



October 2016

## **Comments on the Draft First Amendment of the Immigration Regulations**

### **1. Background**

The tourism industry is poised to contribute immensely to the South African economy, if favourable policies and operational environment are in place. Tourism is one of the fastest growing economic sectors in the world. It is a sector that supports 284 million or one in 11 jobs in the world. In South Africa, the total contribution of Travel & Tourism to GDP was ZAR375.5bn (9.4% of GDP) in 2015, and is forecast to rise by 3.0% in 2016 (WTTC report, 2016). In 2015 Travel & Tourism directly supported 703,000 jobs (4.5% of total employment). This is expected to rise by 3.8% in 2016 and rise by 3.2% pa to 1,001,000 jobs (5.3% of total employment) in 2026. In 2015, the total contribution of Travel & Tourism to employment, including jobs indirectly supported by the industry, was 9.9% of total employment (1,554,000 jobs). Visitor exports generated ZAR115.0bn (9.1% of total exports) in 2015. The industry also contributes to skills development and training.

The industry has however not been without its challenges. These range from health and infrastructure to policy issues, among others. One of the issues that have been burning for some time is the one on Immigration regulations. Since the implementation of the Immigration regulations of May 2014, research has revealed a 6.8% decline in international arrivals between 2014 and 2015 (TBCSA, 2015). After an outcry from the tourism industry regarding the negative effects of the immigration regulations that were gazetted in May 2014, and subsequent intervention by the Inter-ministerial Committee that was put in place by the President, the challenges regarding the Unabridged Birth Certificates (UBCs) continue relentlessly. SAA recorded that 3,974 passengers were denied boarding due to the UBCs between June 2015 and the end of July 2016. When extrapolating this to all airlines, this equates to 13,246 passengers who were denied boarding, as SAA accounts for 30% of all inbound air traffic into SA.

In what may be called an attempt to deal with this situation, the Department of Home Affairs (DHA) released a government gazette on 16 September, referred to as the Draft

First Amendment of the Immigration Regulations. The publication of this Amendment followed consultation with the newly established Immigration Advisory Board (IAB).

The new draft amendments include:

- A definition of an unabridged birth certificate as “any document or birth record issued by the relevant authority reflecting the full names and surnames, the date of birth of the child and the names and surnames of the parents of such a child.” (2) (b).
- Substitution for sub-regulation (12), to specify requirements for a parent or parents travelling with a child from a visa required country as well as a visa exempt country.
- Sub-regulation 12 (a) provides for one or both parents from a visa required country, when applying for a visa, to produce an unabridged birth certificate; a consent form or affidavit from the parent that is not travelling, authorising the other parent to travel with the child, and thirdly, where applicable, to submit a death certificate of the deceased parent registered as a parent of the child on the birth certificate.
- Sub-regulation 12 (b) stipulates that a parent or parents from a visa exempted country who are travelling with a child *may be required* by an immigration officer to produce the child’s unabridged birth certificate upon admission into or departure from the Republic. The immigration officer must, in granting such child admission into or departure from the Republic, consider:
  - (aa) The reasons for the absence of the other parent
  - (bb) Consent form from the other parent, authorising the one travelling with a child to enter into or depart from the Republic with the child he/she is travelling with
  - (cc) A court order granting full parental responsibilities and rights in respect of the child, if he/she is not the legal parent or guardian of the child
  - (dd) Where applicable, a death certificate of the other parent, provided that the DG may, where both parents are deceased and the child is travelling with a relative or another person related to him/her, approve such a person to enter into or depart from the Republic with a child

Where an immigration officer requests the production of an unabridged birth certificate, or any other documents as mentioned above or in sub-paragraphs (aa) to (dd) in the draft amendment, the officer may refuse such a child admission into or departure from the republic.

## **2. What are the issues at hand?**

The amended regulations basically grant the power of entry into or departure of children from the Republic to immigration officers. This could indicate an abdication of responsibility on the part of the minister to decisively take a decision on this matter.

Officers could actually choose to be strict in terms of demanding the required document or to be lax, thus compromising the security of the country.

