

# The Global Labour Rights Reporter

Protecting the Labour Rights of Migrant Workers and Refugees



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GUEST EDITOR'S NOTE:

## A WORKER IS A WORKER: PROTECTING THE LABOUR RIGHTS OF WORKERS ON THE MOVE

NEHA MISRA, SOLIDARITY CENTER GLOBAL LEAD-MIGRATION AND HUMAN TRAFFICKING

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Labour migration feeds the global economy. Of the over 281 million international migrants in the world,<sup>1</sup> 169 million are migrant workers (meaning those who are employed in a country of which they are not a national) with a rise in the number of young people migrating for employment.<sup>2</sup> As such, migrant workers make up 5% of the global workforce. And yet, migration policy is often crafted in the realm of security and sovereignty, outside of the legal frameworks for industrial relations and labour law protections. Migrant workers are seen more as foreigners subject to immigration control, than workers deserving of full workers' rights protections under international labour standards – resulting in millions of migrants being denied fair and easy access to justice and remedy.<sup>3</sup>

At the same time, the United Nations High Commissioner for Refugees (UNHCR) estimates that there were over 89 million people who were for-

cibly displaced in 2021, by war, climate or other human rights violations, of which over 27 million<sup>4</sup> were deemed refugees.<sup>5</sup> The total number of forcibly displaced persons topped 100 million for the first time in 2022 – with the war in Ukraine and other conflicts adding over 10 million people.<sup>6</sup> Here too, despite the fact that many refugees and forcibly displaced persons bring skills and talents to host countries and, in some circumstances, help meet labour shortages, they too are vulnerable to exploitation given that they are often poorly integrated into host country labour markets. As the ILO has observed, "Access to formal and decent work remains an issue. The fact that few countries display a systematic correlation between the legal and normative provisions for status determination and protection on the one hand, and right to work on the other,

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<sup>1</sup> U.N. International Organization Migration (IOM), WORLD MIGRATION REPORT 2022, <https://worldmigrationreport.iom.int/wmr-2022-interactive/> (last visited April 10, 2023).

<sup>2</sup> Int'l Labour Organization (ILO), ILO GLOBAL ESTIMATES ON INTERNATIONAL MIGRANT WORKERS RESULTS AND METHODOLOGY -THIRD EDITION (2021) [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms\\_808935.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_808935.pdf). The number of migrants (including refugees) working in a particular destination country may be much higher as many are employed in the informal economy and may be undercounted.

<sup>3</sup> See, Mishka Pillay, Mia-Lia Boua Kiernan & Carolina Gottard, *Ending Immigration Detention and Criminalization by Centering Grassroots Leadership*, GLOBAL COALITION ON MIGRATION: SPOTLIGHT REPORT ON GLOBAL MIGRATION (2022), [https://spotlightreportmigration.org/wp-content/uploads/SRGM\\_EN.pdf](https://spotlightreportmigration.org/wp-content/uploads/SRGM_EN.pdf).

<sup>4</sup> U.N. High Commissioner for Refugees (UNHCR), FIGURES AT A GLANCE, <https://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited April 10, 2023).

<sup>5</sup> This number reflects refugees as defined in the 1951 Convention, namely those outside their country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail themselves of the protection of that country, or to return there, for fear of persecution. See U.N., Refugee Convention (1951) at art. 1A(2). Some have argued that those forcibly displaced by climate should be deemed refugees as well. Bill Frelick, *It is Time to Change the Definition of Refugee*, HUMAN RIGHTS WATCH, (January 2020), <https://www.hrw.org/news/2020/01/28/it-time-change-definition-refugee> (last visited April 10, 2023).

<sup>6</sup> UNHCR, GLOBAL TRENDS AT-A-GLANCE, <https://www.unrefugees.org/refugee-facts/statistics/> (last visited April 10, 2023).



**Neha Misra**

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is a major constraint. Moreover, in general, weak overall protection regimes frequently translate into weak labour market access regimes and limited workplace protection for refugees and other forcibly displaced persons.<sup>7</sup> Even when refugees are granted the right TO work in a host country, they are often systematically denied rights AT work.<sup>8</sup>

Migrants who work -- whether documented or undocumented, considered economic migrants or refugees, in the formal or informal economy -- are among the most vulnerable as they are often excluded from coverage of labour laws, including limitations or exclusions on the freedom of association, right to organize or to collectively bargain. Low wages (when paid) and exposure to dangerous working conditions are also commonplace. There is a clear deficit of decent work opportunities for migrant workers.<sup>9</sup> Migrant workers are **three times** more likely to be victims of forced labour than adult non-migrant labour.<sup>10</sup> And yet, access to labour justice -- either in the country in which they work or the country where they are from -- is often difficult at best. Migrant workers in temporary labour migration schemes are often vulnerable due to systematic, structural impediments -- like tied visas -- in such schemes.<sup>11</sup> And these problems are com-

pounded for those who are undocumented migrant workers, many of whom work in the shadows without recourse to labour inspection, administrative bodies, or courts.

Global migration systems are deliberately structured to discriminate among workers. Systems and structures are designed to create a hierarchy among workers -- based on gender, race/ethnicity/caste, nationality, or migration status (documented/regular, undocumented/irregular, permanent resident/temporary contract). In the same workplace, for example like in a garment factory in Jordan, one will find migrant workers legally paid different wages or charged different recruitment fees based on their nationality; with women workers, the undocumented and refugees often being at the lowest level.<sup>12</sup> Even in countries like the U.S. where employers cannot legally discriminate against workers for example based on gender, migration policy allows such discrimination for migrants.<sup>13</sup>

Such policy incoherence is commonplace in global migration and is perpetuated by migration managed as a security issue versus a labour one. In fact, it's often Ministries of Foreign Affairs, Security or the Interior that develop migration policy or manage migration even after arrival and not Ministries of

<sup>7</sup> ILO, THE ACCESS OF REFUGEES AND OTHER FORCIBLY DISPLACED PERSONS TO THE LABOUR MARKET (2016) at para 50, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/meetingdocument/wcms\\_490753.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/meetingdocument/wcms_490753.pdf).

<sup>8</sup> See Jennifer Gordon, *Refugees and decent work: Lessons learned from recent refugee jobs compacts*, ILO (2019), available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---ifp\\_skills/documents/publication/wcms\\_732602.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_732602.pdf).

<sup>9</sup> Decent work as defined by the International Labour Organization (ILO) and the four pillars of the ILO's Decent Work Agenda -- employment creation, social protection, rights at work, and social dialogue -- are integral elements of the 2030 Agenda for Sustainable Development. See ILO, DECENT WORK, <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> (last visited April 10, 2023).

<sup>10</sup> ILO, GLOBAL ESTIMATES OF MODERN SLAVERY FORCED LABOR AND FORCED MARRIAGE (September 2022), [https://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@ipecc/documents/publication/wcms\\_854733.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@ipecc/documents/publication/wcms_854733.pdf) [hereinafter ILO Global Estimates].

<sup>11</sup> There is no standard definition of temporary labour migration (TLM) schemes, and indeed TLM schemes are found under many different names globally -- such as the 'kafala' or sponsorship system; nonimmigrant visa programs; guestworker programs; circular migration, etc. Regardless of what they are called, TLMs have common attributes. Workers are often required to pay

recruitment fees to participate. Their visas are usually tied to a particular employer, and there is often very little ability for the worker to change employers within the destination country. Workers in TLMs, particularly low wage migrant workers, are unable to migrate with their families. And they often migrate temporarily (meaning a limited period of time (months to years) for jobs that are actually permanent or long-term; sometimes requiring them to leave the destination country, go through the recruitment process again, to work in the same "temporary" job. See ILO, TEMPORARY LABOUR MIGRATION: UNPACKING COMPLEXITIES -- SYNTHESIS REPORT, (2022) [https://www.ilo.org/global/topics/labour-migration/publications/WCMS\\_858541/lang--en/index.htm](https://www.ilo.org/global/topics/labour-migration/publications/WCMS_858541/lang--en/index.htm); See also, *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse*, <https://migrationthatworks.files.wordpress.com/2020/01/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse1.pdf>

<sup>12</sup> Silas Amo-Agyei, *The migrant pay gap: Understanding wage differences between migrants and nationals*, ILO (2020), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_763803.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_763803.pdf).

<sup>13</sup> Centro de los Derechos del Migrante (CDM), MIGRANT WORKER WOMEN SUBMIT FIRST-EVER PETITION AGAINST THE U.S. UNDER THE USMCA, (March 2021) <https://cdmigrante.org/migrant-worker-women-usmca/> (last visited April 10, 2023).

Labour. In the realm of access to justice, the policy incoherence may be even more acute. Countries may create different administrative or judicial bodies for redress of migrant workers labour claims or may even deny access to legal venues for certain categories of the migrants, like undocumented workers.<sup>14</sup> The absence of “firewalls” -- or a separation of immigration enforcement activities from labour law enforcement (as well as from other public service provision, such as healthcare, education and housing) -- has long been seen a hinderance to migrant workers exercising their workplace rights.<sup>15</sup> For a worker to report abuse or exploitation in the workplace, they need to trust that they will not be arrested, detained or deported for immigration offenses or for reporting a violation against an employer who holds their visa.

Access to justice for extreme forms of labour exploitation such as forced labour, but also for basic workplace rights violations like wage theft, workers compensation for on-the-job injuries, and discrimination, is elusive for both regular and irregular migrant workers. While the absence of firewalls is a major issue, there are often other obstacles. For example, in many countries, a migrant must be physically present to pursue a claim, even for basic workplace violations such as wage theft. And many countries do not provide opportunities to stay in a country to pursue a claim, especially for those on employer-tied temporary visas or the undocumented. Migrant workers must have access to concrete status protections when they exercise their rights and help to enforce labour laws. Trade unionists and other labour and migrant rights activists have been calling for the development of justice mechanisms that allow migrants, whether still in the destination country or after returning to their origin country or a third country, to easily and fairly obtain remedies for the systematic violations they face in the workplace. The concept of “portable justice” is gaining traction, and one that is essen-

tial for migrant workers. Collective organizing will continue to lag for migrant workers without it.

Wage theft of migrant workers remains rampant. In the same ILO report that found that migrant workers are three times more likely to be in forced labour than other workers, also found that the “systematic and deliberate withholding of wages, used by abusive employers to compel workers to stay in a job out of fear of losing accrued earnings, is the most common form of coercion, experienced by 36 per cent of those in forced labour.”<sup>16</sup> “Systemic wage theft has long been part of the labour migration landscape in every region of the world. During COVID-19, egregious underpayment of migrant workers was even more widespread as businesses encountered financial pressures and vast numbers of workers were repatriated without payment of their wages. Though every jurisdiction has judicial and/or administrative mechanisms to address wage claims, employers in every country can be confident that very few unpaid migrant workers will ever use those mechanisms to recover their wages. This is because the system is stacked against them at every stage in the wage claim process.”<sup>17</sup>

The devastating impact of global COVID-19 pandemic on migrant workers was predictable and well documented.<sup>18</sup> The structural flaws in current migration management regimes – such as employer-tied visas and limited access to venues for claims – and continued policy incoherence

<sup>16</sup> ILO Global Estimates, *supra* note 10.

<sup>17</sup> Bassina Farbenblum & Laurie Berg, *MIGRANT WORKERS' ACCESS TO JUSTICE FOR WAGE THEFT: A GLOBAL STUDY OF PROMISING INITIATIVES*, (2021) <https://www.solidaritycenter.org/wp-content/uploads/2021/12/Migrant-Workers-Access-to-Justice-for-Wage-Theft-Publication.pdf> (A recent report by the Migrant Justice Institute (with support from the Solidarity Centre and the ILAW Network).

<sup>18</sup> See e.g. ILO, *COVID-19 HAS MADE LIFE EVEN MORE PRECARIOUS FOR MIGRANT WORKERS* (November 2021) [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_829452/lang-tr/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_829452/lang-tr/index.htm) (last visited April 10, 2023); Katharine Jones, Sanushka Mudaliar & Nicola Piper, *Locked down and in limbo: The global impact of COVID-19 on migrant worker rights and recruitment*, ILO (2021) [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_821985.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_821985.pdf); Migration Data Portal, *How COVID-19 HAS MADE LIFE MORE DANGEROUS FOR MIGRANT WORKERS* (April 2022) <https://www.migrationdataportal.org/blog/how-covid-19-has-made-life-more-dangerous-migrant-workers> (last visited April 10, 2023); Tula Connell, *Migrant Workers Essential Workers not only in COVID-19*, SOLIDARITY CENTRE (April 2020) <https://www.solidaritycenter.org/migrant-workers-essential-workers-not-only-in-covid-19/> (last visited April 10, 2023); Tula Connell, *Podcast: Winning Rights for Migrant Workers during COVID-19*, SOLIDARITY CENTRE (March 2021) <https://www.solidaritycenter.org/podcast-winning-rights-for-migrant-workers-during-covid-19/>.

<sup>14</sup> See e.g. PICUM, *A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice*, PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS (2020), <https://picum.org/wp-content/uploads/2020/03/A-Worker-is-a-Worker-full-doc.pdf>; See also, International Labour Organization (ILO), *FAIR RECRUITMENT AND ACCESS TO JUSTICE FOR MIGRANT WORKERS* (2022) [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_850615.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_850615.pdf)

<sup>15</sup> François Crépeau & Bethany Hastie, *The Case for 'Firewall' Protections for Irregular Migrants Safeguarding Fundamental Rights*, 2(3) EUR. J. OF MIGRATION AND L. 157-183, (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2780641](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2780641).

around regularization of undocumented migrant workers made these precarious low wage workers often the first to experience the economic (and social) shock of the pandemic. Now as global economies recover and address the long-term impact of the pandemic, governments are looking to migration as ways to fill post-pandemic labour shortages. As noted in a recent OECD publication, “Labour shortages have been widespread across countries, yet particularly in Australia, Canada and the United States; and across industries, yet particularly in contact-intensive ones like accommodation and food, but also manufacturing... other factors beyond [just] the economic cycle may also play a role: the post-COVID-19 increase in labour shortages may partly reflect structural changes, in particular changes in preferences, as some workers may no longer accept low-pay and poor or strenuous working conditions.”<sup>19</sup> Within this context, many governments are turning to migrants to fill these jobs that are characterized by low wages, long hours, and weak occupational safety and health protections.

Unfortunately, governments are doubling down on promoting exploitative temporary labour migration schemes as a way to fill job shortages, often in lieu of or in place of humanitarian pathways. For example, in the United States, the Biden-Harris administration’s *Collaborative Migration Management Strategy*, launched in 2021, “identifies and prioritizes actions to strengthen cooperative efforts to manage safe, orderly, and humane migration in North and Central America”, focused on the US side on expanding access to nonimmigrant work visa programs.<sup>20</sup> Migrant rights advocates however point out that such temporary migration schemes are being expanded without the necessary protections for workers in these sectors, including protections from rampant wage theft,<sup>21</sup> while humanitarian pathways

like asylum and temporary protected status (TPS) are being reduced, and calls for regularization of the undocumented fail. The latest government to exemplify this trend is in the United Kingdom where the UNHCR has accused the government of “extinguishing the right to seek refugee protection in the UK” through a proposed new bill that greatly limits access to asylum protections.<sup>22</sup> And while the various governments of the Gulf Cooperation Council, like Qatar and Kuwait, have implemented some reforms to the “kafala” or sponsorship system, low-wage migrant workers are still only able to migrate for work through temporary labour migration schemes without their families.

Such policy incoherence is all too common in global migration management. The predominant paradigm of regular labour migration globally is one of temporariness – where employer-tied temporary visas resulting in the inability to change employers or exercise visa portability, high recruitment fees, short-term contracts (for long-term, permanent jobs) – results in a large percentage of the workforce in many sectors segregated into low-wage jobs where workers have no right to family unity. The accompanying political unviability of regularization of the huge percentages of the undocumented migrant workforce in global economies, results in a structural extreme form of flexible labour. Unions and labour rights advocates consistently call for migration systems that are rooted in humanitarianism, family unity, real labour market needs (as determined by an independent labour commission for example), pathways to long-term residency and equality of treatment for workers in workplaces and under the law.

The incoherent migration management global system described above purposely creates major obstacles for migrant workers to exercise their freedom of association, right to organize and collectively bargain. It is built into the fabric of migration management regimes. In major migrant workers destination countries such as Qatar, Saudi Arabia and the United Arab Emirates, migrant workers are completely denied not only

<sup>19</sup> Orsetta Causa, et al., *The Post-COVID-19 Rise in Labour Shortages*, OECD ECONOMICS DEPARTMENT WORKING PAPERS No. 1721 (July 2022), <https://www.oecd-ilibrary.org/docserver/e60c2d1c-en.pdf?expires=1677521745&id=id&acname=guest&checksum=750D2FA53AB6A3B54E071CB5B4171336>.

<sup>20</sup> See The White House, FACT SHEET: UPDATE ON THE COLLABORATIVE MIGRATION MANAGEMENT STRATEGY (April 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/20/fact-sheet-update-on-the-collaborative-migration-management-strategy/>.

<sup>21</sup> The U.S.-based Economic Policy Institute (EPI) issued a recent study that showed the H-2B program—which allows U.S. employers to hire migrant workers for temporary and seasonal jobs—grew to its largest size ever in 2022. At the same time, mass violations of wage and hour laws were being committed in the industries that employ H-2B workers, with U.S. Department of Labor data showing that nearly \$1.8 billion was stolen from workers employed in the main H-2B

industries (which includes both U.S. and migrant workers) between 2000 and 2021. See, Daniel Costa, *As the H-2B visa program grows, the need for reforms that protect workers is greater than ever*, ECONOMIC POLICY INSTITUTE, (August 2022) <https://www.epi.org/publication/h-2b-industries-and-wage-theft/>.

<sup>22</sup> Rajeev Syal & Kiran Stace, *Rishi Sunak ‘extinguishing the right to seek refugee protection in the UK’*, GUARDIAN, (2023), <https://www.theguardian.com/uk-news/2023/mar/07/suella-braver-man-asylum-migration-bill-law-change-small-boats>.

the right to form unions, but the freedom of association generally as well. In other major destination countries like Malaysia and Thailand, migrant workers are denied the right to form their own unions, hold leadership positions in unions or participate in collective bargaining. Migrant workers have also been forced to sign contracts that restrict this fundamental right. And migrant workers – both undocumented and those in temporary labour migration schemes – are routinely blacklisted, reported to immigration authorities, detained and deported for trying to organize. Access to justice for migrant workers is ever more difficult without this fundamental right to organize. Sustained advocacy by workers and labour rights advocates demanding respect and dignity in the workplace for all workers is gaining traction – a worker is a worker is worker. The articles in this issue of the Global Labour Rights Reporter highlight some of the innovative strategies and initiatives workers and their allies (in the legal community and the labour movement) have been implementing to ensure that migrants and refugees – regardless of their status – can exercise their rights and access remedy for violations.



# VISA PROTECTIONS TO ENABLE EXPLOITED MIGRANT WORKERS TO BRING LABOUR CLAIMS: AN AUSTRALIAN PROPOSAL

## Laurie Berg and Bassina Farbenblum<sup>1</sup>

Australia | Originally written in English

### Introduction

Migrant worker exploitation is entrenched in numerous industries in virtually every country. The vast majority of unlawful employer conduct goes unchecked because labour enforcement systems are weak and under-resourced, and because most migrant workers choose to not report exploitation. Many migrant workers stay silent for fear that if they come forward, they will put their visa and stay in the country of employment at risk or jeopardize a future visa. Migrant workers who are sponsored by their employer fear they will lose their sponsorship and, with it, their permission to lawfully remain in the country. Undocumented workers and workers who have breached the conditions on their visa fear detection by immigration authorities and visa cancellation or removal. When migrant workers reach the end of their stay and could potentially safely pursue a labour claim without risk to their job or visa, they are required to swiftly return home. All intelligence about exploitative employers is lost and the worker never accesses justice for the multitude of labour violations they face.<sup>2</sup>

*“These immigration-related challenges could be overcome in two ways: (1) short-term permission to extend a migrant worker’s stay with work rights to pursue a wage claim and for some, transition to a new employer and/or visa, and (2) for those who have worked without legal authorization, protection against removal or visa cancellation.”*

In Australia, in 2022, Migrant Justice Institute developed a detailed proposal for protection against visa cancellation and a new short-term ‘Workplace Justice’ visa for migrant workers who demonstrate they are taking action against an employer for a violation of labour law.<sup>3</sup> Working with another national organisation, the Human Rights Law Centre, Migrant Justice Institute built unprecedented support for the somewhat radical proposal across the union movement and community sector, and later, the business community. The proposal came to be described by a senior Australian Federal Government official as a ‘unity ticket’. In May 2023, the Immigration minister announced that it will introduce the two key elements of the proposal: a pilot of a short term visa for migrant workers to stay to pursue wage claims or participate in a labour enforcement investigation; and a legislated protection against visa cancellation for visa holders who speak out against an exploitative employer but have breached their visa conditions. The details of each element are currently being developed. If implemented robustly, the Australian proposal will provide new models and

<sup>1</sup> Associate Professor Laurie Berg is on the UTS Faculty of Law and is Co-Executive Director of the Migrant Justice Institute. Associate Professor Bassina Farbenblum is on the UNSW Faculty of Law & Justice and is Co-Executive Director of the Migrant Justice Institute.

<sup>2</sup> See Migrant Justice Institute (MJI), *MIGRANT WORKERS AND WAGE THEFT: WHY HY GOVERNMENT AND BUSINESS SYSTEMS ARE FAILING AND WHAT NEEDS TO CHANGE*, (2023), <https://www.migrantjustice.org/wagethefta2j>.

<sup>3</sup> See MJI, *BREAKING THE SILENCE: A PROPOSAL FOR WHISTLEBLOWER PROTECTIONS TO ENABLE MIGRANT WORKERS TO ADDRESS EXPLOITATION*, (2023) <https://www.migrantjustice.org/law-and-policy-reform-proposals> (last visited Mar 1, 2023).

strong global precedents for protections for migrant workers who seek to bring labour claims without jeopardizing their visa.

This article discusses the context and detail of the proposal, as well as the process for building support and consensus among diverse advocates, unions and community stakeholders. It situates the proposed reforms in the context of examples of other global models which, for the most part, are more limited.

### The Problem: The Overwhelming Majority of Migrant Workers in Australia Endure Wage Theft and Other Labour Abuses in Silence

Instead, a de facto low-wage temporary migrant labour force has emerged. This includes the hundreds of thousands of international students with limited work rights, backpackers who are promised visa extensions if they undertake horticultural and other work in regional areas, and a skilled employer-sponsored temporary visa program that can be used by employers to employ vulnerable migrant workers.

Wage theft and other forms of exploitation are endemic in industries with large numbers of migrant workers. Migrant Justice Institute's 2016 survey of 4,322 temporary visa holders found that three quarters earned below the relevant minimum hourly wage, and a third earned less than half the minimum.<sup>4</sup> Among those who were underpaid, 91% told nobody and took no action. Our subsequent large scale survey in 2019 produced similar findings.<sup>5</sup>

Many of these workers stay silent in the face of wage theft and other forms of exploitation for similar reasons as migrants elsewhere. International students who have worked more than the number of hours permitted under their visa avoid bringing a claim against their employer due to fear of visa cancellation or jeopardizing a future visa. Sponsored wor-

kers subjected to wage theft remain silent for fear of losing their job, and with it their visa. Exploited backpackers frequently decline to hold their employer to account for sexual harassment and other exploitation because they need employer certification to receive a second-year visa.

Australia's national labour regulator, the Fair Work Ombudsman (FWO), has acknowledged for years that most migrant workers are extremely reluctant to seek its assistance.<sup>6</sup> The Federal Government first attempted to address this issue by implementing an 'Assurance Protocol' between the FWO and the Department of Home Affairs (DHA) in 2017. Under the arrangement, DHA commits to generally not cancel an international student's<sup>7</sup> visa for breach of work rights if the worker is assisting the FWO with its inquiries. In principle, the Assurance Protocol was an innovative approach to migrant worker protection, acknowledging the need for visa safeguards to enable international students to report exploitation. In practice, however, it has had virtually no impact. Between 2017 and 2021, it was used by only 77 temporary visa holders<sup>8</sup>.

Its ineffectiveness stems from several key shortcomings, including that it is only available to migrants who have breached a visa condition related to work rights, and only if they are 'helping [the FWO] with [its] inquiries'.<sup>9</sup> It is not available for exploited workers



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<sup>6</sup> Alexandra Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum & George Tan, INTERNATIONAL STUDENTS AND THE FAIR WORK OMBUDSMAN, (2017), <https://www.migrantjustice.org/publications-list/report-international-students-and-the-fair-work-ombudsman> (last visited Mar 1, 2023).

