

CITIZENSHIP AND IMMIGRATION

Departure from Namibia Regulation Act 34 of 1955, as amended in South Africa prior to Namibian independence

Summary: This Act ([RSA GG 5509](#), also published in [OG 1920](#)) regulates the departure of persons from Namibia. More specifically, it prohibits departure without a passport or a permit, or at a place other than an official border post. It also makes it an offence to assist anyone to leave the country illegally.

Applicability to SWA: Section 1 defines “Union” to include “the territory of South West Africa”. Section 10 of the original Act stated: “This Act shall apply also in the territory of South-West Africa.” Section 10, as amended by *Act 69 of 1962*, stated: “This Act and any amendment thereof shall apply also in the territory of South West Africa, including that portion thereof known as the Eastern Caprivi Zipfel.” These provisions were repealed after Namibian independence.

Transfer of administration to SWA: The relevant Transfer Proclamation is the Executive Powers (Interior) Transfer Proclamation (AG 17/1978), dated 30 March 1978. However, section 3(1)(6) of this Proclamation excluded the Act from the operation of section 3(1) of the General Proclamation, meaning that the administration of the Act was not transferred to SWA.

Amendments: The following pre-independence South African amendments applied to SWA –

- *Commonwealth Relations Act 69 of 1962* ([RSA GG 264](#))
- *Residence in the Republic Regulation Act 23 of 1964* ([RSA GG 746](#))
- *Border Control Act 61 of 1967* ([RSA GG 1745](#))
- *Admission of Persons to and Departure from the Republic Regulation Amendment Act 38 of 1969* ([RSA GG 2370](#))
- *Departure from the Union Regulation Amendment Act 7 of 1979* ([RSA GG 6340](#))
- *Aliens and Immigration Laws Amendment Act 49 of 1984* ([RSA GG 9182](#))
- *Transfer of Powers and Duties of the State President Act 97 of 1986* ([RSA GG 10438](#)).

Act 4/1993 ([GG 686](#)), which commenced on 22 September 1994 (GN 172/1994, [GG 925](#)), amends sections 1, 2, 6, 8 and 9; inserts section 6A; repeals section 10; and substitutes certain expressions and the long title. It also substitutes section 11 to change the name of the Act (from “Departure from the Union Regulation Act”).

Regulations: Pre-independence regulations have not been researched. Post-independence regulations are contained in GN 136/1994 ([GG 895](#)), as amended by GN 243/2013 ([GG 5284](#)) (which substitutes Regulation 2 and adds Annexure B), and by GN 7/2020 ([GG 7099](#)) (which substitutes Regulations 2 and 3, and Annexure B).

Cases:

S v Lofty-Eaton & Others (1) 1993 NR 370 (HC)

S v Malumo & Others (In re Ndala) 2014 (3) NR 690 (the question of whether this Act is applicable to the Eastern Caprivi Zipfel was put forward, but the Court ruled that the issue can be raised only after the conclusion of the trial in terms of s. 319 of the Criminal Procedure Act 51 of 1977).

Namibian Citizenship Act 14 of 1990

Summary: This Act ([GG 65](#)) regulates the acquisition and loss of Namibian citizenship in accordance with Article 4 of the Constitution. It repeals the *South African Citizenship Act 44 of 1949* and the *Residence of Certain Persons in South West Africa Regulation Act 33 of 1985*. It was brought into force with effect from 15 September 1990 by Proc. 13/1990 ([GG 72](#)).

Amendments: The Immigration Control Act 7 ([GG 690](#)) of 1993, which was brought into force on 29 July 1994 (GN 133/1994, [GG 895](#)), amends section 29.

Regulations: There is no savings clause for regulations made in terms of the repealed laws. Regulations made in terms of the current Act are contained in GN 14/1991 ([GG 154](#)), as amended by GN 135/2018 ([GG 6647](#)) (concerning fees payable for citizenship certificates and renunciation of Namibian citizenship).

Cases:

Alberts v Government of Namibia & Another 1993 NR 85 (HC) (holding that the Constitution does not allow Parliament to enact legislation depriving a Namibian citizen by birth of his or her citizenship by reason of having served in the armed forces of another country; that the Act does not purport to do this; and that the Constitution may not be effectively altered by a policy decision)

Swart v Minister of Home Affairs 1997 NR 268 (HC) (section 5; addresses the application for citizenship by naturalisation of a South African citizen resident in Namibia at the time of independence, holding that he was lawfully domiciled in Namibia for this purpose under the relevant laws on immigration, without having to obtain a permanent residence permit; also holding that his failure to apply for citizenship by registration, which he could have done within one year after independence, did not prevent an application for citizenship by naturalisation)

