



For attention: Hon JS Mananiso, MP

Email: LABill8B-2024@parliament.gov.za

23 October 2025

Dear Hon Mananiso

The Helen Suzman Foundation is an NGO that advocates for constitutional democracy and human rights in South Africa. We attach our written submission in response to the invitation for comments on the [Immigration Amendment Bill \[B 8B-2024\]](#).

We would like to confirm our interest in making oral representations at a convenient date.

Should you have any queries, it would be appreciated if you could contact me at the following email address: naseema@hsf.org.za

Yours Sincerely

Naseema Fakir
Executive Director

Director: Naseema Fakir
Trustees: • Max du Plessis • Cora Hoexter • Nick Jonsson • Daniel Jowell • Kalim Rajab • Palesa Morudu • Phila Zulu
Patron: Prof. Thuli Madonsela

Helen Suzman Foundation Trust
Trust No: 1455/93
NPO Reg. No. 036-281-NPO
PBO no: 930020049

Postnet Suite 130, Private Bag
x2600, Houghton 2041
Tel: +27 11 482 2872
Email: info@hsf.org.za
Website: www.hsf.org.za

North Block, La Val Office
Block, 45 Jan Smuts Avenue,
Westcliff, Johannesburg,
2193
South Africa

1. Introduction

- 1.1 The Immigration Amendment Bill ("**The Bill**") seeks to strengthen South Africa's immigration framework by introducing section 34(1A), which allows for the conditional release of detained foreigners where it is in the interests of justice to do so.
- 1.2 Ostensibly to strengthen the fairness and efficiency of this process, the Immigration Amendment Bill amends the Immigration Act ("**The Act**"), which allows for the conditional release of a detained foreigner where it is in the interests of justice to do so. This provision, if properly implemented, could promote proportionality and reduce unnecessary detention.
- 1.3 The Helen Suzman Foundation ("**HSF**") submits here that the Bill falls short of the intentions of giving effect to the Constitutional Court judgement *in Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22 and *Ex parte Minister of Home Affairs and Another v Lawyers for Human Rights; In Re: Lawyers for Human Rights v Minister of Home Affairs and Others* (CCT 38/16) [2023] ZACC 34 (30 October 2023) by:
 - 1.3.1 failing to provide accompanying regulations defining the "*reasonable conditions*" under which a foreigner may be released, or the "*relevant factors*" to be considered by immigration officers when exercising this discretion;
 - 1.3.2 conferring broad discretionary power on immigration officers without clear legal guidance, thereby risking arbitrary, inconsistent, or unlawful decisions;
 - 1.3.3 overlooking the serious operational and systemic challenges that will accompany implementation — including overcrowded and under-resourced detention facilities, and the risk of corruption within police and immigration processes;
 - 1.3.4 neglecting to ensure adequate training for officials tasked with applying section 34(1A) and its regulations;
 - 1.3.5 placing additional pressure on the already overburdened Magistrates' Courts, without clear procedures for hearings or guidance on legal representation; and

- 1.3.6 undermining procedural fairness by limiting access to interpreters and legal representation, both of which are essential to just decision-making.
- 1.4 As such, the Bill risks creating uncertainty and perpetuating rights violations, particularly the Constitutional rights of human dignity (section 10), right to freedom and security of the person (section 12), the rights of arrested, detained and accused persons (section 35).
- 1.5 However, if the Bill remains government policy, the HSF submits that it be amended to:
 - 1.5.1 require that the Minister of Home Affairs ("**The Minister**") promulgate regulations alongside the Bill setting out the relevant factors and reasonable conditions contemplated in section 34(1A);
 - 1.5.2 strengthen interdepartmental coordination between the Departments of Home Affairs ("**The Department**"), Justice and Constitutional Development, and the South African Police Service ("**SAPS**") to ensure lawful and humane implementation;
 - 1.5.3 provide for systematic training, oversight, and anti-corruption mechanisms; and
 - 1.5.4 guarantee that detainees have access to interpreters and legal representation to uphold constitutional fairness.

2. The Bill fails to provide clear regulations on reasonable conditions and relevant factors

- 2.1. Section 1(c) of the Bill inserts section 34(1A) into the Immigration Act, providing that:

"...the immigration officer has considered whether the interests of justice, after taking into account the relevant factors that must be prescribed by the Minister, permit the release of such foreigner subject to reasonable conditions (...)."

- 2.2. In the proposed section 34(1A)(a)(ii), reference is made to "*relevant factors*" and the release of a foreigner subject to "*reasonable conditions*." However, the Bill offers no guidance on what these reasonable conditions might entail or what factors immigration officers must consider.

- 2.3. Without clear regulations, immigration officers have no framework for determining relevant factors, creating a risk of arbitrary or inconsistent decision-making.
- 2.4. Past experience demonstrates the consequences of leaving regulations unpromulgated. When the Minister failed to issue regulations under the Citizenship Act, this created legal uncertainty and repeated contraventions of constitutional rights.
- 2.5. The Department had initially been ordered to promulgate regulations in relation to section 2(2) of the Citizenship Act on 03 July 2014, followed by a Supreme Court of Appeal order on 06 September in 2016 and a failed appeal by the Department,
- 2.6. This culminated in the High Court holding the Department in contempt in *Khoza v Minister of Home Affairs and Another* [2023] ZAGPPHC 816. As it was nearing a decade of the initial order, the court explicitly admonished the Department for failing to promulgate necessary regulations.
- 2.7. HSF submits that these risks can be mitigated if the Select Committee on Security and Justice amends the Bill to require that:
 - 2.7.1. *Reasonable conditions* and *relevant factors* are spelled out in accompanying regulations; and
 - 2.7.2. The Minister promulgates these regulations concurrently with the passage of the Amendment Bill.
- 2.8. Providing such clarity would give immigration officials legal certainty, uphold constitutional rights, and reduce the likelihood of litigation arising from arbitrary or inconsistent decision-making.