<sup>7</sup> The Protocol applies to all temporary migrants with work rights, but in reality can only be used by international students. Employer-sponsored workers are practically unable to avail themselves of these protections. These workers fear loss of sponsorship if they bring a claim against their sponsoring employer during their term of employment. However, for these workers, protection against visa cancellation is not sufficient to address the invalidity of their visa on the basis of the termination of sponsorship. Instead, if their sponsorship ends or is terminated, these workers require a new visa to regularise their stay for a short period of time in which to pursue a claim and identify a new sponsor before transitioning back onto an employer-sponsored visa.

<sup>8</sup> Information provided by DHA pursuant to a Freedom of Information Request, FA 21/12/00662, (14 February 2022).

<sup>9</sup> Fair Work Ombudsman, *Visa protections – the Assurance Protocol*, <https://www.fairwork.gov.au/find-help-for/>

<sup>4</sup> Laurie Berg & Bassina Farbenblum, WAGE THEFT IN AUSTRALIA: FINDINGS OF THE NATIONAL TEMPORARY MIGRANT WORK SURVEY, 5 (2017), <https://www.migrantjustice.org/highlights/2017/11/14/report-released-wage-theft-in-australia-findings-of-the-national-temporary-migrant-work-survey> (last visited Mar 1, 2023).

<sup>5</sup> Bassina Farbenblum & Laurie Berg, WAGE THEFT AND INTERNATIONAL STUDENTS REPORT, 8 (2020), <https://www.migrantjustice.org/iswagetheft> (last visited Mar 1, 2023).

in relation to whom the FWO decides to not make further inquiries due to inadequate evidence (especially for workers underpaid in cash), lack of agency resources or other reasons. Indeed, the FWO does not routinely investigate the claims of migrant workers who seek its assistance.<sup>10</sup> As a result, availability of the Protocol is speculative and largely outside the worker's control. The Protocol is also not available to workers who wish to approach other agencies to report or seek assistance in relation to other workplace harms, including workplace health and safety breaches, sexual harassment or bullying, or other abuses.

*"It has become clear to unions, community lawyers and migrant organizations across Australia that given the seriousness of the risk of visa cancellation (or removal for undocumented workers), migrant workers will only come forward against their employers if there are strong, express protections against adverse consequences or they are already at the end of their stay and have nothing to lose."*

### **Migrant Justice Institute's proposal for 'whistleblower protections'**

In 2022, Migrant Justice Institute developed a detailed proposal for a new short-term 'Workplace Justice Visa' for migrant workers who demonstrate they are taking action against an employer for a violation of labour law, and protection against visa cancellation primarily for international students who have breached their work hours cap.

#### *A new Workplace Justice visa*

Under the proposal, a new Workplace Justice visa would be available to migrant workers who pursue legitimate claims against an employer through a range of avenues beyond the federal labour regulator.

**Eligibility for the visa.** A migrant worker would be eligible for the visa if:

1. There are reasonable grounds to suspect that the worker's employer has committed a

[visa-holders-migrants/visa-protections-the-assurance-protocol](#) (last visited Mar 1, 2023).

<sup>10</sup> Laurie Berg & Bassina Farbenblum, *Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman*, 23(3) AUSTRALIAN J. OF HUM. RTS. 310-331 (2017), <https://www.tandfonline.com/doi/full/10.1080/1323238X.2017.1392478>.

non-trivial contravention of labour or immigration law in relation to that worker; and

2. The worker is a 'whistleblower', i.e. the worker has taken steps to address the contravention. This includes assisting a relevant government agency's investigation of the employer, engaging with a union in relation to the employer's alleged contravention or having retained a private or community lawyer to pursue a legal claim.

Forms of acceptable evidence of the merits of the worker's allegation, and evidence that the worker is taking steps to seek redress. These would be set out in a legislative instrument and include:

1. Certification by a relevant enforcement agency that it is conducting inquiries or pursuing compliance measures in relation to the visa-holder's employment. Relevant enforcement agencies would include a range of state and federal labour authorities, as well as policing agencies and enforcement agencies within labour hire licencing schemes;
2. A court, tribunal or commission issuing a 'temporary stay certificate' certifying that a worker's ongoing presence in Australia is required for the conduct of its proceedings; or
3. Certification by an employment law practitioner who holds specialist accreditation from their relevant law society or is employed in a government-funded legal service, pro bono practice in a commercial firm, or a union. The legal practitioner must certify that there are reasonable grounds to suspect that a worker's employer has contravened a relevant workplace law in relation to the visa-holder's employment, and that the worker is pursuing a legal remedy in relation to an alleged workplace contravention through negotiation with the employer or a legal application to an appropriate forum.

Prescribing a broader range of acceptable evidence, including from union lawyers, ensures that government agencies' resources are not depleted by a potentially large number of requests for certification by workers who wish to benefit from this visa.

Eligibility conditioned on non-trivial alleged contraventions by employers. A legislative instrument would specify a list of workplace contraventions that give rise to visa eligibility, including violations under employment law, workplace health and sa-

fety law and laws proscribing sexual harassment, among others.

Safeguards against unmeritorious claims brought in order to obtain the visa. The 3 certification options strike a balance between providing safeguards against fraudulent claims to obtain the visa on the one hand, and, on the other hand, a simple process for adducing evidence and determining eligibility that does not create impediments to migrant workers genuinely applying for protection.

The possibility of non-government actor certification creates an option that is not resource-intensive or lengthy for the government agencies to administer. Recognizing potential government concerns regarding false or inadequately substantiated certifications, the proposal contains three safeguards. First, eligibility for certification is restricted to lawyers with current legal practice certificates who are subject to professional disciplinary oversight. Second, eligibility is restricted to private lawyers who hold accredited specialization from their respective law societies (with increased professional reputational risk), or are employed by pro bono practices of commercial firms, in government-funded practices or in unions that have no financial or other incentive to falsely certify a claim. Third, a legislative instrument would set out a threshold for 'non-trivial' contraventions such as minimum underpayment of AUD 2,000 (USD 1,340) per worker.

Expanded enforcement actors including a role for trade unions. The proposal has the significant benefit of creating an enforcement community beyond government regulators and incentivizing workers to bring claims through legal centres and unions. This includes incentivizing migrant workers to join a union (there are no legal or other restrictions preventing migrant workers in Australia from joining a union) and in turn incentivizing unions to recruit migrant workers. It would also substantially increase the government's access to intelligence to inform its enforcement activities because an applicant relying on a certification from a private lawyer is required to present evidence that they have also reported the noncompliance to a relevant government authority.

Visa structure, duration and conditions. The proposed Workplace Justice visa is a substantive visa with the following features:

1. A validity period of 6-12 months, at the decision-maker's discretion depending on the form, quality and content of evidence of the merits and progress of the investigation, com-

plaint or claim. The visa remains valid for the approved period regardless of whether the claim settles, because conditioning visa validity on the matter remaining on foot may unnecessarily discourage settlement. An immigration decision-maker may require certification of the bona fides of the settlement in cases of doubt.

2. The visa-holder may apply for a subsequent/renewal of a Workplace Justice visa if they can demonstrate that a legal process or investigation remains on foot (a higher threshold than for the initial visa). This is critical because providing access to this visa only once would enable an unscrupulous employer to unduly extend a negotiation or legal proceedings until the expiry of the visa, forcing the worker to depart without remedy.
3. The visa-holder is permitted to work. Without income obtained through work rights, most migrant workers would be unable to remain in Australia to pursue such claims. This would result in the visa either having very limited take-up, or visa holders engaging in unauthorized work to support themselves, thus compounding the problem which the visa is intended to address.
4. A visa condition should stipulate that the visa-holder must not abandon the claim or cease to cooperate with authorities (not including bona fide settlement). This ensures that the visa holder and employer are not complicit in labour contraventions to facilitate a worker's stay in Australia.
5. Where a migrant worker transitions from a substantive visa to a Workplace Justice visa, the Workplace Justice visa should have the same visa pathways as the previous substantive visa. This would provide an opportunity for employer-sponsored workers who have left an exploitative employer to find alternative sponsorship.

Availability of the visa to undocumented workers, including upon detection. The visa should be available to undocumented workers regardless of whether they proactively come forward or bring a labour claim after detection by DHA. An extended discussion of potential concerns and responses in relation to undocumented workers is presented in the Proposal.<sup>11</sup>

#### *Protection against visa cancellation*

<sup>11</sup> MJI, BREAKING THE SILENCE: A PROPOSAL FOR WHISTLEBLOWER PROTECTIONS TO ENABLE MIGRANT WORKERS TO ADDRESS EXPLOITATION, at 21-22 (2023), <https://www.migrantjustice.org/law-and-policy-reform-proposals> (last visited Mar 1, 2023).



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The proposal also contains recommendations for strengthened protections against visa cancellation and future visa ineligibility to enable international students in Australia, in particular, to pursue legitimate claims against an employer. These would be applied where the international student has breached their work-related visa condition in connection with work for a specific employer, there are reasonable grounds to suspect that that employer has committed a non-trivial contravention of labour or immigration law in relation to that worker and the worker has taken steps to address the contravention. The eligibility and evidentiary requirements for applying for protection against visa cancellation would mirror the requirements for the Workplace Justice visa.

To provide a clear and reliable legal basis for this protection, the assurance should be provided through an existing provision in Australian migration legislation that 'The Minister is not to cancel a visa ... if there exist prescribed circumstances in which a visa is not to be cancelled'. Australian Regulations do not currently prescribe any circumstances in which a visa is not to be cancelled. Under the proposed scheme, regulations would be issued, prescribing that a visa is not to be cancelled in circumstances where a worker has become a 'whistleblower' in the circumstances described above.

### **Building a movement in support of the proposal**

Unlike other OECD countries, Australia's reckoning with migrant worker exploitation is in its infancy. Though the issue has gained increasing prominence in recent years, until recently, migrant worker rights have largely been a sleeper issue for the Australian government. In May 2022, a new Labour government came into power with an elec-

tion commitment to address migrant worker exploitation.

Recognizing a window of opportunity to introduce more radical systemic reforms, the Migrant Justice Institute partnered with the Human Rights Law Centre to develop a proposal for whistleblower protections for migrant workers. The concept of a temporary visa to enable a migrant worker to extend their stay in Australia to pursue a claim had formed the basis of law reform recommendations by lawyers, unions and the community sector for over a decade. The Migrant Workers Centre, which works alongside the union movement in Victoria to empower migrant workers, had coined the term 'whistleblower' to convey that this visa would enhance the agency of migrant workers who were blowing the whistle on employer/corporate misconduct. However, no individual or organization had worked through the details of how this visa should operate, including eligibility requirements and safeguards against misuse.

Given the fairly radical nature of the proposal, the lead organizations sought to reach a broad consensus among unions, service providers and other peak national organizations on the form of the proposal through an options paper and a series of expert consultations. Once the proposal had been refined with all elements justified and potential concerns addressed, the lead organizations approached a broad range of organizations across Australia seeking their endorsement. Over 40 organizations endorsed the proposal, including legal service providers, unions (right- and left-affiliated), churches, ethnic community peak bodies, professional peak bodies (including migration agents), international human rights organizations, peak national social welfare services, and a state Anti-Slavery Commissioner (a full list of endorsing organizations is available in the proposal).<sup>12</sup> The proposal was also later endorsed by the UN Global Compact Network Australia, a peak body for many of the largest businesses in Australia that have committed to addressing modern slavery.

The proposal was confidentially shared with key government ministers and departments in late 2022, followed by discussions to address concerns. As it was under consideration by the Federal Government Cabinet in February 2023, the proposal was publicly released with an extensive media and social media campaign. In May 2023, the Immigration minister announced that it will introduce the two key elements of the proposal: a pilot of a short term visa for migrant workers to stay

<sup>12</sup> *Id.*

to pursue wage claims or participate in a labour enforcement investigation; and a legislated protection against visa cancellation for visa holders who speak out against an exploitative employer but have breached their visa conditions. The Department of Home Affairs held a ‘co-design’ workshop with unions and civil society on the detail of each element, and as of July 2023, the final forms of the two elements are currently being developed by government.

### The global context: an advance on more limited protections in many countries

This proposal builds on lessons learned from other countries. A number of jurisdictions have introduced visas to address migrant worker exploitation but have done this in a partial way that does not effectively encourage a broad range of migrant workers to address exploitation at work. If implemented, the Australian proposal would provide new models and strong global precedents for protections for migrant workers who seek to bring labour claims without jeopardizing their visa.

#### *Current Limited Options for Migrant Workers to Obtain a New Visa to Pursue a Labour Claim*

Many jurisdictions provide visas to victims of trafficking or witnesses in criminal investigations of forced labour or similar crimes, which may also enable that worker to pursue civil remedies against the employer.

*“However, in the absence of a criminal investigation, only a very small number of jurisdictions enable workers to extend their visa, or apply for a new short-term visa, in order to remain in the country of employment to pursue a wage claim.<sup>13</sup>*

*Even in countries with formal procedures for applying to stay, these schemes are limited, and often do not permit the migrant to work while their case continues.”*

For instance, under Latvian law, an undocumented worker “employed in particularly exploitative working conditions” is able to request a one-year (renewable) temporary residence permit “if the foreigner has turned to the court with an application regarding recovery of the unpaid work remuneration from the employer”.<sup>14</sup> However, it is not

<sup>13</sup> This section draws on the research conducted by Sarah Mehta, Head – International Projects, Migrant Justice Institute. Any errors are the authors’ own. For further information, see also, MJI, MIGRANT WORKERS’ ACCESS TO JUSTICE FOR WAGE THEFT, <https://www.migrantjustice.org/wagetheft2j> (last visited Mar 1, 2023).

<sup>14</sup> IMMIGRATION LAW (IMIGRĀCIJAS LIKUMS), section 23(7) (Lat.).



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known whether this residence permit is granted in practice.

Hong Kong has formal procedures for foreign domestic workers to request a visa extension for the purposes of filing and pursuing a labour claim.<sup>15</sup> This enables them to remain in Hong Kong when their visa comes to an end (ordinarily two weeks after the termination of their employment contract). However, each two-week visa extension costs around HK\$ 230 (USD 29.40) and does not permit the migrant to work while on the visa, so the migrant must absorb all the costs of housing, food, and other expenses while pursuing a case. This is a significant cost for many workers, particularly as many will need to apply for multiple extensions given court delays.

In Malaysia, migrant workers and others can apply for a ‘special pass’ that allows them to stay beyond their visa, generally for up to 30 days, if the worker shows documentation that they are pursuing a labour claim.<sup>16</sup> The pass can be renewed for a total of three months at the discretion of the immigration department. Advocates note that this pass is not a

<sup>15</sup> Government of Hong Kong, Home Affairs Department, WORKING IN HONG KONG, [https://www.had.gov.hk/rru/en/images/pdf/Your\\_Guide\\_to\\_Services\\_in\\_HK\\_English\\_chapter\\_4.pdf](https://www.had.gov.hk/rru/en/images/pdf/Your_Guide_to_Services_in_HK_English_chapter_4.pdf) (last visited 26 Jan. 2023); Hong Kong Federation of Asian Domestic Workers Unions (FADWU), THE PRICE OF JUSTICE: MIGRANT DOMESTIC WORKERS’ EXPERIENCE OF TRYING TO RESOLVE LABOUR DISPUTES, (2019), [https://idwfed.org/wp-content/uploads/2022/07/the\\_price\\_of\\_justice.pdf](https://idwfed.org/wp-content/uploads/2022/07/the_price_of_justice.pdf) (last visited Mar 1, 2023); Rachel Li, *Interview - HELP*, (2023) (interview conducted in the course of MJI research, transcripts on file).

<sup>16</sup> *Immigration Regulations of 1963*, Regulation 14 (Malaysia); See Bar Council of Malaysia, MIGRANT WORKERS’ ACCESS TO JUSTICE: MALAYSIA, (2019), [https://www.malaysianbar.org.my/cms/upload\\_files/document/Migrant%20Workers%20Access%20to%20Justice%20Report%20\(28Nov2019\).pdf](https://www.malaysianbar.org.my/cms/upload_files/document/Migrant%20Workers%20Access%20to%20Justice%20Report%20(28Nov2019).pdf) (last visited Mar 1, 2023); Renuka Balasubramaniam, *Interview*, (2023) (interview conducted in the course of MJI research, transcripts on file); Apolinar Tolentina, *Interview*, (2023) (interview conducted in the course of MJI research, transcripts on file); iVisa, MALAYSIA VISA EXTENSION: ALL THE INFORMATION YOU NEED TO KNOW ABOUT IT, <https://www.ivisa.com/malaysia-blog/updated-information-for-malaysia-visa-extension> (last visited Mar 1, 2023).

meaningful safeguard for migrant workers because it is short, discretionary, expensive (it costs 100 Malaysian Ringgits – approximately USD 24 – each time it is renewed), and does not carry work rights, leaving a worker with no lawful ability to support themselves while legal proceedings proceed.

In recent years, several countries, including Canada,<sup>17</sup> Finland,<sup>18</sup> and New Zealand<sup>19</sup> have introduced portability schemes for migrant workers who have experienced workplace exploitation. These allow an employer-sponsored worker to report a labour violation and then access a short-term visa to stay in the country, find alternative work, before reapplying for a new visa once they have identified a new employer sponsor. These models are primarily directed to permitting sponsored workers to leave exploitative employment. Eligibility for the visas is conditioned on the migrant worker evidencing labour exploitation but it is not clear how frequently the claims are investigated by labour authorities and individual labour remedies such as wage repayment obtained.

#### *Protection From Visa Cancellation and Removal*

In Australia, protection from visa cancellation is critically important because a large portion of Australia's vulnerable migrant workforce are international students who work beyond the permitted work hours cap in order to compensate for illegally underpaid wages. Because they have breached their visa, if detected their visas could be cancelled and they would be required to leave Australia.

Though we have not identified other global examples of protection from visa cancellation for migrant workers who have breached their visa, the United States recently introduced new protections

to enable undocumented workers who report labour abuse to avoid removal and remain temporarily in the country. In 2023, the US Department of Homeland Security instituted a new, streamlined and centralized process for migrant workers involved in labour disputes to request immigration relief through deferred action, which can last up to two years in general and may be accompanied by work authorization.<sup>20</sup> Applicants must provide a letter of support from a local, state or federal labour agency, outlining the “enforcement or jurisdictional interest of the labour agency”, the relevant workers and why prosecutorial discretion for these workers furthers the labour agency's interest. Although deferred action does not change the immigration status of undocumented workers, it provides workers with protection from deportation and time to pursue other labour and immigration options. Advocates note that another benefit of deferred action, in this model, is that it provides work authorization that is not tethered to a single employer, increasing the worker's employment options and bargaining power to avoid or leave an exploitative work situation.<sup>21</sup>

#### **Conclusion**

As a new global community of practice emerges among advocates addressing migrant worker exploitation, there are important opportunities to establish and share proposals and examples of promising practices.<sup>22</sup> There are clear examples of governments drawing on each other for restrictive migration reforms (including Australia's notorious offshore detention regime).<sup>23</sup> It is time for advocates to press governments in a race to the top on migration reforms to enable migrant workers to address workplace exploitation. We hope that this proposal will set a new global best practice, but regardless of its implementation, we hope that sharing the proposal will contribute to the global conversation among advocates developing and driving reforms in each of our countries.

<sup>17</sup> Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2019-148, sections 299(2)(l) and 303.2(2)(a) in Government of Canada, *Part 2: Regulations Amending the Immigration and Refugee Protection Regulations*, 153 CANADA GAZETTE (2019), <https://gazette.gc.ca/rp-pr/p2/2019/2019-05-29/html/sor-dors148-eng.html> (last visited Mar 1, 2023); see also Amanda Aziz, A PROMISE OF PROTECTION? AN ASSESSMENT OF IRCC DECISION-MAKING UNDER THE VULNERABLE WORKER OPEN WORK PERMIT PROGRAM (2022).

<sup>18</sup> Finnish Immigration Services, *Residence permit or certificate due to exploitation by employer*, MAAHANMUUTTOVIRASTO, <https://migri.fi/en/residence-permit-or-certificate-due-to-exploitation-by-employer> (last visited Mar 1, 2023); See Platform for International Cooperation on Undocumented Migrants (PICUM), LABOUR MIGRATION POLICIES CASE STUDY SERIES: FINLAND, (2022), [https://picum.org/wp-content/uploads/2023/02/Labour-migration-policies\\_Case-study-series\\_Finland\\_EN.pdf](https://picum.org/wp-content/uploads/2023/02/Labour-migration-policies_Case-study-series_Finland_EN.pdf).

<sup>19</sup> Government of New Zealand, *Migrant Exploitation Protection Work Visa: Visa details*, IMMIGRATION NEW ZEALAND, <https://www.immigration.govt.nz/new-zealand-visas/visas/visa/migrant-exploitation-protection-visa> (last visited Mar 1, 2023).

<sup>20</sup> U.S. Department of Homeland Security, DHS ANNOUNCES PROCESS ENHANCEMENTS FOR SUPPORTING LABOR ENFORCEMENT INVESTIGATIONS, <https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations> (last visited Mar 1, 2023).

<sup>21</sup> Nina DiSalvo, *Interview - Towards Justice*, (2023).

<sup>22</sup> Migrant Justice Institute, Solidarity Center, The ILAW Network and MIDEQ have worked to support this emerging community through a series of reports, research briefs, explainers and global webinars. For more information, see [www.migrantjustice.org/wagethefta2j](http://www.migrantjustice.org/wagethefta2j).

<sup>23</sup> Daniel Ghezalbash, *Legal Transfers of Restrictive Immigration Laws: a Historical Perspective*, 66 INT'L AND COMP. L. QUARTERLY 235-255 (2017).

# MIGRANT WORKERS' RIGHT VIOLATIONS: THE NECESSITY FOR LAWYERS TO SEEK COURT INVALIDATION OF THE STATE AUTHORITY TO TIE WORKERS TO SPECIFIC EMPLOYERS

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Canada | Originally written in English

## Introduction

Migrants around the world that are issued work authorization tying them to specific employers systematically experience human and labour rights violations. Drawing from past and contemporary Canadian, U.S. and U.K. examples of employer-tying policies, this article illustrates why lawyers must look beyond band-aid protection measures for migrant workers and focus on dismantling the root cause of their vulnerability to abuse: the employer-tied legal status.

## Employer-tied Labour (Im)migration Programs: Raising Alarms

Legislatures and governments commonly use labour migration programs to address long-term workforce objectives, as well as urgent skill shortages. When doing so, policymakers have various options available for admitting and integrating foreign nationals into the labour market. Programs that admit foreign nationals with permanent legal status for example, provide the rights to work, study, leave the country temporarily, settle if they wish and, with time, request citizenship. States

also manage schemes fast-tracking the admission of foreign nationals with open work authorizations,<sup>3</sup> allowing work for a specific period for almost any employer (and, sometimes, access to permanent status).

In parallel, governments often enforce admission schemes imposing on migrant workers an employer-tied legal status that negates their right to freely change employers.<sup>4</sup> If the worker quits, is laid off or otherwise loses the relationship with their employer-sponsor or group of employers-sponsors, the worker's right to legally earn a living in the country is immediately revoked or invalidated – at least temporarily.

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<sup>3</sup> For example, the U.S. SWAT program, the Canadian International Experience Class, or the European Union intra-mobility worker agreements; See e.g., Government of Canada, INTERNATIONAL EXPERIENCE CANADA: ABOUT THE PROCESS – WORKING HOLIDAY, <https://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/iec/about.html> (last visited April 10, 2023).

<sup>4</sup> In some instances, a 'change of employer-sponsor' procedure is available. However, excluding exceptional circumstances, workers are typically prohibited from working for a new employer before a new work permit is granted by the state. This process is uncertain, usually dependent upon a relatively complex, costly, and/or lengthy procedure, and is generally *de facto* inaccessible to workers trapped with an abusive employer.

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For employer-tied migrant workers, resigning or asserting a right that could jeopardize the relationship with the employer-sponsor implies a risk of irregular employment, delays or loss of access to work permit renewal or permanent residency and family unification, undocumented legal status, deportation, and interdiction for re-entry in the country. In this context, most refrain from resigning or asserting their fundamental right to freedom of association or other protected labour rights – even in cases of unsafe work conditions or employer abuse. Migrant workers also refrain from complaining or seeking justice in case of a rights violation – unless they experience a major illness or accident or have been laid off and exceptionally find themselves with not much to lose and an extraordinary community support network.<sup>5</sup>

The systemic rights violations experienced by employer-tied migrant workers across the world has long been recognized by migrant justice associations, workers' rights groups, and human rights organizations. Since 2000, Human Rights Watch and Amnesty International alone have published more than 50 reports on the issue.<sup>6</sup> At least 12 United Nations Bodies, including the International Labour Organization and the World Bank, have acknowledged the higher risks of abuse faced by employer-tied migrant workers.<sup>7</sup> National agencies such as the U.S.

