

The 'undesirable person' provisions of the new immigration legislation

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The Immigration Amendment Act, No 13 of 2011, and the new regulations under the Act, provide for what is termed the 'undesirable person'. Essentially, a foreign national who falls within a category listed in s30(1) of the Act can be declared by the Department of Home Affairs (DHA) as an 'undesirable person'.



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S30(1) of the Act provides a list of eight instances in which a foreign national can be declared as 'undesirable', that is any foreign national that:

- is likely to become a public charge [s30(1)(a)];
- is declared as such by the Minister of Home Affairs [s30(1)(b)];
- is found to be judicially incompetent [s30(1)(c)];
- is an unrehabilitated insolvent [s30(1)(d)];
- is ordered to depart from the Republic [s30(1)(e)];
- is a fugitive from justice [s30(1)(f)];
- is the holder of previous criminal convictions without the option of a fine for conduct that would be an offence within the Republic [s30(1)(g)];
- has overstayed on a permit issued by the DHA [s30(1)(h)].

Focus of article

This article focuses on s30(1)(h), since it is a new category, which effectively has removed the imposition of fines upon foreign nationals who remain in the Republic on expired permits. Under the Act, foreign nationals who overstay in the Republic can now be declared as 'undesirable'.

Regulation 27(3) provides that a person who overstays in the Republic after the expiry of their visa will be declared as 'undesirable'. The period of the declaration is determined by examining the foreign national's period of overstay in the Republic. Foreign nationals who overstay in the Republic for a period not exceeding 30 days will be declared as 'undesirable' for a period of 12 months. Foreign nationals who overstay for period exceeding 30 days will be declared as 'undesirable' for a period of five years.

In addition to this, the DHA has also introduced Directive 9 of 2014 which confirms Regulation 27(3) and stipulates that persons who overstay on their permits will be declared as 'undesirable'.

S30(1)(h), read together with regulation 27(3) and the directive, effectively means that even if a particular foreign national has submitted an application for an extension of an existing visa, where that visa expires after submission, such a foreign national can and will be declared as an 'undesirable person'.

Johnson case

In *Johnson and Others v Minister of Home Affairs and Others; InRe: Delorie and Others v Minister of Home Affairs and Another* (10310/2014, 10452/2014) [2014] ZAWCHC 101 (30 June 2014), the Western Cape High Court considered the impact on s30(1)(h), regulation 27(3) and the directive on two families separated due to declarations of undesirability.

The Western Cape High Court elected to consolidate the Johnson and Delorie applications since they both sought to urgently remove the 'undesirable person' status of two foreign nationals who had left the Republic on expired permits.

The Johnson case concerned Louise Henrikson Egedal-Johnson, a Danish national who, since 2009, has been married to Brent Johnson, a South African citizen. The couple had one child born of the marriage. Since her marriage to Johnson, Egedal-Johnson remained in the Republic on a relative's permit which was issued by the DHA on 28 February 2012. The permit expired on 27 February 2014. On 10 February 2014, Egedal-Johnson applied to have the permit extended.

As at 28 May 2014, her extension application had not been adjudicated upon by the DHA. On 28 May 2014, Egedal-Johnson and her family left South Africa. In departing from South Africa, the immigration officials at Cape Town International Airport issued Egedal-Johnson with a form declaring her as an 'undesirable person' since she had overstayed in the Republic for a period of approximately 90 days.

When Egedal-Johnson attempted to re-enter the Republic, she was refused entry by immigration officials and was subsequently deported to Denmark with her child.

Delorie application

The Delorie application concerned David Ross Henderson, a Zimbabwean national, who was married to Cherene Theresa Delorie, a South African permanent resident. The couple had two children born of the marriage. Henderson remained in the Republic on a valid work permit, which expired on 21 April 2014. Henderson was unable to apply for an extension of his work permit before its expiry. As such, when he left South Africa on a business trip to Nigeria, immigration officials at the Cape Town International Airport declared Henderson as an 'undesirable person' since he had overstayed in the Republic for a period of approximately 30 days.

Henderson was unable to return to the Republic due to his 'undesirable' status.

It is within the context of these facts that Johnson and Delorie, on behalf of their families, applied for urgent relief from the Western Cape High Court.

Yekiso J made the following key findings: Shortly before Egedal-Johnson and Henderson had departed from the Republic on 28 May 2014, the immigration laws relating to 'undesirable' persons had fundamentally changed and the introduction of s30(1)(h) meant that foreigners who overstayed on expired permits could be declared as 'undesirable'. Their status as

'undesirable' persons meant that Egedal-Johnson, Henderson and their respective families were suffering prejudice and they had no alternative remedy available to them at the time of instituting the urgent applications. It was held that the 'undesirable' status of Egedal-Johnson and Henderson is suspended. Egedal-Johnson and Henderson were permitted to enter and remain in the Republic.

Subsequent to the enactment of the Act and regulations, the DHA introduced an appeal process for persons who had been declared as 'undesirable' after overstaying on expired permits.

The applicants were invited by the DHA to institute appeals against their 'undesirable' status and the applicants elected to lodge such appeals. However, at the time at which the matter was adjudicated upon, the appeals lodged by the applicants had not yet been processed by the DHA. It was for this reason that Yekiso J was of the view that the court should consider the application. Yekiso J also considered the urgent nature of the applications and the fact that the applicants had demonstrated the possession of a prima facie right to relief.

Appeal process

Importantly the notice of 'undesirable' status issued to any foreigner declared by the DHA as such provides that such a foreigner is entitled to appeal such a decision by lodging a formal appeal with the DHA.

The formal appeal must include the following documentation:

- written representations stipulating reasons why the declaration should be removed;
- a copy of the declaration of undesirability;
- copies of the foreigner's passport; and
- copy of the acknowledgement of receipt if the foreigner has applied for an extension of their visa.

The DHA has indicated that appeals will be adjudicated upon within approximately 48 hours. However, there is no guarantee that this will be the case in practice.

Employers who employ foreign nationals should endeavour to inform such individuals of the implications of the 'undesirable person' provisions of the Act.

Further, foreign nationals who seek the extension of existing visas must ensure that such applications are made at least 60 days prior to expiry of their existing visas. A failure to do so may result in such foreign nationals being declared as 'undesirable' persons.

Foreign nationals who are declared as 'undesirable' can lodge a formal appeal to remove that declaration on good cause shown. If the DHA does not consider the appeal within a reasonable period of time, foreign nationals may be able to institute court action in order to remove that declaration.

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