These regulations imply that airlines should be responsible for not only confirming valid visas for their passengers where applicable, but also for confirming that all children travelling into South Africa, whether accompanied by their parents or not, have a valid birth certificate. The regulations in effect transfer the responsibility to the airlines to check the documentation. Prior to this requirement, all airlines are required to do is to request the passport to confirm identity of the passenger and where applicable to check the visa. South Africa is a signatory to the Chicago Convention, the country and hence, airlines should only be accepting passports and applicable visas as valid identification documentation. Birth certificates are not deemed to be valid identification documentation under the Convention's Standards and Recommended Practices. Furthermore, airlines are not equipped or skilled to validate birth certificates for children.

Thus, two years later after the publication of the immigration regulations, the industry still faces a challenge where visitors travelling with children are and will still be turned away if they have no Unabridged Birth Certificates. The phrase "*May be required*" means that it will still be necessary for parents travelling with children to carry UBCs when travelling, as immigration officers may demand them.

The challenge with the regulations is that they are not enforced consistently with neighbouring countries. The DHA did announce that minors from Lesotho will not need to produce a UBC when crossing the border if they have a letter from a South African learning institution saying that the institution holds the UBC in safe keeping. If the regulations are not uniform, potential traffickers will capitalise on loopholes and start trafficking children from Lesotho. In addition, studies have shown that child trafficking is linked to the incidence of extreme poverty. The *Institute for Trafficked, Exploited and Missing Persons* identifies poverty as the root cause of international human trafficking, with a study establishing a strong correlation between a countries' GDP and their odds of being a source or destination country for human trafficking. *Tourism Update* points out that it is ironic that a concession has been made for Lesotho, with a GDP per capita that is a fifth of South Africa, while the regulations negatively affect tourism growth from key source markets with a higher GDP per capita than SA, where trafficking is less likely.

#### **Point 4 of the Draft First Amendment of the Immigration Regulations**

##### **Section 6 - Admission and Departure**

"Regulation 6 of the Regulations is hereby amended by the substitution for sub-regulation (12) of the following sub-regulation".

"(12)(a) Where a parent or parents, from a visa required country, and who is or are travelling with a child, such parent or parents **must, when applying for a visa for the child, submit**

(i) an unabridged birth certificate of the child;

- (ii) consent in the form of an affidavit from the other parent registered as a parent on the unabridged birth certificate of the child, if he or she is not travelling with the child, authorising him or her to enter into or depart from the Republic with the child he or she is travelling with;
- (iii) a court order granting full parental responsibilities and rights or legal guardianship in respect of the child, if he or she is the parent or legal guardian of the child; or
- (iv) where applicable, a death certificate of the deceased parent registered as a parent of the child on the birth certificate.

#### **Comment -**

1] Section 12(a)(iii) is confusing. As the amendment stands at the moment it requires that the court order must be submitted irrespective of whether or not both parents or a single parent is travelling with the child. In the 2014 Regulations it is clear that it only applies when a single parent is travelling with the child/children. This needs to be clarified.

In regard to section 12 (b) (i) and 12 (b) (ii); it is inconceivable that they have used the words “may” and “must consider” in section 12(b)(i). This is a contradiction in terms of what is required.

Section (12)(b)(i)(aa) provides an open ended variation to the provisions set out in the 2014 Regulation. It would appear to be suggesting that if an immigration official is not comfortable with the reasons for the absence of the non-travelling parent, he or she may refuse the child admission into or departure from SA. As the traveller is required to provide a consent affidavit from the absent registered parent as set out in section (12)(b)(i)(bb). There is no reason for this inclusion as it creates further uncertainty and will be open to interpretation by each and every individual immigration official.

### **3. Implications for the Tourism Industry and our position as TBCSA**

The immediate effect of these regulations is the loss of passengers and thence income for the National Carrier South African Airways that may be needing cash injection given its current situation. SAA recorded that 3,974 passengers were denied boarding due to UBCs from June 2015 to end of July 2016. SAA accounts for 30% of all inbound air traffic into SA. This loss of passengers and revenue would also apply to all South African and International Airlines operating to and from South Africa. When extrapolating this to all airlines, this equates to 13,246 passengers denied boarding.