<sup>5</sup> In cases of work-related illness or accident or when being laid off by an abusive employer-sponsor – when former tied migrant workers find themselves without much to lose for complaining and with exceptional timely access to adequate resources to make a complaint against their employer – they may not, in any event, see their claim dealt with before the expiration of their residence permit, facilitating impunity for abusive employers. Bassina Farbenblum & Laurie Berg, *MIGRANT WORKERS' ACCESS TO JUSTICE FOR WAGE THEFT: A GLOBAL STUDY OF PROMISING INITIATIVES* (2021), <https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/626229554faefb74014351e3/1650600300445/MIGRANT+WORKERS%E2%80%99+ACCESS+TO+JUSTICE+FOR+WAGE+THEFT>. See also British Columbia Employment Standards Coalition, *JUSTICE DENIED: THE SYSTEMIC FAILURE TO ENFORCE BC STANDARDS* (February 2022) (which outlines the lengthy delays in resolution of complaints submitted by workers to the BC Employment Standards Branch.).

<sup>6</sup> Eugénie Depatie-Pelletier, *LABOUR MIGRATION PROGRAM DECLARED A "MODERN FORM OF SLAVERY" UNDER CONSTITUTIONAL REVIEW: EMPLOYER-TYING POLICY IMPACT VS MYTHICAL "HARM REDUCTION" MEASURES* (LL.D. thesis, Faculty of Law, Université de Montréal, unpublished) at 32. (2018) [hereinafter Depatie-Pelletier 2018].

<sup>7</sup> *Id.* at 33-34.

State Department's Human Trafficking office now also acknowledge the correlation between employer-tied labour programs and conditions of forced labour on a regular basis.<sup>8</sup> Recently, the human rights issues faced by employer-tied migrant workers received heightened public attention during the 2022 FIFA World Cup in Qatar.<sup>9</sup>

The negative impact of the employer-tied status on the exercise of rights by migrant workers is now extensively documented and well-established by researchers within all branches of the social sciences.

*"More precisely, employer-tying measures restrict workers' freedom of movement,<sup>10</sup> as well as their autonomy to make fundamental decisions impacting their economic survival, legal condition, family stability and/or bodily integrity.<sup>11</sup> The employer-tied status is associated with state-increased risks of wage theft and other financial abuses, debt bondage as a result of payment of recruitment fees,<sup>12</sup> undocumented legal status, and human trafficking."<sup>13</sup>*

<sup>8</sup> See e.g. U.S. Dept of State, Office to Monitor and Combat Trafficking in Persons, *TRAFFICKING IN PERSONS REPORT* (July 2022), <https://www.state.gov/wp-content/uploads/2022/10/20221020-2022-TIP-Report.pdf>.

<sup>9</sup> See e.g. Amnesty Int'l, *QATAR: ONGOING DEBATE OVER MIGRANT WORKER DEATHS EXPOSES NEED FOR TRUTH AND COMPENSATION* (November 2022), <https://www.amnesty.org/en/latest/news/2022/11/qatar-ongoing-debate-over-migrant-worker-deaths-exposes-need-for-truth-and-compensation/>.

<sup>10</sup> Elizabeth Frantz, *Jordan's Unfree Workforce: State-Sponsored Bonded Labour in the Arab Region*, 49(8) J. OF DEV. STUD. at 1072 (2013).

<sup>11</sup> Ray Jureidini & Nayla Moukarbel, *Female Sri Lankan domestic workers in Lebanon: a case of 'contract slavery'* 30(4) J. OF ETHNIC AND MIGRATION STUD. (2004).

<sup>12</sup> Sabine Damir-Geilsdorf, *Contract Labour and Debt Bondage in the Arab Gulf States. Policies and Practices within the Kafala System*, in *BONDED LABOUR: GLOBAL AND COMPARATIVE PERSPECTIVE (18TH-21ST CENTURY)* at 163-190 (Sabine Damir -Geilsdorf ed., 2016).

<sup>13</sup> Hila Shamir, *The Paradox of "legality": Temporary Migrant Worker Programs and Vulnerability to Trafficking*, in *REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY* at 471-502 (Prabha Kotiswaran ed., 2017).

It is further associated with physical and psychological harm, obstacles to health, safety and lack of access to social protections offered by state agencies, community groups and workers' unions,<sup>14</sup> state-increased risks of excessive or unsafe work,<sup>15</sup> of psychological, physical and sexual harassment, assault and rape<sup>16</sup> and of work-related illnesses, accidents and death.<sup>17</sup> In addition, employer-tying measures have also been shown to restrict migrant workers' capacity to access justice in the country of employment,<sup>18</sup> and discriminate against workers on the basis of their country of origin.<sup>19</sup> On a larger scale, academics have noted that the state has created a situation ripe for abuse,<sup>20</sup> providing employers with "a pool of unfree workers who are disposable at will" with little political cost to the government.<sup>21</sup>

Although employer-tied migrant workers often have, in theory, access to part or all labour protections and formal rights as citizens and other free local workers, their capacity to exercise these rights is structurally and fundamentally hindered by the employer-tied legal status.

### Traditional Smokescreen Policies

To minimize worst case scenarios and criticism for inaction (if not complicity) of human rights violations being experienced by migrant workers,



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governments typically enforce traditional harm reduction measures to try to prevent migrant worker abuse. This is often in the form of access to a new employer-tied work permit, as well as special requirements for recruiters, agents and employers of tied migrant workers, such as registration, background checks and certification<sup>22</sup>, verification of the authenticity and decency of job offers, the requirement of health and safety insurance, mandatory written contracts, as well as increased authority and funding for monitoring, fines and exclusion of employers/sponsors and their agents found to be non-compliant.<sup>23</sup>

However, a system that allows access to new employer-based work permits only reinforces the conditions ripe for abuse due to the requirement of employer-sponsor involvement, and workers are often desperate to ensure the extension of their right to legal employment in the country<sup>24</sup>. Equally, no matter the requirements imposed on employers or the monitoring and enforcement mechanisms in place, because complaining might result in reprisals for a worker, including the suspension of the abused migrant worker's right to earn a living,<sup>25</sup> monitoring systems are severe-

<sup>14</sup> Anna Boucher, PATTERNS OF EXPLOITATION: UNDERSTANDING MIGRANT WORKER RIGHTS IN ADVANCED DEMOCRACIES at 170-194 (February 2023).

<sup>15</sup> See e.g. Kamila Fialkowska & Kamil Matuszczyk, *Safe and fruitful? Structural vulnerabilities in the experience of seasonal migrant workers in agriculture in Germany and Poland* 139 SAFETY SCIENCES, at 105-196 (2021).

<sup>16</sup> See e.g. Virginia N. Sherry, *Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia*, 16(5e) HUMAN RIGHTS WATCH at 57-63 (2004), <https://www.hrw.org/sites/default/files/reports/saudi0704.pdf>.

<sup>17</sup> See e.g. Evelyn Encalada Grez, *Mexican Migrant Farmworkers in Canada: Death, Disposability and Disruptions during COVID-19* 38(1) MEXICAN STUDIES/ESTUDIOS MEXICANOS at 140-169. (2022).

<sup>18</sup> See e.g. Myriam Dumont-Robillard, *L'ACCÈS À LA JUSTICE POUR LES TRAVAILLEUSES DOMESTIQUES MIGRANTES : UNE ILLUSION?* (2015).

<sup>19</sup> See e.g. Nandita Sharma, *Immigration Status and the Legalization of Inequality*, in eds, IMMIGRANT EXPERIENCES IN NORTH AMERICA: UNDERSTANDING SETTLEMENT AND INTEGRATION at 204-222 (Harald Bauder & John Shields eds., 2015).

<sup>20</sup> Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers* (2012), 34 COMP. LAB. L. & POL'Y J. 95 at 93-131 (2012-2013).

<sup>21</sup> Judy Fudge & Fiona MacPhail, *The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour*, 31 COMP. LAB. L. & POL'Y J. 101, at 101-139 (2009) [hereinafter Fudge 2009].

<sup>22</sup> See Hastie, B. *ACCESS TO JUSTICE FOR MIGRANT WORKERS: EVALUATING LEGISLATIVE EFFECTIVENESS IN CANADA* (2021), Allard Research Commons / Allard Faculty Publications.

<sup>23</sup> Fudge 2009, *supra* note 21.

<sup>24</sup> See Depatie-Pelletier 2018 *supra* note 6, at section 1.1.1.4.

<sup>25</sup> Association for the Rights of Household and Farm Workers, *BAND-AID ON A BULLET WOUND: OPEN WORK PERMITS FOR EMPLOYER-TIED MIGRANT WORKERS FACING WORKPLACE ABUSE—EMPIRICAL EVALUATION OF THE CANADIAN OPEN WORK PERMIT FOR VULNERABLE WORKERS POLICY* (September 2021), [https://aafqweb.files.wordpress.com/2021/09/arhw\\_owp-v-policy-report\\_september-2021.pdf](https://aafqweb.files.wordpress.com/2021/09/arhw_owp-v-policy-report_september-2021.pdf) [hereinafter Association for the Rights of Household and Farm Workers]; Eric Tucker, Sarah Marsden & Leah Vosko, *FEDERAL ENFORCEMENT OF MIGRANT WORKERS' LABOUR RIGHTS IN CANADA:*

ly limited in their impact. Employer impunity remains the norm and not the exception within employer-tied migrant worker regimes.<sup>26</sup>

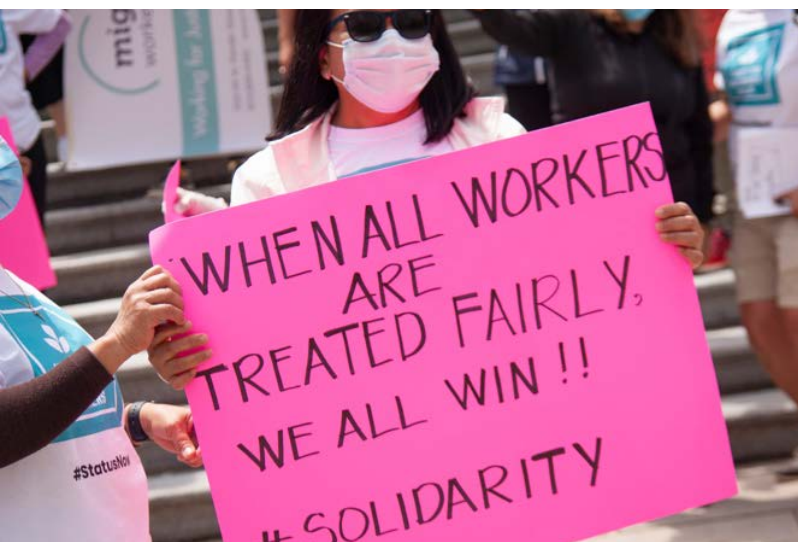
Other “smokescreen” measures sometimes implemented take the form of foreign government agents’ oversight of employer-tied workers in the host country, as well as multi-employer, sector-specific or agency-tied work permits, formally allowing some form of labour market mobility for workers. However, such measures have also been shown to have no positive impact on working conditions and only serve to facilitate the transfer of workers between employers whenever convenient for them. Sector-specific work permits also ensure a more efficient ‘naming’ mechanism to quickly exclude workers who complain or became incapacitated for health reasons.<sup>27</sup>

The inability for traditional “protection” measures to negate a tied migrant worker’s structural vulnerability to abuse has been acknowledged by courts<sup>28</sup>, human rights commissions<sup>29</sup>, human

right tribunals<sup>30</sup>, labour and employment standards boards,<sup>31</sup> House of Commons’ standing committees<sup>32</sup>, as well as governmental agencies<sup>33</sup>.

### Exceptional Open Permits and Delayed Deportation: the Latest Band-aid Measure

In the face of increasing acknowledgment, media coverage and outcry from community groups and NGOs with respect to the abuse faced by tied migrant workers, some governments are now implementing an additional band-aid measure: open work permits in case of alleged wage theft or other form of abuse.<sup>34</sup> For instance, the Canadian government introduced its Open Work Permit for Vulnerable Workers (OWP-VW) policy in July 2019.<sup>35</sup> The policy was designed to allow migrant workers access to quick labour market mobility in case of abuse in the context of their employment and to facilitate the reporting of abuse to authorities.<sup>36</sup> Two evaluations<sup>37</sup> of this policy



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A RESEARCH REPORT at 2795 (2020), [https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3794&context=scholarly\\_works](https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3794&context=scholarly_works).

<sup>26</sup> Unless specific witness protection mechanisms are put in place such as in the U.S. See e.g. Jessica Corbett *New Biden Policy Could Protect Migrant Worker Whistleblowers From Deportation*, TRUTHOUT (Jan 2023) [hereinafter Corbett 2023] <https://truthout.org/articles/new-biden-policy-could-protect-migrant-worker-whistleblowers-from-deportation/> (last visited April 6, 2023).

<sup>27</sup> Depatie-Pelletier 2018, *supra* note 6 at sections 1.3.3.3 and 4.

<sup>28</sup> See e.g. L’Écuyer c. Côté, [2013] QCCS 973 (Can. Mon.).

<sup>29</sup> See e.g. Commission des droits de la personne et des droits de la jeunesse, LA DISCRIMINATION SYSTÉMIQUE À L’ÉGARD DES

TRAVAILLEUSES ET TRAVAILLEURS MIGRANTS (2012), <https://numerique.banq.qc.ca/patrimoine/details/52327/2102629>.

<sup>30</sup> See e.g. La Presse Canadienne, *83 000 \$ à un travailleur agricole mexicain lésé*, LE DROIT (April 5, 2019), <https://www.ledroit.com/2019/04/06/83-000-a-un-travailleur-agricole-mexicain-lese-ad87944d33f550fb88d07d1aa16c4021> (last visited April 6 2023).

<sup>31</sup> See e.g. *Travailleurs Unis de l’Alimentation et du Commerce section 501 c. L’Écuyer et Locas* [2010] QCCRT 0191 (Can. Que.).

<sup>32</sup> See e.g. Canada Parliament, House of Commons, Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Report on the Temporary Foreign Worker Program*, 1 SESS., 42ND PARLIAMENT. COMMITTEE REPORT 4, at 31 (2016) (This report recommended that the Canadian government “take immediate steps to eliminate the requirement for an employer-specific work permit”).

<sup>33</sup> See e.g. Immigration and Refugee Protection Canada, C. Gaz., Part II, V. 156, No 14 June 2022 (Can.).

<sup>34</sup> See Corbett 2023 *supra* note 26.

<sup>35</sup> Immigration and Refugee Protection Regulations SOR/2002-227 at section s.207.1 (Can.).

<sup>36</sup> See Government of Canada, OPEN WORK PERMITS FOR VULNERABLE WORKERS [R207.1 – A72] – INTERNATIONAL MOBILITY PROGRAM, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/vulnerable-workers.html> (last visited April 6, 2023) (The objectives include to provide a worker a distinct means to leave their abusive employer, to mitigate the risks of migrant workers working without authorization, and to facilitate the participation of a worker in a complaint or investigative process.) Abuse is defined in Canadian legislation as including physical assault, sexual abuse, psychological abuse, financial abuse, and reprisals. See Immigration and Refugee Protection Regulations, *supra* note 35 at section 196.2.

<sup>37</sup> We note that the authors of this article were heavily involved with the writing of both reports for their respective organizations.

conducted by organizations working to advance the rights of migrant workers were published in 2022.<sup>38</sup>

The Association for the Rights of Household and Farmworkers (the Association) identified three primary barriers for abused tied workers in accessing these open work permits: employer-dependent legal status and the desire to avoid risks of losing legal status and/or further psychological distress; the requirement for a valid work permit at the time of application; and no funding for legal support and assistance to aid workers with their applications. In particular, because of a migrant worker's legal status in Canada being tied to their employer, workers were generally hesitant to apply in the first place for fear of reprisal from their employer, recruitment agent, placement agency, and/or immigration authorities. The low proportion of applications that were successful did not incite workers suffering abuse to risk losing their legal status in order to try to obtain the OWP-VW.<sup>39</sup> The workers who were successful in obtaining an open work permit were nevertheless forced to again find an employer to tie themselves to after 12 months (the usual length of the OWP-VW validity) in order to preserve their right to earn a living – a process sometimes re-traumatizing, if not impossible for the workers who fled abusive employer-tied conditions in the first place.<sup>40</sup> Finally, the evaluation found that no protocol was in place to ensure that problematic employers were penalized following the recognition of the abuse.<sup>41</sup>

The Migrant Workers Centre (MWC) analysed the detailed written reasons for 30 decisions, both positive and negative, given by immigration officers when approving or refusing an OWP-VW application. The report provided a snapshot of the kinds of abuse workers face with their Canadian employers. Almost all of the workers, or 96.7%, experienced financial abuse, including in the form of unpaid wages, unpaid overtime, being forced to repay a portion of their wages to their employer, or having paid illegal recruitment fees. Specifica-

lly, 36.7% paid illegal recruitment fees ranging between \$3,000 and \$40,000 CAD. Seventy percent of the workers reported having experienced psychological abuse from their employer, including verbal insults, threats of deportation and sending a worker back to their country of origin, and/or racist and discriminatory remarks. Thirty percent of the workers reported having experienced physical abuse by their employer. And disturbingly, 10% of the workers reported sexual abuse by their employer.<sup>42</sup>

The written decisions of immigration officers showed a great deal of inconsistency and confusion around what officers considered abuse. Clear violations of employment standards, including not providing a minimal number of hours of work or forcing a worker to work for a different employer in violation of their work contract and work permit conditions, were often not seen as financial abuse. The charging of recruitment fees, which is explicitly prohibited across Canada, was only seen as a form of financial abuse in 1 of the 11 cases where an illegal fee was collected.<sup>43</sup> Workers' personal statements were not always accepted at face value as being enough to substantiate abuse. Psychological abuse was often not acknowledged by officers in their reasons for decisions, except where it could be well documented in the form of text messages or emails.<sup>44</sup>

MWC's report also observed disturbing situations of applicant workers facing immigration enforcement action if their application was unsuccessful, targeted for removal proceedings from Canada, for alleged violations of immigration laws, as a result of information included with their vulnerable worker open work permit application. The report recommended that any jurisdiction implementing such a policy should, at minimum, assign specialized officers to adjudicate applications, with specific training on evaluating evidence of abuse within a trauma-informed approach. It also noted the importance of guaranteeing that workers who come forward are protected from any law enforcement action as a consequence of their application.<sup>45</sup>

Both reports concluded that though policies such as the Canadian OWP-VW provide a mechanism for some workers to flee abusive employment

<sup>38</sup> Association for the Rights of Household and Farm Workers, *supra* note 25; Migrant Workers Centre (MWC), A PROMISE OF PROTECTION? AN ASSESSMENT OF IRCC DECISION-MAKING UNDER THE VULNERABLE WORKER OPEN WORK PERMIT PROGRAM (March 2022) [hereinafter MWC Report].

<sup>39</sup> The approval rate between June 2019 and July 2021 was approximately 57.1%. *See id.* at 12.

<sup>40</sup> The OWP-VW is a temporary measure, normally issued for 12 months, with no practical possibility of renewal.

<sup>41</sup> Association for the Rights of Household and Farm Workers, *supra* note 25.

<sup>42</sup> MWC Report, *supra* note 38 at 14.

<sup>43</sup> *Id.* at 18.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 34-36.

situations, the limited case-by-case issuance of open work permits cannot be expected to counteract the “profoundly entrenched structural impunity of abusive employers that the employer-specific work permit has established”.<sup>46</sup>

### Other Reforms: Necessary for Human Rights, but Insufficient to Prevent Abuse

In this context, so long as an employer-tying measure remains in place, any labour migration policy improvement will have a limited impact on systemic abuse and rights violations of migrant workers. More precisely, while various reforms are equally necessary to ensure that temporary foreign worker programs are compatible with migrants’ fundamental, labour and socio-economic rights – none of them alone address the root cause of migrant workers’ systemic vulnerability to abuse if workers remain tied to their employers. The following examples include reforms also needed to ensure a migrant worker can meaningfully exercise their human and labour rights:

- access to unbiased international recruitment services closely monitored or administered by both the government of the country of origin and the country of destination, as well as to a binational micro-credit program – to prevent debt bondage;<sup>47</sup>
- admissions based on government sponsorship determined by annual national skills shortage assessment, instead of employer(s)-specific sponsorship;<sup>48</sup>
- automatic issuance of open work permits and study permits for accompanying family members – to ensure psychological integrity;
- access to tailored government placement services also available to foreign workers;<sup>49</sup>
- sufficient state-funded community integration and support programs;<sup>50</sup>
- protection upon arrival by a certified workers’ union or migrant workers’ association;<sup>51</sup>

<sup>46</sup> Eugénie Dépatie-Pelletier, Hannah Deegan & Katherine Berze, *Band-Aid on a Bullet Wound—Canada’s Open Work Permit for Vulnerable Workers Policy*, 11(36) *LAWs* (2022), <https://www.mdpi.com/2075-471X/11/3/36>.

<sup>47</sup> See Dépatie-Pelletier 2018, *supra* note 6 at section 4.1.I.B.

<sup>48</sup> *Id.* at section 4.1.I.A. et 4.1.I.C.

<sup>49</sup> *Id.* at section 4.1.II.

<sup>50</sup> *Id.* at section 4.1.III.

<sup>51</sup> See e.g. United Food and Commercial Workers, *THE STATUS OF MIGRANT AGRICULTURAL WORKERS IN CANADA* (2022).

- ongoing access to a legal status regularization procedure in case of irregularity;<sup>52</sup>
- independent access upon arrival to permanent legal status, to ensure meaningful access to justice and the capacity to temporarily leave the country (notably for transnational family unity matters) and return without impacting a worker’s status or access to rights;<sup>53</sup>
- access to virtual justice from the workers’ country of origin;<sup>54</sup> and
- access to socio-economic compensation and benefits from the workers’ country of origin.<sup>55</sup>

Regardless of the implementation of the above policies, however, the systemic violation of migrant workers’ rights will continue until employer-tying measures are eliminated and workers are free to immediately accept an alternative job offer and walk away from abuse without any risk or fear of loss of legal right to work or deportation.

### Political Advocacy and Fragile Victories

Civil society, along with labour unions<sup>56</sup> and federations,<sup>57</sup> have been pushing for the replacement of employer-tied work authorization with permanent legal status and the issuance of open work permits. In Canada for instance, national campaigns on both issues are ongoing<sup>58</sup>, including a petition to the House of Commons.<sup>59</sup> While such

<sup>52</sup> See e.g. Migrants Right Network, *REGULARIZATION IN CANADA – POLICY BRIEF* (2022), <https://migrantrights.ca/wp-content/uploads/2022/07/MRN-Brief-Regularization-July-2022.pdf>.

<sup>53</sup> See e.g. Migrant Worker Alliance for Change, *POLICY SUBMISSION: PERMANENT STATUS ON LANDING – REAL REFORM FOR CAREGIVERS* (2018), <https://migrantworkersalliance.org/policy/statuson-landing2018/>.

<sup>54</sup> See e.g. Ashwini Sukthankar, *Visas, Inc. Corporate Control and Policy Incoherence in the U.S. Temporary Foreign Labor System*, JUSTICE IN MOTION (GWJA), (2012), [https://www.justiceinmotion.org/files/ugd/64f95e\\_31649e341fed4c8e9a73dd9922e7b6b1.pdf](https://www.justiceinmotion.org/files/ugd/64f95e_31649e341fed4c8e9a73dd9922e7b6b1.pdf).

<sup>55</sup> See e.g. Robert Holzmann, Florence Legros & Pamela Dale, *Assessing Benefit Portability for International Migrant Workers: A Review of the France-Morocco Bilateral Social Security Agreement*, WORLD BANK SOCIAL PROTECTION AND LABOR DISCUSSION PAPER NO. 1604 (2016).

<sup>56</sup> United Food and Commercial Workers, *supra* note 51.

<sup>57</sup> Caroline Senneville, *Personne ne devrait être prisonnier de son employeur*, LE DEVOIR, (March 16, 2023), <https://www.ledesvoir.com/opinion/idees/785499/idees-personne-ne-devrait-etre-prisonnier-de-son-employeur>.

<sup>58</sup> See e.g. Canadian Council for Refugees, *OPEN WORK PERMITS NOW* (2022), <https://www.openworknow.ca> (last visited April 7 2023).

<sup>59</sup> See e.g. House of Commons Canada, *PETITION E-4138 (CITIZENSHIP AND IMMIGRATION) CALLING ON THE CANADIAN GOVERNMENT*

collective organizing and political advocacy is essential for migrant worker empowerment and to achieve policy advances, political victories based on policymakers' sympathies and understanding of the reality faced by migrant workers alone can unfortunately prove to be short-lived.

