

Chapter 5. Legal Position of Foreign Nationals¹³³⁹*Jon Klaaren*

§1. LEGISLATIVE COMPETENCE IN RELATION TO FOREIGN NATIONALS

688. The regulation of the entry and removal of foreign nationals is an exclusive national competence. The national government is also competent to regulate the residence of foreign nationals. Still, provincial legislatures appear competent, within the confines of the right to equality and within their substantive competences, to regulate legally resident foreign nationals. The Constitutional Court's decision in *Larbi-Odam and Others v. Member of the Executive Council for Education (North-West Province) and Another* to strike down a provincial regulation distinguishing between the extension of contracts of teachers with South African nationality and those with lawful permanent residence was based on the right to equality, not the competence of the provincial legislature.

§2. CONSTITUTIONAL PROTECTION OF FOREIGN NATIONALS

689. The legislative competence of the state to regulate the position of foreign nationals is limited by most of the provisions in the Bill of Rights, since all but three and a half of the rights in the Bill (sections 19, 20, 21(3)&(4), and 22) are available to foreign nationals. South African courts have exercised constitutional review of regulations relating to foreign nationals and specifically applied several provisions of the Bill of Rights including the right to equality, the right to dignity, the right to freedom and security of the person, the rights of detainees, and the right to freedom and movement.

690. In *Khosa*, the Constitutional Court applied the right of equality (section 9) and held that permanent residents, in this case former refugees from Mozambique, were entitled to equal treatment and equal access to social assistance. Indeed, the applicants additionally asserted their constitutional right of social security, a socio-economic right found in section 27(1) of the South African Constitution and the majority opinion confirmed that this right would apply to noncitizens. This case is thus noteworthy for using the right to equality and socio-economic rights to extend constitutional protection of social welfare beyond citizens to foreign nationals. Not all equality challenges to competent statutes discriminating on the basis of foreign nationality have been successful. In *Union of Refugee Women & Others v. Director: Private Security Industry Regulatory Authority & Others*,¹³⁴⁰ the Constitutional Court found a statute authorizing the requirement of extensive documentation before refugees could be registered as security guards not to be discriminatory

1339. Note that the Constitutional Court prefers the term 'foreign national' over that of 'alien'. See *National Coalition* (CC).

1340. (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC).

because the trustworthiness of nationals and permanent residents is easier to verify, objectively, than that of refugees. In *Minister of Home Affairs v. Watchenuka*,¹³⁴¹ the Supreme Court of Appeal used the right to human dignity (section 10) to strike down an official policy barring 'asylum seekers – people who claim to be taking refuge in this country from persecution or conflict elsewhere – from being employed and from studying while they are waiting to be recognised as refugees'.

691. In *Lawyers for Human Rights v. Minister of Home Affairs*,¹³⁴² a successful challenge was mounted to the provision in the Immigration Act¹³⁴³ distinguishing between illegal foreigners who are within the borders of South Africa and those who have not formally entered the country but were at ports of entry. Greater safeguards relating to detention were offered to those within the country as opposed to those without formal entry. The Court reasoned that the rights contained in sections 12 (right to freedom and security of the person) and 35(2) (rights of detainees) were integral to the values of human dignity, equality and freedom that are fundamental to the South African constitutional order.

§3. STATUTORY PROVISIONS REGARDING FOREIGN NATIONALS

692. The entry, residence and removal of foreign nationals are regulated by the Immigration Act.¹³⁴⁴

I. Entry and Residence

693. Under the Immigration Act, apart from the rights of entry of permanent residents, foreign nationals may enter the country if they have been issued with one of a number of temporary residence permits and if they do not fall into the category of prohibited or undesirable persons. Temporary residence permits consist of visitor's permits, study permits, treaty permits, business permits, crew permits, medical treatment permits, relative's permits, work permits, retired person's permits, corporate permits, exchange permits, asylum transit permits. Cross-border and transit permits are also authorized.¹³⁴⁵

694. Sections 25–28 of the Immigration Act concern holders of a permanent residence permit. They have all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship. Permanent residence permits may be issued as direct residence after five years of temporary residence in terms of a work or corporate permit as long as a person also has an offer of permanent employment.

1341. Paragraph 1.

1342. (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC).

1343. 13 of 2002.

1344. *Ibid.*

1345. *Ibid.*, ss 10-24.

Permanent residence is also available on a number of other grounds including holding an offer of permanent employment provided that no citizen or permanent residence is available for that employment; possessing extraordinary skills or qualifications; intending to establish a business; becoming a recognized refugee in terms of the Refugees Act;¹³⁴⁶ intending to retire in South Africa; having a minimum net worth; or being a relative within one degree of kinship of a citizen or permanent resident. A permanent residence permit may be withdrawn if the foreign national has been convicted of one of a set of offences, has failed to comply with the conditions of the permanent residence permit, or has been absent from South Africa for three years.

695. Prohibited persons are those persons with infectious diseases, with a warrant outstanding or criminal conviction for offences including murder, previously deported, who are members of an organization advocated racial hatred or social violence, who are members of a terrorist organization, or possessing fraudulent documentation. Section 29.¹³⁴⁷ Undesirable persons are those persons likely to become a public charge, judicially declared incompetent, an insolvent, ordered to depart, a fugitive from justice, with criminal convictions for lesser offences, or otherwise identified as undesirable by the Minister.¹³⁴⁸

II. Removal

696. A foreign national who is in contravention of the Immigration Act may be arrested and detained pending deportation. Safeguards available to such foreign nationals include notice of a decision to deport in writing, the power to request confirmation of detention by warrant of a court, notice in an appropriate language of such rights, an initial limitation on detention of thirty days, and minimum prescribed standards for detention.¹³⁴⁹

1346. 130 of 1998.

1347. Immigration Act, 13 of 2002, s. 29.

1348. *Ibid.*, s. 30.

1349. *Ibid.*, s. 34.

South Africa

by
Christina Murray (Editor)
Professor of Constitutional and Human Rights Law,
University of Cape Town

with

Coel Kirkby (Co-Editor)
McKenzie Fellow, University of Melbourne

This monograph is up-to-date as of January 2014

2014



Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: sales@kluwerlaw.com
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

The monograph *South Africa* is an integral part of *Constitutional Law* in the *International Encyclopaedia of Laws* series.

Printed on acid-free paper.

ISBN 978-90-654-4944-3
Constitutional Law was first published in 1992.

Murray, Christina. 'South Africa'. In *International Encyclopaedia of Laws: Constitutional Law*, edited by André Alen & David Haljan. Alphen aan den Rijn, NL: Kluwer Law International, 2014.

This title is available on www.kluwerlawonline.com

© 2014. Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to:
Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201,
USA. Email: permissions@kluwerlaw.com