

**Recognising rights,
Recognising political realities**

**The case for
regularising
irregular migrants**

July 2006



About JCWI

The JCWI (Joint Council for the Welfare of Immigrants) is an independent national organisation which has been providing legal representation to individuals and families affected by immigration, nationality and refugee law and policy since 1967. JCWI actively lobbies and campaigns for changes in law and practice and its mission is to eliminate discrimination in this sphere.

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Report summary

Main findings

1. A regularisation scheme alone will not solve irregular migration and labour migration. Regularisation is not without disadvantages.
2. However there is ample scope to mitigate these disadvantages with a view to capitalising on the cost benefits and ensuring social justice in the UK.
3. As a policy initiative concurrent with immigration policy reform and a strengthening of migrants' rights a one-off general regularisation could make a significant contribution to managing migration, reduction of labour exploitation and social cohesion.
4. Regularisation could have important repercussions for social justice in the UK by ensuring rights for all living in the UK; that the presence of an irregular workforce without rights does not undermine the conditions for the UK domestic workforce; and that that the irregular migrant population does not impact on equalities targets for the settled migrant communities.
5. Regularisation would acknowledge international social injustice by recognising that the irregular migrant population is here for various reasons ranging from civil conflict to poverty in their countries of origin.

Main recommendations:

1. The Government should urgently consider a well-managed one-off general regularisation for the main irregular groups i.e, failed asylum seekers, overstayers, and illegal entrants (including trafficked persons).
2. The Government should consider the long-term benefits of a permanent regularisation process which would use a seven-year residence period as a gateway to Indefinite Leave to Remain.
3. The Government should urgently review the new Points Based Scheme for economic migration so as to ensure its currently stratified and restrictive nature does not contribute to any continuance of an irregular migrant presence in the UK.
4. In particular all non-EEA economic migrants entering the UK, whether skilled or unskilled, should enjoy the prospect of earning Indefinite Leave to Remain.
5. The Government should urgently review ratification of the major treaties promoting migrant rights, i.e, the Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16.V.2005), the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18.XII.1990); and the European Convention on the Legal Status of Migrant Workers (Strasbourg, 24.XI.1977).

JCWI's recommendations for options for a regularisation model

1. The Government should look at the benefits of a one-off general regularisation awarding Indefinite Leave to any irregular migrant who can demonstrate a seven-year period of residency in the UK. The main beneficiaries would be persons who were in the UK legally but who have since fallen into irregularity i.e. failed asylum seekers and overstayers.

2. In addition, irregular migrants persons who can demonstrate a period of residency between two and seven years should be eligible for a gateway of temporary leave subsequently leading to permanent stay if they can meet at least one of a number of additional criteria: i.e., can evidence employment or other contribution to UK society; family ties; good character references from designated referees.
3. Any irregular migrant who has been present in the UK who can show they have been trafficked and/or that they are the victim of labour or sex exploitation should be eligible for temporary leave to remain.
4. The two- and seven-year residency periods are suggested together with a staged process of initial temporary leave for some and immediate indefinite leave for others because there are precedents for this model in more limited cohort specific regularisations that have occurred in the UK since 1998 and existing concessions.
5. The restriction for persons present for less than two years will enable the Government to safeguard integrity of the immigration and asylum system and help limit "pull".

1. Introduction

Official figures suggest the UK has an irregular migrant population of up to 570,000 (Home Office: 2005). It is varied in character consisting of among others clandestine or trafficked migrants, failed asylum seekers and overstayers. What they all have in common is that they have entered or remain in the UK in an unregulated immigration capacity. Living in fear of deportation, they are consequently without means to enforce their rights, and are one of the most disadvantaged and exploited segments of the population.

Regularisation is the name of the process which would enable this group to earn authorisation to be present here in a regulated immigration capacity and, free of the threat of deportation, be better able to realise their rights and less prone to exploitation. Regularisation is different to an amnesty because it is a managed process. As a term it is also preferable because it acknowledges that irregularity in immigration status is primarily a bi-product of regulations that needs changing and is not an inherently criminal activity that requires absolution.

Earlier this year it was estimated that regularisation, by capturing hitherto lost taxation, national insurance contributions and other revenues could net the Treasury up to £1 billion a year more when set against the potential £4.7 billion cost of deporting the entire irregular migrant population (IPPR: 2006). In returning to the subject of regularisation and arguing in favour of it here, JCWI concurs on the potential cost benefits. But as one would expect from an NGO that campaigns against discrimination towards migrant communities, we do not just argue on grounds of cost. We believe there are pressing human rights reasons for providing authorisation to members of the irregular

migrant population to remain in the UK. Much migration, regular or irregular, is the result of global inequity and injustice and, when the participation of irregular migrants in UK society goes unrecognised, that injustice is reproduced here, and in turn endangers everyone's access to justice and equality.

We also argue from JCWI's long experience of the realities of the immigration system. Irregular migration is frequently the response of the world's desperate to an immigration system that has always been particularly restrictive to the global south. With the introduction of managed migration, the national identity register and the new immigration rules by 2008, a whole new era of immigration control is upon us, characterised by surveillance of the new immigrant population within. New civil penalties for employers who employ irregular workers will entail more workplace surveillance and apprehension of people who are in the UK in an irregular capacity. More spot checks for irregular migrants outside the workplace are also taking place (Letter from the Home Minister Andy Burnham MP to Kate Hoey MP, April 2006, M7430/6), and with the expected introduction of identity cards for foreign nationals before the UK population, these may just increase.

One would expect that there would be an increase in detention and removals as a result of surveillance and apprehension but already at its current rate of 20,000 deportations a year it will take the Government at least another 25 years to remove more than half a million undocumented migrants from the UK (Former Immigration Minister Tony McNulty, interviewed BBC *Newsnight* Tuesday 16 May). Therefore any party in power that does not consider regularisation as a serious policy solution in a new era of immigration control, is simply "making a rod for its own back" as surveillance and apprehension can only increase the population that requires costly detention and deportation. Already David Roberts, the Director of Enforcement and Removals at the Immigration and Nationality Directorate, has conceded that it is an untenable strategy to follow-up individual visa overstayers with a view to deportation. He was also unable to state how many failed asylum seekers who received letters from the Home Office requesting them to leave the UK had complied (Home Affairs Select Committee, Tuesday 16 May, 2006).

Meanwhile any opposition party, safe in the knowledge that thousands

of people are not being deported, can continue to safely jibe away at a government's inability to properly manage the immigrant population. This is not unjustified. This Government has pledged itself to a new managed migration system to attract migrant workers to the UK and prevent exploitation. Yet this system is already failing and will not function in future under any government unless it also takes into account the irregular migrant population currently present. For managed migration to succeed it is logical that it starts with managing the people who are already here through a regularisation programme.

Convincing though the sheer weight of political reality is, the overwhelming argument in favour of regularisation is that it is good for recognising migrants' rights and good for everyone's rights. While it should be recognised that both irregular and regular new migrants are prone to some exploitation, migrant workers who have irregular immigration status do not have any way of practically enforcing their employment rights and thus are at particular risk of exploitation, injury and worse. In turn this is not good for regular migrant and UK workers. For if exploitative employers can always turn to a workforce that is overly flexible and compliant out of a fear of being removed from the UK, how will this help uphold equality in the workplace for anyone? And how can the Government begin to talk about ending child poverty when the children of irregular migrant parents are subsisting on the lowest wages?

There is also the danger that irregular migration reinforces existing patterns of inequality and discrimination because according to statistics for failed asylum seekers and those detained under the Immigration Act powers the majority of this group of irregular migrants are visible minorities. According to the Home Office at the end of 2005 the top ten nationalities for detainees who had previously claimed asylum were from the Middle East, West Indies, Asia and Africa. With the exception of Albania and Serbia Montenegro this was largely true for the top ten nationalities for asylum detainee removals.

They are people driven to this country by whatever means available to them to escape poverty and injustice in the developing world or human rights violations. Therefore to tolerate a situation where this group of workers' presence and contribution goes unrecognised is to tolerate the potential reinforcement of racial disadvantage and discrimination. Research on European surveillance cultures suggests that under a new UK

immigration regime based on surveillance it will be racial minorities who will be most targeted for identity checks, (Beck and Broadhurst: 1998) and thus tagging and detention. It will be irregular migrants from these minorities who will live on the margins of society in constant fear of apprehension and deportation. This state of affairs will be magnified by a points system which will continue to restrict the ability of persons from the developing world to enter to work legally and will encourage them to seek to enter by irregular routes including via traffickers.