In this regard, the case of migrant domestic workers in the United Kingdom is exemplary. In 1998, the U.K. government allowed domestic workers employed in private households to change employers, so that even though the worker entered the country with a specific employer, the worker was not tied to that employer.<sup>60</sup> In 2009, the Home Affairs Select Committee confirmed that maintaining the right to change employers 'is the single most important issue in preventing the forced labour and trafficking of such workers.'<sup>61</sup> And yet, in 2012, the U.K. government re-introduced a visa regime that did not permit domestic workers to change employers.<sup>62</sup> When an independent review, commissioned by the U.K. government itself, confirmed that the new regime increased the vulnerability of workers to abuse, exploitation, and human trafficking,<sup>63</sup> the U.K. government rejected the findings and ignored the recommendation to end the tied visa system.<sup>64</sup>

Gains won exclusively by political advocacy can quickly be swept away with changes in governments or their priorities, especially given the efficiency of pressure exercised by employers' associations.<sup>65</sup>

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TO ELIMINATE EMPLOYER-SPECIFIC WORK PERMITS, <https://petitions.ourcommons.ca/en/Petition/Details?Petition=e-4138> (last visited April 7 2023).

<sup>60</sup> Virginia Mantouvalou, 'Am I Free Now?' *Overseas Domestic Workers in Slavery*, 42(3) J. OF LAW AND SOC'Y 329 at 335 (2015)

<sup>61</sup> *Id.* at 336.

<sup>62</sup> Alan Travis, *New visa rules for domestic workers will turn the clock back 15 years*, THE GUARDIAN (February 29 2012), <https://www.theguardian.com/uk/2012/feb/29/new-visa-rules-domestic-workers> (last visited April 7 2023).

<sup>63</sup> James Ewins, *Independent Review of the Overseas Domestic Workers Visa*, U.K. HOME OFFICE at paras 68, 71 (2015), <https://www.gov.uk/government/publications/overseas-domestic-workers-visa-independent-review>

<sup>64</sup> Alan Travis, *Government rejects call to end UK tied visas for domestic workers*, THE GUARDIAN (7 March 2016).

<sup>65</sup> See e.g. Ludovic Rheault, *Corporate Lobbying and Immigration Policies in Canada* (2014), 46(3) CANADIAN J. OF POL. at 691 (2013).

## The Utility of Courts Where Worker Unfreedom Has Been Legalized

*"Modern employer-tying measures applicable to migrants replicate the employer-worker power dynamics characteristic of past unfree labour regimes."*

Various historical U.S. examples are informative on the role that courts may, and often must, play when a legislature or government adopts a policy that directly or indirectly restricts workers' capacity to resign and tie them to their employer.

For instance, the post-slavery employer-tying measures peddled in the U.S. as "anti-vagrancy" policies, penalizing workers who were found without a work contract, thereby restricting their capacity to quit or refuse unsafe work, had to be challenged in court to be formally declared invalid in law since they were incompatible with an individual's fundamental right not to be held in servitude.<sup>66</sup> Equally, the constitutionality of post-slavery restrictive contract laws, which penalized or criminalized workers for quitting a work contract before the end, were also challenged in court before being found to be unenforceable due to their incompatibility with basic human freedoms.<sup>67</sup>

The same applies to post-slavery peonage or "false pretense" policies, under which workers who accepted an advance from their employer were

<sup>66</sup> Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78(4) J. OF AMERICAN HIST. at 1272-1279 (1992) (Congress had enacted the ... Act, thereby nullifying the southern Black Codes, which punished freed slaves for vagrancy and idleness. ... Nevertheless ... "tramp" acts ... were passed (...). ... In ... 1878, a judge ... declared that the ... act ... violated the constitution (...). ... [H]olding the poor in " ... servitude" violated the principle of voluntary labor and turned free ... [workers] into slaves (...)... All too often poor men made "contracts only against their will . . . compelled by the force of circumstance." The vagrancy laws revoked even this formal right of free choice by enlisting punitive state power (...).")

<sup>67</sup> William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42(1) J. OF S. HIST. at 44-47, 54, 59 (1976) [hereinafter Cohen 1976] ("South Carolina adopted a contract law holding that a worker who failed to give the labor reasonable required of him ... would "be Hable to fine or imprisonment (...)." ... In 1907 two courts declared this ... law ... unconstitutional. ... Federal judge ... Brawley ... contented that ... the courts had no higher duty than to construe liberally the provisions for personal security and liberty which were the foundations of free government. ... [H]e also observed that South Carolina's effort to promote foreign immigration would be of no avail "so long as our statute books hold legislation tending to create a system of forced labor which in its essential is as degrading as that of slavery.")

penalized by the state for resigning before the payment of their debt. These policies were declared inapplicable by the Supreme Court of the U.S. in 1911<sup>68</sup>, but the resistance of southern states to abide led to another landmark U.S. Supreme Court decision in 1944, which clarified why the right to freely change employers is key to prevent the condition of servitude.<sup>69</sup>

Post-slavery employer-tying measures applicable to convicts were also found unjustifiable by the U.S. Supreme Court in 1914.<sup>70</sup> More precisely, the court clarified the effect of state punishment in the case of a worker's breach of labour contract.<sup>71</sup> The South Carolina Supreme Court also evaluated the legality of the common law tort of hiring a labourer who was under a contractual obligation to work for another<sup>72</sup>. In this case, the court reaffirmed that the right to quit and not be held under servitude implies a right to change employers.

In immigration matters specifically, the U.S. Supreme Court acknowledged in 1988 that a legal sanction associated with the act of resignation will create a condition of servitude for migrant workers economically dependent on their employment for legal status in the country.<sup>73</sup> Neverthe-

less, jurisprudence addressing the enforcement of employer-tying measures on migrant workers remains to be developed across the world.<sup>74</sup>

These historical U.S. examples confirm that courts may, and systematically must, play a key role in the defense of workers' fundamental freedoms against attacks by legislatures and governments. They also confirm that state restrictions of a worker's right to change employers places a worker in a legal condition of servitude where their capacity to exercise fundamental rights is negated.

Historical cases are also useful to remind us that employer-tying measures not only cause harm to affected workers, but also create obstacles to collective bargaining for all workers, as well as barriers to the enforceability of human rights and labour laws on some employers, and therefore to the integrity of the rule of law. As clarified by the U.S. Supreme Court in 1944, employer-tying measures result in a downward pressure on job offers and employment conditions offered to citizens and other unrestricted workers:

*"The undoubted aim ... was ... a system of completely free and voluntary labor throughout the United States ... [I]n general, the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition."*<sup>75</sup>

<sup>68</sup> *Bailey v. Alabama*, 219 U.S. 219, 219 (1911) ("While the immediate concern [of the 13th Amendment] was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag. The words involuntary servitude have a "larger meaning than slavery." ... The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labour free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.

<sup>69</sup> *Pollock v. Williams* (1944), 322 US 4, 17-18 (United States Supreme Court).

<sup>70</sup> Cohen 1976, *supra* note 67 at 54, 59.

<sup>71</sup> *Id.* at 143-144. ("This labor is performed under the constant coercion and threat of ... [a] possible arrest ... and this form of coercion is as potent as it would have been had the law provided for the ... compulsory service of the convict. ... [T]he state permitted the making of the contract, and provides a punishment for its breach. ... Thus, under pain of ... [state sanction], the convict may be kept at labor to satisfy the demands of his employer. In our opinion, this system is in violation of rights intended to be secured by the Thirteenth Amendment (...)" *Id.* at 146.

<sup>72</sup> *Shaw v. Fisher* 102 S.E. 325, 113 S.C. 287, 290 (1920).

<sup>73</sup> *United States v. Kozminski* 487 US 931, 943, 947-948 (1988) ("[N]o available choice but to work or be subject to legal sanction. ... The history ... reflects ... that a... special vulnerability may be relevant in determining whether a particular type or a certain degree of ... legal coercion is sufficient to hold that person to involuntary servitude. ... [T]hreatening ...

an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude...").

<sup>74</sup> For examples of litigation undertaken thus far, see Depatie-Pelletier 2018, *supra* note 6 at section I.

<sup>75</sup> *Pollock supra* note 69.

## Upcoming Constitutional Litigation in Canada... and Other “free” Societies?

In this context, in jurisdictions which recognize a fundamental right not to be held in servitude – or, a right to liberty, a right to bodily integrity, a right to access to justice, a right not to be discriminated against on the basis of country of origin, a right to freedom of association, freedom of occupation,<sup>76</sup> and/or a right to dignity, the legality of a government’s authority to tie workers to specific employers will likely need to be legally challenged to prevent abuse of migrant workers.

*Because sector-specific and multi-employer work permits are equally problematic, litigation should not single out a specific measure – such as employer-tied work permits alone.<sup>77</sup> To prevent any creative and detrimental measures by policymakers when facing a challenge to the employer-tied regime, challenges in court must as broadly as possible target the legality of the general state authority to restrict, in any way, a worker’s fundamental right to resign and change employers.*

With these lessons in mind, the Association for the Rights of Household and Farm Workers is preparing to launch strategic litigation in Canada on public interest standing, in the name of the migrant workers that have been employed as household and farm workers in Quebec with an employer-tied work permit<sup>78</sup> – the *End Migrant Worker Unfreedom* constitutional challenge.<sup>79</sup>

Given the high threshold outlined by the Canadian Constitution and in Supreme Court of Canada

jurisprudence of acceptable justifications of state restrictions of fundamental rights, this strategic litigation will rely on an individual’s formal rights to liberty, security of the person and life, and access to justice – as well as on the right not to be discriminated against on the basis of their country of origin.<sup>80</sup>

The constitutional litigation was approved for initial funds<sup>81</sup> under Canada’s Court Challenges Program, which notably serves to facilitate challenges to the legality of state actions that impact the fundamental right to life, liberty and security of the person.<sup>82</sup> Legal arguments have been developed and a first screening of Canadian academics, community organizations and migrant workers that would be best to bring testimony to court has been completed. Sufficient additional financial support has also been identified, and the Association is currently in the phase of retaining the services of litigators specialized in constitutional law.<sup>83</sup>

The litigation will first require a solid evidentiary foundation demonstrating that the Canadian government’s employer-tied work permit regime infringes on fundamental rights, using in particular the extensive academic research done on migrant farm and household workers during the last few decades. The second stage of the constitutional action will centre on answering the following legal question: do the objectives of employer-tying measures justify the fundamental rights infringement in a “free” society? The litigation will aim to demonstrate that employer-tying policies constitute an inadequate means to advance the government’s policy objectives, and regardless of justification, result in a disproportionate infringement of constitutional rights.

The Canadian government has explicitly stated three policy goals associated with employer-tied work permits: (1) the protection of the labour market interests of citizens and other free workers, (2) the protection of the rights of migrant workers, and (3) the facilitation of program in-

<sup>76</sup> See e.g. Amnesty Int’l, *South Korea: Constitutional Court ruling leaves migrant workers to human rights abuses*, ASA 25/015/2011 (2011), <https://www.amnesty.org/en/wp-content/uploads/2021/07/asa250152011en.pdf>.

<sup>77</sup> For example, seasonal agricultural workers in Canada are authorized to work with a sector-specific work permit. However, their ability to leave their employer is severely limited. Workers are provided a standard work contract by the Canadian government including a clause that states that as a general rule, the employer-sponsor’s authorization is required to request and finalize a transfer to another employer. Immigration Regulation, *supra* note 35 at section 11.1(c).

<sup>78</sup> The option of bringing the challenge with at least one migrant worker as a co-plaintiff has not yet been completely dismissed.

<sup>79</sup> Association for the Rights of Household and Farm Workers, *STRATEGIC LITIGATION END MIGRANT WORKER UNFREEDOM* (2023), <https://dtmf-rhfw.org/en/strategic-litigation> (last visited April 7 2023) [hereinafter *Strategic Litigation*].

<sup>80</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 at ss. 7, 15 (U.K.); Constitution Act 1987, s. 96 (Can).

<sup>81</sup> Association for the Rights of Household and Farm Workers, 2023 URGENT FUNDRAISING CAMPAIGN, <https://dtmf-rhfw.org/en/donate/> (last visited April 7, 2023).

<sup>82</sup> Court Challenges Program, HUMAN RIGHTS (2023), <https://pcj-ccp.ca/rights-human-rights/> (last visited April 7, 2023).

<sup>83</sup> For more information, See *Strategic Litigation*, *supra* note 79.



tegrity and law enforcement.<sup>84</sup> Given the nature and extent of the constitutional rights' being infringed, and given the evidence of less harmful policy alternatives available in Canada, an argument will be made that, for all three policy objectives, employer-tying measures have a disproportionate impact unjustifiable in a free society.

Moreover, given the fact that evidence can and will be brought that demonstrates that employer-tying measures also worsen working conditions for citizens,<sup>85</sup> worsen the rights violations of migrants in general, and result in increasing undocumented employment, irregular legal status for migrant workers and increasing impunity for their employers,<sup>86</sup> an additional legal argument will be made to demonstrate that the state measures also constitute an arbitrary means to reach the stated policy objectives and maintain the integrity of the rule of law.

No matter its results, Canada's *End Migrant Worker Unfreedom* constitutional challenge, which should be launched by December 2023, will produce an informative and useful precedent in the global fight to ensure migrant workers worldwide a meaningful capacity to assert their rights.

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<sup>84</sup> Government of Canada, GOVERNMENT OF CANADA RESPONSE TO THE REPORT OF THE STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION: TEMPORARY FOREIGN WORKERS AND NON-STATUS WORKERS (2009), <https://www.ourcommons.ca/Committees/en/CIMM/StudyActivity?studyActivityId=2606129>.

<sup>85</sup> See e.g. Pierre Brochu, Till Gross & Christopher Worswick, Temporary foreign workers and firms: Theory and Canadian evidence, 53(3) Can, J, of Econ. at 871-872. (2020).

<sup>86</sup> See e.g. Xochitl Bada, & Shannon Gleeson, The North American Agreement on Labor Cooperation and the Challenges to Protecting Low-Wage Migrant Workers, in ACCOUNTABILITY ACROSS BORDERS at 83-110 (eds., Bada, X. & S. Gleeson 2019).

# ACHIEVING PROTECTIONS FOR UNDOCUMENTED WORKERS IN THE U.S.: OBSTACLES, MILESTONES, BREAKTHROUGHS

## MICHAEL FELSEN<sup>1</sup>

United States | Originally written in English

In the United States, where undocumented workers<sup>2</sup> are concerned, there has long been a tension between the enforcement of immigration law,<sup>3</sup> on the one hand, and of worker protection laws, on the other. Immigrant workers who are not authorized to be in the U.S., and hence lack authorization to work here, are subject to adverse immigration action, including possible deportation. All workers in the U.S., meanwhile, regardless of immigration status, are entitled to the benefits of many of its laws, including laws governing wages and hours,<sup>4</sup> health and safety

on the job,<sup>5</sup> anti-discrimination,<sup>6</sup> and the right to organize for a union.<sup>7</sup> A particular tension arises when employers subject their immigrant workers to unlawful abuses on the job but the workers, fearing employer retaliation, including the threat of deportation, stifle their complaints and endure the illegalities. Enforcement of worker protection laws suffers, workers suffer, and law-abiding employers are placed at a competitive disadvantage, all on a massive scale.<sup>8</sup>

This paper will examine fluctuations in U.S. policy and activity over the past few decades, in the treatment of undocumented workers and enforcement of immigration law in the workplace. The examination will conclude with a discussion of very recent developments in U.S. government practice, indicating a decisive move by the Biden administration toward actualizing the ability of

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<sup>2</sup> In this paper, the terms "undocumented," "immigrant," and "noncitizen" workers are used interchangeably to identify workers without authorization to work lawfully in the U.S., recognizing, of course, that in fact many immigrants and noncitizens can be legally employed in the U.S.

<sup>3</sup> The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq, governs immigration policy and practice overall, including deportation of unauthorized "aliens", 8 U.S.C. § 1227. In 1986, the Act was amended to include the Immigration Reform and Control Act of 1986 (IRCA), described by the U.S. Supreme Court in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) as "a comprehensive scheme prohibiting the employment of illegal aliens in the United States...which made combating the employment of illegal aliens central to [t]he policy of immigration law."

<sup>4</sup> Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §203 et seq; Cases interpreting the law have made clear that immigration status is not a factor in determining a worker's right to be paid earned wages. *Jin-Ming Lin v. Chinatown Restaurant Corp.*, 771 F. Supp. 2d 185, 190 (D. Mass. 2011)

(employees' immigration status irrelevant to their claims under the FLSA for unpaid minimum wage and overtime). See *also Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1306-07 (11th Cir. 2013) (FLSA applies to undocumented workers seeking recovery of overtime); *Lucas v. Jerusalem Café, LLC*, 721 F.3d 927, 933-35 (8th Cir. 2013) (FLSA applies to undocumented workers because "employers who unlawfully hire unauthorized aliens must otherwise comply with federal employment laws.")

<sup>5</sup> Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq.

<sup>6</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq.

<sup>7</sup> National Labor Relations Act, 29 U.S.C. §151 et seq; In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984), the United States Supreme Court held that undocumented immigrants are "employees" under the National Labor Relations Act.

<sup>8</sup> Daniel Costa, *California Leads the Way: A look at California laws that help protect labor standards for unauthorized immigrant workers*, ECONOMIC POLICY INSTITUTE (2018), <https://www.epi.org/publication/california-immigrant-labor-laws/> (last visited March 28, 2023).

undocumented workers to partake in the safeguards provided by federal worker rights laws.

### The Bumpy Road to Better Protections for Immigrant Workers



**Michael Felsen**

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More than two decades ago, the administration of President Bill Clinton recognized that simultaneous immigration and worker protection law enforcement at any given worksite was not conducive to effective worker protection. After a series of immigration raids interfered with ongoing labour organizing campaigns and with pending prosecution of minimum wage claims by immigrant workers, in 1996 an internal immigration agency policy was developed, intended to ensure that immigration authorities avoid involvement in labour disputes.<sup>9</sup> And in 1998, a Memorandum of Understanding ("MOU") between the U.S. Immigration and Naturalization Service ("INS," now renamed Immigration and Customs Enforcement, "ICE," a division of the Department of Homeland Security, "DHS") and the U.S. Department of Labor ("DOL") was crafted to create a barrier between DOL inspections and INS enforcement actions.<sup>10</sup> Its purposes included rooting out non-compliance with labour standards that apply to all workers in the U.S., and also preventing the further victimization of unauthorized workers that occurs when unscrupulous employers, in retaliation for workers' assertion of their rights, manipulate immigration law enforcement as a cudgel against the workers.

These new policies and protocols failed to deliver on their promises. By the time President Barack Obama was inaugurated in January 2009, workplace raids to uncover undocumented workers, and the subsequent deportation of those workers, conducted during President George W. Bush's eight

<sup>9</sup> INS Operating Instruction 287.3(a) It provided, for example: "When information is received concerning the employment of undocumented or unauthorized aliens, consideration should be given to whether the information is being provided to interfere with labor rights."

<sup>10</sup> U.S. Department of Labor, *ESA Press Release: Labor Department and INS Sign Memorandum of Understanding to Enhance Labor Standards Enforcement to Aid U.S. Workers* (1998) <https://www.dol.gov/newsroom/releases/esa/esa19981123-0>.

*"Critical to these recent successes is the role of immigrant and worker rights organizations in vigorously advocating for greater workplace protections for immigrant workers -- rights that can only be secured with the active cooperation of immigration authorities."*

years in office, had become commonplace.<sup>11</sup> Worker and immigrant advocacy groups made clear to the Obama Administration that something had to change.<sup>12</sup> The Obama Administration made early efforts to achieve broad immigration reform, without success. But it avoided workplace raids, preferring immigration law enforcement focused on border apprehensions, removal of immigrants with criminal records,<sup>13</sup> and "paper raids"<sup>14</sup> that investigated employers who knowingly employed and exploited undocumented workers. The large number of immigrant deportations during the Obama years drew substantial criticism from immigrants' rights advocates, who continued during his term to press for their priorities.<sup>15</sup> But the

<sup>11</sup> Amy Chozick, *Raids of Illegal Immigrants Bring Harsh Memories, and Strong Fears*, NEW YORK TIMES, (2017) [hereinafter "Raids of illegal immigrants"] <https://www.nytimes.com/2017/01/02/us/illegal-immigrants-raids-deportation.html>. For example, In May 2007, 160 immigration enforcement agents raided a food processing plant in Portland, Oregon, arresting 167 workers – just after local media reported on the settlement of a \$400,000 wage and hour lawsuit brought by the workers in the plant. In May 2008, agents arrested another 389 workers in a food processing plant in Iowa, while at least three other agencies were investigating serious labour violations. Rebecca Smith, Ana Avendano & Julie Martinez Ortega, *ICED OUT: How IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS* (2009) [https://s27147.pcdn.co/wp-content/uploads/2015/03/ICED\\_OUT.pdf](https://s27147.pcdn.co/wp-content/uploads/2015/03/ICED_OUT.pdf)

<sup>12</sup> *Id.*

<sup>13</sup> Chirs McGreal, *Barack Obama: lack of immigration reform my biggest failure so far*, GUARDIAN (2012) <https://www.theguardian.com/world/2012/sep/20/barack-obama-immigration-reform-failure>

<sup>14</sup> Raids of Illegal Immigrants, *supra* note 11.

<sup>15</sup> Jennifer (JJ) Rosenbaum & Josh Stehlik, *WORKERS RIGHTS PROTECTIONS IN IMMIGRATION ENFORCEMENT REFORM* (2014) <https://www.nilc.org/wp-content/uploads/2017/03/workers-rights-in-admin-relief-NGA0-NILC-JWJ-2014-09.pdf>. Topping the priority list was: "Take the fear of immigration retaliation and intimidation off of the table in workplace and civil rights disputes by clarifying the process under which immigrants who stand up to protect their civil and labor rights and who are not yet in proceedings can apply for deferred action through USCIS."

Obama administration did recognize the workplace abuse suffered by undocumented workers and the importance of their role in worker protection enforcement efforts overall, and took some significant steps forward.

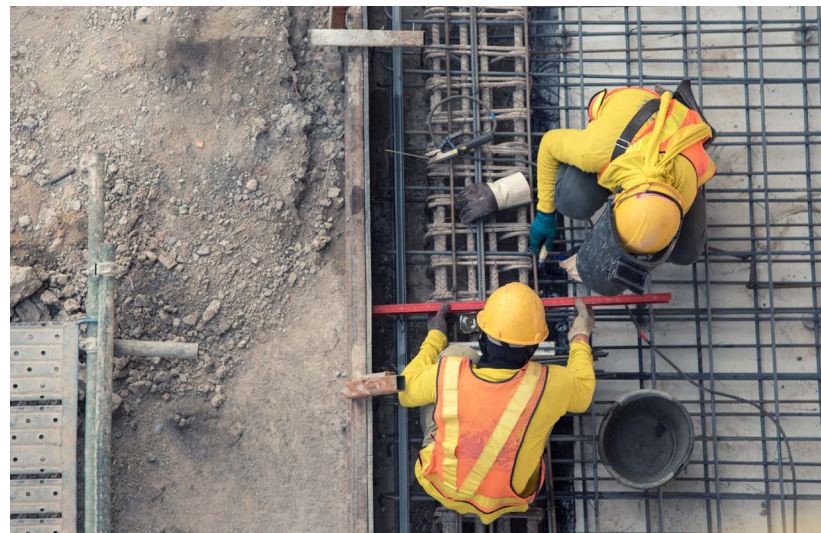
In 2011, DOL and ICE committed to a revised version of the 1998 MOU, redoubling efforts to ensure that the two agencies' worksite based enforcement activities do not conflict.<sup>16</sup> In 2016, the Equal Employment Opportunity Commission ("EEOC," charged with addressing various forms of workplace discrimination, including under Title VII of the Civil Rights Act) and the National Labor Relations Board ("NLRB," charged with ensuring workers' rights under the NLRA - National Labor Relations Act - to organize and engage in collective action) joined the agreement.<sup>17</sup>

The MOU, which is still in effect, reiterates the agencies' pledge to protect against immigration enforcement interference during ongoing labour disputes at a workplace, including disputes involving the following employee rights:

- The right to be paid the correct wages and overtime pay;
- The right to work under safe conditions;
- The right to workers' compensation, family and medical leave, and employee benefits;
- The right to be free from unlawful discrimination;
- The right to form, join or assist a labour organization, to participate in collective bargaining or negotiation, and to engage in protected concerted activities for mutual aid or protection;
- The rights of members of labour unions to union democracy, and to information about employee rights and the finances of unions, employers, and labour relations consultants; and
- The right to protection from retaliation for seeking enforcement of any of these rights.

<sup>16</sup> U.S. Department of Homeland Security & U.S. Department of Labor, REVISED MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF HOMELAND SECURITY AND LABOR CONCERNING ENFORCEMENT ACTIVITIES AT WORKSITES (2011), [https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU\\_4.19.18.pdf](https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU_4.19.18.pdf).

<sup>17</sup> U.S. Department of Homeland Security & U.S. Department of Labor, ADDENDUM TO THE REVISED MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF HOMELAND SECURITY AND LABOR CONCERNING ENFORCEMENT ACTIVITIES AT WORKSITES (2016), [https://www.dol.gov/sites/dolgov/files/OASP/MOU-Addendum\\_4.19.18.pdf](https://www.dol.gov/sites/dolgov/files/OASP/MOU-Addendum_4.19.18.pdf).



