

Change of status within South Africa

High Court rules on change of status from within South Africa.

By **Tarryn Pokroy Rietveld**

With the coming into operation of the Immigration Amendment Act 13 of 2011 ('the Amendment Act') which was published in the Government Gazette on 26 August 2011, but which only came into formal operation once the Regulations were finalised and published on 26 May 2014, some rather drastic changes were brought about in respect of changes of status from within South Africa.

The situation was previously that a change of status was allowed from any category of visa to any other category of visa and such application could be made from within South Africa. For example, an individual could enter South Africa on a tourist visa genuinely as a visitor and decide that they wished to remain on in South Africa for a longer term duration. Such person could then change status from that tourist visa to a work visa or any other temporary residence visa category, assuming they complied with the relevant requirements. Some individuals would enter South Africa on a tourist visa with the sole intention of then changing status from within South Africa to a different category of visa such as a work visa, again, assuming they complied with the

relevant requirements for the same.

The only time that this process could not be undertaken was if the tourist visa issued to the individual contained a restriction in any way prohibiting a change of status from within South Africa. In this situation, the individual then had to return to their country of origin or usual residence and make an application for the appropriate category of visa through the South African Embassy there, and await the outcome there as well.

When the Amendment Act came into operation in 2014, this brought with it Section 10(6)(b) which stipulates as follows:

"An application for a change of status attached to a visitor's or medical treatment visa shall not be made by the visa holder while in the Republic, except in exceptional circumstances as prescribed."

The Immigration Regulations went on to stipulate that the exceptional circumstances mentioned in the above extract from the Amendment Act would be where the individual:

- is in need of emergency lifesaving medical treatment for longer than three months; or
- is an accompanying spouse or child of a holder of the business or work visa, who wishes to apply for a study or work visa; or
- the holder's continued stay in the Republic is required for any purpose related to a criminal trial in the Republic, provided that such application shall be initiated by the relevant Deputy Director of Public Prosecutions and addressed to the Director General.

It is on the second instance of allowance for a change of status that forms the basis of this article.

An exception to this prohibition against changing status in South Africa from a visitor's visa was made for individuals who entered South Africa on a visitor's visa in order to accompany their spouse or parent, the spouse or parent being the holder of a business or work visa. Technically, the visa issued to this kind of individual is a long term visitor's visa, normally issued for a duration of two to three years, allowing the individual to then reside with the main applicant, being the work or business visa holder, while they are in South Africa. Should such spouse or child then wish to change status to be able to take up employment in South Africa or take up schooling in South Africa, they are entitled to do so and such application for change of status, despite being a change of status from a visitor's visa, can be made locally.

The same or a similar provision in respect of the spouse of a South African citizen was, quite surprisingly, never made. Logically, it certainly would have made sense to include a provision allowing for change of status for such an individual in South Africa. However, despite the fact that such an individual may be married to a South African citizen, they

are not entitled to change status from within South Africa. In order to be able to continue to reside in South Africa on a long term visitor's visa or even to take up employment in terms of Section 11(6) of the Immigration Act 13 of 2002 ('the Immigration Act') to which they are entitled to do should they find an offer of employment, they must return to their country of origin in order to make the application through the South African Embassy there and await the outcome there as well.

The distinction between the spouse of a foreign national and the spouse of a South African citizen being treated so drastically differently is inexplicable.

However, it was exactly this issue that was tackled by the Stewart family in the Western Cape division of the High Court of South Africa in a case against the Minister and Director General of Home Affairs. A judgement was handed down on 29 January 2016

which, in essence, supports the fact that there is no logic behind the spouse of a South African citizen, being in South Africa on a visitor's visa, being unable to change status from within South Africa.

The facts here were indeed that the foreign national spouse, married to a South African citizen, entered South Africa on a tourist visa and applied for a change of conditions to allow the individual to continue to reside in South Africa with her South African citizen spouse. The application was refused on the basis that a change of conditions or status is not allowed in respect of this situation.

Technically, a tourist visa is issued in terms of Section 11(1) of the Immigration Act, being a visitor's visa. The spousal visa, for which the applicant had applied, is issued in terms of Section 11(6) of the Immigration Act which also falls under the category of a visitor's visa. As a result, it was the basis for the argument that this was not or should not be seen as a change of status as the visa category, in terms of the Immigration Act remained a visa in terms of Section 11 of the Immigration Act.

Although the High Court has now ruled in favour of the Stewart family and ordered the Department of Home Affairs to issue the foreign national spouse with a spousal visa in

order to continue to reside in South Africa with her South African citizen spouse, until such time as an amendment to the Act and the Regulations are made or a directive is issued by the Department of Home Affairs to this effect, such application process undertaken by the Stewart family does not immediately allow for this kind of change of status in South Africa. This judgment is, most certainly, welcome as there certainly was a discrepancy here between spouses of foreign nationals and spouses of South African citizens.

The situation with regard to change of status from a tourist visa to any other category of visa remains in place and is certainly consistent with best practice. ■

An individual could enter South Africa on a tourist visa genuinely as a visitor and decide that they wished to remain on in South Africa for a longer term duration. Such person could then change status from that tourist visa to a work visa or any other temporary residence visa category.

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