Before we go on to make our case in more depth we would like to point out that regularisation is not just the idea of immigration rights NGOs or think tanks. Many governments have given the idea serious consideration and some, such as the US Government, have implemented regularisation programmes with benefits to their population. In the UK, the House of Lords' own European Union Committee has conducted a cross-party, in-depth investigation into economic immigration which has concluded that, at the very least, the Government needs to take a long hard look at migrants' rights and to conduct a public debate about the advantages and disadvantages of regularisation – primarily because of the potential underclass that irregular migrants constitute (House of Lords European Union Committee Sub-Committee F: 2005)

We are not expecting any of the political parties to agree to a regularisation programme straight away. We hope however that they will realise that it is urgent that politicians engage actively in the debate on regularisation with us and others, whether they start from the premise that deportation is politically unrealistic – or from a concern about the rights of the people they were elected to represent. Neither do we advocate regularisation as a full proof stand-alone solution to the problems of irregular migration the UK. Rather regularisation should be part of an overall “package” of immigration reform because irregularity is after all only a bi-product of regulations. So we examine the principles which should guide reform of the immigration system.

It would also not be realistic to propose automatic regularisation for the entire irregular population. To protect individual migrants from falling back into irregularity, and to reassure the public that regularisation is not a free-for-all, and that membership of British society is valued, a carefully managed process is needed. We suggest options that could be helpful.

2. Who are the irregular migrants?

Terminology

The terminology around irregular migration is an issue of contention. Terms widely used include “illegal”, “undocumented”, “unauthorised” and “irregular”. The government and politicians of all parties frequently use the word “illegal” which risks influencing public discourse and attitudes toward migrants negatively. In addition, using the term “illegal” is contrary to the recommendations of the International Labour Organisation which has called upon all participating states to avoid this terminology (ILO: 2001). We prefer the term ‘irregular’ as most accurately describing the range of individuals who have entered and / or remained in the UK outside officially-regulated and sanctioned routes for entry and residence. We also use it because it has a less “criminalising” effect on the migrant population as a whole.

Background to irregular migration

As long as huge imbalances in wealth between the global south and industrialised world exist, the “push” and “pull” factors for migration will inevitably continue (UN Global Commission: 2005). While people also migrate to the UK for reasons of war, violence, and human rights abuses, the economic and political “push” factors are not necessarily mutually exclusive.

Irregular migration is driven by the same reasons, the difference being that irregular migrants enter or remain in an unregulated capacity. The reasons people choose to migrate irregularly are manifold. Those who are

fleeing persecution may have to leave their country of origin in an irregular manner to avoid detection, or they may have to leave in a hurry, which inevitably means they will not have the required documentation that allows them to travel, let alone gain authorised entry in a country of destination. Some have to rely on smugglers to reach safety.

A Home Office survey of the motivations and the experiences of detained irregular migrants (Home Office: 2005b) is one of very few research studies based on interviews with irregular migrants themselves. The major reason for leaving the country of origin was an actual or perceived danger (violence or intimidation) from both state authorities and non-state sources. Most people in this group had claimed asylum. The next most commonly given reasons were the availability of jobs and the presence of family members or friends. Two-thirds of the interviewees had friends, relatives or employment contacts prior to leaving their home country. However, there were also amongst the interviewees those whose agents decided to bring them to the UK.

Some, but not all, irregular migrants end up as migrant workers in the informal economic sector. Many have entered the UK within the immigration rules but fall into the informal sphere because of changes in circumstances which can include the loss of documents, expiry of visas, being fired by an employer when a visa was attached to a particular job, extraordinary delays in immigration decisions, the impossibility of removals taking place or an inability to return to the home country.

Obtaining regular entry into the UK for the purposes of work is not easy for those from non-EEA countries. While the Government has indicated that economic migrants are welcome and has introduced a new Points-Based System for non-EEA nationals to facilitate their entry into the UK for work, immigration in an unskilled capacity is restricted for persons from outside the European Union. There are also complex application procedures and requirements for evidence that one is qualified to work in a particular type of job or be self-employed. This means that many people may well resort to “agents” to facilitate entry to the UK. According to the Home Office, approximately 75% of those apprehended in the UK for circumventing immigration controls had some part of their journey facilitated by criminal gangs (Home Office: 2002), although a proportion of these have been trafficked to the UK against their will (ILO:2005).

The numbers

There is no single definitive estimate of the number of irregular migrants in the UK or anywhere else in the world for that matter because irregularity prevents any meaningful statistical coverage. Statistics in this area are at best “educated guesses”.

According to the International Organisation for Migration (IOM: 2003) the numbers of people moving irregularly across borders every year range from 700,000 to 2 million. In the EU it estimates these numbers range from 120,000 to 500,000 irregular migrants. The IOM further estimates that there are three million irregular migrants in the EU, up from two million a decade ago. This figure is best regarded as a minimum, the actual number in all probability being much higher. The UK Immigration Service once indicated to the IOM that there are up to one million irregular migrants in the UK (IOM: 2003).

A more recent report published by the Home Office estimates “the illegally resident” population more conservatively (Home Office: 2005a). These estimates are based on the “residual method” which compares estimates of regular migration with figures for the foreign-born population. The results of this method showed the irregular population in the UK to be between 310,000 (0.5% of total UK population) and 570,000 (1% of total UK population). The median estimate stood at 430,000, or 0.7% of the total UK population. Given that these figures are based on 2001 flows and are thus pre-2004, they are more problematic because they may include some EEA nationals who have since become regular by way of Accession. It is also significant that the failed asylum seeker population alone stands at between 155,000 and 283,500 according to the Home Office (Public Accounts Select Committee: 2006).

At one per cent of total UK population, the irregular migrant presence should not be exaggerated. However, it clearly constitutes a much higher proportion of the UK’s foreign-born population which, according to the Office of National Statistics, stood at around eight per cent of total population by 2001, and was even higher in the capital and other major urban centres. Thus it can be argued that the predicament of the irregular migrant population without rights has a potentially disproportionate impact on the equality of the settled migrant communities.

Definitions

The irregular migrant population covers a wide range group of people, who, broadly speaking, have no valid leave to remain in the UK and/or had no leave to enter. They can be divided into three categories:

- 1 Overstayers, or migrants who entered the country with leave but subsequently failed to renew their leave to remain or depart the UK and who have thereby overstayed their visas;
- 2 Migrants who have entered the country clandestinely by circumventing immigration control and entering the UK without detection, who entered on false documentation, or by deception;
- 3 Those who remain in the UK despite directions for their removal, for instance failed asylum seekers.

These are the major categories of irregular migrants who we would like to see included in a regularisation programme because their actual immigration status is irregular.

However before we look at their circumstances in more detail it should also be noted that many migrants may be living legitimately in the UK but are in breach of conditions that may be attached to that permission to remain. Among these are asylum seekers who are working in breach of temporary admission conditions, or students who are working over and above the number of hours they are allowed to work, or visitors who are not allowed to work at all, but do so nonetheless. It is those in this category who Anderson et al have recently argued are best described as being “semi-compliant” with immigration control rather than irregular (Anderson *et al*: 2006).

Another caveat is that according to a Home Office survey, (Home Office: 2005b) the experience of most respondents was that of moving in and out of legal and illegal residence in the UK. 60% of the respondents entered the UK illegally. Others became illegally resident by overstaying a tourist, student or work visa. A typical example might be where a person enters the UK illegally, waits some time to claim asylum, and then goes underground when asylum had been refused, reverting back to their initial illegal status. Three quarters of those interviewed had worked illegally.

However the defining characteristic of irregular migrants is that being at threat of deportation they have no way of practically enforcing rights, and are therefore particularly vulnerable to discrimination and exploitation. The view held by the Government in general seems to be that irregular workers are primarily 'illegals', rather than human beings who are exploited. For example Baroness Ashton of Upholland responding to Baroness Turner of Camden during the passage of the Immigration Asylum and Nationality Act 2006 on the subject of irregular migrants rights said: "I do not want to distort the fact that an illegal worker is an illegal worker or to take away from the critical need to support legal workers in this country appropriately."