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In the MOU, DHS agrees to "be alert to and thwart attempts by other parties to manipulate its worksite enforcement activities for illicit or improper purposes," and will evaluate whether tips it gets concerning worksite enforcement involve a labour dispute or are meant to retaliate or "otherwise frustrate the enforcement of labor laws." DHS also agrees to consider labour agency requests to grant immigration relief (such as parole<sup>18</sup> or deferred action<sup>19</sup>) for witnesses needed for a labour agency investigation or related proceeding. The labour agencies retain their ability to seek visas for witnesses, including by certifying worker victims of crime for U and T visas.<sup>20</sup>

<sup>18</sup> U.S. Citizenship and Immigration Services (USCIS), HUMANITARIAN PAROLE, <https://www.uscis.gov/forms/explore-my-options/humanitarian-parole> (last visited March 28, 2023) (Parole allows an individual who may be inadmissible or otherwise ineligible for admission into the United States to be in the country for a temporary period for urgent humanitarian reasons or significant public benefit.).

<sup>19</sup> Deferred action is a determination to defer removal of an individual as an act of prosecutorial discretion. An individual is not considered to be unlawfully present during the period when deferred action is in effect, since the individual has been authorized by DHS to be in the United States for the duration of the deferred action period. Deferred action recipients are also considered to be "lawfully present" for purposes of eligibility for certain public benefits (like certain Social Security benefits) during the period of deferred action. Work authorization can also be obtained. Deferred action does not, however, confer lawful immigration status to an individual, nor does it excuse any previous or subsequent periods of unlawful presence they may have. USCIS, FREQUENTLY ASKED QUESTIONS, <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#general> (last visited March 28, 2023).

<sup>20</sup> U nonimmigrant status, also known as the U visa, is for victims of certain qualifying criminal activities, including domestic violence, sexual assault, hate crimes, human trafficking, involuntary servitude, and certain other serious offenses. USCIS,

The MOU complemented a June 2011 memorandum<sup>21</sup> from the director of ICE, instructing agents to use prosecutorial discretion in their immigration enforcement decisions, taking into account such questions as “whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as...the Department of Labor, or National Labor Relations Board, among others.”

Each of these policies and pronouncements demonstrated a growing recognition, promoted by immigrant and worker advocacy organizations, that immigrant workers were especially susceptible to workplace abuse on account of their undocumented status, that labour agencies were responsible to enforce their rights under the applicable worker protection laws, and that the cooperation – and non-intervention – of the immigration enforcement agencies was essential to the labour agencies’ effective implementation of their worker protection responsibilities.

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VICTIMS OF CRIMINAL ACTIVITY: U NONIMMIGRANT STATUS, <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status> (last visited March 28, 2023) T nonimmigrant status, also known as the T visa, is for victims of a severe form of trafficking in persons. Victims who obtain either status can remain and work in the United States for up to four years once granted such nonimmigrant status. Extensions beyond four years may be granted, and victims can apply for a Green Card, also known as lawful permanent residency, if they meet certain requirements. USCIS, VICTIMS OF HUMAN TRAFFICKING: T NONIMMIGRANT STATUS, <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status> (last visited March 28, 2023) Eligibility for both U and T visas generally requires the victim to assist or cooperate with law enforcement in the detection, investigation, or prosecution of human trafficking or qualifying criminal activity. USCIS, VICTIMS OF HUMAN TRAFFICKING AND OTHER CRIMES, <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes> (last visited March 28, 2023) In 2011, DOL’s Wage and Hour Division (WHD) began to complete U visa certifications for victims of five qualifying crimes detected in connection with its workplace investigations (involuntary servitude, peonage, trafficking, obstruction of justice and witness tampering). In April 2015, WHD began exercising its authority to certify applications for trafficking victims seeking T visas and added three additional qualifying criminal activities (extortion, forced labour, and fraud in foreign labour contracting) in its certification of U visa requests. U.S. Department of Labor, U AND T VISA CERTIFICATIONS, <https://www.dol.gov/agencies/whd/immigration/u-t-visa> (last visited March 28, 2023). Over the past decade the use of these tools has been effective in providing immigration relief to workers in certain cases, but the number of available visas is capped, there is a large backlog of requests, and wait times can run to years. Advocates continue to argue for improvement and expansion of this important program.

<sup>21</sup> U.S. Immigration and Customs Enforcement, MEMORANDUM: EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS (2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

*“Simply put, immigrant workers are not likely to complain about wage theft, unsafe conditions on the job, or union-busting, or to cooperate in an agency’s investigation into these issues, if employer retaliation, and the threat of potential deportation or other adverse immigration consequences, might result from their assertion of labour rights.”*

## The Pendulum Swings Again

The Obama Administration’s elimination of worksite raids and the emphasis on prosecutorial discretion – with a focus on immigrants with criminal records and recent arrivals, not undocumented workers – was jettisoned by the Trump administration<sup>22</sup>, with chilling results for immigrant workers. Trump’s DHS ushered in a new enforcement regime, intended to quadruple or quintuple worksite enforcement,<sup>23</sup> and ultimately focused on raids resulting in removal of undocumented workers in unprecedented numbers,<sup>24</sup> and with devastating consequences to families.<sup>25</sup> The effectiveness of the labour agencies’ worker protection enforcement efforts suffered too, as immigrant workers were driven back into the shadows,<sup>26</sup> while the offending employers were largely left alone.<sup>27</sup> These aggressive anti-immigrant-worker policies and actions were met with

<sup>22</sup> Hamed Aleaziz, *Workplace Arrests Have Soared As The Trump Administration Steps Up Immigration Enforcement*, BUZZFEED NEWS (July 24, 2018), <https://www.buzzfeednews.com/article/hamedaleaziz/workplace-arrests-trump-enforcement-ice>

<sup>23</sup> Tal Kopan, *ICE chief pledges quadrupling or more of workplace crackdowns*, CNN POLITICS (October 17, 2017), <https://www.cnn.com/2017/10/17/politics/ice-crackdown-workplaces/index.html>

<sup>24</sup> National Immigration Law Center, *WORKSITE IMMIGRATION RAIDS*, <https://www.nilc.org/issues/workersrights/worksite-raids/> (last visited March 29, 2023).

<sup>25</sup> Holly Straut-Eppsteiner, *Worksite Immigration Raids Terrorize Workers and Communities Now, and their Devastating Consequences Are Long-Term*, NATIONAL IMMIGRATION LAW CENTER (April 11, 2019), <https://www.nilc.org/2019/04/11/worksite-immigration-raids-terrorize-workers-and-communities/>

<sup>26</sup> Michael Felsen & M. Patricia Smith, *Wage Theft is a Real National Emergency*, THE AMERICAN PROSPECT, (March 5, 2019), <https://prospect.org/power/wage-theft-real-national-emergency/>

<sup>27</sup> Renae Merle, *As Workplace Raids Multiply, Trump administration charges few companies*, THE WASHINGTON POST (August 9, 2019), <https://www.washingtonpost.com/business/2019/08/09/workplace-raids-multiply-trump-administration-charges-few-companies/>

strong protests and defensive actions on behalf of immigrant workers.<sup>28</sup>

Enter the current administration of President Joe Biden. On January 21, 2021, the day after Biden's inauguration, in an effort to mark a stark contrast with the policies of former President Trump, the Acting Secretary of DHS issued a memo<sup>29</sup> with interim guidelines for enforcement of U.S. immigration law. The memo paused, for 100 days, all but a handful of removals of unauthorized immigrants, emphasizing prosecutorial discretion and a focus on three priority areas: individuals posing national security threats, those unlawfully attempting to cross the border after November 1, 2020, and criminals with "aggravated felony" convictions. There is no suggestion that apprehending undocumented workers was in any way contemplated as part of the interim enforcement scheme.

The interim guidance was superseded by a September 30, 2021 memorandum issued by DHS Secretary Alejandro Mayorkas, entitled "*Guidelines for the Enforcement of Civil Immigration Law*" ("Guidelines").<sup>30</sup> Reiterating the legally-accepted principle of prosecutorial discretion, Mayorkas acknowledged that there are at least 11 million undocumented or otherwise removable noncitizens in the U.S., and that DHS has nowhere near enough resources to remove all of them. He recognized that the majority of undocumented noncitizens have been contributing members of U.S. society, including those "who work on the frontlines in the battle against COVID...teach our children, do back-breaking farm work to help deliver food to our table..." in other words, undocumented workers. Affirming, with slight modifications, the same three limited priority enforcement foci as outlined in the January 21 interim memo, the Guidelines, echoing earlier directives, also assert:

"It is an unfortunate reality that unscrupulous employers exploit their employees' immigration

status and vulnerability to removal by, for example, suppressing wages, maintaining unsafe working conditions, and quashing workplace rights and activities. We must ensure our immigration enforcement authority is not used as an instrument of these and other unscrupulous practices. A noncitizen's exercise of workplace...rights, or service as a witness in a labor...dispute, should be considered a mitigating factor in the exercise of prosecutorial discretion."

Shortly thereafter, on October 12, 2021, Secretary Mayorkas issued a policy statement, "*Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual*."<sup>31</sup> He emphasized that DHS "**must adopt** immigration enforcement policies to facilitate the important work of the Department of Labor and other government agencies to enforce wage protections, workplace safety, labor rights, and other laws and standards," including practices "to alleviate or mitigate the fear that victims of, and witnesses to, labor trafficking and exploitation may have regarding their cooperation with law enforcement in the investigation and prosecution of unscrupulous employers" (emphasis added). This would include "consideration of deferred action, continued presence, parole, and other available relief for noncitizens who are witnesses to, or victims of, abusive and exploitative labor practices," including in cases where DOL requests such relief for victims of, or witnesses to, exploitative employer practices subject to ongoing investigation.<sup>32</sup>

<sup>31</sup> DHS, MEMORANDUM: WORKSITE ENFORCEMENT: THE STRATEGY TO PROTECT THE AMERICAN LABOR MARKET, THE CONDITIONS OF THE AMERICAN WORKSITE, AND THE DIGNITY OF THE INDIVIDUAL, (October 12, 2021), [https://www.dhs.gov/sites/default/files/publications/memo\\_from\\_secretary\\_mayorkas\\_on\\_worksite\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf)

<sup>32</sup> A few months later, in February 2022 the DOL, NLRB, and EEOC announced a joint initiative to combat employer retaliation against workers who assert their protected labour rights. National Labor Relations Board, THE NATIONAL LABOR RELATIONS BOARD, US DEPARTMENT OF LABOR, US EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ALIGN TO END RETALIATION, PROMOTE WORKERS' RIGHTS, (November 10, 2021) <https://www.nlrb.gov/news-ou-treach/news-story/the-national-labor-relations-board-us-department-of-labor-us-equal>. In a video presentation for worker and immigrant advocates entitled "Ending Retaliation, Securing Racial and Economic Justice," representatives of each of the agencies discussed their commitment to combat retaliation, including and mentioning explicitly retaliation against undocumented workers. DOL Regional Solicitor Fisher, for example, made clear that threats of any kind, including threats of deportation against undocumented workers, are being met with immediate legal action brought against the offending employers for injunctive relief prohibiting such behavior. Several such injunctive actions have been brought by DOL in the past few years. The U.S. Equal Employment Opportunity Commission (EEOC), *Ending Retaliation, Securing Racial and Economic Justice in the Workplace*, YOUTUBE,

<sup>28</sup> National Employment Law Project, FEAR OF IMMIGRATION RAIDS MAY HARM WORKPLACE RIGHTS (April 13, 2017) <https://www.nelp.org/press-clips/fear-of-immigration-raids-may-harm-workplace-rights/>.

<sup>29</sup> U.S. Department of Homeland Security (DHS), MEMORANDUM: REVIEW OF AND INTERIM REVISION TO CIVIL IMMIGRATION ENFORCEMENT AND REMOVAL POLICIES AND PRIORITIES, (January 20, 2021) [https://www.dhs.gov/sites/default/files/publications/21\\_0120\\_enforcement-memo\\_signed.pdf](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf)

<sup>30</sup> DHS, MEMORANDUM: GUIDELINES FOR THE ENFORCEMENT OF CIVIL IMMIGRATION LAW (September 30, 2021) [hereinafter The Guidelines], <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

The next development came on July 6, 2022, when DOL announced a new process for requesting the agency's support for immigration-related prosecutorial discretion for workers involved in labour disputes.<sup>33</sup> In a "Frequently Asked Questions" format, DOL emphasized that its mission and effective enforcement depend on worker cooperation, and that those who lack work authorization are often reluctant to report violations, engage with government enforcement agencies, or otherwise exercise their rights. Hence, DOL devised a user-friendly method to request a "Statement of Interest" ("Statement") from the agency, which would assert DOL's need for witnesses to participate in its investigation and/or possible enforcement. The Statement would request DHS's use of immigration-related prosecutorial discretion to assist DOL in holding labour law violators accountable for violations at the particular workplace. Affected workers seeking immigration relief could include DOL's Statement in support of any such request they make to DHS, which would then make the determination in its sole discretion.<sup>34</sup>

Immigrant and worker rights organizations appreciated DOL's initiation of an accessible system through which worker requests for support for immigration relief could be made.<sup>35</sup> They also were heartened by DHS Secretary Mayorkas' earlier express recognition of both the workplace challenges undocumented immigrants face, the

(February 24, 2022), <https://www.youtube.com/watch?v=M-jB7vFK7MXY>.

<sup>33</sup> U.S. Department of Labor, PROCESS FOR REQUESTING DEPARTMENT OF LABOR SUPPORT FOR REQUESTS TO THE DEPARTMENT OF HOMELAND SECURITY FOR IMMIGRATION-RELATED PROSECUTORIAL DISCRETION DURING LABOR DISPUTES (July 6, 2022), <https://www.dol.gov/sites/dolgov/files/OASP/files/Process-For-Requesting-Department-Of-Labor-Support-FAQ.pdf>.

<sup>34</sup> In May, 2022, the NLRB had issued a memo, "Ensuring Safe and Dignified Access for Immigrant Workers to NLRB Processes," indicating its willingness to consider requests for immigration relief support from workers engaged in labour disputes under the Board's jurisdiction. National Labor Relations Board, NLRB GENERAL COUNSEL ISSUES MEMO ON ENSURING ACCESS FOR IMMIGRANT WORKERS TO NLRB PROCESSES, (May 2, 2022), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-issues-memo-on-ensuring-access-for-immigrant-workers>. And, on February 21, 2023, the EEOC issued an FAQ entitled "EEOC's Support for Immigration-Related Deferred Action Requests to the DHS" in which its process for requesting a Statement of Interest is described. EEOC, EEOC'S SUPPORT FOR IMMIGRATION-RELATED DEFERRED ACTION REQUESTS TO THE DHS, <https://www.eeoc.gov/faq/eeocs-support-immigration-related-deferred-action-requests-dhs> (last visited March 29, 2023).

<sup>35</sup> Southern Poverty Law Center, SPLC: NEW DEPARTMENT OF LABOR POLICY A WELCOME STEP FOR PROTECTING LONG EXPLOITED IMMIGRANT WORKERS, (JULY 8, 2022) <https://www.splcenter.org/presscenter/splc-new-department-labor-policy-welcome-step-protecting-long-exploited-immigrant>.

contributions they have made to U.S. society, and the immigration relief that needs to be made available to them. But they remained frustrated.<sup>36</sup> While DHS had exercised its prosecutorial discretion by granting immigration relief to particular individuals who were victims of and/or witnesses in particular wage theft,<sup>37</sup> safety and health,<sup>38</sup> and anti-retaliation DOL enforcement actions,<sup>39</sup> the advocates were anxious to see an institutionalized, wide-ranging, and dedicated method by which undocumented workers could access such immigration relief.<sup>40</sup>

With more than a year having passed since Secretary Mayorkas issued his Worksite Enforcement memo, following persistent requests for concrete action by DHS,<sup>41</sup> the worker and immigrant rights advocates mobilized yet again. On November 17, 2022, they presented a letter<sup>42</sup> to the DHS Secretary, unequivocally urging his agency to clarify the process by which workers can access prosecuto-

<sup>36</sup> Alexandra Martinez, *Immigrant workers want protections from deportation for reporting labor abuse*, PRISM, (October 24, 2022), <https://prismreports.org/2022/10/24/immigrant-workers-protections-labor-abuse/>.

<sup>37</sup> Dana Gentry, *Feds: Stadium subcontractor 'repeat violator' of wage laws*, NEVADA CURRENT (May 8 2020) <https://www.nevadacurrent.com/2020/05/08/feds-stadium-subcontractor-repeat-violator-of-wage-laws/>.

<sup>38</sup> Jennifer Solis, *Feds unveil process to protect immigrant workers facing employer retaliation*, NEVADA CURRENT (July 8 2022), <https://www.nevadacurrent.com/2022/07/08/feds-unveil-process-to-protect-immigrant-workers-facing-employer-retaliation/>.

<sup>39</sup> Shelley Murphy, *Jury orders construction company to pay \$650,000 to immigrant worker retaliation case*, BOSTON GLOBE (June 21, 2022) <https://www.bostonglobe.com/2022/06/21/metro/jury-orders-construction-company-pay-650000-immigrant-worker-retaliation-case/>.

<sup>40</sup> National Immigrant Law Center, NILC Statement on the Department of Labor's Guidance for Workers Involved in Labor Disputes, (July 6, 2022), <https://www.nilc.org/2022/07/06/department-of-labors-guidance-for-workers-involved-in-labor-disputes/> ("Providing temporary protections to immigrant workers that allow them to safely fight back against injustices in the workplace will bolster all workers' rights. The Department of Homeland Security must swiftly follow through on their commitment to clarify the process by which workers can access protections so that all working people, including immigrant workers, can do their jobs safely and with dignity.").

<sup>41</sup> National Day Laborer Organizing Network, *#Breaking: Hundreds of Migrant Workers have take to the streets of #NYC!* FACEBOOK (October 1, 2022) <https://www.facebook.com/NDLON/posts/pfbid0Piz6fDAbn2emEEympgSem1pa7oHfEeNsGPrh7BTMVF3YYpAQhe36Ri5pjVufHQW1PI>.

<sup>42</sup> National Immigrant Law Center, DHS SIGN-ON LETTER REGARDING PROSECUTORIAL DISCRETION, (November 17 2022) <https://www.nilc.org/wp-content/uploads/2022/11/DHS-Sign-On-Letter-Regarding-Prosecutorial-Discretion-Labor-Disputes-Nov-2022.pdf>.

rial discretion, including deferred action and parole, when involved in labour disputes.

*“The letter stated: ‘Establishing a clear, effective process to provide immigration protections and work authorization to immigrants who assert their civil and labor rights is an essential step forward in achieving this vision and will leave a legacy that elevates labor standards for all workers in this country.’ It was signed by three hundred and thirty immigrants’, civil, and labor rights organizations.”*

### A Significant Leap Forward

The advocates’ years of relentless and passionate advocacy finally paid off on January 13, 2023, when DHS announced a new process to streamline the exercise of its existing authority to grant discretionary immigration protection to undocumented workers involved in a federal, state or local labour agency investigation or enforcement action.<sup>43</sup> Under the new process, noncitizen workers can submit their requests for deferred action, which should include, as anticipated, a “statement of interest” from the labour agency to DHS (U.S. Customs and Immigration Service), through a central intake point specifically established to handle such requests related to the labour agency’s investigative efforts. Workers can, at the same time, request employment authorization. The labour agencies can also seek DHS support in ongoing actions by directly submitting their “statement of interest,” and can seek expedited consideration of worker requests for employment authorization if, for example, the respective agency is seeking back pay or reinstatement in an enforcement action or other court proceeding.<sup>44</sup>

<sup>43</sup> DHS, DHS SUPPORT OF THE ENFORCEMENT OF LABOR AND EMPLOYMENT LAWS, <https://www.dhs.gov/enforcement-labor-and-employment-laws> (last visited March 29, 2023).

<sup>44</sup> Obtaining work authorization in this fashion avoids the bars to back pay and reinstatement applicable to workers unlawfully retaliated against but not authorized to work, following the Supreme Court’s holding in *Hoffman*. *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) (In *Hoffman*, a worker who had used false identity papers was illegally fired, as found by the NLRB, for engaging in union organizing activity. The Board ordered the employer to pay the wages he lost after having been laid off in violation of the protections of the National Labor Relations Act, 29 U.S.C. §151 et seq. The Supreme Court, in a 5-4 decision, determined that even though the worker was protected by the law against the employer’s retaliatory action, the Board’s “back pay” remedy

DHS has never instituted a systematic process like this before, and worker and immigrant advocacy groups have been unanimous in their appreciation of its significance. They have also been clear to point out, justifiably, their repeated, forthright calls to action that preceded DHS’s move. Applauding “these essential protections [that] enable immigrant workers to report workplace abuses without fear that employers will use their immigration status to retaliate against them and their communities,” National Employment Law Project Executive Director Rebecca Dixon emphasized that “[t]his latest DHS announcement is a result of sustained advocacy by workers and advocates demanding respect and dignity in the workplace for all workers.”<sup>45</sup> Raha Wala, V.P. of Strategic Partnerships and Advocacy at the National Immigration Law Center agreed: “This momentous victory is the result of years of activism from workers and advocates and will be critical to supporting collective organizing and making worksites across the country safer and more equitable for everyone.”<sup>46</sup> Many other such groups<sup>47</sup> echoed that combination of appreciation for the government’s action, and pride upon seeing, at last, the fruits of their insistence that DHS turn stated policy into actual, meaningful practice.<sup>48</sup>

### Conclusion

The workers and advocacy organizations engaged in this struggle recognize that while this is a milestone, the journey toward worker and immigrant justice continues. The labour agency and DHS systems will need to be carefully monitored for their effectiveness in delivering the necessary relief they are designed to provide. Immigration

could not stand, since it intruded on key provisions of IRCA, which requires that workers have legal authorization to work.).

<sup>45</sup> National Employment Law Project, HOMELAND SECURITY ANNOUNCEMENT AFFIRMS PROTECTIONS FOR IMMIGRANT WORKERS REPORTING WORKPLACE ABUSES, (January 13, 2023) <https://www.nelp.org/news-releases/homeland-security-announcement-affirms-protections-for-immigrant-workers-reporting-workplace-abuses/>.

<sup>46</sup> National Immigration Law Center, NILC STATEMENT ON THE DEPARTMENT OF HOMELAND SECURITY’S GUIDANCE REGARDING WORKERS ASSERTING THEIR RIGHTS IN THE WORKPLACE, (January 13, 2023) <https://www.nilc.org/2023/01/13/statement-on-department-of-homeland-security-guidance-regarding-workers-asserting-their-rights-in-the-workplace/>.

<sup>47</sup> Kara Rodriguez, *Undocumented Workers in Labor Disputes can Apply for Temporary Immigration Relief*, RAISE THE FLOOR, (January 13, 2023) <https://www.raisetheflooralliance.org/undocumented-workers-in-labor-disputes-can-apply-for-temporary-immigration-relief>

<sup>48</sup> National Day Laborer Organizing Network, IMMIGRANT WORKERS RESPOND TO NEW HOMELAND SECURITY IMMIGRANT WHISTLEBLOWER POLICY, (January 13, 2023), <https://ndlon.org/immigrant-workers-to-respond-to-new-homeland-security-immigrant-whistleblower-policy/>.



reform to address the needs of the more than 11 million unauthorized immigrants in the U.S. remains, of course, essential but maddeningly elusive. At the same time, wage theft, unsafe conditions, discrimination, and union-busting continue to be all-too-real in far too many workplaces. Worker protection agencies need more funding, and ever-improving strategies for enforcement of workers' rights.<sup>49</sup>

Recognizing the challenges ahead is necessary, but shouldn't diminish the importance of the above-described government efforts to advance worker protection generally, and the rights of undocumented workers specifically. Likewise, while workers and immigrants and the groups that advocate for them have much still to fight for, their victory here demonstrates that together they can accomplish great things.

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<sup>49</sup> In another very recent victory for worker and immigrant advocates, on February 13, 2023, DOL announced that its Occupational Safety and Health Administration ("OSHA") will begin certifying U and T Visa applications as of March 31, 2023. For the first time, OSHA will be able to issue these visa certifications – during its workplace safety investigations – when the agency identifies qualifying criminal activities, including manslaughter, trafficking, extortion, felonious assault, forced labour and obstruction of justice. In OSHA's press release, Assistant Secretary for Occupational Safety and Health Doug Parker says: "Workers in the U.S. need to feel empowered and able to trust OSHA and the U.S. Department of Labor enough to voice their concerns about workplace safety regardless of their immigration status and fears of retaliation. By enabling OSHA to issue U and T visa certifications, we will be empowering some of our economy's most vulnerable workers to tell us if their jobs are jeopardizing their safety and health, and that of their co-workers, and to support our enforcement efforts." U.S. DEPARTMENT OF LABOR, READOUT: US DEPARTMENT OF LABOR EXPANDS OSHA'S ABILITY TO PROTECT ALL WORKERS BY CERTIFYING SPECIAL VISA APPLICATIONS TO ENSURE EFFECTIVE ENFORCEMENT, (February 13, 2023) <https://www.dol.gov/newsroom/releases/osha/osha20230213-1>. DOL's move follows vigorous advocacy, including a forceful June 22, 2023 letter to the Secretary of Labor urging such action, signed by 27 worker and immigrant advocacy organizations. See Sign-on Letter: Request for Stakeholder Meeting Regarding the Occupational Safety and Health Administration (OSHA) Becoming a U and T Visa Certifying Agency, (June 22, 2022) [https://drive.google.com/file/d/1LKw6YVW\\_2hQMx5apmXuwfhhohUS-DEppsb/view](https://drive.google.com/file/d/1LKw6YVW_2hQMx5apmXuwfhhohUS-DEppsb/view).