Tlhoru v Minister of Home Affairs 2008 (1) NR 97 (HC) (section 5(1)(g) requiring renunciation of foreign citizenship in order to attain Namibian citizenship by naturalisation and section 26 prohibiting dual citizenship both held to be constitutional; judgment notes that section 26 must be interpreted in light of overall constitutional scheme for citizenship, meaning that citizenship by birth may not be regulated or derogated from by statutory provisions and that citizenship by descent may be regulated only by a requirement of registration)

Minister of Home Affairs v Dickson & Another 2008 (2) NR 665 (SC)(ordinary residence for purposes of acquiring citizenship by marriage means lawful residence)

Le Roux v Minister of Home Affairs and Immigration & Others 2011 (2) NR 606 (HC) (endorsing and applying the *Tlhoru* holding that section 26 interpreted in light of the Namibian Constitution does not apply to Namibian citizens by birth)

Berker v Minister of Home Affairs and Immigration & Others 2012 (1) NR 354 (HC) (refers to court order made by agreement between parties confirming that application of section 26 is unconstitutional insofar as it is applied to deprive Namibians by birth or descent of their Namibian citizenship; special costs awarded against respondents, because applicant's Namibian passport was unlawfully confiscated by immigration official on grounds that she also held a German passport and because she was "treated as foreigner in her own country").

See also *MW v Minister of Home Affairs* 2014 (4) NR 1108 (HC), reversed on appeal 2016 (3) NR 707 (SC) (meaning of ordinary residence in Art 4(1)(d) of Namibian Constitution)

See also *Ex parte: Mukondomi* (HC-NLD-CIV-MOT-ALP-2020/00004) [2020] NAHCNLD 89 (20 July 2020) (deals with domicile rather than citizenship, for purposes of an application for admission as a legal practitioner, but discusses in some detail the concept of a good faith marriage as referred to in Art 4(3)(a)(aa) of the Namibian Constitution).

Commentary:

Faith Chipepera & Katharina G Ruppel-Schlichting, “Namibia: Children’s right to citizenship” in Oliver C Ruppel (ed), *Children’s Rights in Namibia*, Konrad Adenauer Stiftung, 2009, available at www.kas.de

Kaity Cooper & Dianne Hubbard, “By the Skin of its Teeth: How Namibia narrowly avoided a Constitutional crisis”, Citizenship Rights in Africa Initiative blog post, 7 February 2017, available at <http://citizenshiprightsafrika.org/by-the-skin-of-its-teeth-how-namibia-narrowly-avoided-a-constitutional-crisis>.

Namibian Citizenship Special Conferment Act 14 of 1991

Summary: This Act ([GG 311](#)) makes provision for the conferment of Namibian citizenship upon certain descendants of persons who left Namibia because of persecution by the colonial government.

Regulations: The Act makes no provision for regulations.

Immigration Control Act 7 of 1993

Summary: This Act ([GG 690](#)) regulates and controls the entry of persons into Namibia and their residence inside the country. It also provides for the removal from Namibia of certain immigrants. It repeals the *Aliens Control Act 30 of 1963*, *Aliens Registration Act 26 of 1939*, *Residence in the Republic Regulation Act 23 of 1964* and *Admission of Persons to Namibia Regulation Act 59 of 1972*, as well as most of the *Aliens Act 1 of 1937*. It was brought into force on 29 July 1994 by GN 133/1994 ([GG 895](#)).

Regulations: Regulations made in terms of the repealed legislation survive in terms of section 60(3) of this Act, but pre-independence regulations have not been researched.

Immigration regulations made in terms of the current Act are contained in GN 134/1994 ([GG 895](#)). The portions of the regulations relating to fees for various visas and permits are amended by GN 82/2008 ([GG 4029](#)). Regulation 13 on “Contagious infections or viruses or diseases” and Regulation 24 on visa fees were substituted by GN 133/2010 ([GG 4514](#)), which also amended Annexure I of the regulations by deleting item 10. Regulation 13 is amended to add ebola to the list of prescribed diseases by GN 145/2014 ([GG 5556](#)), but this amendment ignores the substitution of Regulation 13 by GN 133/2010 and does not make sense in respect of the substituted regulation.

The Government Notice which issues these regulations repeals the regulations published in RSA GN R.337/1964, RSA GN R.289/1964, RSA GN R.1711/1967, RSA GN R.82/1969, RSA GN R.3933/1969, RSA GN R.878/1970 and RSA GN R.1350/1972.

These regulations are also amended by GN 138/2018 ([GG 6647](#)) (substitution of Regulation 24 on fees, substitution of Annexure H, and amendment of Annexure I).

Note that there is some contradictory overlap between regulation 24 and regulation 29 as a result of this amendment.

