

Immigration Bill: Growing with the Flow

A new immigration bill is before the South African parliament. One of its key professed aims is to enable South African industry to acquire the foreign skills it needs to grow, while training South Africans. Up to now immigration in South Africa has been regulated by the old Aliens Control Act, an apartheid construct, which was by extension not geared for the new realities of the global economy. The question now is to what extent the new immigration policy is geared towards South Africa's developmental challenges? To what extent can an effective immigration policy reduce the skill shortage in South Africa? And how, in the words of *The Economist* magazine referring to Europe, can it reconcile its economic need for more immigrants with its apparent political distaste for them?

Most analysts view the draft Immigration Bill as fairly progressive. The minister of home affairs, **Mangosuthu Buthelezi**, has said that 'our starting point has been that of ensuring that the future of migration control is based on objective criteria and procedures which eliminate discretion or arbitrary powers. Migration control must register the policies developed by other line functions such as labour, education, foreign affairs and tourism, not formulate them.'

What provisions does the Bill make?

1. The bill seeks to mainstream the processing of documenting foreigners so as to focus administrative capacity on illegal foreigners. The Bill clearly sets out all categories of temporary and permanent residence permits and related grounds.
2. The Bill establishes a regulatory agency, the SA Immigration Service (SAIS), which will be directed by an Immigration Board. The Board will have representatives from the Departments of Trade and Industry, Labour, Tourism, Finance, Safety and Security. The minister will also request certain 'bodies' to nominate representatives, and will appoint four others on the grounds of their expertise in administration, regulatory matters or migration law, control, adjudication or enforcement. The Board's role in this new regime will be quite significant as it will formulate policy through regulations, which are aimed to be a continuation of the process of policy formulation rather than simply implementation of the law. Home Affairs has accepted that immigration cannot be rigid in a global society; immigration policy must reflect the changing needs of a rapidly changing society.
3. The Bill introduces a corporate permit for companies wishing to employ foreigners. In issuing such a corporate permit the SAIS would

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take into account the training programme provided by the corporate applicant for citizens and residents and/or the financial contribution offered by the corporate applicant towards the training fund. The corporate applicant would also have to make corroborated representations to the Service for the need for foreigners. Given the partial dependence on foreign labour in some SA industries such as mining and agriculture, the

bill makes provision for the minister of labour to designate certain industries, in respect of which the Service would waive or reduce the requirements set out for a corporate permit. The Bill also states that the SAIS may reduce or waive the payment for a corporate permit when so requested by the Department of

Trade and Industry in respect of foreign investments or industries or businesses when special economic circumstances exist.

4. The Bill also proposes the payment of a licence fee by the prospective employer of a foreigner. This will go into a training fund and the amount will be prescribed from time to time as a ratio of the foreigner's remuneration. Provision is also made for the waiving of such a licence fee if the Departments of Labour and Trade and Industry are satisfied that the employer has in place an adequate training programme for citizens and residents.
5. Furthermore, the SAIS may issue a work permit to a foreigner who has certain skills or qualifications which may be prescribed from time to time. The Bill refers to foreigners who have 'exceptional skills and qualifications'; whose presence in the country is deemed to enrich the country's human resources. The Department of Trade and Industry and the Department of Labour may reach an agreement that a certain number of foreigners with specific skills or qualifications

- are necessary for our economic growth or for specific industries, say nuclear scientists or computer programmers,' says Buthelezi. SAIS would issue a permit without the requirement of a prior job offer or the payment of a licence fee.
6. Provision is also made for investor and self-employed permits for those intending to establish a business in South Africa. Regulations will prescribe the minimum amount which such a foreigner would have to invest in such a business.
 7. In order to eradicate exploitation of foreigners, the Bill also sets out that any foreigner employed in South Africa should not be employed at terms or conditions inferior to those offered to citizens and residents or prevailing in the relevant market sector, including collective bargaining agreements.
 8. It sets up immigration courts, which will have the power to review the decisions of the Service, the validity of regulations, actions against the SAIS, including damages.

With regard to the key elements of the Bill, the following points need to be highlighted:

- The composition of the Immigration Board, as set out in the Bill, is inclusive, drawing in people from both the private and public sectors. By making the Board responsible for formulating regulations, and modifying policy as the circumstances demand, Home Affairs is moving away from the rigid approach of the past. Although not spelt out in the legislation the Immigration Board should draw people from the business community, who are at the coalface, to identify labour shortages.
- The introduction of a licence fee for companies employing foreigners adds to the disincentives created by government through such measures as the skills development levy, as expressed by various business chambers. It is seen as increasing labour costs and making South Africa less competitive than other developing countries. As a parliamentarian put it, 'South Africa is not the most sought after destination'; such a fee may deter foreign investors. It also increases the costs of non-profit institutions such as universities of attracting international staff. Furthermore, international experience has shown that state training is less effective than that of the private sector.
- The effectiveness of the provision for exceptional skills/qualifications will depend on the definition of who would qualify and how the schedule of such skills is drawn up.
- The introduction of a business permit can attract entrepreneurs, provided the amount of money they have to invest is reasonable and will not be excessive for small entrepreneurs.