# THE VULNERABILITY OF UNDOCUMENTED MIGRANT WORKERS UNDER ITALIAN IMMIGRATION LAW. AN INSIGHT ON THE ITALIAN LEGAL FRAMEWORK AFTER 2020: A CHANGE OF COURSE?

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Italy | Originally written in English

## Introduction: Foreigners and Vulnerable Undocumented Migrant Workers

The juridical status of migrants in the state of arrival is a classic example of vulnerability, due to the intersectional discrimination and inequality, combined with structural and social dynamics, that they face. When addressing this issue, the U.N. Human Rights Council made the following statement: “The vulnerable situations that migrants face can arise from a range of factors that may intersect or coexist simultaneously, influencing and exacerbating each other and also evolving or changing over time as circumstances change.”<sup>2</sup>

On one hand, merely moving from one place to another causes the acquisition of a different *juridical* status<sup>3</sup> and, therefore, different levels of empowerment and access to rights. On the other hand, it is undeniable that immigration policies are one of the main causes of migrants’ vulnerability.<sup>4</sup> Indeed, Italian and European immigration

policies are crafted to fight illegal migration, in accordance with the perception that immigration is a problem of public order and security, and there is no apparent room for policies addressing the lawful entrance and residence of people in European countries. This approach pushes migrants to enter and stay illegally, thereby experiencing a situation of invisibility and marginality, while also being at heightened risk for becoming potential victims of criminal organizations, abuse, and exploitation.<sup>5</sup> In fact, undocumented and irregular migrants are considered paradigmatic victims of exploitation.<sup>6</sup>

The Italian legal framework has traditionally ignored the existence of these people, exacerbating issues created by this invisibility by not regulating and protecting migrants who entered Italy. However, in 2020, the Italian government issued special protections that give migrants lawful opportunities, through individual assessments of their situation in Italy, to escape from this invisibility.

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<sup>2</sup> U.N. High Commissioner for Refugees (UNHCR), *Principles and Practical Guidance on the Protection of the Human Rights of Migrants in Vulnerable Situations, Report of the United Nations High Commissioner for Human Rights*, at 12, UN Doc. A/HRC/37/34 (Jan. 3, 2018).

<sup>3</sup> Jorge A. Bustamante, *La “responsabilidad del estado” y las migraciones internacionales*, in *DERECHO INTERNACIONAL Y PROTECCIÓN DE MUJERES MIGRANTES EN SITUACIÓN DE ESPECIAL VULNERABILIDAD* 17, 34 (Carmen Pérez González ed., 2014).

<sup>4</sup> Indeed, also institutions may be cause of “pathogenic” vulnerabilities. See Catriona Mackenzie, Wendy Rogers, & Susan Dodds, *Introduction: What is Vulnerability and Why Does It Matter for Moral Theory?*, in *VULNERABILITY: NEW ESSAYS IN ETHICS AND*

*FEMINIST PHILOSOPHY* 1, 8 (Catriona Mackenzie, Wendy Rogers, & Susan Dodds eds., 2013).

<sup>5</sup> See Anne T. Gallagher & Marika McAdam, *Abuse of the Position of Vulnerability Within the Definition of Trafficked Persons*, in *ROUTLEDGE HANDBOOK OF HUMAN TRAFFICKING* 185, 186 (Ryszard W. Piotrowicz, Cony Rijken, & Baerbel Heide Uhl eds., 2017).

<sup>6</sup> Louise Waite, Gary Craig, Hannah Lewis, & Klara Skrivankova, *Introduction*, in *VULNERABILITY, EXPLOITATION AND MIGRANTS – INSECURE WORK IN A GLOBALISED ECONOMY* 1, 7 (Louise Waite, Gary Craig, Hannah Lewis, & Klara Skrivankova eds., 2015).

## The Italian “cimmigration” System: a Cause of Migrants’ Vulnerability to Exploitation

Italian immigration policies are a prime example of furthering vulnerability of migrant workers. Under Italian immigration law, foreigners – including asylum seekers and refugees – are perceived not only as dangerous “enemies,” but also as sources of social insecurity.<sup>7</sup> Therefore, Italian immigration policies are designed to fight both irregular migration and criminal organization, while policies on access and stay are completely neglected,<sup>8</sup> pushing people to find alternative illegal ways to enter and live in Italy.<sup>9</sup> Nevertheless, those who enter and stay illegally are criminalised under the article 10-bis of the so-called Consolidated Act on Immigration.<sup>10</sup> Accordingly, they are invisible to Italian institutions and are even denied access to basic rights, despite the formal guarantee of fundamental rights provided by the Italian constitutional framework.<sup>11</sup>



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<sup>7</sup> See Luigi Ferrajoli, *Il populismo penale nell’età dei populismi politici*, in 1 QUESTIONE GIUSTIZIA, 79, 80 (2019).

<sup>8</sup> See, e.g., Alessandro Riccobono, *Immigrazione e lavoro al tempo della crisi. Aspetti problematici e prospettive di riforma del quadro normativo*, 2-3/2013 NUOVE AUTONOMIE, 401, 406 (2013); Livio Neri, *Il lavoro*, in IMMIGRAZIONE, ASILO E CITTADINANZA 191, 201 (Paolo Morozzo Della Rocca ed, 5th ed. 2021).

<sup>9</sup> The latest “Flows Decree,” which identifies the number of people, which can enter Italy for working reasons during the current year, seems to repeat previous mistakes. The decree provides a very low number, compared to the demand. Migrants can enter only if they have already an employer. Therefore, when they are still in their home country, migrants have to find an employer available to apply for and carry on the procedure in Italy. The latest Decree also added a new requirement, asking employers to verify the availability of Italian workers before hiring a foreigner. See Associazione per gli Studi Giuridici sull’Immigrazione (ASGI), *Al via le quote d’ingresso per il 2023. Un commento al Decreto Flussi* (Jan. 31, 2023), <https://www.asgi.it/notizie/decreto-flussi-2023/>.

<sup>10</sup> Decreto legislativo 25 luglio 1998, n. 286/1998 (It.), <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-07-25;286>. Italian scholars blamed the crime punished under article 10-bis for being useless and ineffective. See e.g. Luca Masera, “Terra bruciata” attorno al clandestino: tra misure penali simboliche e negazione reale dei diritti, in IL PACCHETTO SICUREZZA 27 (Oliviero Mazza & Francesco Viganò eds., 2009); Massimo Donini, *Il cittadino extracomunitario da oggetto materiale a tipo d’autore nel controllo penale dell’immigrazione*, in 1 QUESTIONE GIUSTIZIA, 101, 114-115 (2009).

<sup>11</sup> As addressed by scholars, the Italian legal framework is built on the existence of structural inequalities between citizens and aliens but provides that different treatments have to be reasonable and respectful of

*“Indeed, undocumented migrants cannot be employed through regular contracts, nor do they have access to the regular labour market. This is because the Consolidated Act on Immigration criminalises the employment of foreign workers without a residence permit, which makes it impossible for employers to hire undocumented migrants legally.”<sup>12</sup>*

As a result, undocumented migrants are forced to work in the informal economy and accept conditions of abuse and exploitation,<sup>13</sup> or turn to criminal organizations to make a basic living. The agricultural sector in Italy is a prime example of this type of abusive situation: it is almost entirely based on the exploitation of migrants, who are able to work for lower wages and longer hours than Italian workers. Undocumented migrants are usually illegally recruited by other foreigners to work without a formal contract and without any guarantees for health, safety and social security.<sup>14</sup> Moreover, they often live in segregation and isolation from the rest of Italian society, in temporary and precarious encampments in the rural zones, which they can only leave when transported to the working place by the same ‘gangmasters.’<sup>15</sup>

It is worth noting that this employment situation is not only common among undocu-

fundamental rights. See Silvio Bologna, *Lavoro e sicurezza sociale dei migranti economici: l’eguaglianza imperfetta*, in DIRITTO E IMMIGRAZIONE. UN QUADRO AGGIORNATO DELLE QUESTIONI PIÙ ATTUALI E RILEVANTI 277, 281 (Giuseppe De Marzo & Francesco Parisi eds., 2021).

<sup>12</sup> D.Lgs. n.286/1998, art. 12, paras. 12 & 12-bis (It.).

<sup>13</sup> Madia D’Onghia, *Immigrazione irregolare e mercato del lavoro: spunti per una discussione*, 2019-2 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 463, 474 (2019); Stella Laforgia, *Il contrasto allo sfruttamento lavorativo dei migranti*, in MIGRANTI E LAVORO 192 (William Chiaromonte, Maria Dolores Ferrara, & Maura Ranieri eds., 2020). On the other hand, regular migrants are also particularly vulnerable to abuse in the workplace since their residency depends on their job.

<sup>14</sup> ALAGIE JINKANG, PERCEPTIONS POLICY BRIEF: - VULNERABILITY AND EXPLOITATION OF MIGRANT WORKERS IN ITALIAN AGRICULTURE 2 (Apr. 2022).

<sup>15</sup> See LETIZIA PALUMBO & ALESSANDRA SCIURBA, THE VULNERABILITY TO EXPLOITATION OF WOMEN MIGRANT WORKERS IN AGRICULTURE IN THE EU: THE NEED FOR A HUMAN RIGHTS AND GENDER BASED APPROACH 24 (2018), [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604966/IPOL\\_STU\(2018\)604966\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604966/IPOL_STU(2018)604966_EN.pdf)

mented migrants, but it also affects migrants who may agree to work in these conditions because they need an employment contract to renew their Italian residence permit. In this situation, employers usually take their identity documents to retain full control over them, which often results in them losing their right to renew their residence permit because of the precariousness or irregularity of the job.<sup>16</sup>

In the meantime, employees in this situation are unable to ask for help from the state authorities to protect themselves from abuses. Indeed, “due to the fear of being arrested (and/or deported), many migrants refrain from reporting their exploitation (no matter the degree). This suggests that the Italian policy approach that criminalises migrants in irregular situations is an obstacle to combating labour exploitation.”<sup>17</sup>

Furthermore, according to the traditional approach of Italian immigration law, this condition of irregularity is usually irreversible. The Italian legal framework does not provide any way out of this status of invisibility, making it impossible for an undocumented migrant to get not only a permit to stay in Italy lawfully, but also access to the regular economy. Measures of regularization (‘amnesties’) are only provided, as an exception, from time to time by the Italian government when the need to reconcile “the world of legal immigrants with the world of actual immigrants residing and working in the country” arises.<sup>18</sup> Furthermore, these “amnesties” have strict eligibility requirements, due to their exceptional character.<sup>19</sup> For example, to be eligible to apply for amnesty, a migrant would have to prove having been in Italy on 8th March 2020 and having had a suitable employment, despite his irregularity, and the employer would have to prove having had the minimum income required.

<sup>16</sup> A sample of these situations of vulnerability and abuse is provided in the judgment No. 17095 of the Court of Cassation of March 16, 2022. On that occasion, the Court described the conditions of both documented and undocumented migrant workers, and convicted the employers of the crime of slavery and forced labour. Rita Daila Costa, *Servitù, schiavitù e sfruttamento lavorativo*, 4/2022 RIVISTA GIURIDICA DEL LAVORO E DELLA SICUREZZA SOCIALE 419 (2022) (citing Cass., 16 marzo 2022, n. 17095, V pen., sent. (It.)).

<sup>17</sup> Jinkang, *supra* note 14, at 7.

<sup>18</sup> Maurizio Ambrosini, *Moral Economy and Deservingness in Immigration Policies. The Case of Regularisations in Italy*, 23 ETHNICITIES, 306, 314 (2022).

<sup>19</sup> *Id.*, at 313.

## A Change in Course: the Special Protection After the Reform of 2020

The framework just pictured became harsher after the increasing of refugees arrival by sea in 2015. For years, “the attention was mainly attracted by landings from the Mediterranean Sea and by the reception of asylum seekers, generating fears of invasion well in excess of the objective figures.”<sup>20</sup> As a consequence, several restrictive provisions were approved, affecting the lives of many asylum seekers, and reducing their possibility of getting permits to stay after filing their applications for international protection.

Nevertheless, after a controversial measure of migrant regularization, defined in article 103 of the so-called “restart decree” (Decree n. 34/2020, issued in May 2020) failed,<sup>21</sup> the Italian government made a decisive change of course at the end of 2020. Indeed, Decree n. 130/2020, issued in October 2020,<sup>22</sup> introduced an unexpected innovation in Italian immigration law.

Aiming to reduce the side effects of the prior restrictive reforms of the asylum system, Decree n. 130/2020 introduced a “new” form of complementary protection<sup>23</sup> in the Italian asylum system: protection of the right to respect for one’s private and family life, in accordance with Article 8 of European Convention on Human Rights (ECHR).<sup>24</sup> The Decree n. 130/2020 forbade the expulsion of

<sup>20</sup> *Id.*, at 315.

<sup>21</sup> See Alessandro Bellavista, *L'emersione del lavoro irregolare nel “Decreto Rilancio”*, in DALL'EMERGENZA AL RILANCIO: LAVORO E DIRITTI SOCIALI ALLA PROVA DELLA PANDEMIA 163 (Alessandro Garilli ed., 2020).

<sup>22</sup> Decreto legge 21 ottobre 2020, n. 130/2020 (It.), <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2020-10-21:130>.

<sup>23</sup> Ruma Mandal, UNHCR Department of Internal Protection, *Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)*, PPLA/2005/02, at 2, (Jun. 2005), <https://www.unhcr.org/media/no-9-protection-mechanisms-outside-1951-convention-complementary-protection-ruma-mandal> (“The term ‘complementary protection’ has emerged over the last decade or so as a description of the increasingly-apparent phenomenon in industrialised countries of relief from removal being granted to asylum seekers who have failed in their claim for 1951 Convention refugee status. [...] all these initiatives have in common is their complementary relationship with the protection regime established for refugees under the 1951 Convention/1967 Protocol. They are intended to provide protection for persons who cannot benefit from the latter instruments even though they, like Convention refugees, may have sound reasons for not wishing to return to their home country.”).

<sup>24</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), art. 8, Nov. 4, 1950, E.T.S. No. 5.

a foreigner when doing so could violate the right protected by ECHR Article 8, as well as other constitutional and international obligations of Italy, defined under Article 19 of the Consolidated Act on Immigration.

Thus, people who cannot be expelled because of their status as refugees have the right to apply for a residence permit for “special protection.”<sup>25</sup>

Indeed, after the reform of 2020, people could receive special protection through several paths. Under the first option, asylum seekers who do not fit the requirements of international protection may be able to receive recognition of their right to special protection. Under the second option, migrants could apply directly for recognition of their right to get a permit to stay for special protection, under Article 19, par. 1.2 of the Consolidated Act on Immigration. Article 19 became an important means of defence against unlawful deportation, since a valid expulsion order could not be issued in case of a potential violation of it.

### *The Special Protection After 2020 as a Way Out of Invisibility*

Despite several references to the system of humanitarian protection that was abolished in 2018,<sup>26</sup> the 2020 reform made an unexpected change in the overall system of Italian immigration law. According to some scholars, Decree n. 130/2020 fi-

<sup>25</sup> See Decreto Legislativo 28 gennaio 2008, n. 25, art. 32, para. 3 (It.), <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2008-01-28;25> (providing detailed rules on the permit to stay for special protection).

<sup>26</sup> Until 2018, the right to asylum under the Italian Constitution was realized in the form of refugee status, subsidiary protection, and humanitarian protection. Humanitarian protection was provided on serious humanitarian grounds or in response to constitutional or international obligations incumbent on Italy. It was a form of protection which, according to case law, had to be recognized due to hypotheses of ‘vulnerability’, to assess on a case-by-case basis. Recent case law also recognized the existence of humanitarian grounds in the case of the “social integration” of the applicant, in conformity with the right to respect for private and family life under ECHR Article 8 ECHR. To provide protection for social integration, case law required, however, that at the outcome of a comparative assessment the ties in Italy were stronger than in the country of origin. In 2018, with the so-called Security Decree, this form of protection was repealed, causing alarm among civil society and even the international community. Despite the lack of reference to the old humanitarian reasons, the reform of 2020 was clearly inspired by the previous framework, referring to constitutional and international obligations and to the right to one’s private and family life. See Marcella Ferri, *La tutela della vita privata quale limite all’allontanamento: l’attuazione (e l’ampliamento) degli obblighi sovranazionali attraverso la nuova protezione speciale per integrazione sociale*, 2/2021 DIRITTO, IMMIGRAZIONE E CITTADINANZA 78 (2021).

nally introduced a permanent regularization mechanism for undocumented foreigners residing in Italy.<sup>27</sup> Indeed, its special protection provision may allow the regularization of undocumented migrants based on an individual assessment.

Before 2020, “special” protection was merely an application of the principle of *non-refoulement*. This meant it only applied to people at risk of suffering torture or inhuman or degrading treatment if they were returned to their home countries.

“The reform of 2020 extended the Italian understanding of the principle of non-refoulement, extending the application of the principle according to the obligation created by Article 8 of the ECHR and giving specific relevance to the assessment of the migrant’s private and family life. In making this assessment, according to case law, the key element to evaluate is work integration, since it may reveal the existence of an effective link with Italy.”<sup>28</sup>

*Indeed, according to the interpretation of the European Court of Human Rights of ECHR Article 8,<sup>29</sup> Italian case law is interpreting the concept of “private” life as independent of family life. Thus, private life embraces every kind of relationship of the individual with the external world and, in particular, working relationships. These are considered the most significant proof of private life and, therefore, the most meaningful element of consideration for special protection under the 2020 decree.<sup>30</sup>*

Nevertheless, special protection has been recognized not only when people were already working in Italy regularly,<sup>31</sup> but also when they have been

<sup>27</sup> See Paolo Bonetti, *Il permesso di soggiorno per protezione speciale dopo il decreto legge n. 130/2020: una importante innovazione nel diritto degli stranieri*, in FONDAZIONE MIGRANTES, IL DIRITTO D’ASILO – REPORT 2021 – GLI OSTACOLI VERSO UN NOI SEMPRE PIÙ GRANDE 245, 268 (2021); Livio Neri, *Si fa presto a dire speciale. La protezione speciale a due anni dal decreto legge 130/2020: un istituto unitario ancora in cerca di una disciplina, un permesso di soggiorno che non può non essere convertibile*, 3/2022 DIRITTO, IMMIGRAZIONE E CITTADINANZA, 123, 125 (2022).

<sup>28</sup> Trib. Ord. di Roma, sez. dir. della pers. e immig., 22 gennaio 2021, n. 19019/2019 (It.); Trib. di Venezia, 13. ottobre 2022, n. 7300/2022 (It.).

<sup>29</sup> Paradiso & Campanelli vs Italia, App. No. 25358/12 (Jan. 24, 2017), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-170359%22%7D>.

<sup>30</sup> See Cass., sez. un. civ., n. 24414/2021 (It.).

<sup>31</sup> This is usually the case of asylum seekers, which are not entitled to international protection but have been living in



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working there irregularly<sup>32</sup> and even when they have experienced exploitative conditions.<sup>33</sup> Therefore, the obligation to protect one's right to private and family life made it possible to consider if a migrant works (or has worked) in Italy, even if under irregular conditions, ensuring them the right to a residence permit due to their work integration and thus protecting their right to private life.

In this way, special protection could have been a tool to give access to justice to undocumented and irregular migrants, giving them a way out of their invisibility and marginality. Indeed, the opportunity to get a permit to stay, rather than an order of expulsion, could be an effective means of encouraging irregular migrants to finally report the exploitative working conditions they may have been experiencing.<sup>34</sup> Employers who

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Italy, studying, and working.

<sup>32</sup> Indeed, it would be contradictory and unreasonable asking to prove a regular employment, since undocumented migrants cannot work lawfully.

<sup>33</sup> According to case law, the reference to international and constitutional obligations aims to provide protection when fundamental rights might be violated. Thus, victims of exploitation are also entitled to receive protection, since their fundamental rights are violated by their condition of exploitation. See Court of Turin, May 24, 2022 (this needs a cite to the specific case – I tried finding it but there were several opinions issued by the Tribunale di Torino on this day...); Rita Daila Costa, *Il diritto alla protezione "speciale" del migrante vittima di sfruttamento lavorativo*, 23 DIRITTO DELLE RELAZIONI INDUSTRIALI, 117, 119 (2023).

<sup>34</sup> It is worth reminding that Italian immigration law provides also a form of protection for the victim of labour exploitation, under article 18. Nevertheless, this protection is open only to victims of "serious" exploitation and has been blamed for ineffectiveness; see PALUMBO & SCIURBA, *supra* note 15 at 59; Letizia Palumbo & Alessandra Sciorba, *Vulnerability to Forced Labour and Trafficking: The Case of Romanian Women in the Agricultural Sector in Sicily*, 5 ANTI-TRAFFICKING REV., 89, 103 (2015). The "new" special protection, instead, may be recog-

exploit migrant workers save money by not paying the required amounts to pension and social security for them. While this kind of wage theft is common, in most cases, the fear of being expelled prevents undocumented migrants from reporting it or accessing justice.<sup>35</sup>

However, these 2020 reforms empowered undocumented migrant workers to report their exploitative employers, allowing those who had taken this precarious and informal work to be able to prove they have worked in Italy and, therefore, were entitled to special protection and a residence permit.

### The Latest Reform of Special Protection: a Step Back

Despite all these potential applications of special protection, the latest reform to the applicable law, which came into force with by Decree n. 20/2023<sup>36</sup> has partly changed the scope of this protection, removing the reference to the protection of private and family life in Article 19 of the Consolidated Act on Immigration.

However, despite the impact of Decree n. 20/2023, the protection of the right provided by ECHR Article 8 still must be considered an essential part of special protection. As pointed out by early commentators, even in the absence of a direct reference to private and family life, the current face of special protection would not be changed. Indeed, it is well established in case law that private and family life must be protected, not only because of the obligation provided by ECHR Article 8,<sup>37</sup> but also because they are still relevant under constitutional and international obligations.<sup>38</sup>

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nized to victims of every kind of exploitation, regardless of their employees' criminal accountability.

<sup>35</sup> It is worth underlining that, under Italian law, undocumented migrants have the right to sue their employers in cases of wage theft. See Cass., sez. lav., 13 ottobre 1998, n. 10128 (It.); Cass., sez. lav., 26 Marzo 2010, n. 7380 (It.); Cass., sez. lav. 21 settembre 2015, n. 18540 (It.).

<sup>36</sup> Decree n. 20/2023 of 2023 (It.), <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2008-01-28:25>.

<sup>37</sup> As already addressed, despite the removal of an express reference to the right to respect for private and family life, ECHR Article 8 must be applied in cases of "social integration." See Nazzarena Zorzella, *L'inammissibile fretta e furia del legislatore sulla protezione speciale. Prime considerazioni*, QUESTIONE GIUSTIZIA, Apr. 4, 2023, <https://www.questionegiustizia.it/articolo/protezione-speciale-zorzella>.

<sup>38</sup> The relevance given to ECHR Article 8 before 2018, despite the lack of a direct reference, is one of the main arguments that may be used to reduce the side effects of the reform of Decree n. 20/2023 of 2023. See Zorzella, *supra* note 37.

Moreover, despite the case law focusing its attention on the application of the rights provided by ECHR Article 8, it is worth underlining that the right to special protection for undocumented migrants working in Italy is ensured also by the Italian Constitution. Specifically, Article 35, which mandates the protection of every kind of work in every kind of condition, also applies to undocumented migrant workers in Italy. This provision is the source of the constitutional obligation applicable to Article 19 of the Consolidated Act on Immigration and, therefore, establishes the right to special protection.<sup>39</sup>

This means that the protection of undocumented migrant workers should be still ensured under the “new” Article 19, even though its direct reference to the protection of family and private life has been removed. Therefore, despite the formal changes to the text of Article 19, the special protection seems to retain its prior scope.

Nevertheless, it cannot be denied that significant damage was created by the reform implemented by Decree n. 20/2023.