These regulations are further amended by GN 8/2020 ([GG 7099](#)) (amendment of regulation 2, insertion of regulation 2A, and insertion of Annexure AF to update ports of entry).

Notices: Maximum amounts in terms of section 11(2)(a) are set in GN 135/1994 ([GG 895](#)).

Pursuant to section 40(1) of the Act, GN 318/2020 ([GG 7420](#)) provides an exemption from section 39(2)(h) (on prohibited immigrants) for any person whose stay in Namibia has exceeded the period stipulated in the relevant permit, subject to the condition that the person in question leaves Namibia on or before 28 February 2021.

Cases: The following cases concern the present Act –

- Swart v Minister of Home Affairs* 1997 NR 268 (HC) (sections 1, 2(1)(b), 22; also discusses section 1 of the previous *Admission of Persons to the Republic Regulation Act 59 of 1972* and section 3(2)(b) of the previous *Residence of Certain Persons in South West Africa Regulation Act 33 of 1985*)
- S v Ithilenga* 1997 NR 239 (HC) (section 56(d))
- Correia v Commanding Officer, Windhoek Prison & Another* 1999 NR 48 (SC) (sections 24, 36, 39(2)(h), 41, 42(4)(b)(i))
- S v Russel* 1999 HR 39 (HC) (section 30(1)(a)—meaning of “employment”)
- Frank & Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC); 2001 NR 107 (SC) (Immigration Selection Board as an administrative body subject to Article 18 of the Constitution; interpretation of section 26(3)(e); factors relevant to decision on permanent residence)
- Sikunda v Government of the Republic of Namibia (3)* 2001 NR 181 (HC) (section 49); *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC) (section 49; Composition of the Security Commission pursuant to Article 114 of the Constitution; Security Commission as subject to Articles 18 and 12 of the Constitution)
- Lalandii (Pty) Ltd v Butshingi NLLP* 2002 (2) 409 NLC (no legal obligation on potential employer to furnish letter of motivation in support of application to regularise immigration status)
- Miller & Paschke v The Law Society of Namibia NLLP* 2002 (2) 328 NHC (discussion of application of Act to non-Namibians married to Namibian citizens and domiciled in Namibia)
- Mulopo v Minister of Home Affairs* 2004 NR 164 (HC) (right to fair administrative action based on valid reasons, failure to establish right to residence based on Namibian citizenship of children and effect of failure to join Immigration Selection Board)
- Zhu v Minister of Home Affairs & Another* 2004 NR 170 (HC) (deportation cannot be imminent without a directive from an immigration tribunal)
- S v Mushwena & Others* 2004 NR 276 (SC) (general discussion)
- S v Ngono* 2005 NR 34 (HC) (section 12)
- S v Makonde*, Case No 123/2005 (appropriate sentence for contravention of section 29(5); quoted in *S v Jeremani* 2009 (1) NR 149 (HC)
- S v Cambinda; S v Agostino; S v Carvalho* 2006 (2) NR 550 (HC) (appropriate sentences for offences under Act)
- S v Koch* 2006 (2) NR 513 (SC) (section 47 of Act discussed in *dicta* at 525-26)
- S v Marisa* 2006 (2) NR 586 (HC) (sentence imposed under section 29(5) confirmed)
- Getachew v Government of the Republic of Namibia* 2006 (2) NR 720 (HC), 2008 (1) NR 1 (SC) (sections 22, 24, 35 and 42)
- Minister of Home Affairs v Dickson & Another* 2008 (2) NR 665 (SC) (section 22)
- S v Jeremani* 2009 (1) NR 149 (HC) (appropriate sentence for contravention of section 29(5))
- S v Willem; S v Nkomo* 2009 (1) NR 352 (HC) (formulation of charges under section 12(1) and (4))
- S v Mbele* 2011 (1) NR 357 (HC) (section 29(1)(a))
- Berker v Minister of Home Affairs and Immigration & Others* 2012 (1) NR 354 (HC) (refers to court order made by agreement between parties confirming that application of limits of entry into, and residence in, Namibia in Part V of Act to Namibian citizens is unlawful)

S v Okuani 2014 (1) NR 16 (HC) (formulation of criminal charge under section 12 of Act)

Fernandes v Minister of Home Affairs and Immigration & Another 2015 (3) NR 805 (HC) (section 27(2)(b); administrative body bound by reasons for decisions given to applicant at the relevant time, and must provide facts on which decision is based if such are not generally well known)

Namrights Inc v Nicodemus & Others 2016 (2) NR 596 (LC) (applicability of sections 24 and 27 to person with refugee status)