- Given the scarce resources available in South Africa, attention needs to be paid to the potential costs of some of the proposals in the Bill, for example the establishment of *Immigration Courts*. As Dr van Zyl Slabbert said at a recent migration conference, 'unimplementable legislation creates corruption, bureaucratic stagnation and allows lawyers to find loopholes'.

Brain gain

The proposed legislation's coming to terms with the country's need for skilled immigration is an important step in boosting the country's human resources. The Black Management Forum has said that the skills base in South Africa is too small to carry economic growth rates exceeding four to five percent a year. South Africa's high unemployment rate is partly the result of a large pool of unskilled and semi-skilled workers, whom the economy cannot absorb into the sectors in which there is growth, namely those such as information technology, which require skills.

In a global village where labour and capital search for the most convenient and incentive-based 'homes', immigration policy should be used as a tool to stimulate the economy. Using the example of the United States, Professor Lawrence Schlemmer noted at a recent conference on the Immigration Bill that without its absorption of immigrants the US would not be where it is today. The debate raging in Europe at the moment concerns whether immigrants are a resource or a burden. Do they generate wealth or parasitically live off the state? In the European Union now, for every unemployed foreign resident, eight more are working and providing jobs for other Europeans.

A new UN study says that as a result of declining birth rates the European Union will require 40 million immigrants by 2025 to avoid a decrease in its workforce. To keep the ratio of workers to pensioners steady, the migration flow would need to be 3.6 million a year in Germany, and 1.8 million in France.

It is with this in mind that it is necessary for an immigration policy to focus on management rather than control. The movement of people and capital cannot be 'disciplined' or controlled: it needs to be managed. Migration was very much a feature of the 20th century. Globalisation will ensure that it continues to be a feature of the 21st.

Greater global interdependence has ensured that those who have transferable skills become in effect 'citizens of the world', while those who are marginalised increasingly depend on the state. In South Africa the attraction of skilled labour is even more necessary when viewed against the background

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of HIV/AIDS, which is expected to have an impact on unskilled as well as skilled workers.

However, the state also needs to take positive steps to prevent skilled people from leaving the country. Although South Africa has drawn professionals from other parts of Africa and Eastern Europe in the last decade, the inflow has not been sufficient to compensate for those leaving. For example, in 1998 South Africa officially lost 337 engineers and related technologists, gaining just 77 in return. Twenty-eight medical practitioners and specialists immigrated to the country, but 94 left. Furthermore, many professionals leave the country without officially declaring that they are emigrating. Official figures, therefore, underestimate the extent of the skill loss.

Among higher education institutions there is concern that the Immigration Bill does not do enough to enable them to attract both students and academics from overseas, critical as it is that such institutions should be linked to the global knowledge economy. As a special adviser to the minister of education said recently, to impart skills to our people we sometimes need to attract people from abroad. For example, South Africa not only has a shortage of vocational skills but it also has a shortage of people who can provide training.

Southern African Development Community

In attempting to be perceived as the region's partner, rather than as a hegemon, South Africa has adopted an ambiguous stance in the past on migrants from other member states of the Southern African Development Community (SADC).

While recognising the support given to the liberation movements by these states, the government is also acutely aware of the local population's xenophobia engendered by high unemployment rates. Furthermore, one of the government's stated foreign policy aims is to contribute towards regional development. The attraction to South Africa of many skilled people from neighbouring states is perceived as hampering this goal. However, as Professor Crush of Queens University in Canada has pointed out, these people will emigrate anyway, if they do not come to South Africa they will just go elsewhere. South Africa needs to find a balance between building its own capacity and not depleting that of the region. It is important for Home Affairs to liaise with Foreign

Affairs in particular in order to harmonise their policies regarding immigrants, and especially those from the region.

SADC has drafted a Protocol on the Free Movement of Persons in the Community. It has yet to be implemented, and its implementation would not necessarily remove the problem of illegal immigrants from other parts of Africa outside SADC because member states of SADC do not have the ability to control their borders effectively and there are significant differences in levels of economic development. Unless South Africa is able to implement a selective immigration policy, more people will be drawn into South Africa, perceived by many as the engine room of the region, further depleting other countries' human resources.

The Protocol requires a two-thirds majority to enter into force. This seems highly unlikely in the near future, and some SADC members would certainly be loathe to accede to all of the provisions.

However, as far as South Africa is concerned, and given the importance of the hinterland for the country's own economic development and growth, a co-ordinated policy on immigration and skills should take into account the regional fears about 'brain depletion'.

Conclusion

The new Immigration Bill is a brave attempt to identify the benefits a country can derive from immigration. However, it does so within a number of parameters, such as contribution to a public sector administered fund, which may act as an obstacle.

Immigration policy needs to work *with* rather than *against* the rules of the market and the movement of people. Expansion of the pool of skilled human resources in South Africa is tightly woven into the country's attempt to become globally competitive. It needs to be kept simple so that it can be implemented effectively. Companies can make job offers to foreigners attractive in order to bring them to South Africa, but the government also needs to create a climate that encourages rather than dissuades.

Finally, immigration policy must be co-ordinated with broader foreign policy, education, trade and investment, and tourism objectives.