Indeed, this reform has completely changed the way to access special protection, abolishing paragraph 1.2 of Article 19. As previously mentioned, this provision allowed migrants to directly apply for the recognition of their right to special protection. Decree n. 20/2023 has removed this possibility and, incredibly, reduces actual access to special protection. Currently, special protection may be granted only after an application for international protection, or as a means of defending against unlawful deportation. Therefore, Article 19 can no longer be considered as a regularization mechanism for undocumented foreigners residing in Italy, signifying an incredible step back. After this reform, even though migrants have all the substantial requirements demanded by Article 19 to be entitled to special protection, their right to it may only be recognised if they are applying for asylum or if they want to oppose an expulsion order. Once again, undocumented migrants are bound in a condition of invisibility and vulnerability, without a way out.

## Concluding Remarks

Migrants’ vulnerability to abuse and exploitation is partly caused by Italian immigration policies and, particularly, by marginalisation and criminalisation

<sup>39</sup> See Rita Daila Costa, *La tutela del lavoratore straniero “irregolare” dopo il decreto n. 130/2020*, 11 IL LAVORO NELLA GIURISPRUDENZA 1120, 1128 (2022).

tion of immigrants, as the Italian legal framework shows. Nevertheless, vulnerability requires not only understanding, but also deconstruction, since it shows not only the reasons why individuals are exposed to harm by others, but also the responsibilities of the States.<sup>40</sup> In this sense, making the invisible visible is a means of deconstructing these vulnerabilities, since emerging from marginality and invisibility is itself an essential tool to fight labour exploitation, in that it allows people to be able to access their own rights<sup>41</sup>.

Thus, the “special” protection may be a valuable tool not just in the fight of exploitation, but also in the prevention of it. By introducing a form of protection for one’s private and family life, Decree n. 130/2020 seemed to have changed the traditional approach of Italian immigration law, proposing a effective procedure that would allow migrant workers able to come out from invisibility and finally have access to their fundamental rights.

This is not totally changing, despite the change effected by the Decree n. 20/2023. Indeed, the right to the protection of private and family life is not disposable, being ensured by ECHR Article 8 and the Italian Constitution, in addition to being part of the Italian understanding of the principle of *non-refoulement*.

Nevertheless, by eliminating the option of applying for direct recognition for special protection, the latest reform of 2023 has reduced the possibility to access special protection, once again changing the course of Italian immigration law and bounding people inside the borders of their invisibility.

<sup>40</sup> Alessandra Sciorba, *Vulnerabilità posizionale e intersezionale. I minori migranti soli come caso para-digmatico*, in I SOGGETTI VULNERABILI NEI PROCESSI MIGRATORI. LA PROTEZIONE INTERNAZIONALE TRA TEORIA E PRASSI 71, 75 (Isabel Fanlo Cortés & Daniele Ferrari eds., 2020).

<sup>41</sup> Laura Calafà, *Per un approccio multidimensionale allo sfruttamento lavorativo*, 2 LAVORO E DIRITTO 193, 209 (2021).

# ACCESS TO JUSTICE FOR NON-PAYMENT OF MIGRANT WORKERS' WAGES IN THE GULF

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*Persian Gulf | Originally written in English*

## Introduction

The Arab region is a destination for a significant proportion of the world's migrant workers. According to International Labour Organization's (ILO) global estimates on international migrant workers, there were 24.1 million migrant workers in the Arab States of the Middle East in 2019, representing 14 percent of all migrant workers worldwide. Importantly, the region has the highest global share of migrant workers as a proportion of the total workforce, reaching 41 percent in 2019 compared to the global average of just 5 percent,<sup>2</sup> and even higher in the six Gulf Council Cooperation (GCC) countries, especially Qatar and the United Arab Emirates (UAE).

Access to justice for owed wages and benefits had been a major structural challenge in the GCC prior to COVID-19, but the pandemic exposed and deepened the scale of the problem. Numerous civil society organizations voiced the concern that COVID-19 had led to a major increase in non-payment of wages, with some employers taking advantage of the pandemic to dismiss migrant workers and withhold the wages and benefits owed to them.<sup>3</sup> In other cases, employers

were alleged to have placed migrant workers on drastically reduced salaries, forced them into unpaid leave, or made unlawful deductions from the salary of the worker. Cases of workers not receiving their end-of-service benefits or having to pay for their return tickets were also reported. In a survey conducted with 2,252 Indian migrant workers returning from the GCC between May – December 2020, more than half had returned because they had lost their jobs. Of these returnees, 39 percent reported that they have experienced non-payment of wages or dues and/or reduced wages. Despite the presence of consular and embassy staff and the existence of a helpline in the workers' language to share information about the workers' legal rights, none filed a claim against their employer in the country of destination to recover their entitlements.<sup>4</sup>

This brief article sets out the international labour standards on wage protection, and highlights some of the promising practices (and remaining challenges) in addressing non-payment of wages in the GCC, with a focus on Qatar and the UAE.

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<sup>2</sup> International Labour Organization (ILO), GLOBAL ESTIMATES ON INTERNATIONAL MIGRANT WORKERS: RESULTS AND METHODOLOGY 3RD EDITION at 31, (June 2021), [https://www.ilo.org/global/topics/labour-migration/publications/WCMS\\_808935/lang-en/index.htm](https://www.ilo.org/global/topics/labour-migration/publications/WCMS_808935/lang-en/index.htm).

<sup>3</sup> ILO Migration Advisory Group (Arab States), DISCUSSION NOTE FOR POLICYMAKERS: COVID-19 PANDEMIC: WAGE PROTECTION OF MIGRANT

WORKERS IN THE ARAB STATES (2021), [https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/briefingnote/wcms\\_803052.pdf](https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/briefingnote/wcms_803052.pdf). See also, Migrant Forum in Asia (MFA), JUSTICE FOR WAGE THEFT CAMPAIGN, <https://justiceforwage-theft.org/> (last visited April 4, 2023).

<sup>4</sup> S Irudaya Rajan & C S Akhil, *Empty-handed and Demoralized: New Evidence of Non-payment of Wages Among Indian Return Migrants During Covid-19*, MFA POLICY BRIEF No. 3 (July 2021), <https://justiceforwagetheft.org/en/entity/6coz00v2td4>



## International Labour Standards on Wage Protection

With respect to international labour standards, the Protection of Wages Convention, 1949 (No. 95)<sup>5</sup> and accompanying recommendation (Protection of Wages Recommendation, 1949 (No. 85)<sup>6</sup>), provide the key framework on wage protection,<sup>7</sup> outlining:

- The right to payment in legal tender at regular intervals, directly to the worker or worker's chosen bank account;
- Protection with regards to payment in-kind and deductions of wages (including payments to intermediaries, such as labour contractors or recruiters for obtaining or retaining employment);<sup>8</sup>
- In the case of employer insolvency, privileged priority for worker wage claims;
- Upon the termination of the employment contract, the right of workers to the swift and final settlement of their wages due; and
- The right of workers to be informed of their wages before they enter employment at the time of each payment of wages (for example, via a written employment contract and wage payment slips or statements)

Of the GCC, only Saudi Arabia has ratified Convention No. 95, which came into force in that country in December 2021.<sup>9</sup>

In addition, wage protection for domestic workers is covered by the ILO Domestic

Workers Convention, 2011 (No. 189)<sup>10</sup> and Domestic Workers Recommendation, 2011 (No. 201).<sup>11</sup> There are estimated to be 5.80 million domestic workers in the GCC, with 2.05 million or 36 percent who are women, and 3.75 million or 64 percent who are men. The majority of these workers are excluded from the respective labour laws, and instead covered by separate regulations that provide inferior protections to those of the labour law.<sup>12</sup> ILO Convention No. 189 states that domestic workers must be paid directly in cash at regular intervals at least once a month. Payment may be made via bank transfer or similar means, with the consent of the worker.<sup>13</sup> ILO Recommendation No. 201 calls for domestic workers to receive an easily understandable written account of the total remuneration due to them and the specific amount and purpose of any deductions that may have been made. Upon termination of employment, any outstanding payments should be made promptly.<sup>14</sup> Moreover, ILO Convention No. 189 provides protection with respect to in-kind payments as well as deductions.<sup>15</sup>

According to ILO Conventions Nos. 95 and 189, there should be effective mechanisms for monitoring and enforcement, including through labour inspection, and when workers have experienced (wage) abuses, there must be effective access to justice and remedy.



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<sup>5</sup> ILO, PROTECTION OF WAGES CONVENTION 95 (1949), [hereinafter ILO C95] [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C095](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C095).

<sup>6</sup> ILO, PROTECTION OF WAGES RECOMMENDATION 85 (1949), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312423](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312423)

<sup>7</sup> ILO, GUIDANCE TOOL ON PROTECTION OF WAGES FOR MIGRANT WORKERS (April 2023) [[https://www.ilo.org/global/topics/labour-migration/publications/WCMS\\_878456/lang-en/index.htm](https://www.ilo.org/global/topics/labour-migration/publications/WCMS_878456/lang-en/index.htm) Hereinafter Guidance Tool].

<sup>8</sup> Arguably, reductions of migrant workers' wages during the pandemic, which were reported to be common in the GCC, could be seen as unlawful deductions, even if they were with the 'consent' of the worker, because there was no possibility of collective bargaining.

<sup>9</sup> ILO, NORMLEX: SAUDI ARABIA, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P11110\\_COUNTRY\\_ID:103208](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P11110_COUNTRY_ID:103208) (last visited April 4, 2023).

<sup>10</sup> ILO, DOMESTIC WORKERS CONVENTION 189 (2011), [hereinafter ILO C189] [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:2551460](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:2551460) (Convention No. 189 has not been ratified by any of the GCC countries.)

<sup>11</sup> ILO, Domestic Workers Recommendation 201 (2011), [hereinafter ILO R201] [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:2551502:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:2551502:NO)

<sup>12</sup> ILO, MAKING DECENT WORK A REALITY FOR DOMESTIC WORKERS: PROGRESS AND PROSPECTS IN THE ARAB STATES TEN YEARS AFTER THE ADOPTION OF THE ILO DOMESTIC WORKERS CONVENTION, 2011 (NO. 189) (December 2021) [https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms\\_831916.pdf](https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_831916.pdf).

<sup>13</sup> ILO C189, *supra* note 10 at Article 12(1).

<sup>14</sup> ILO R201, *supra* note 11 at Art. 15(1-2).

<sup>15</sup> Guidance Tool, *supra* note 7.

*“Withholding of wages (or threats to do so) can be an indicator of forced labour<sup>16</sup> of the 27.6 million people in forced labour, more than a third (36.3 percent) had their wages withheld or were prevented from leaving by threats of non-payment of due wages.<sup>17</sup> According to the latest global estimates, the highest proportion of forced labour is in the Arab States (5.3 per 1,000 people).<sup>18</sup>”*

### Structural Issues That Result in Delayed and Non-payment of Wages and Benefits in the Gulf

Non-payment, under-payment and delayed payment of migrants' wages is a worldwide phenomenon,<sup>19</sup> and indeed sometimes a strategy for unscrupulous employers who are aware of the limited risk of detection and penalty. Yet, there are structural reasons why this issue is especially problematic in the GCC due to cashflow constraints that companies may face.

#### *Subcontracting and 'Pay When Paid'*

Many migrant workers in the GCC, particularly in the construction sector, work in subcontracted or labour outsource ('triangular employment') arrangements and sometimes workers themselves may not be clear on who is their 'employer'. In the UAE, this ambiguity was recently addressed to some degree through the Executive Regulations of Federal Decree-Law No. (33) of 2022 and Ministerial Decree No. (51) of 2022 Regarding Licensing and Regulating the Activities of Recruitment Agencies. Temporary employment or 'outsourcing' companies (which have a direct contractual relationship with the worker but the latter supplies his/her labour to a third party) can have their license suspended or revoked if they don't pay the wor-

kers' wages.<sup>20</sup> However, there is no obligation on the third party (which benefits from the labour of the worker) to pay the workers' wages where the temporary agency does not or cannot. The third party is required to ensure safe working conditions, compliance with maximum normal working hours, and should allow the worker to review the attendance sheet prior to sending it to the agency (including any reservations the worker may have regarding its content) – which could reduce risk of undercounting hours worked, including overtime – but does not have any (joint/several) liability with respect to wages<sup>21</sup>.

Another common issue is a consequence of delayed payment from principal contractors to the immediate employer of the worker, which results in compounded delay in receipt of wages by the subcontracted workers. The time lag between payments for execution of the work by clients and receipt of payment down the supply chain by contractors and subcontractors can add up to months, and is compounded at each tier of the supply chain (as each contractor only "pays when paid" i.e. waiting for their payment from a supplier before releasing funds to their subcontractors).<sup>22</sup> In such instances also, workers have no legal recourse against the principal contractor or client and are especially vulnerable if their direct employer declares bankruptcy.

#### *End of Service Benefits*

Migrant workers are excluded from social protection systems in the GCC, with the exception of access to healthcare, which is generally provided through employer-paid private insurance.<sup>23</sup> Instead, end-of-service benefits (usually around one month salary per year of employment) serve as an inadequate substitute for social protection in GCC countries.<sup>24</sup> However, rather than being

<sup>16</sup> ILO, ILO INDICATORS OF FORCED LABOUR (October 2012), [https://www.ilo.org/global/topics/forced-labour/publications/WCMS\\_203832/lang-en/index.htm](https://www.ilo.org/global/topics/forced-labour/publications/WCMS_203832/lang-en/index.htm).

<sup>17</sup> ILO, Walk Free, & International Organization for Migration (IOM), GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE (September 2022), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ipec/documents/publication/wcms\\_854733.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf).

<sup>18</sup> *Id.*

<sup>19</sup> Bassina Farbenblum & Laurie Berg, *Migrant Workers' Access to Justice for Wage Theft: A Global Study of Promising Initiatives*, MIGRANT JUSTICE INSTITUTE (2021), <https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/61adba9108bec25ce355c6e4/1638775475553/Farbenblum+Berg+2021+MWA2J+with+hyperlinks.pdf>

<sup>20</sup> Executive Regulations of Federal Decree-Law No. (33) of 2022 at Article 9(7)(d) (U.A.E.).

<sup>21</sup> Ministerial Decree No. (51) OF 2022, at Article 9(5) (U.A.E.).

<sup>22</sup> Jill Wells, EXPLORATORY STUDY OF GOOD POLICIES IN THE PROTECTION OF CONSTRUCTION WORKERS IN THE MIDDLE EAST, ILO White Paper (February 2018), [https://www.ilo.org/beirut/publications/WCMS\\_618158/lang-en/index.htm](https://www.ilo.org/beirut/publications/WCMS_618158/lang-en/index.htm).

<sup>23</sup> With the exception of Bahrain, where migrant workers are included in the unemployment fund.

<sup>24</sup> Entitlements differ for domestic workers and workers in the private sector, covered by the Labour Laws. See Migrant Rights.Org, A COMPARISON OF END-OF-SERVICE GRATUITY FOR DOMESTIC WORKERS IN THE GCC, ( March 2020), <https://www.migrant-rights.org/wp-content/uploads/2020/03/A-Comparison-of-End-of-service-Gratuity-For-Domestic-Workers-In-The-GCC.pdf>. For private sector workers in Qatar, end-of-services benefits are provided for in Article 54 of the Labour Law No. 14 of

paid by an institution (such as a social security corporation), such benefits are only an obligation on the employer, who pays a lump-sum gratuity based on the last monthly wage. Thus, if a worker does not get her owed end-of-service benefit, her only option is to sue the employer in court. If the employer does not have enough cash on hand at the end of service, the migrant workers are not paid or may have to wait to be paid.

### Promising Practices

GCC countries were some of the first in the world to require payment of wages of migrant workers (in the private sector) through digital Wage Protection Systems (WPS). Though an important global innovation, critics have noted that these systems serve more as a 'notification system' which flags employers for penalties in cases of outright non-payment, rather than a system that serves to compensate workers and thus protect their rights.<sup>25</sup> The WPS across the Gulf do not currently address wage manipulation (miscalculation of overtime, end of service gratuity payment, or annual leave payments); or address situations where payments are withdrawn from the Automatic Teller Machine (ATM) by the employer, and nor do they compensate the worker (as the most common penalty is a suspension of the employer's ability to recruit more migrant workers).<sup>26</sup>

Furthermore, the current systems do not protect workers against employers' inability to pay wages, for example as a result of bankruptcy.

*"International labour standards are clear on the status of worker wage claims if an enterprise enters into insolvency: in the event of enterprise insolvency, worker wage claims should be treated as privileged debt among creditor claims, covered by a guarantee institution, or both."<sup>27</sup>*

However, this is far from the reality in many GCC countries, with exceptions to some degree in the UAE and Qatar.

The remainder of this article focuses on some of the promising initiatives in wage recovery that have recently been implemented in Qatar and the UAE, with a focus on speedy access to adjudication in wage recovery – an important consideration given that courts can often take years to resolve a claim, and it is highly unlikely the worker will stay on to pursue one against an employer.

### Qatar

In August 2017, Qatar passed a law that established the Dispute Settlement Committee, a quasi-judicial expedited labour dispute mechanism aimed at improving access to justice by settling labour disputes within three weeks of a worker filing a complaint.<sup>28</sup> The worker can file a complaint in person or online, and online guidance documents are available in the main languages spoken in Qatar. After filing the complaint, all communications are sent by text messages to the mobile of the worker. The employer is notified, as

2004, while in the UAE, they are covered by Article 51 of the Labour Law (Federal Decree-Law No. 33/2021 Concerning the Regulation of Labour Relations). See ILO, COUNTRY BRIEFS OF THE REGULATORY FRAMEWORKS GOVERNING MIGRANT WORKERS IN THE ARAB STATES (September 2022), [https://www.ilo.org/beirut/projects/fairway/WCMS\\_776362/lang--en/index.htm](https://www.ilo.org/beirut/projects/fairway/WCMS_776362/lang--en/index.htm).

<sup>25</sup> ILO, *Minimum Wages and Wage Protection in the Arab States: Ensuring a Just System for National and Migrant Workers*, ILO POLICY ADVISORY COMMITTEE ON FAIR MIGRATION IN THE MIDDLE EAST (January 2019), <https://gulfnews.com/world/gulf/kuwait/kuwait-expats-working-in-government-complain-of-not-receiving-gratuity-1.82724989>.

<sup>26</sup> ILO, ASSESSMENT OF THE WAGE PROTECTION SYSTEM IN QATAR, (June 2019), [https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms\\_726174.pdf](https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_726174.pdf).

<sup>27</sup> Guidance Tool, *supra* note 7. See also ILO C95, *supra* note 5, at art. 11; ILO, PROTECTION OF WORKERS' CLAIMS (EMPLOYER'S INSOLVENCY) CONVENTION 173 (1992) at article 1, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312318](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312318) Additionally, ILO Convention No. 189 recognizes the specific vulnerability of domestic workers in this context and requires Members to take measures to ensure that domestic workers enjoy conditions not less favourable than those of workers generally in respect of the protection of workers' claims in the event of the employer's insolvency or death. ILO C189, *supra* note 10.

<sup>28</sup> The Dispute Settlement Committees are presided by a judge and issue legally executable court decisions. In 2022, the number of Dispute Settlement Committees was increased from three to five. Council of Minister's Decision No. 6 of 2018 on the Establishment of the Worker's Dispute Settlement Committee, the rules and procedures which are to be followed before it, the mechanism for implementation of its decisions and setting its rewards. See also: State of Qatar, QATAR'S LABOUR DISPUTE RESOLUTION EXPLAINED – A GUIDE FOR WORKERS: DISPUTE-RESOLUTION\_FLOWCHART-R3, [hereinafter Dispute Resolution Flowchart], [https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms\\_773305.pdf](https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_773305.pdf)

he becomes party to a labour dispute. Generally one or two conciliation meetings are organized with the participation of Ministry of Labour officers, the employer and the worker. If the meetings fail to come to a compromise, the case is transferred to a Dispute Settlement Committee. However, after receiving a favourable outcome from a Dispute Settlement Committee, the worker would often need to submit a claim to the Enforcement Court in order to enforce the decision.

Although the Committees were set up in March 2018, the length of time for the proceedings and enforcement stretched significantly beyond the time-limit originally set out in the legislation.<sup>29</sup> In November 2018, the Qatari government announced the establishment of the Workers' Support and Insurance Fund,<sup>30</sup> which would pay workers if they had a favourable outcome from the Dispute Settlement Committee but the Enforcement Court had not been able to secure payment of the workers' dues. This was especially important for workers whose employers were insolvent, bankrupt or otherwise unable to pay. However, cases were still progressing slowly. In April 2022, a decision was issued by the Fund laying out the conditions and procedures regarding the disbursement of workers' dues and benefits – namely that it would disburse funds based on the final decisions of the Dispute Settlement Committee, decisions of the specialized court, or in emergency and exceptional situations and for the common good.<sup>31</sup> The decision also provided for the creation of an electronic platform dedicated to the applications for fund disbursement. According to the decision, in case of death of the worker, survivors are entitled to apply for the payment of workers' benefits.<sup>32</sup>

Following this decision, disbursement accelerated quickly and by November 2022, the Fund had disbursed over US\$320 million in unpaid wages

<sup>29</sup> Amnesty Int'l, Qatar: *All work, no pay: The struggle of Qatar's migrant workers for justice*, AI Index MED 22/0793/2019 (September 19, 2019), <https://www.amnesty.org/en/documents/mde22/0793/2019/en/>.

<sup>30</sup> Law No. 17 of 2018 to Establish the Workers' Support and Insurance Fund, Qatar Legal Portal (Qatar), <https://www.almeezan.qa/LawView.aspx?opt&LawID=7798&language=ar> (last visited April 4, 2023).

<sup>31</sup> James Cockayne, *Developing Freedom: The Sustainable Development Case for Ending Modern Slavery, Forced Labour and Human Trafficking*, UNITED NATIONS UNIVERSITY CENTRE FOR POLICY RESEARCH (UNU-CPR) at 223-224 (2021), <https://www.developingfreedom.org/report/>.

<sup>32</sup> 'Sanduq da'm al-'ummal yu'lin ijra'at saref al-'ujur al-muta'akhira lil 'amala wa 'uqubat sahib al-'amal', Al-Sharq, <https://shrq.me/pboakv> (last visited April 5, 2023).



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and benefits.<sup>33</sup> Indeed, more than USD 160 million was paid just in the three months between July - September 2022.

Three limitations should be highlighted, however:

- Workers cannot go to the Workers' Support and Insurance Fund directly – they must file a claim with the Dispute Resolution Committee, which still takes time to process it, and this may not be an option for workers needing to return quickly to countries of origin;
- The Dispute Resolution Committees are far more accessible (at least on paper) than most judicial processes for migrant workers – the Committees hear disputes in both English and Arabic and work extended hours. However, workers may still find it hard to navigate particularly with respect to the required documentation (e.g. workers are still required to prepare a calculation of their losses, and all other court documents in Arabic, for example);<sup>34</sup>
- The maximum disbursement of financial entitlements is capped at no more than around US\$5,500 or a salary of three months for those employed by an active company; US\$3,200 or a salary of two months for those employed under a company now bankrupt and just \$2,100 or a salary of up to three months for domestic workers.<sup>35</sup> The much lower amount

<sup>33</sup> ILO, PROGRESS REPORT ON THE TECHNICAL COOPERATION PROGRAMME BETWEEN THE GOVERNMENT OF QATAR AND THE ILO (November 2022), [https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/---ilo-qatar/documents/publication/wcms\\_859839.pdf](https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/---ilo-qatar/documents/publication/wcms_859839.pdf).

<sup>34</sup> Dispute Resolution Flowchart, *supra* note 29.

<sup>35</sup> Government of Qatar, DECISION OF THE CHAIRMAN OF THE BOARD OF DIRECTORS OF THE WORKERS' SUPPORT AND INSURANCE FUND No. (2) OF

that is offered to domestic workers is not explained and would arguably be considered discriminatory, particularly given that the objective of the fund is to “provide wage awards, humanitarian support and social services in an efficient, consistent and non-discriminatory manner.”<sup>36</sup>

### *United Arab Emirates*

A number of reforms to make wage claims easier for workers have also been introduced in the UAE, and particularly in the emirate of Abu Dhabi. In 2018, the Abu Dhabi Judicial Department introduced ‘mobile labour courts’ that travelled to labour camps across the Emirate, with a view to hearing and deciding cases ‘on the spot.’ Also in 2018, the Abu Dhabi Judicial Department established a ‘one-day labour court’ to speed up rulings and settle disputes between workers and employers where the value of the claim is less than approximately USD 5,000. Unfortunately, the government has released no reliable data, nor has an independent assessment been carried out on the mobile courts and the one-day courts. According to government media releases, mobile courts delivered over USD 157 million in unpaid wages to 53,000 workers in response to complaints filed by migrant workers from January 2019 to June 2020.<sup>37</sup>

Also in 2018, the Ministry of Human Resources and Emiratisation (MoHRE) commenced an insurance policy for workers, called ‘Taa-meem’ which may be used to compensate workers for their unpaid wages. Under the current system, a company can choose either to supply a bank guarantee, from a bank operating in the UAE for at least AED 3,000 (approx. US\$816) for each worker, or to buy an insurance policy for the worker which has a maximum insurance coverage of AED 20,000 (US\$5,500) to every worker and protect them from the company’s bankruptcy or failure to obtain their legitimate dues.<sup>38</sup> Although the insurance scheme has been operating for several years, there is again no reliable data nor an independent assessment of this initiative to date.