There are also costs of repatriation by airlines, for parents or minors not carrying the required documentation. This will happen in cases where the immigration officer denies a parent travelling with a child or a minor, entry into SA.

Some of the people who have been turned away at other airports on their way to South Africa have vowed not to come to South Africa again. The phenomenon of turning people away is a negative public relations exercise about South Africa, and makes it hard to sell the destination abroad. This leads to increased loss of investment

opportunities, thereby giving South African business to its competitors. When South African arrivals declined for example, Australia grew its overseas tourism to 7,2m – an 8.2% increase.

An analysis of data based on reservations by intelligence firm ForwardKeys, showed that international arrivals of families into SA increased by 1.8% between 01 September 2014 and 31 May 2015, but with effect from 01 June 2015, with the advent of the UBC requirements, they dropped by 9.8%. Reservations from the UK were down by 3%, Germany by 16%, US by 18%, the Netherlands by 3% and France and Sweden by 29%. Loss in tourism revenue occurs mainly due to a decline in tourist arrivals, especially from the key source markets. According to South African Tourism, the average spend per passenger is R13 000, which amounts to R7.51 billion revenue lost to the country. The ripple effect of this could be loss in staff earnings, possible retrenchments in small business establishments and an increased unemployment.

Although there has been a recovery in terms of tourism arrivals in 2016, where overseas arrivals went up by 19% between January and May 2016, when compared to 2015, tourism is actually not at the level where it is supposed to be. The new draft amendment may well take us two steps backward.

#### **4. Best Practices on immigration regulations for parents travelling with children**

This section outlines practices in three countries, which are based on policies around parents who travel with children, or children travelling alone.

##### **4.1. Canada**

The Canadian government strongly recommends a child travelling either with one parent/guardian, alone or with relatives should have a consent letter from the other parent or both parents. The consent letter is not a legal requirement, but may be requested by immigration authorities when entering or leaving a foreign country or in Canada. The letter demonstrates that children have permission to travel abroad from parents or guardians who are not accompanying them.

##### **4.2. United States of America**

In the United States of America, Customs and Border Protection strongly recommends that unless the child is accompanied by both parents, the adult should have a note from the child's other parent (or in the case where a child is travelling with other relatives), stating that the parent acknowledges that the other spouse is travelling out of the country with the child, and giving permission to the other spouse to do so.

##### **4.3. United Kingdom**

The practice in the United Kingdom is that they ask questions to establish the relationship of the adult that is travelling with a child. This practice is provided for under Section 55 of the Borders, Citizenship and Immigration Act 2009. The UK also

recommends carrying of a birth certificate, marriage or divorce certificates where surnames are different. A consent letter from a child's parents is normally required, where a child is travelling with relatives.

## **5. Conclusion**

South Africa is the only country that requires travellers to carry copies of UBCs in cases where a parent or parents are travelling with children. Benchmarking from the three countries mentioned in the previous paragraph shows that there are no requirements where both parents accompany the child. Also, if other visa exempt countries such as the ones mentioned above have regulations and stringent measures in place, should South Africa still put measures on visitors from these countries? It is our view that the security issues are already dealt with by those countries. It is therefore not necessary to duplicate these measures for these countries. South Africa's immigration regulations could only be implemented for visa-required countries as well as on people that are leaving the Republic to go and visit other countries. This would assist in safeguarding its own citizens and protecting children from being trafficked out of the country.

These regulations should be weighed up against losses that the economy has already incurred through a decline in overseas arrivals. The Department should undertake a study that would weigh up the benefits of the legislation against the economic losses through the tourism industry, before the finalisation of the regulations. This process would shed light on the importance of the tourism sector to the economy, as it is currently not regarded as a sector that plays a significant role in economic growth.

International best practice in dealing with child trafficking entails police working through intelligence systems, also in tandem with international agencies such as Interpol and the United Nations World Tourism Organisations Child Protection Group. We would therefore encourage that for South Africa.

The End.