(Failed) asylum seekers

Asylum seekers are only permitted to engage in employment if they have been waiting for an initial Home Office decision on their asylum claim for twelve months or more since they lodged their application, and the delay in the decision-making process is the fault of the Home Office. According to the statistics in 80% of cases in 2004/05, 88% of initial decisions were made within 4 months, and 91% within 6 months (Home Office: 2005, *Asylum Statistics*). Therefore only a marginal number of asylum seekers enjoy permission to work. The only resource that asylum seekers can rely on is National Asylum Support Service (NASS) support, which may at times be hard to come by and constitutes much less than what a British national would receive on benefits. Asylum seekers working without authorisation are however more accurately viewed as undocumented for the purposes of work rather than as irregular migrants, since they have "temporary admission" whilst their asylum claim is considered.

Failed asylum seekers whose removal is complicated do not have permission to work either, but are also here in an irregular immigration capacity. Removal of failed asylum seekers may be impeded for a variety of practical reasons, such as a lack of travel documents, a lack of co-operation from the authorities of the country of origin in issuing such documents, or because there are no safe routes to the country of origin, or simply because that country is unsafe to return to. Once asylum seekers have reached the end of the asylum process and exhausted their rights of appeal, NASS will terminate support for those without children, leaving many asylum seekers destitute and without any means for support. A small proportion receive NASS support under section 4 of the

Immigration and Asylum Act 1999 if they can establish that they are temporarily unable to leave the UK for reasons beyond their control. Many entitled to receive support are destitute due to administrative failure (Citizens Advice: June 2006). As a result many failed asylum seekers may resort to unauthorised work. As we have seen this segment of the irregular population may number up to 283,500 and Home Office figures on failed asylum seekers suggest it is dominated by nationalities from the global south.

Overstayers

Overstayers are migrants who were given limited leave to enter or remain in the UK, which expired and was not renewed. Overstayers may be any “kind” of migrant: visitors, students, au pairs, or perhaps working holiday makers. A person can also become an overstayer where the immigration authorities curtail leave to remain. This may occur for instance in cases where deception was used to obtain leave to remain, or where a person failed to comply with conditions attached to that leave, where a person no longer meets the requirements of the rules on which the leave was granted, or when a person becomes “undesirable”. Once a person becomes an overstayer, they also lose the rights that were attached to the original leave, for instance a right to work or recourse to public funds.

Overstaying is a criminal offence under the Immigration Acts, which is committed when a person “knowingly” overstays, subject to a maximum of 2 years imprisonment. However the recent remarks by the Immigration and Nationality Directorate’s Director of Enforcement and Removals, which we have previously noted, confirm that the Home Office does not actively trace or prosecute overstayers on an individual basis (Home Affairs Select Committee, Tuesday May 16, 2006).

People who enter in an unregulated capacity

These may include persons trafficked against their will but as a group they are described by the Home Office as illegal entrants. A person is an illegal entrant when:

- 1 they enter the UK without seeing an Immigration Officer at all;
- 2 they did not obtain leave to enter when this was required;
- 3 a deportation order is still in force against them;
- 4 deceiving an immigration officer.

Where do irregular migrants work?

By April 2006, unemployment in the UK had increased by 0.5 per cent since 2005 to stand at 5.2 per cent or 1.59 million. Job vacancies had fallen and were down 32,000 on 2005. Despite this, in the quarter leading to April, an average of 598,700 job vacancies a month remained unfilled at any one time (www.statistics.gov.uk). Even amidst a rise in unemployment, and an economy which has never been so deregulated, UK nationals are not able to fulfil all the demands of the labour market, particularly where the labour is unskilled.

According to the Home Office Survey, more than half of interviewees who had worked whilst in the UK illegally, did so in unskilled occupations. According to the IPPR, irregular working occurs in the main in those jobs that are considered dirty, difficult and dangerous (IPPR: 2006). A London study by Queen Mary College found migrants constituted 90 per cent of low-paid workers in cleaning, hospitality, home care and food processing. (Evans *et al*: 2005) While this study did not take immigration status into account, it is further evidence of the type of sectors irregular migrants may gravitate to working in. This was confirmed by labour specialists appearing before the Home Affairs Select Committee (May 16 2006).

In a 2006 study published by the Home Office on employers' use of migrant labour, the employers interviewed reported relying to a considerable extent on migrant workers, particularly in the low-skilled sectors. In the high-skilled sectors studied, particularly administration, business and management, and finance, migrant workers were less crucial to business than in the low-skill sectors. Migrant workers have become an important source of labour, with many employers believing that businesses would suffer or could not survive without migrant labour. Migrant workers are sometimes preferred over UK nationals, particularly in the agricultural, hotels, and catering, and the lower-skilled ends of the administration, business and management sectors. Anderson *et al*'s recent study of both irregular and regular European migrant workers suggests that the reasons for this include migrant workers' flexibility and the high level of skill relative to the minimum required for the tasks that need to be performed (Anderson *et al*: 2006.)

This underlines the fact that while both irregular and regular migrants

work in lower-skilled jobs, this does not mean that some of them may not be highly-skilled. In their London study Evans *et al* (2005) found that 49 per cent of low paid migrant workers had obtained at least a tertiary qualification before entering the UK. Consequently it is safe to assume that some irregular migrants may be highly educated and skilled but the nature of their irregular immigration status may be an obstacle, or a further barrier in addition to other factors such as racial discrimination or language, to them working in the more highly skilled employment for which they have been trained.

Some migrant workers are trafficked for the purposes of criminal activity, or forced labour connected with criminal gangs, for example in the case of women who are trafficked for sex work. Sex trafficking constitutes two thirds of the 2.4 million persons trafficked annually. However, about a third of these persons are trafficked for forced labour other than in the sex industry. The International Labour Organisation has estimated that profits from forced and trafficked labour amount to \$32 billion annually or \$13,000 per trafficked worker (ILO: 2005). In industrialised countries, such as the UK, trafficked people arrive for the purposes of factory work, domestic labour, agricultural work, construction or even contract cleaning, forced labour in these posts being obscured and facilitated by the features characteristic of the deregulated economy: recruitment agencies, the use of outsourcing and contractors; and lengthy commissioning and sub-contracting chains (Anderson and Rogaly: 2005)

3. A new era of immigration control

Background to current policy context

The UK Government frequently talks about reducing the “pull” factors which encourage immigration but frequently fails to mention that demand for migrant labour, particularly unskilled labour, is a “pull” factor that migrants from poorer countries are bound to respond to. The fact that some choose to respond to it irregularly is partly the product of an immigration system that seeks to restrict the entry of labour from the developing world even as employers demand such labour and UK nationals fail to respond to that demand. Irregular migrant working is also the product of an immigration system which restricts entry of those fleeing persecution, and puts restrictions on their economic participation in the UK, even as human rights violations continue to be committed in various parts of the world.

Migration policy 1997–2002: When economic migration was bad

Although the government has recently changed its view on economic migration to a more positive one, this has not always been the case. Only as recently as 1999 “economic migrant” was a term used to describe those abusing the system of immigration control, exploiting whatever route offered the best chance of remaining within the UK. *“That might mean use of fraudulent documentation, entering into a sham marriage or, particularly in recent years, abuse of the asylum process”* (White Paper 1998). In effect, asylum seekers were branded as “economic migrants”, coming to the UK not for protection, but to take employment, and lodging fraudulent claims in order to do so. The White Paper *Fairer, Faster, Firmer – a Modern Approach to Immigration and Asylum* argued that the gross inefficiency of the asylum system was leading to the policy of refugee

protection itself being discredited, which in turn facilitated large-scale abuse of the system. There was concern that people with no right to refugee protection were coming to the UK in large numbers to enjoy the advantages of employment or access to welfare benefits during the prolonged period when their asylum applications were under consideration. (Flynn:2003)

As such the 1998 White Paper made the commitment to *detect and remove those entering or remaining in the UK without authority and take firm action against those profiting from abuse of the immigration laws, including effective preventative measures*. Such measures included speeding up the asylum process, prohibiting asylum applicants from taking up employment, and providing subsistence level support in the form of vouchers. The White Paper also envisaged stepping up detention, quadrupling the capacity to allow for 4,000 people to be detained at any time. The Government believed that the measures would enable it to uphold its obligations on refugee protection whilst at the same time deterring the bogus applicants. As far as the Government saw it, the only people who would lose out were those who should never have benefited from it in the first place, i.e. the bogus applicants who were really economic migrants seeking a better life in the UK rather than fleeing persecution. (Flynn: 2003)

2002–present: Economic migration is good

The 2002 White Paper *Secure Borders, Safe Havens*, went further, but in a sense also signalled a shift in Government thinking. In order to deal with the abuse rife in the asylum system, more migration routes to the UK for the purposes of work were to open up. Whereas before economic migration was rhetorically associated with irregular migration, it was now seen as a contributory force to the UK economy, bringing *“considerable benefits to the UK, including improvements in economic growth and productivity, as well as cultural enrichment and diversity. Managing migration means having an orderly, organised and enforceable system of entry.”* (White Paper: 2002). New policies were to be devised responding to the UK’s economic need, such as the Highly Skilled Migrant Programme, the Sectors Based Scheme, changes to the Seasonal Agricultural Workers Scheme and the Working Holiday Makers Schemes.

