

Would Home Affairs have “passed matric” in 2014?

Puzzling and unnecessary decisions play havoc with families and skills development.

By Julian Pokroy

For more than a decade, I have committed myself, in the season we are in, to review the “year that was” in the immigration and visa law sphere in South Africa. Wherever possible, comparatives have also been drawn into the picture in respect of immigration law regimes in other countries.

On this note, there has been a general tightening up, around the world, in policy and law and regulation in this sphere. Some of the changes have been based on reason and logic, some have been influenced by politics and I dare say demographics, and others have been misguided and illogical.

Whether the legislative and regulatory changes in South Africa in 2014 fall into the categories of illogicality or any of the other categories is a moot question ...

What is however unquestionable is that the haste with which the new regulations were foisted on the country and public was unnecessary and badly thought through.

Had the regulations been perfect in every respect, one possibly could have forgiven the powers that be for that haste. The reality is that the new regulations are not only less than perfect but also devoid of the economic realities of the new South Africa, the realities of global movement of people,

especially highly skilled foreigners and practicality.

Hardest hit in this regard have been the following categories:

- Spouses of South African citizens;
- Foreign parents of South African citizens;
- Skilled foreigners who do not necessarily fall into one of the critical skills visa categories or where the specific skill that they have is not deemed to be “critical”; and
- Investor type business permits (previously known as own business/self-employment permits) when those businesses do not fall into the amorphous definition of “business in the national interest”.

One of the harshest realities of the “new” South Africa has been not only the flight of skills from the country but also the failure of our educational system both at secondary and tertiary level, to produce the required skills in many of the specialised areas of expertise.

Our system has not been the only factor influencing this but the harsh reality arose that a lot of these skills are in short supply globally and, whilst we may be producing within the country many of the skills, they are being “shopped” and given incentives from a visa perspective to take their skills to so-called “greener” pastures. This has exacerbated the problem.

One of the ways of countering the flow of skills and paucity of certain skills is, as a bridging and interim measure, to import the skills into South Africa. This is an international best practice scenario.

One imports the skills in this scenario, makes it attractive and easier for that skilled foreigner to come into the country and one then “uses” those skills to transfer and assist in training of South Africans in that skill set.

An important rider in this last equation is that a country must then make it attractive and easy to obtain the necessary visas.

One of the ascension of elements in this scenario is to facilitate and speed up the process.

This brings me to my first point of report that the one thing that has not been eliminated is the backlogs and that speedy resolution and finalisation of visa applications is certainly not happening in general.

Isolated cases of speedy adjudication and resolution of visas indeed does take place from time to time but they are more the exception than the rule.

Delays in processing have become worse than what they were prior to the amendments on 26 May this year.

The introduction of Visa Facilitation Services (VFS) has only resulted in a buffer being created between the general public applicant and the central adjudication hub of the Department of Home Affairs at head office level. It certainly has not speeded up the process.

VFS is a receiving agent and dispatch agent only and does no adjudication whatsoever.

An interesting point that has arisen is the

The Deputy Minister of Home Affairs declared that there were more than 50,000 applications in backlog and, in response to a question, further declared that more than half of those related to foreign nationals in marriages and/or spousal relationships with South African citizens or permanent residents.

additional fee of R1,350 per applicant per process that now has to be paid to VFS for the aforesaid reception and dispatch. Whether this is constitutional and correct at law is a debatable point.

At the time of writing of this article I watched a television programme in which the Deputy Minister of Home Affairs declared that there were more than 50,000 applications in backlog and, in response to a question, further declared that more than half of those related to foreign nationals in marriages and/or spousal relationships with South African citizens or permanent residents.

This has certainly not been a step forward and characterises 2014 in its interface with visa applicants.

Another characteristic which emerged during 2014 in terms of the interface referred to is that of inconsistent decisions which are bad at law and potentially unconstitutional if in fact not indeed unconstitutional, that are being handed down by the Department of Home Affairs.

This has caused a further characterisation of 2014 as the year in which more reviews and appeals have been lodged against the Department against such erroneous decisions.

The crunch for 2015 lies in the fact that appeals and reviews generally disappear into a vacuum and any decision making in this regard is retarded by the lack of urgency surrounding dealing with those decisions.

By way of next report, a provision which came into effect, literally overnight after 26 May, was the provision that any person whose expiry date of their visa had been passed would be declared “undesirable” on their way out of the country and would be prohibited, depending on the length of their overstay, from coming back into South Africa for periods ranging from one to five years.

While it is understood, and indeed is international best practice to sanction a visa overstayer, the effects referred to in the paragraph hereunder have been unduly harsh and severe.