3. The Bill Fails to Codify the Interest-of-Justice Criteria

- 3.1. When the Bill was served before the Portfolio Committee on Home Affairs ("**The Committee**"), it was resolved that the "*interest-of-justice*" criteria referenced in section 34(1A) should be codified in regulations accompanying the Bill.
- 3.2. According to a press release, the Committee's view was informed by the fact that the Department of Home Affairs' standard operating procedure is not publicly accessible and can be amended without stakeholder input. Codifying

these criteria in regulations would, in the Committee's view, allow for meaningful parliamentary oversight and transparency.

- 3.3. HSF submits that failure to codify the interest-of-justice criteria in binding regulations would leave immigration officials with wide, unstructured discretion, undermining the purpose of section 34(1A) and creating the risk of arbitrary or inconsistent decision-making.

4. Concerns Regarding the Implementation of Section 34(1A): Safeguards

- 4.1. HSF is concerned that the practical implementation of section 34(1A) will be ineffective unless robust safeguards are integrated into the system. Given the oversight role of the Select Committee on Security and Justice, HSF urges the Committee to engage the Department, the Department of Justice and Constitutional Development, and SAPS to ensure that implementation plans adequately address foreseeable risks.
- 4.2. Corruption among police and immigration officials is a particular concern. Specific areas requiring attention include:
 - 4.2.1. Police holding cells may be used as places of detention for foreigners. These facilities are often overcrowded and under-resourced, creating conditions that may foster bribery and corruption.
 - 4.2.2. There is a clear need for robust safeguards to prevent abuse within the detention system.
 - 4.2.3. Police officials and immigration officers must receive comprehensive training on the Immigration Act and the implementation of section 34(1A) and its accompanying regulations.
- 4.3. Without these measures, the rollout of section 34(1)(a) risks undermining both the integrity of immigration enforcement and the protection of detainees' rights.

5. Pressure on the Legal System

- 5.1. Section 34(1)(b) and (2) imposes a 48-hour time limit on immigration officials to bring detainees before a Magistrate. However, the Bill does not address several practical challenges that could arise, including:
 - 5.1.1. The additional case load burden this will place on Magistrates' Courts.

5.1.2. Whether Magistrates will be required to receive training to preside over immigration hearings.

5.1.3. Whether hearings will be conducted in open court or in chambers.

5.2. These practical challenges create a scenario that increases the opportunities for corruption and bribery to occur in order to have matters expedited.

5.3. HSF recommends that the Department collaborate with the Department of Justice and Constitutional Development to strengthen legal representation provisions. This would ensure that detainees have access to appropriate and adequate legal assistance, including through pro bono organisations or Legal Aid South Africa.

6. The Right to an Interpreter

6.1. Section 1(c)(iv) of the Bill, read with section 34, provides that an interpreter must be supplied “when possible, practicable, and available.” The use of an interpreter is critical to the fairness of proceedings.

6.2. Errors in translation can have devastating consequences, as decision-makers may be unable to take a lawful and informed decision if the facts are inaccurately conveyed.

6.3. HSF submits that clear procedures and resources must be in place to guarantee access to interpreters for all detainees, ensuring that language barriers do not compromise justice.

7. Conclusion

7.1. The Bill has commendable intentions in seeking to introduce a mechanism for the conditional release of detained foreigners under section 34(1A) and to ensure that such decisions are guided by the interests of justice.

7.2. However, HSF submits that the Bill falls short of these objectives by:

7.2.1. failing to provide accompanying regulations that define *reasonable conditions* for release and the *relevant factors* that immigration officers must consider;

- 7.2.2. leaving wide discretionary powers in the hands of immigration officials without clear guidance, creating a risk of arbitrary or inconsistent decision-making;
 - 7.2.3. overlooking operational and systemic challenges, including overcrowded and under-resourced detention facilities and the potential for corruption among police and immigration officials;
 - 7.2.4. failing to ensure adequate training for officers tasked with implementing section 34(1A);
 - 7.2.5. imposing a tight 48-hour timeframe for bringing detainees before a Magistrate without addressing the capacity of courts or the need for legal training and support; and
 - 7.2.6. providing insufficient guarantees that detainees will have access to interpreters and legal representation, which are essential to a fair and just process.
- 7.3. As such, the Bill risks undermining both the integrity of South Africa's immigration enforcement system and the constitutional rights of detainees.
- 7.4. HSF therefore submits that, if the Bill is to remain government policy, it should be amended to establish and reinforce institutional safeguards for training and oversight mechanisms and must be accompanied by regulations in order to prevent implementation lacunas and avoid unnecessary litigation.
- 7.5. All of these measures are necessary to ensure that South Africa's immigration system operates in accordance with the Constitution, respects the rule of law, and safeguards the rights and dignity of detained foreigners.