In February 2005 the latest proposals concerning economic migration were set out in a Home Office Command Paper: *Controlling our borders: Making migration work for Britain – Five Year Strategy for asylum and*

immigration (CM6472). The main measure is a new “Points Based System” consolidating all existing economic migration categories for non-EEA migrants into one system. However, overall the Five-Year Strategy continues to erode the rights of those seeking protection in the UK, as well as restricting routes to the UK for asylum seekers and their family members.

There is no doubt that these measures have opened up economic migration routes to the UK for non-EEA nationals and provide some foreign nationals with easier access to the UK labour market. However, the point is that work migration from outside the European Union, and thus from the developing world, remains rigidly controlled. In essence, the system of managed migration also makes a distinction between two categories of workers. On the one hand there are those to be sought after and attracted, the (highly) skilled workers from whom it is assumed the UK can derive more benefit (for instance doctors, nurses, engineers, IT professionals etc.). On the other hand, low, or unskilled, workers who are deemed to be less attractive but are prepared to do the jobs that the resident work force is not willing to do for the wages and conditions offered and/or because these jobs are generally seen as “dirty” (food manufacturing, textile industry, agricultural sector etc). The “flexibility” of the system is maintained through formulations of qualification requirements outside the immigration rules. Managed migration only looks at what benefit someone can bring to the UK economy and the flexibility of the system allows the government to open and close routes for work migration at will. The five-year strategy confirms this:

The purpose of the reforms is to admit people selectively in order to maximise the economic benefit of migration to the UK...Migration makes a substantial contribution to economic growth, helps fill gaps in the labour market, including key public services...However, migration can have an adverse impact on public services and community life if it is not properly managed. The system should therefore be focussed primarily on bringing migrants to do key jobs that cannot be filled from the domestic labour force. (Five Year Strategy, CM 6472)

In summary, in the fight against irregular migration, the Government has responded in different ways, most notably by reforming the immigration system so as to manage every aspect of work migration to, and in, the UK.

Managed migration

Before looking at policy responses to irregular migrant workers, it is necessary to consider the systems of immigration control in place that govern regular economic migration. As these systems of managed migration were partly introduced to deal with abuse of the system of immigration control, it is fair to ask whether they can be effective in combating irregular migration and migrant working.

Before the announcement of the Points-Based System there were approximately 80 routes that governed economic migration into the UK which are now scheduled for phase-out as various components of the Points-Based System go live. They include, among others, the Highly Skilled Migrant Programme, the Work Permit scheme, the Sector Based Scheme (hospitality and food processing industries), and Seasonal Agricultural Workers Scheme.

Generally speaking, the schemes governing highly or skilled migrants come with the most rights, i.e. longer grants of leave leading to the right to settle in the UK and rights to family reunion. The schemes governing the lower skilled workers come with few rights, for example temporary, non-renewable grants of leave, prohibiting settlement or family reunion. Temporary leave in particular impedes workers' practical ability to enforce their workplace rights as at least twelve months in a job is generally needed to secure employment rights by way of challenging unfair dismissal (JCWI Bulletin, 2005).

The Points Based System (PBS)

All of the different routes to work in the UK will be replaced by the "Points Based System" (PBS) by 2008. This is a system that aims to simplify the existing work migration routes and will have "built-in" immigration control.

While the Government sees the PBS as an instrument to increase economic competitiveness and cultural exchange, the system is primarily focused on attracting highly skilled migrants to the UK who, according to the government, do key jobs that cannot be filled by the domestic or EEA labour force. Announced in March 2006, the PBS has

three major objectives:

1. Better identification of, and attraction for those non-EEA migrants who have most to contribute to the UK;
2. a more efficient, transparent and objective application process; and
3. facilitating improved compliance and reducing scope for abuse.

The overarching presumptions are that

- the expanded European Union provides an accessible and mobile work force that can be readily accessed by the UK's economy and that employers should look first to recruit from the UK and the expanded EU before recruiting from outside the EU;
- the system should be “robust against abuse” and those who benefit from migration, employers and educational institutions should work with government to ensure this is the case;
- and there should be built-in flexibility that allows easy opening up and closing down of migration, depending on whether there is a labour shortage in a certain sector.

The PBS consists of a 5-tier framework (see table on the next page):

| | SKILLS LEVEL | CRITERIA | LEAVE GRANTED |
|----------------------|--------------------------------------|--|--|
| TIER 1 | Highest skilled | <p><i>Points awarded for:</i></p> <ul style="list-style-type: none"> – qualifications – previous earnings – age – bonus points if earnings/qualifications gained in the UK | <p>5 years, with settlement after (or “fast track” settlement after 2 years for the most successful).</p> <p>Family members can join.</p> |
| <i>Subcategories</i> | <i>Post study</i> | <p><i>Postgraduates in UK will be allowed a transitional period to find a job in the UK and then apply under Tier 1 or 2</i></p> | |
| TIER 2 | Skilled workers | <ul style="list-style-type: none"> – need a job offer <p><i>Points awarded for:</i></p> <ul style="list-style-type: none"> – qualifications – prospective earnings <p>If job offer is NOT in a shortage occupation, the prospective migrant must have passed specified tests</p> <p>Shortage occupations are determined by a new Skills Advisory Body</p> | <p>Leave is linked to the duration of the contract. Settlement is possible after 5 years. It is possible to switch to Tier 1 also.</p> <p>Family members can join.</p> |
| TIER 3 | Low-skilled | <ul style="list-style-type: none"> – will look first at domestic/EU work force to fill vacancies – schemes are set up if there is a temporary labour shortage – subject to quotas <p>Schemes run by “operators”</p> | <p>Maximum 12 months.</p> <p>Family members cannot join.</p> <p>No right to switch or route to settlement.</p> <p>SBS* terminated in 2006. SAWA* phased out by 2010.</p> |
| TIER 4 | Students | <ul style="list-style-type: none"> – must have been offered and accepted by a place of study – details as yet unclear | <p>Leave is linked to sponsorship and duration of course.</p> <p>Family members can join. May work for 20 hours per week and full-time during vacations.</p> |
| TIER 5 | Youth mobility and temporary workers | <p>5 subcategories:</p> <ol style="list-style-type: none"> 1. Creative/Sports. 2. Religious (if coming to UK for longer term may also qualify under Tier 2). 3. Exchange Programmes (WHM*, Au Pairs) 4. Voluntary Work. 5. International Agreement (GATS, diplomatic arrangements) <p>Sponsors must vouch applicants meet the relevant criteria</p> | <p>Maximum leave is 24 months.</p> <p>No switching.</p> <p>*WHM: Working Holidaymakers Scheme</p> <p>*SBS: Sectors-Based Scheme</p> <p>*SAWA: Seasonal Agricultural workers Scheme</p> |

To avoid abuse of the system, financial securities will be required of those whose personal circumstances or migration route suggest that they present a high risk of breaching the immigration rules. The system will be introduced phase by phase, with the aim of full implementation by early 2008. Before implementation, impact assessments and tests will be carried out. This scheme will be highly flexible, with the ability to open and close migration routes to the UK, depending on shortages of labour. In future, whether or not a foreign national will be able to come and work in the UK will depend in large part on whether or not there is a labour shortage in the relevant area of work. All non-EEA migrants, apart from the highly skilled, require a job offer before coming to the UK to take up work.