S v Munuma & Others 2016 (4) NR 954 (SC) (inapplicability of sections 7 and 9 to persons involuntarily deported back to Namibia)

Minister of Home Affairs and Immigration v Prollius (SA76-2017) [2020] NASC (19 March 2020) (interpretation of “only” in s 22(2)(b); Namibian domicile cannot be acquired while present in Namibia only on a work permit); overrules *Prollius v Minister of Home Affairs and Immigration* (HC-MD-CIV-GEN-2016/00251 2016/00268); *Holtmann v Minister of Home Affairs and Immigration* (HC-MD-CIV-GEN-2016/00347) [2017] NAHCMD 343 (24 November 2017)

Viljoen v Chairperson of the Immigration Selection Board & Another 2017 (1) NR 132 (HC) ((a) the words “permanently resident in Namibia” in s. 26(3)(g) cannot be taken to mean the holder of a permanent residence permit; (b) a person who is domiciled in Namibia is “permanently resident in Namibia” for the purposes of that provision; (c) the Board abused its discretion in its consideration of whether the daughter in question was “able” to maintain her mother, which cannot be equated with “proof of ability to maintain”. Also, where an administrative decision is unlawful and the unlawfulness is “gravely material” and has undermined the statutory remedies provided, this constitutes exceptional circumstances which justify the court in supplanting the statutory remedies, proceeding with the judicial review process and ordering the administrative body to grant the outcome sought by the applicant within a specified time period; for a contrasting decision on exhaustion of statutory remedies, see *Four Three Five Development Companies (Pty) Ltd v Namibia Airports Company & Others* 2017 (1) NR 142 (HC)).

The following cases were decided under this Act’s predecessor, the *Admission of Persons to the Republic Regulation Act 59 of 1972* –

Djama v Government of the Republic of Namibia 1992 NR 37 (HC)
S v Luanda & Another 1993 NR 287 (HC).

Namibia Refugees (Recognition and Control) Act 2 of 1999

Summary: This Act ([GG 2065](#)) concerns the recognition and control of refugees in Namibia and gives effect to certain provisions of international conventions on refugees to which Namibia is party. It was brought into force on 22 September 2000 by GN 234/2000 ([GG 2412](#)).

Regulations: Namibia Refugees (Recognition and Control) Regulations are contained in GN 236/2000 ([GG 2412](#)).

Notices: Osire was declared as a reception area for refugees and others in GN 235/2000 ([GG 2412](#)).

Related international agreements: The Namibia Refugees (Recognition and Control) Regulations make reference to compliance with Article 35 of the *UN Convention on Refugees, 1951* and Article II of the *Protocol relating to the Status of Refugees (New York Protocol)*,

1967. See also *SADC Declaration on Refugee Protection within Southern Africa, 1998* (not legally-binding).

Cases: *S v Isaac* 2004 NR 122 (HC); *Namrights Inc v Nicodemus & Others* 2016 (2) NR 596 (LC) (section 18; UN Convention Relating to the Status of Refugees, Articles 2 and 26).

Namibian Citizenship (Second) Special Conferment Act 6 of 2015

Summary: This Act ([GG 5775](#)) makes provision for the conferment of Namibian citizenship upon certain descendants of persons who left Namibia because of persecution by the colonial government. It contains provisions similar to those in the Namibian Citizenship Special Conferment Act 14 of 1991 ([GG 311](#)). However, the time period covered by the 1991 Act has expired; the 2015 Act covers an additional time period.

Regulations: Regulations are authorised by section 5 of the Act, but none have yet been promulgated.

One-Stop Border Posts Control Act 8 of 2017

Summary: This Act ([GG 6423](#)) provides for the conclusion of agreements between Namibia and adjoining countries on the establishment and implementation of one-stop border posts which are jointly managed.

Regulations: Section 9 of the Act authorises regulations, but none have yet been issued.

INTERNATIONAL LAW

****African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 2009**

****African Union Convention on Cross-Border Cooperation (Niamey Convention), 2014**
Constitution of the International Organization for Migration (IOM), 1953

Convention against Transnational Organized Crime (Palermo Convention), 2000
Convention relating to the Status of Refugees, 1951

Protocol relating to the Status of Refugees (New York Protocol), 1967

****OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969**

***SADC Protocol on the Facilitation of Movement of Persons, 2005**

Cases on international law: *S v Mushwena & Others* 2004 NR 276 (SC) (*per* minority opinion of O'Linn, AJA) refers to the "Convention relating to the Status of Refugees and Stateless Persons as Supplemented by the Protocol relating to the Status of Refugees" (confirming that Namibia acceded to the Protocol on 17 February 1995) and the OAU Convention governing the Specific Aspects of Refugee Problems in Africa.