on these issues. However, there is no provision in the South African Citizenship Act 88 of 1995 that makes any mention of this right to retain permanent residence in South Africa. This legal vacuum leaves many persons vulnerable – not least the children of these so-called 'permanent residents.'
- 3.3. Submission:** It is the submission of the LSSA that the Amendment Bill should make the necessary provision for this measure and to protect those ex-citizens who have already obtained permanent residence in South Africa by this route.

4. THE ISSUE OF AUTOMATIC LOSS

- 4.1. Problem:** Where a South African citizen loses his South African citizenship as a result of acquisition of a foreign citizenship under the 1995 Act then, from the time of such acquisition of such foreign citizenship until the time when he/she applies for a resumption and obtains the outcome, such person is not a South African citizen.
- 4.2.** The South African Citizenship Act 44 of 1949 dealt with the issue of loss of citizenship in s 15 of the Act. Section 15 (1A) was introduced by Act 70 of 1991. Section 15 (1A)(b) specifically stated:

'Any person or category of persons to whom the Minister has granted an exemption under paragraph (a), shall not cease or be deemed not to have ceased to be a South African citizen.'

This provision ensured that loss of citizenship was not automatic under the 1949 Act and also ensured that as long as the South African citizen underwent the exemption process, it would be as though he never lost his South African citizenship. The 1995 Act, however, contains no similar provision.

As a consequence, the South African citizen who acquires foreign citizenship and loses his South African citizenship thereby is, therefore, not a South African citizen for the period until he applies for and obtains a resumption of his South African citizenship status in terms of Section 13 of the 1995 Act.

Even then, once this process of resumption of citizenship is completed, such person would not have been a South African citizen for the period from when he acquires the relevant foreign citizenship up to the time when the resumption application is finalised. Once again, all too often the innocent victim of this provision will be the children who are born during this 'window' who will not have the benefit and dignity of being South African citizens by birth.

- 4.3. Submission: It is the submission of the LSSA that a similar provision to that contained in the 1949 Act by the Amendment in 1991 be considered for the current Act by way of this Amendment Bill. In other words the proposed provision would provide for the fact that once the resumption or exemption process has been completed, the applicant is deemed to have remained a South African citizen as from the date he acquired his foreign citizenship (and not merely as from date of resumption or exemption, as it currently is).**

5. ACQUISITION OUTSIDE SOUTH AFRICA

- 5.1. Problem:** Another provision that was applicable under the 1949 Act was contained in s 15(1)(a) which is very similar to s 6(1)(a) of our current 1995 Act apart from one major difference. The issue of loss of citizenship as a result of acquisition of a foreign citizenship was applicable only where such

foreign citizenship was acquired outside South Africa. Section 15(1)(a) of the 1949 Act stated as follows:

'a South African citizen shall cease to be a South African citizen if - (a) he, whilst outside the Union, and not being a minor, by some voluntary and formal act, other than marriage, acquires the citizenship or nationality of a country other than the Union' (Our underlining).

- 5.2. Details:** There are numerous South Africans that take up foreign passports in South Africa with no intention of ever actually leaving South Africa to reside abroad permanently whether as a result of family or ancestral linkages. This would allow numerous loyal South Africans to avoid losing their South African citizenship where they acquire a foreign citizenship while still in South Africa. It is worth pointing out that roughly about as many countries in the world permit dual nationality as prohibit it. The motivations are many and varied. The fact of the matter is that South Africa does not have any fundamental objection to persons having dual nationality. South Africans may not be deprived of their citizenship - and this may not be achieved via some back door or logic in terms whereof, as currently happens, it is the citizen who has deprived himself / herself of his/her citizenship, and not the State or the Minister.
- 5.3. Submission:** In this kind of scenario the idea of an inclusion of this kind of provision should perhaps also be considered in the Amendment Bill.