In some senses it could be argued that nothing has changed in terms of the rights afforded to migrant workers. Both under the old system and the Points Based System, skilled workers enjoy a route to settlement and the right to be joined by family, while low-skilled or unskilled workers will only ever be awarded temporary and non-renewable leave, affecting their ability to enforce workplace rights and no right to family settlement.

A culture of surveillance

In order to control the irregular migrant population in the UK, successive governments have come up with a variety of control measures and sanctions. As a result a new culture of surveillance has emerged, in which every aspect of a recent immigrant's life is monitored.

The "management" in managed migration

Managed migration envisages a crucial role for employers in controlling immigration. The Immigration Asylum and Nationality Act 2006 places responsibility for ensuring regular checks on a migrant worker's documentation with employers. Under the Points Based System employers will have to register before they are able to recruit overseas labour, and may jeopardise that registration if they are connected with employees who breach immigration law. Employers will have to report their employee(s) to the Home Office should they not appear for work for a certain period of time. The Home Office's view is that employers

should be partly responsible for ensuring that their employees are compliant with immigration control if they benefit from migrant labour. Below we look at enforcement measures in place, including those for employers.

Enforcement in the work place

Sanctions against employers were introduced in the Asylum and Immigration Act 1996 as a deterrent to the employment of irregular migrants. The 2006 Immigration, Asylum and Nationality Act introduced civil penalties. An employer will have to check a migrant worker's documents at regular intervals so as to avoid employing an irregular migrant. The Points Based System also contains provisions that allow for increased liability of the employer in terms of irregular working. The Confederation of British Industry is among those organisations expressing concern that employers are being roped in to carry out the duties of an immigration officer (Financial Times, *'Curbs on Migrant Labour Worry Employers'* Tuesday 30 May 2006)

The provisions in the Act could have a discriminatory effect, as the CBI joined the Commission for Racial Equality and JCWI, in pointing out during the passage of the Act through Parliament. The threat of civil penalties, as well as the requirement to repeatedly check documents, could act as a disincentive to employers hiring foreign nationals, including those who are regular, and ethnic minorities. The European experience (Beck and Broadhurst: 1998) suggests such measures will increase the scope for discrimination against, and stigmatisation of, foreign nationals and ethnic minorities. Furthermore, while legitimate and responsible businesses could find themselves hobbled by the costs of implementing the measures, irresponsible, abusive and criminal employers are unlikely to be deterred by the penalties; and will probably find the documentation issue of the greatest assistance in threatening migrant workers.

JCWI lobbied extensively on these issues while the 2006 Act was passing through Parliament. The Act would be more effective at tackling employers who deliberately exploit migrant workers – as opposed to those who just make bureaucratic mistakes over checking documents – if it took into account not just whether employers have conducted

document checks, but also the conditions under which they employ migrant workers. A rights-based approach which protected irregular migrant workers from immediate deportation in return for informing on exploitative employers could be more useful in outlawing the worst employer offenders.

Although stricter sanctions have been introduced as part of the 2006 Act, they are unlikely to root out irregular working in the UK. The provisions under the 1996 Act produced very little result with only a handful of prosecutions, and even fewer convictions since enactment.

Enforcement outside the work place

The Immigration Service participates in a variety of joint multi-agency street crime reduction operations (CROPS) around the country initiated by police and British Transport Police. In such operations, immigration officials will attend, on invitation, railway and London Underground stations where it is suspected that those who have committed immigration offences will be encountered. As noted previously, ministerial correspondence suggests that this a nation-wide initiative although JCWI is aware of operations only in the London, the South East and East Anglia so far. It is unclear how the Immigration Service identifies a person as having committed an immigration offence and the European research on surveillance cultures suggests that such practices will have a disproportionate discriminatory effect on ethnic minorities in the UK (Beck and Broadhurst: 1998).

Identity cards

The Government is on record as having stated that ID Cards will assist in tackling unauthorised working and irregular migration. The ID Card is likely to become one of those documents the employer will be required to check for permission to work. It is unclear as to how the ID Card scheme will tackle unauthorised working. Employers who are not currently checking immigration documents are unlikely to change such practices when the ID card scheme is introduced. ID cards are more likely to have the effect of driving those who have been working undocumented further into the informal sector. With regard to irregular

migration, people will still enter Britain using documents, be they genuine or forged; and ID cards offer no more a deterrent to people smugglers and traffickers than passports and visas.

Why the PBS and the surveillance culture will fail to manage migration

The combined Points-Based System/surveillance approach described above verges on hubris in its complexity. In particular the PBS's tiered system is at risk of lacking clarity given that sub-categories and exceptions are already being introduced. As presently structured it risks being overly restrictive in the way it responds to the economy's needs; and generally difficult to administer given its potential complexity. Far from being a tool for managed migration the PBS, like economic migration policy before it, could actually increase the presence of an irregular migrant population.

Firstly few immigration officials have a ready grasp of the conditions attached to each separate category. Migrant workers and employers seldom have a clear understanding of what is entailed by being a worker under each of these separate categories, generating the scope for inadvertent breaches of immigration status, and an increase in the numbers of those with of irregular resident status. (JCWI: 2005).

Secondly, the Government's presumption that somehow attracting low, or unskilled, workers is not as important as attracting (higher) skilled migrants is also at odds with the real shortages of labour which are occurring in the lower-skilled sectors as underlined by the Home Office's own report (Home Office: 2006). It is true that over the next decade the numbers of primary occupation jobs that could be described as unskilled will decline. However across all categories there will be a net increase of 1.3 million jobs, 12 million job openings overall and only a small rise in unemployment predicted over this period, together with a need for increasing number of male workers to fulfil jobs previously carried out by women (Sectors Skills Development Agency: 2006). This suggests that there is likely to be a need for migrant labour in all categories.

Thirdly, the Home Office assumes that Accession State nationals can fill those labour demands particularly in the low and unskilled sectors. For

the time being it seems Accession State nationals tend to typically work in these sectors (Anderson et al: 2006). However, it is unlikely that Accession States will be an unlimited resource of low-skilled workers in the future. In time, as these states enjoy increased investment from the EU, and similar rates of development, the trend is more likely to be similar to that of other Western countries, i.e. salaries will go up, as will GDP, more people will go to university and their work forces will become more professionalised. In the not-too-distant future Britain may no longer have the competitive edge in terms of attracting labour from overseas, particularly once other European countries lower their barriers to free movement. The ageing of the work force, particularly in continental Europe (Evandrou: 1997) suggests it is likely that increasingly European countries will compete for non-EEA migrant labour.

Fourthly, experience shows that restrictive economic migration policies result in many migrant workers falling into irregularity. Low-skilled people from developing countries who have made a substantial investment in migration relative to their resources will have an incentive not to comply with sharply limited leave. Also, since the application procedures involved in coming to the UK to work are so complex and expensive, migrant workers may well choose to rely on third parties including those who operate illegally, to enter the UK for work.

The current shortfall of labour within the lower-skilled sectors, combined with such restrictive immigration rules, fuels the creation of an irregular migrant work force and the informal sector. Immigration control procedures underestimate the level of current demand in the economy for the employment of migrants and this has led to the creation of a parallel system alongside official controls, which has facilitated the recruitment of workers by unofficial means. This problem is likely to become more pronounced in the future as economies become more diverse and new types of goods and services emerge (JCWI: 2005).

Most importantly, removal is not a feasible strategy for responding to irregular migration. Of course, enforcement against irregular migrants has been stepped up in recent years. More resources have gone into detection, apprehension, detention and removal, but even as it increases the number of removals remains low relative to the size of the irregular population. In 2001 the Home Office pledged to remove 30,000 failed applicants per year but removals are currently at only 20,000 a year. At

the upper estimate of the irregular migrant population removal of all irregular migrants will therefore take at least a quarter of a century on present rates and could take half a century if they fell lower. At up to £11,000 per person per removal, it is not cheap and to deport the entire irregular migrant population could cost £4.7 billion (IPPR: 2006). In 2006, it is not surprising that beginning with the House of Commons Public Accounts Committee report on removing failed asylum seekers, the issue of removals has turned into a huge political football.

4. The case for regularisation

There are many benefits to a regularisation scheme. It would assist in bringing the irregular migrant population back within the ambit of immigration control, and allow the Home Office to gain insight into the size and composition of the irregular migrant population with which better policies on immigration may be formulated. It may also be used as a vehicle to detect and prosecute abusive employers.

Our first main argument in favour of regularisation is that deporting the entire irregular migrant population is not cost effective in relation to the potential cost benefits of regularisation.