The situation referred to is that of a foreign national applicant who needs to travel after their visa expiry date but who has timeously lodged an application for an extension or variation of their visa and where, due to the intransigence of the Department of Home Affairs or inability to finalise their visa application, extension or variation, has now reached their expiry date due to no fault on their part.

There was a departmental directive in place which declared that such person who was not a wilful overstayer, could indeed travel out of the country without penalty and re-enter the country provided that they carried with them the original receipt proving timeous lodgement of their application.

Literally within 24 hours of the new regulations coming into place on 26 May, a directive was issued recanting that directive.

Countless foreign nationals were therefore declared undesirable on their way out of the country despite having complied with the aforesaid requirements, and such persons were then effectively prohibited from coming back into the country for the periods previously referred to.

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The Department indicated intransigence on their part and indicated further that it would not be amending these regulations.

Several High Court matters were heard in the Cape High Court in fact ordering the Minister and Director General of Home Affairs to deal with an overstay appeal process as there was potentially even an unconstitutionality relating to the separation of parent from child and spouse from spouse.

The Department then initiated a special "overstay appeal" desk to deal timeously with such appeals and in the beginning it worked pretty well. However

at this time it appears that few, if any, overstay appeals are in fact being dealt with.

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It must be reiterated that a visa overstayer, and not one who fits into the description referred to above, indeed should be penalised for a wilful overstay and this is certainly in line with international best practice in this regard. But humanitarian reasons and potential unconstitutionality have to be considered as mitigating factors in dealing with the situation. An easy way of dealing with this would be to revert back to the relevant departmental directive which was enforced prior to the introduction of the new regulations, that is, to allow an unintentional overstayer whose application has not been finalised by Home Affairs due to Home Affairs' fault, to travel in and out of the country without penalty, provided they are in possession of the original receipt proving lodgement of their visa extension or variation application.

A further characterisation of 2014 has been the unwillingness of the Department to diplomatically and proactively deal with queries and a perceived intransigence on the Department's part in dealing with enquiries. With the advent of VFS, this intransigence seems to have increased somewhat.

2014 was further characterised by many innuendos of better service delivery and we certainly hope that in 2015 some of these will become reality and reach fruition. ■

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SARS no longer a shining beacon

Can our revenue collection service regain its former glory?

By Yusuf Mahomedy

For the past decade, SARS has been the gold standard against which other government agencies came up woefully short. While those that shall not be named, were drowning in political interference, leadership crises and poor service delivery, SARS managed to swim against the tide. Without exception, in any conversation about government, I noticed that people were quietly proud of SARS. It gave us comfort that a government agency could excel and we hoped that, one day, others would catch up.

As a high performing organisation, SARS had a reputation that was the envy of tax authorities around the world. This did not happen overnight though. By investing not just in world class systems, but also their management structures, SARS was able to swim faster in a complex environment. Just ask the tax consultants that struggle to keep up with the ocean of tax changes.

Unfortunately, in the space of a few months, the reputation of SARS has been shattered. The new SARS commissioner was appointed in September and wasted little time in dissolving the executive committee. From the investigation into the rogue unit to the personality power battles, we still have a long way to go in this story.

What does this mean for SA in 2015?

The local economy is plodding along with low growth and rising debt. The recent upheavals may reduce the capacity of SARS to meet revenue targets. This

will create ripples for government coffers, at a time, when we cannot afford any further downgrades by the ratings agencies. On the positive side, tax collection systems remain strong, supported by automated processes and a skilled workforce.

Another concern is that service delivery may slip in the course of the year due to staffing issues. The manner in which top management was removed has created a negative culture in the rank and file of SARS. Staff are worried about their jobs and performing their duties without interference. I will not be surprised to see middle managers and skilled tax specialists swimming for better shores. The loss of people with institutional knowledge and competence, will adversely affect the performance of SARS in future. It is up to the tax commissioner, supported by HR, to build a new leadership team. In this regard, the team must be respected, credible and trustworthy for staff to support them.

The real challenge, though, may be convincing taxpayers to contribute more to the fiscus. Unlike previous years when taxpayers focused on the Budget Speech, this year, they will be looking at SARS and wondering whether their tax rands are being managed well. Business is reluctant to come to the table, aggravated by the impact of load shedding, and strikes on their bottom line. Low income earners are expecting tax relief, not increases, to cope with inflationary pressures. Higher income earners are under pressure to service their debt and maintain their lifestyle. Unfortunately, the bulk of tax increases are likely to target their wealth, employment income or expenditure.

Until next month ... Get your umbrella out and prepare for the rainy days ahead. ■

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