Our second argument is that regularisation might actually restore some trust in the political system and make irregular migration less of a political football. Unfortunately, successive governments and political parties have focused the attention on enforcement and control to score political points and to assure the public that action against irregular migration is being undertaken. This means that public resources have become focused on detection, apprehension, detention and removal of undocumented migrants in the UK. The Identity Card Act 2006 and measures in the Immigration, Asylum and Nationality Act 2006 are likely to increase public expectation that irregular migrants will be apprehended, detained and removed. Increasing public expectation in this way is clearly pointless when one studies the reality of removals, particularly the prohibitive cost. It can only destroy trust in the immigration system and in our politicians. By encouraging more of the migrant population already present to comply with immigration control, regularisation could be way of “turning a new leaf” in managing migration, and thus reassuring the public that that migration is being fully managed.

But the third reason should be the most compelling for any government and society concerned with social justice. Objectives on equality and social integration simply cannot be achieved as long as one section of society is without hope of ever having a real stake hold in it.

Equalities and integration

Vast inequalities between the industrialised and developing worlds explain much of migration. As the UN Global Commission on International Migration and others have noted, neither the globalised market place, nor international aid have narrowed the gap between the rich and poor countries of the world. Many developing country economies struggle with demographic growth and cannot create sufficient job opportunities for their population. Some of these countries may also be characterised by poor governance, human rights violations and armed conflict. Many people therefore seek a solution to their poverty and danger in migration (UNGCIM: 2005, IPPR: 2006).

Some commentators have argued that we should seek to mitigate the international wealth gap through aid rather than permitting migration (Goodhart 2006). However aid plainly cannot compete with migrant remittances as a cash flow to developing countries. The World Bank has found that officially recorded migrant remittances worldwide exceeded \$232 billion in 2005. Of this, developing countries received \$167 billion, more than twice the level of development aid from all sources. Remittances sent through informal channels could add at least 50 percent to the official estimate, making remittances the largest source of external capital in many developing countries; and this money finds its way into local economies and is used for the improvement of educational, health and housing standards (World Bank: 2006). The World Bank concludes that migrant worker remittances could have major implications for reducing poverty in the developing world. Yet it is precisely people from the poorest countries who have the most incentive to emigrate who face the most restrictions their economic migration to the UK, and thus have particular incentives to enter or remain irregularly.

While the study of low-paid migrant workers in London by Evans et al did not specifically take into account immigration status, they have

noted that this linkage between global inequity and migration displays itself in the nationalities of the low-paid sub-contracted workforce which is disproportionately composed of recent migrants from the global south (2005). As we have argued, sub-contracting and decommissioning structures make the employment of irregular migrants in such jobs particularly feasible, and is most recently exemplified by the illegal employment of five migrant cleaners via a subcontractor to the Home Office (Daily Telegraph: 18 May 2006). Such employment structures are not unionised and, in addition to immigration status, which stratifies rights according to nationality and skill (Morris: 2004), also make it extremely difficult for already vulnerable migrant workers to enforce their rights in the workplace. This may be in relation to entitlement to sickness or holiday pay or, crucially for people from the global south, racial discrimination. Thus global injustice through migration underpins the delivery of essential services, particularly in the metropolis.

In 2006 the UK Government was considering ratifying the Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16.V.2005) but, despite the recommendations of the House of Lords European Union Committee (November 2005) and criticism by the European Parliament in May 2006, had not announced plans to consult on ratifying the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18.XII.1990); or the European Convention on the Legal Status of Migrant Workers Strasbourg (24.XI.1977). There is thus no clear overarching standard of rights for migrants, which would at least be afforded by the 1977 European Convention; and virtually no protection or access to rights for irregular migrants as would be afforded by the UN Convention, or even the stay of deportation which would be afforded to victims of trafficking under the 2005 Council of Europe Trafficking Convention.

As well as being unable to enforce their rights in the workplace, the irregular population's ability to realise other rights and access essential services is becoming more restricted. Under Section 19 of the Asylum and Immigration (Treatment of Claimants) Act 2004 it is now virtually impossible for irregular migrants to be married in a civil ceremony in the UK. They are denied any free health care other than that which is urgent by NHS hospitals. Maternity services are not included within the meaning of urgent. They can also be refused non-urgent care by GPs.

This state of affairs is likely to be compounded if the clause originally included in the Identity Card Act requiring an identity card to be produced as a condition of accessing public services is ever reintroduced. The research shows that people from visible minorities are more likely to be identity checked (Beck and Broadhurst: 1998). Already the worry must be that overseas visitor managers and other frontline staff in the NHS resort to a subjective understanding of immigration status based on nationality and race when it comes to deciding an entitlement to rights and services.

The extent of this is difficult to measure given that there is little definitive information about the composition by race and nationality of the irregular migrant population. Relatively little is known about the connection between the irregular migrant population and black and ethnic minority groups already established in the UK (Morris: 2004). As we have noted failed asylum seekers are disproportionately drawn from visible minorities and it is likely that dispersal patterns may affect their ability to access the support of particular ethnic communities to which they belong. It is also possible that the established migrant communities, through their business communities, may exploit the labour of irregular migrant newcomers as well as offering them support.

What cannot be denied is the way in which the disadvantage of the irregular migrant population, denied access to justice and services, will impact on Government objectives on equalities, social cohesion and integration. *“If connections by ethnic identity and or personal networks are strong then the position of established minorities will be somewhat undermined by their (irregular migrants) parallel existence, denied many of the rights we take for granted. If however there are no connections of ethnic identity or personal contact then we confront an even more disturbing prospect of sharp status differentiation which follows racial or ethnic lines.”* (Morris: 2004)

Case studies of regularisation schemes

Even though the UK has never embarked on a regularisation scheme and so far seems to rule out any such programme, many other countries have opted to go down that route to deal with problems associated with irregular migration. Rarely are such programmes completely successful in rooting out irregular migration. To achieve this, other areas of policy

need to be addressed and reformed. However, most have been successful in other areas: such as driving up wages, bringing irregular migrants onto the radar of immigration control, and providing access to rights for irregular migrants. Most have also shown cost benefits.

Below we set out two case studies of regularisation programmes, in Spain and the United States.

Spain

Spain has had six regularisation schemes since 1985 and has since legalised approximately 1.3 million irregular migrants. Overall, there is a noticeable upward trend in the number of applicants per regularisation (see table on next page).

In the main the regularisation programmes were attempts to simultaneously control the informal economy (accounting for approximately 20% of Spain's GDP), gather information on unauthorised migrants and reduce the number who were irregular. (Levinson: 2005). The main criticisms of the programmes have been their slow operation as well as temporary permits having been granted, causing many migrants to fall back into irregularity once the permits expire. Many of the above regularisation schemes were to address the shortcomings of the previous ones.

The Spanish government chose to describe the 2005 regularisation programme as a "normalisation" process as it applied only to those migrants already working in Spain. The main criticism of it thus far is that it is "employer-led" because some employers are unwilling to "normalise" employees if they have to pay them a regular wage (PICUM:2006). There is also a noticeable upward trend in the number of applications at each of the regularisation programmes which is potentially a sign that regularisation does not curb irregular migration. However, many of the applicants will have applied for more than one of the regularisation schemes because the schemes only granted temporary residence.

| YEAR | No. applicants | No. regularised | Criteria |
|------|----------------|-----------------|--|
| 1985 | 44,000 | 23,000 | <ul style="list-style-type: none"> ● Must have been present before 24/07/1985 ● Must have job offer |
| 1991 | 135,393 | 109,135 | <ul style="list-style-type: none"> ● Living and working in Spain since 15/05/1991 ● Rejected asylum seekers or those with cases pending |
| 1996 | Approx 25,000 | 21,300 | <ul style="list-style-type: none"> ● Working in Spain since 01/01/1996 ● Have a work or residence permit issued after May 1986 ● Family member of a migrant living in Spain since before January 1996 |
| 2000 | 247,598 | 153,463 | <ul style="list-style-type: none"> ● Present before June 1999 ● Had either a work or residence in the previous 3 years; or ● Had applied for a work or residence permit |
| 2001 | 350,000 | 221,083 | <ul style="list-style-type: none"> ● Prove "roots" in Spain, including employment in Spain, family ties; ● Have no pending expulsion orders, or prohibitions from being on Spanish soil |
| 2005 | 691,655 | 573,270 | <ul style="list-style-type: none"> ● Migrant workers, applications made through employers; ● Must have been registered in the population register (municipality) before 08/08/2004; ● Have remained in Spain continuously during this period; ● No criminal record; ● Employer must show that they are registered and paying required taxes; and ● Must have signed a contract with the employee for a minimum of ten months |

(Sources: Levinson: 2005, www.picum.org, *Migration News Sheet* (March 2006))

USA

The USA combined a general regularisation to reduce the number of irregular migrants already present in the US with the enactment of a new law (the Immigration Reform and Control Act 1986 (IRCA) to restrict irregular immigration through employer penalties.

The provision was two-tiered. The first programme ran from 5 May 1987 and 4 May 1988 and gave legal resident status to irregular immigrants who could prove they had been living in the US continuously since 1st January 1982. Another programme, SAW (Special Agricultural Worker), allowed for any undocumented worker who had worked for 90 days in seasonal agriculture work during the previous three years to apply to become a permanent resident. The registration dates were from 1 June 1987 to 30 November 1988. Both programmes together allowed for the regularisation of three million irregular migrants in the US, of which 2.7 million obtained residency. The regularisations were accompanied by measures to combat irregular working, such as employer penalties and increased funding for border enforcement (Levinson: 2005).

The IRCA-related regularisation has not been successful in deterring irregular migration to the US in the long term. The main criticism of the programme was that it did not include all those potentially affected. While it ran till 1988, only those who could prove they had been living in the US since 1982 qualified. This appeared to incentivise many irregular migrants who arrived in the US after 1982 to obtain false documents so as to make an application under the scheme which in turn caused an upsurge in the fraudulent documentation industry. However the hugely positive effects included an upward effect on wages, and occupational mobility, with consequent benefits for the integration of the migrant population. (Levinson: 2005).

Regularisations in the UK

Arguably the concept of regularisation is not new to the UK. Specific schemes have been implemented in the past, but given different labels, such as the 'backlog clearance exercise' introduced in the 1998 White Paper. So far no large-scale general regularisations have taken place in the UK. A "general amnesty" has frequently been ruled out by the government, at first in its White Paper *Fairer, Faster, Firmer* at a time when there were huge backlogs particularly in the asylum system, and more recently by the former immigration minister Tony McNulty in

April 2006. The recent comments by the new immigration minister Liam Byrne to the Home Affairs Select Committee in June 2006 that he would not rule out regularisation may represent a new development but it is currently too early to tell. Overall the UK government has tended to look at such exercises on a case-by-case basis, or in terms of specific cohorts, the recent Indefinite Leave to Remain exercise for some asylum seeking families being a major example.

Backlog clearance exercise for outstanding asylum applications (1998 White Paper)

To deal with the huge backlog of over 100,000 cases that had accumulated by July 1998, a special policy was introduced to grant indefinite leave to most asylum claims outstanding since 1993. Those made between 1993 and 1995 were weighed up individually taking into account factors such as community ties, family connections and records of working in the UK for economic purposes and on a voluntary basis, and a form of limited 'exceptional' leave was granted for four years.

Regularisation programme for domestic workers (23/07/1998 – 23/10/1999)

In response to concerns about the treatment of overseas domestic workers, changes to the Overseas Domestic Workers Concession were introduced, the most significant of which allowed a domestic worker to change employer. A number of domestic workers who came to the UK prior to July 1998 found themselves in an irregular situation because as a result of abuse and exploitation they had left their original employer. Ministers therefore decided that as a general approach, in the case of those domestic workers who brought themselves to the attention of IND between 23 July 1998 and 23 October 1999, their stay would be regularised, with twelve months' leave granted in the first instance. The programme included those who had already come to the attention of IND and against whom enforcement action was pending. However in 2006 following the announcement of the PBS the continuation of this concession appeared to be in doubt.

Regularisation scheme for overstayers (2000)

Arguably this was not a regularisation scheme as such. It merely preserved a right of appeal against a refusal following an application to remain in the UK. However those who had been in the UK for seven years or more were considered for indefinite leave. On 2nd October 2000 new limited rights of appeal against removal for overstayers came into force, cancelling a specific right of appeal for overstayers against removal.

"One off exercise" for asylum seeking families (2003)

The basic criteria were that the applicant(s) applied for asylum before 2nd October 2000 and had at least one dependant aged under 18 in the UK on 2 October 2000 or 24th October 2003. It applies to all asylum-seeking families whether or not they have decisions or appeals pending or whether they have already reached the "end of the line", providing they have not previously left the UK either voluntarily or by removal. Excluded from the exercise are those who have a criminal conviction and/or whose presence in the UK is not conducive to the public good.

Long residence rules

In 2003, the long residence concessions were incorporated into the immigration rules. Based on long residence, the Home Office will normally allow someone to remain in the UK. These rules are based on the principles of the European Convention on Establishment, which the UK ratified in October 1969 and which states that nationals of countries that are party to said Convention should not be required to leave the host country they are in if they have lawfully resided there for over 10 years, unless there are particularly compelling reasons why they should be required to leave (for example reasons relating to public policy, security, health, or morality). The Home Office concession and subsequent rules, cover nationals of any country, however. In addition, those whose residence in the UK has been partly or wholly unlawful can also benefit (normally after 14 years).

Other factors taken into account in these applications are age, strength of connections with the UK, character, conduct, associations and employment record, domestic circumstances, criminal record and any representations received on the applicant's behalf. This is also a type of regularisation, allowing overstayers, illegal entrants, and failed asylum seekers, providing they have not been removed or gone underground, to legalise their stay in the UK. However, it is clearly lengthy and it may not always be straightforward. JCWI is aware of cases that were refused because applicants did not pay taxes (which as an undocumented worker is difficult to do in any event, unless under a false name).

Workers Registration Scheme for EEA Accession State nationals (May 2004)

The UK opened its market to nationals of EEA Accession States allowing nationals to reside and work here. This has acted as a regularisation scheme in that it brought nationals of these states already in the UK in

an irregular capacity, within the ambit of immigration control since any removal directions and any conditions ceased to exist upon accession on 1st May 2004. By February 2005 130,000 people signed up under the scheme, 40% of whom were people already in the UK before 1st May 2004 according to the Home Office's Accession Monitoring Report (2005).

Existing concessions/policies

A person may be granted leave outside the UK immigration rules on the basis of a policy or concession which regulates the exercise of discretion. There are a number of such concessions and they are fully set out in the *JCWI Handbook* (JCWI: 2006, *Handbook on Immigration, Nationality and Refugee Law*). Two concessions which may suggest the basis of a model for regularisation are the ones relating to children and spouses.

7 year children policy (DP/69/99) Enforcement action will not usually proceed against a family where that family has a child/children that have lived continuously in the UK for a period of seven years. Indefinite Leave to Remain is normally granted to the whole family.

2 year marriage policy (DP/3/96) A person will not normally be removed where they are in a genuine and subsisting marriage to a person settled in the United Kingdom, the couple were married and living together continuously in the UK for two years before any enforcement action began, and it would be unreasonable to expect the settled spouse to relocate. A form of temporary leave called 'Discretionary Leave' is normally granted.

Discretionary leave (DL) / Humanitarian Protection (HP) Where someone is in need of international protection, but they don't qualify for asylum under the Refugee Convention, or if they have human rights grounds, they may be granted a form of temporary leave called HP or DL.

In addition to the above-mentioned policies UK immigration law does allow for overstayers, or other undocumented migrants to make applications outside the rules at any time to regularise their leave. Usually in order to be successful in such an application, there have to be underlying compassionate, exceptional or humanitarian grounds on which the Secretary of State may exercise his discretion to grant leave to remain.

5. Regularisation – JCWI's recommendations

A one-off general regularisation would offer the advantage of bringing the largest portion of the irregular population currently present within the sphere of rights and managed migration. We are not advocating that all irregular migrants should be granted settlement immediately. In any event not all of them come to the UK for the purpose of settlement. If formulated thoughtfully, a regularisation scheme would not act as a pull factor or undermine official immigration. Furthermore, in order to avoid the pitfalls other countries have experienced, a general UK regularisation should be part of an overall package of immigration reform.

Irregular migrants who should be able to apply include (but not exclusively) failed asylum seekers, overstayers and people who have been trafficked, as well as those who have not been brought to the notice of the Home Office or immigration authorities.

However in future the Government may wish to consider the benefits of building a permanent regularisation process into the immigration rules so as to limit the re-emergence of a significant irregular migrant population over time.

One-off regularisation

Maximum benefit will be derived from a regularisation scheme if it attracts high numbers of irregular migrants and is sufficiently simple so as to reduce administrative burden. However the Government needs to balance these considerations against inadvertent creation of a pull factor. For this reason we propose structuring the gateway to the regularisation

programme around varying residency periods.

Group One: Applicants who can demonstrate that they have been in the UK for seven years' prior to an announced qualifying deadline should be granted Indefinite Leave to Remain, providing they are free of convictions for serious crimes. This suggested seven-year period is preceded by the Regularisation of Overstayers Scheme in October 2000 which in practice gave indefinite leave to those who had overstayed their leave in the UK for seven or more years, and an existing policy (DP/69/99) which gives indefinite leave to families with children who have been in the UK for seven years.

Group Two: Applicants who can show that they have been resident in the UK between two and seven years, should be able to apply for settlement following a period of five years leave to remain, in line with the current work permit rules. Applicants falling within this category would also have to meet additional criteria. The suggested two-year period works effectively in an existing policy (marriage concession DP/3/96). It is also recommended by the Institute of Employment Rights (IER: 2005, Labour Migration and Employment Rights) as *"sufficiently long to focus regularisation on those who have put down roots in the United Kingdom, but sufficiently short to ensure maximum coverage"*.

Our recommendation that those falling in group two have to meet additional criteria is preceded by the government's asylum 'backlog clearance exercise' in July 1998. In that exercise applicants were invited to fill out a questionnaire stating what additional criteria should be taken into account by the Home Office.

The additional criteria for group two ought to take into account amongst other things length of residence, family ties, evidence of voluntary or community work, and potential to work. However, it is very important that the qualifying criteria for either group should not be focused on those who establish proof of employment. This will avoid situations in which employers control their employees' access to a regularisation scheme which can facilitate the abuse and exploitation. In addition, mitigating circumstances such as poor health should also be considered. If poor health prevents someone from working, this should not automatically mean that a person cannot regularise. Evidentiary requirements should be flexible considering that it will be difficult for irregular migrants to obtain

“regular” evidence. Evidence such as character references from the community should be accepted.

A route to eventual settlement via Indefinite Leave to Remain is important for the success of a regularisation programme and to avoid the Spanish experience of previously regularised migrants with only temporary residence continually falling back into irregularity. Temporary leave for Group Two should lead to settlement after five years to ensure consistency with the current immigration rules.

In order to manage a one-off generalisation effectively and reduce pull factor the Government will also need to limit applicants to those whose residency falls within specific datelines prior to any announcement of a regularisation initiative; and ensure applications are processed within a specific time period.

Group Three: Victims of trafficking and those who experience severe labour exploitation, be that in the sex, or other, industry should be able to regularise regardless of length of residence in the UK. At the minimum the UK should sign the Council of Europe Convention on Action against Trafficking in Human Beings, which contains higher standards in terms of victim protection than that which is currently found in UK legislation. The Convention has regard to the notion that trafficked persons may be in danger if removed, and allows for temporary leave to be granted in these circumstances. This option is also available for persons who are assisting in a prosecution. The temporary leave granted should be in line with the above proposed regularisation scheme, i.e. five years, following which a person may apply for settlement.

Permanent regularisation under the immigration rules

In addition to a “one-off, time-limited” regularisation scheme, in future the Government may wish to consider incorporating into the immigration rules a permanent regularisation process. We propose for instance that Indefinite Leave to Remain is granted where a person can show residency in the UK of at least 7 years subject to key criteria such as the absence of a serious criminal record. This would recognise a degree of integration into UK society by the individual migrant concerned.

Other policy measures

Regularisation has to be combined with other policy measures. In order to work effectively policy weaknesses leading to irregular migration and irregular migrant working need to be addressed.

An open and fair Points-Based System Regularisation should go hand in hand with a Points-Based System that opens regular channels for work migration from non-EEA countries, recognising that the UK economy is the true pull factor and migration plays a vital role in redressing global inequality and Making Poverty History. The criteria for entry should be based on essential skills, rather than whether someone is higher or low skilled because even where a person is lower-skilled, these skills may still be essential in that they are needed. It makes no sense whatsoever to attach lesser rights to skills because they are considered to be “low”. The current restrictive policy of inflexible short-term leave for the low and unskilled categories when poor people from the developing world have to invest so heavily in migration only encourages people to become irregular.

Protect migrant workers’ rights As long as we have a highly deregulated economy, a need for a flexible workforce and a large informal sector, irregular working may reappear as a problem and labour exploitation will flourish. It needs to be held in check by employment rights which are guaranteed whatever one’s immigration status. In particular some stay of deportation for irregular workers who report abusive employers is requisite. We therefore recommend that the UK Government ratifies the 2005 Council of Europe Convention on Action against Trafficking in Human Beings and the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Review employer sanctions: In tandem, the system of sanctions against employers contained in the 1996 and the 2006 Acts should be reviewed. Employers should not be punished solely for the administrative failure of not having checked documents. If the Government really wants to tackle exploitation, employers should be sanctioned primarily for employing migrants in less favourable or exploitative conditions.

The right to work for asylum seekers JCWI also recommends that the

Government revisits the previous concession which allowed asylum seekers to apply for permission to work after six months. This will help to avoid the situation of destitution that some asylum seekers may face, as well as promote integration in UK society. Even if their claim eventually fails, the asylum seeker will have been enabled to develop skills and gain financially which in turn can assist them upon return to the sending country and help contribute to that society. Many asylum seekers are highly skilled and if permitted to work whilst their asylum claims are being considered, are less likely to be a burden on the taxpayer and, in fact, will actively contribute to the economy and society in general.

Failed asylum seekers Many failed asylum seekers are destitute because they are unable to leave the UK and are not receiving any NASS (section 4) support. We recommend that permission to work is extended to failed asylum seekers who are temporarily unable to leave the UK or whose removal is not otherwise being enforced. It has been suggested that *“where it has been clear that it is going to be impossible for a failed asylum seeker to leave the UK, for reasons beyond their control – voluntarily or otherwise – for some considerable period (in excess of six months), he or she should be granted some form of leave to remain in the UK”* (Citizens Advice: June 2006). This leave may take the form of some type of temporary status with a right to work.

6. Conclusion

The fact is that the UK can no longer afford to ignore the number of irregular migrants without rights in the UK. The numbers are growing, and as such constitute an underclass of people in our society who enjoy virtually no rights or protection. How many more Morecambe Bays can the Government afford?

So far no large-scale general regularisations have taken place in the UK. As we have sought to argue, such a regularisation would not alone be the final answer to curtailing the presence of irregular migrants or the exploitation of their labour. In the end there will be incentives to evade UK immigration control as long as we have an overly complex and restrictive immigration system which is punitive toward migrants from the global south co-existing with vast global inequalities and a deregulated UK economy.

The additional steps which are required include a more simplified and liberal UK immigration regime: one which reduces the stratification of different groups of migrants and recognises that all types of migrant, whatever their level of skill, or their provenance, need the opportunity to earn some leave to remain in order to have a way of practically enforcing their rights, particularly in the workplace. UK sign up to internationally recognised standards of protection for migrant workers is also vital to protect against the exploitation of all types of migrant and UK national workers.

No doubt some would regard our calls for reform of the immigration system an administrative revolution. Nonetheless we think it will be a political necessity that either this or a successive government will have

to face up to because the current system of managed migration and surveillance is too complex and ultimately unsustainable, particularly in view of limited capacity to detain and deport.

But until that revolution is underway a system of regularisation, undertaken following the necessary research and consultation, will be an important mechanism for assuring the human rights of thousands of irregular migrants. Regularisation, as the experience of Spain and the US has shown, is not straightforward and we are not about to argue that it comes without responsibilities or some disadvantages. However as we have argued its disadvantages can be limited and its chief benefits outweigh any perceived problems. Above all regularisation would give people who contribute to our society a stakehold in it, assure them of a way to access rights and help to ensure that the UK is a more just and integrated society. In this way regularisation ultimately recognises the importance of rights even as it recognises a political reality: the need to reassure the electorate that their politicians are really managing migration.

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