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2022 ON THE PROVISIONS AND PROCEDURES FOR DISBURSING WORKERS’ ENTITLEMENTS (UNOFFICIAL TRANSLATION), [https://www.migrant-rights.org/wp-content/uploads/2022/11/wcms\\_854088.pdf](https://www.migrant-rights.org/wp-content/uploads/2022/11/wcms_854088.pdf).

<sup>36</sup> ILO, RECOMMENDATIONS ON THE ESTABLISHMENT OF THE WORKERS’ SUPPORT AND INSURANCE FUND IN QATAR: DRAWING FROM INTERNATIONAL EXPERIENCE, at 1 (November 2019), [https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms\\_726175.pdf](https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_726175.pdf).

<sup>37</sup> Bassina Farbenblum & Laurie Berg, *supra* note 19 at 24.

<sup>38</sup> Ministerial Resolution No. 318 of 2022 Concerning Bank Guarantees and Employees Protection Insurance Scheme (U.A.E.).

## Conclusion

Wage recovery for unpaid wages or end-of-service benefits remains an enormous challenge for many migrant workers in the GCC. Without trade unions, workers’ committees or active civil society organizations that can sustain pressure on employers, and support workers through a judicial process, most workers simply resign themselves to never seeing justice. Despite the promise of electronic wage protection systems, these systems are not accessible nor designed to compensate workers. However, recent reforms creating an institutional process that compensates workers (without requiring them to pursue the employer for compensation) are a step in the right direction – including the Workers’ Support and Insurance Fund in Qatar and the insurance/bank guarantee requirement in the UAE, though data analysis and independent assessment is still needed.

# UKRAINIAN REFUGEES IN POLAND: HOW TO TACKLE ENTRENCHED ABUSE PRACTICES IN A NEW REALITY

## LEONID STOIKOV

Poland, Ukraine | Originally written in English

### Introduction

According to the United Nations High Commissioner for Refugees, approximately 8 million people have been forced to flee Ukraine since the outbreak of the full-scale Russian military aggression,<sup>1</sup> overwhelming neighbouring countries. This has created pressure on the receiving countries' social protection systems and has flooded their labour markets with millions of desperate people in need of work.

Most of the receiving countries are trying to adapt their systems to this new reality. Notably, reports show that the European Union's economy has in fact benefited from the arrival of Ukrainian refugees, as the vast majority are compelled to find a job. This results in GDP growth in the receiving countries, and in Poland in particular.<sup>2</sup> It is estimated that the contribution to the annual GDP growth rate of the Czech Republic, Poland and Estonia will be about 1.2% per year, and the contribution of migrant workers to the GDP of Hungary, Latvia, Slovakia, Lithuania and Romania will be almost 0.8%.<sup>3</sup> According to the IMF's estimation, even short-term fiscal impact of migrant/refugee flow to the EU will be positive, with approximately EUR 30–37 billion,

or 0.19–0.23% of EU GDP<sup>4</sup> growth. Moreover, the European Central Bank has estimated that the influx of Ukrainian refugees is expected to lead to a gradual increase in the size of the Euro area labour force. Under all of these assumptions, rough calculations point to a median increase of between 0.2% and 0.8% in the Euro area labour force in the medium term.<sup>5</sup>

### Poland's Migrant Worker Legal Framework

Poland is the major recipient and transit country for Ukrainian refugees. Once the Russian invasion started, Polish society responded with selfless support for Ukraine and for refugees fleeing the country. Moreover, the Polish government recognized that the Polish economy benefits from the abundance of migrant workers, as many Poles are labour migrants themselves, creating shortages in the Polish labour market. Additionally, even with millions of refugees coming to Poland, the country has the second lowest unemployment rate in the European Union.<sup>6</sup> As one Polish politician emphasized, 'only those who don't want to work can't find work in Poland.'<sup>7</sup> One may think that in such

<sup>1</sup> U.N. High Commissioner for Refugees (UNHCR), OPERATIONAL DATA PORTAL: UKRAINE REFUGEE SITUATION, <https://data.unhcr.org/en/situations/ukraine> (last visited April 10, 2023).

<sup>2</sup> Paweł Strzelecki, Jakub Grwec & Robert Wyszynski, *The contribution of immigration from Ukraine to economic growth in Poland*, 158 REVIEW OF WORLD ECONOMICS 365-399 (2022), <https://link.springer.com/article/10.1007/s10290-021-00437-y>.

<sup>3</sup> Olga Tucha et. al., *Вплив українських мігрантів на економіку країнреципієнтів* [Impact of Ukrainian migrants on the economies of recipient countries], NATIONAL BANK OF UKRAINE REPORT (December 2022), [https://bank.gov.ua/admin/uploads/article/Migration\\_impact\\_2022-12-15.pdf?v=4](https://bank.gov.ua/admin/uploads/article/Migration_impact_2022-12-15.pdf?v=4)

<sup>4</sup> Nicolò Bird, David Amaglobeli, *Policies to Address the Refugee Crisis in Europe Related to Russia's Invasion of Ukraine*, IMF NOTES No. 2022/003 (2022) <https://www.imf.org/en/Publications/IMF-Notes/Issues/2022/09/08/Policies-to-Address-the-Refugee-Crisis-in-Europe-Related-to-Russia's-Invasion-of-Ukraine-522662>.

<sup>5</sup> Vasco Botelho, *The impact of the influx of Ukrainian refugees on the euro area labour force*, 4 ECB ECONOMIC BULLETIN (2022) [https://www.ecb.europa.eu/pub/economic-bulletin/focus/2022/html/ecb.ebbox202204\\_03~c9ddc08308.en.html](https://www.ecb.europa.eu/pub/economic-bulletin/focus/2022/html/ecb.ebbox202204_03~c9ddc08308.en.html).

<sup>6</sup> UNEMPLOYMENT RATE IN THE EUROPEAN UNION AS OF OCTOBER 2022, <https://www.statista.com/statistics/1115276/unemployment-in-europe-by-country/> (last visited April 20, 2023).

<sup>7</sup> Monika Górecka-Czuryłło, *Pracy nie mają ci, Którzy pracować nie chcą*, [Those who don't want to work don't have a job] RZECZPOSPOLITA (2008) <https://www.rp.pl/wydarzenia/art8337831-pracy-nie-maja-ci-ktorzy-pracowac-nie-chca>.

a situation, when a country is actually in need of workers, migrant workers will be welcomed on decent terms and will not be abused.

However, even though Poland was and is dependent on the migrant workforce, employment for migrant workers was never easy. Before the invasion, non-EU citizens, including Ukrainians, had to obtain permission to work legally.<sup>8</sup> Moreover, a long-term visa for such a foreigner was issued for the period stated in the work permit.<sup>9</sup> Subsequently a temporary residence permit was also issued based on the work permit. However, residence permits could be revoked in the case of losing a job.<sup>10</sup> A foreigner has an obligation under the Law to inform corresponding governmental bodies in 15 days, and has 30 days to find another job, seek another work permit and apply for corresponding changes to be made in the residence permit.<sup>11</sup>



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*“As we can see, a migrant workers’ ability to stay legally in the country is dependent on the employer. Additionally, as the number of migrant workers arriving in Poland rose, authorities were struggling to process all the applications on time.”*

An attempt to quit a job could place a migrant in the situation where they have no choice but to work illegally while the permit is being prepared. Under the law, the migrant worker would also face a fine of up to 5,000 PLN (around 1,200 USD), which is debilitating for workers making minimum wage of 3010 PLN (around 690 USD).<sup>12</sup> Additionally, migrant workers may be obliged to leave Poland and be banned from re-entering Poland and other countries of the Schengen area - for a period of 1 to 3 years.<sup>13</sup>

<sup>8</sup> Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy [The Law of April 20, 2004 on employment promotion and labour market institutions] at art 87, (2004) (Pol.) <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20040991001>

<sup>9</sup> *Id.* at art. 114.

<sup>10</sup> *Id.* at art. 101.

<sup>11</sup> *Id.* at art.123.

<sup>12</sup> The minimum wage was increased in 2023 to 3490 PLN (approximately 790 USD).

<sup>13</sup> Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach [Law of December 2013 on Foreigners] at art. 318, 319 (2013) (Pol.) <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20130001650>.

The situation became worse once COVID-19 restrictions were introduced. Even though work permits, visas, and residence permits were prolonged by the emergency legislation adopted, the waiting period for a new work permit in some regions of the country reached 3-5 months, thus making it very hard for a migrant worker to change jobs and still be within the legal framework.

### Poland’s Legislative Changes for Ukrainian Refugees

Following the Russian invasion of Ukraine, Poland adopted emergency law of March 12, 2022 “on assistance to Ukrainian citizens in connection with the armed conflict on the territory of this state.”<sup>14</sup> With this law, Ukrainian citizens do not have to seek employment permission. Confirmation of the legality of their presence in Poland is enough to be employed.<sup>15</sup> Additionally, according to the Art. 23. 1 of the Law, citizens of Ukraine whose stay in Poland are considered legal and may undertake and conduct business activity in Poland by the same rules as Polish citizens.

The bigger part of migrant workforce coming to Poland, Ukrainian refugees, enjoy almost the same employment rights as EU citizens, and of course enjoy the same array of human and labour rights set forth in the Polish legislation. Poland as a European Union member recognizes key international acts regarding human rights as well as labour rights and has these rights enshrined in national legislation.<sup>16</sup>

<sup>14</sup> Ustawa z dnia 12 marca 2022 r. o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa [Law of March 12, 2022 on assistance to citizens of Ukraine in connection with the armed conflict on the territory of the country] (2022) (Pol.) <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20220000583>.

<sup>15</sup> *Id.* at art 22.1.

<sup>16</sup> Poland as a European union member recognizes the Convention for the Protection of Human Rights and Fundamental Freedoms adopted in 1950 by the Council of Europe. See *Europejska konwencja o ochronie praw człowieka i podstawowych wolności*, MINISTERSTWO RODZINY I POLITYKI SPOŁECZNEJ [MINISTRY OF FAMILY AND SOCIAL POLICY] <https://www.gov.pl/web/rodzina/europejska-konwencja-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci> (last visited April 20, 2023). Additionally, Poland has ratified 92 ILO Conventions and 1 Protocol. Among them Forced Labour Convention, 1930 (No. 29), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Equal Remuneration Convention,

Here are some of the basic labour rights according to the Polish Labour Code<sup>17</sup>:

- the right to freely choose a job - every person employed in Poland can choose the profession in which they want to work. Exceptions apply only to situations where the ban on performing a given job is defined by law (e.g. when a criminal record certificate is required to perform work and the worker does not have one);
- the right to a decent wage - no work can be done for free, and minimum wage rates are set by the state;
- equal rights for performing the same duties, including equal pay for the same work.

### Continued Exploitation of Refugee Workers in Poland

The huge number of desperate refugees seeking work creates endless opportunities for different types of labour exploitation, including wage theft. The concept of 'wage theft' encompasses a wide range of practices: misclassification of individuals as 'self-employed' and outside the scope of the National Minimum Wage framework, the failure to pay overtime pay or holiday pay, unlawful deductions, and the absence of transparency in relation to wage entitlements.<sup>18</sup> It is linked to wider public concerns about the effective enforcement of the statutory minimum wage regime and an employer's total or partial nonpayment of remuneration to which a worker is entitled under applicable law or under a worker's written or oral employment contract.<sup>19</sup>

Under Polish law, wage theft can be understood as a violation of some of the labour rights enshrined in the Labour Code including but not limited to: right to a decent wage, equal rights for per-



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forming the same duties, and the right to remuneration in the event of dismissal. However, labour cases are not limited to wages, but are more complex and include other rights' abuses as well. Multiple cases have been reported, starting with the very first waves of refugees consisting mostly of women and children. A lot of them had to work for accommodation, food, and at half the wage. Sometimes, refugees have to work overtime, for more than ten hours.<sup>20</sup>

*"Ukrainian women who fled the war are looking for opportunities to earn money by doing housework and caring for the elderly. It's hard because they don't know the language and have experienced a tragedy, and employers are taking advantage of the situation and lowering wage rates. Female and domestic workers do not know their rights."<sup>21</sup>*

If workers raised concerns regarding occupational health and safety at their workplace, they were often terminated without pay and without receiving wages from their prior days of employment.<sup>22</sup>

1951 (No. 100), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and others. See, International Labour Organization (ILO), RATIFICATIONS FOR POLAND [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200-COUNTRY\\_ID:102809](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200-COUNTRY_ID:102809) (last visited April 20, 2023).

<sup>17</sup> USTAWA z dnia 26 czerwca 1974 r. Kodeks pracy [Act of June 26 1974 Labour Code] (1974) (Pol.). <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19740240141/U/D19740141Lj.pdf>.

<sup>18</sup> Sarah Green, *Wage Theft as a Legal Concept in CRIMINALITY AT WORK* (Alan Bogg ed. 2020) at 134 <https://academic.oup.com/book/36923/chapter-abstract/322194518?redirectedFrom=fulltext>.

<sup>19</sup> Bassina Farbenblum and Laurie Berg, *MIGRANT WORKERS' ACCESS TO JUSTICE FOR WAGE THEFT: A GLOBAL STUDY OF PROMISING INITIATIVES* (2021), <https://www.solidaritycenter.org/wp-content/uploads/2021/12/Migrant-Workers-Access-to-Justice-for-Wage-Theft-Publication.pdf>

<sup>20</sup> Maciej Orłowski, Tak wykorzystuje się Ukrainki. "Pracują ponad siły po kilkanaście godzin. Czasem bez wypłaty [This is how Ukrainian women are exploited. "They work beyond their strength for several hours at a time. Sometimes without pay.]" NEWSWEEK, <https://www.newsweek.pl/polska/spoleczestwo/hieny-sie-obudzily-jak-wykorzystuje-sie-ukrainki-w-polsce/6lc979c> (last visited April 20, 2023).

<sup>21</sup> Julia Theus, *Praca za mieszkanie, jedzenie i pół wypłaty. Pracodawcy wykorzystują wojnę do wycisku Ukrainek [Work for housing, food and half a paycheck. Employers are using the war to exploit Ukrainian women]*, OKO.PRESS (2022) <https://oko.press/pracodawcy-wykorzystuja-wojne-do-wyzysku-ukrainek> (last visited April 20, 2023).

<sup>22</sup> Unions Help Refugees, FACEBOOK (June 21 2022) <https://www.facebook.com/UnionsHelpRefugees/photos>



The reasons for such exploitation are many. Among them are low awareness of their rights, as well as limited access to justice. It is worth noting that limited access to justice does not necessarily mean legal obstacles targeted at migrants or bad legislation itself.

*“For example, Polish labour legislation provides multiple guarantees to a migrant worker and unlike some other countries Poland has a quite potent Labour Inspection and specialized labour courts. However, low awareness among migrant workers of their rights, unfamiliarity of the local language and distrust in the receiving countries’ legal system are some of the obstacles on the way to justice.”*

Additionally, when we talk about refugees, the desperate position they are in also plays its part.

Most of the migrant workers, especially refugees, are unlikely to seek justice because they don’t believe in the legal system. In the event of informal work, for example, they can be fined and deported or face other consequences such as losing their job and ability to provide for their families. Additionally, professional legal aid is not cheap and the proceedings itself can last for months and years and a migrant worker simply cannot afford it.

A refugee, who is unable to go back to their country, does not have many options. Such refugees will likely accept even a shady job offer, or agree to work unofficially under the argument of a higher wage as the employer saves money on taxes, social benefits, insurance, etc. Or in some cases agree even for a ‘trial period’ without pay<sup>23</sup>.

It is important to understand that before recently it was still a “honeymoon” between Poles and refugees seeking work in the country. And now it is coming to its end. As the government fails to successfully implement a program of equal allocation of refugees in search of a job between urban centres and rural areas, the shortage of job offers in big cities has become a growing source of tension. This situation has two major consequences,

[/a.100706182590968/136390979022488/](https://a.100706182590968/136390979022488/).

<sup>23</sup> *Praca “na próbę” bez wynagrodzenia? Wakacje to czas nieuczciwych przedsiębiorców [A “trial” job without pay? Vacations are the time of dishonest entrepreneurs], FORSAL.PL, (June 21 2022) <https://forsal.pl/praca/aktualnosci/artykuly/8496233,praca-nieuczciwi-przedsiębiorcy-dzien-probny-bez-wynagrodzenia.html> (last visited April 20, 2023).*

it is easier for an employer to capitalize on a migrant’s desperate need for a job, and it creates a conducive environment for beliefs that migrant workers are stealing jobs from citizens among the local population.

## Recommendations

So, what can be done to tackle this issue? As the problem itself does not have a one, main reason, but is a complex issue, there cannot be one simple answer. In order to address the problem a complex multilayer approach must be implemented. It will be insufficient, to create a network of legal clinics for migrant workers in a particular country, as it will only help to address issues on an ad hoc basis and will have only a small impact on the general situation at very best. So, in order to tackle the issue, it’ll be prudent to have each of the main reasons addressed as a part of a complex system. Below are our recommendations and examples on how to holistically combat continued exploitation of migrant and refugee workers in Poland:

### *Adaptive courses and training for migrants and refugees*

This must not be focused only on the language of the receiving country but allow for training focused on how to navigate the labour market, legal and social systems of the receiving country. It should explain peculiarities of wage calculation in the country including the retirement system, as well as basic skills to avoid possible abuse. It is impossible to substitute the experience of growing up in the country and all the knowledge and skills it provides, however, even a glimpse into such an experience can make navigating the new reality simpler and less frightening.

One of the examples of such training is “*Mamo pracuj*” (‘Mom, work’) initiative operating in Poland. The founders of *Mamo pracuj* launched a program specifically for Ukrainian women seeking jobs in Poland shortly after the outbreak of the war in February. Thanks to over 100 expert volunteers – such as recruiters, HR managers and career coaches – some 500 Ukrainian refugees were helped to find decent work in Poland by September 2022.<sup>24</sup> This program gave migrant and refugee the necessary skills and training to be able to find decent work in Poland.

<sup>24</sup> *Mamo Pracuj i Talenti dla kobiet z Ukrainy! [Mom Work and Talenti for women from Ukraine!], MAMO PRACUJ <https://mamopracuj.pl/mamo-pracuj-i-talenti-dla-kobiet-z-ukrainy/> (last visited April 20 2023).*

*A campaign aimed at raising awareness among migrant workers of their rights.*

This involves creating a campaign focused on helping migrant workers understand what one as a migrant worker is entitled to in the receiving/destination country. It will provide such a worker with some ability to better recognize fraudulent job offers, as well as such behaviour on the employer's part.

A good example of such action was the anti-trafficking information campaign that was a joint initiative of the Ukrainian Railways, Trade Union of Railways and Transport Construction Workers, and Kyiv Regional Council of Trade Unions, and supported by the ILO in Ukraine. This initiative was launched on all passenger trains heading to the west of the country.<sup>25</sup> Every month around 50,000-70,000 passengers of intercity trains running in Ukraine learn about the risks of forced labour, human trafficking, and safety rules. Most are internally displaced persons or those fleeing abroad or have recently returned. The information campaign was launched in early April 2022 and should last until the war's end. Almost 400,000 persons were reached and consulted by the labour inspectors on how to mitigate the risks of falling victim to human trafficking or forced labour.

*A network of pro bono legal clinics.*

A network of pro bono legal clinics that have the resources to not just to address simple issues and provide legal advice, but also to represent migrant workers in courts. One of the reasons for limited access to justice for wage theft for migrant workers is, actually, the wage theft itself. Skilled and professional legal support is not cheap, and a migrant worker is more likely to just leave with what they have than try to combat wage theft risking even more money loss and be left without means to survive.

One of the examples is an initiative in Unions Helping Refugees (UHR) launched by All-Poland Alliance of Trade Unions (OPZZ) and supported, among others, by the Solidarity Center.<sup>26</sup> UHR focuses on providing legal aid, helping navigate

the labour law system in Poland and exercising legal legislation in order to assist refugees. The most common approach is to provide a migrant with the tools to defend their rights explaining contract provisions and preparing for negotiation with the employer. In case negotiations do not work, then a migrant worker can be encouraged to and assisted in filing a complaint to the corresponding institutions, such as labour inspectorate and eventually if there is no other options to the court of law. Some recent examples of this include the case of a young Ukrainian woman whose employer established a practice of not paying the workers.<sup>27</sup> Or the case with a local civil society organization who employed an Ukrainian refugee as a "volunteer" and failed to pay even her unofficial wages.<sup>28</sup>



© Trade Union of Railways and Transport Construction Workers

*Unionizing effort among migrants.*

Organizing migrant and refugee workers is of utmost importance, both in terms of explaining the benefits of being in a union and also encouraging local Polish unions to organize migrant workers in their sectors. Desperate and insecure migrants are likely to be strikebreakers once a local union decides to take action and thus are useful to an unscrupulous employer. A migrant worker will eventually be used in a dispute between a union and an employer, either by the employer or by the union.

And somehow unions, in their majority, fail to understand that it is better to use migrant workers to strengthen their union's ranks and posture in a possible dispute, rather than consider them as

<sup>25</sup> ILO PROJECT TOWARDS SAFE, HEALTHY AND DECLARED WORK IN UKRAINE (2022) <https://sway.office.com/tpPPLR7YPT7qWrlV?ref=Link> (last visited April 20, 2023).

<sup>26</sup> Tula Connell, *Polish Federation Safeguards Ukrainian Migrant Worker Rights*, SOLIDARITY CENTER (May 23, 2022) <https://www.solidaritycenter.org/polish-federation-safeguards-ukrainian-migrant-worker-rights/> (last visited April 20, 2023).

<sup>27</sup> Unions Help Refugees, *supra* note 22.

<sup>28</sup> *Id.*

another “enemy.” This lack of understanding that a local citizen worker has more in common with a migrant from across the world than with the employer who grew up across the street is a problem both for the migrant workers and the local ones.

Moreover, numerous and successful unions can support migrant workers as they seek justice, even provide funds to cover legal fees making justice accessible for migrant workers and the job offers more equitable.

*Advocacy campaigns to encourage the government to adopt effective policies.*

This might not be easy as a migrant worker might be viewed as an ideal population by the government because migrants workers fuel the economy, pay taxes and do not vote. Thus, they are of less concern for the politicians as they cannot help them to be re-elected.

However, migrant workers can help the country's economy to stay afloat as is with the example of Poland, thus helping the government to ensure stability in the country, maintain tax flow and welfare of the citizens. Moreover, the current situation in the EU shows that governments actually do try to encourage foreign workers, in particular refugees from Ukraine, to take roots in their country and work for the wellbeing of their economy. Thus, if a country needs a foreign workforce, the government should make the country's policies more welcoming to the migrants, including introduction of higher accountability for an employer for fraudulent behaviour regarding migrant workers, and a system where accountability for wage theft, unofficial employment, exploitation would be harsh and inevitable. ‘Voices of the Polish,’ a civil society organization have been loud for years pointing out that Polish legislation regarding employment of foreigners is completely out of date; no one could possibly have anticipated that Poland will be so attractive to labour migrants. After years of advocacy, long overdue but nevertheless needed changes were introduced in Poland<sup>29</sup> in particular the draft Law on employment of foreigners was introduced and is expected to be adopted in the coming months<sup>30</sup>.

<sup>29</sup> Tetiana Sharapova, *Polscy pracodawcy nie będą już mogli płacić Ukraińcom mniej* [Polish employers will no longer be able to pay Ukrainians less], UKRAINIAN IN POLAND, (September 21, 2022), <https://www.ukrainianinpoland.pl/equal-salaries-for-ukrainians-and-poles-pl/> (last visited April 20, 2023).

<sup>30</sup> Projekt ustawy o zatrudnianiu cudzoziemców - Kancelaria Prezesa Rady Ministrów [Draft Law on Employment of Foreigners], Government of Poland, <https://www.gov.pl/web/>

The most important changes are:

- local labour offices will register work permits in the registrar. Thus, making it easy to check if the employer adheres to wage requirements;
- procedures related to obtaining a work permit for foreigners will be fully digitized (the functionality of the digital system is still to be expanded);
- seasonal work remains for 9 months;
- removal of the so-called ‘labour market test’ when applying for a work permit, which required checking whether there are any registered unemployed people on the local labour market who can be employed. Polish citizens who are unemployed have priority in employment over foreigners;
- separate proceedings regarding the extension of a work permit, which are currently issued, will also be abolished when the employer continues to entrust work to a foreigner in the same position, i.e. it will be possible to continue employment in the same position until a new permit is issued;
- introduction of an obligatory ground for refusal to grant a work permit when the employer fails to pay compulsory social security contributions or advance income tax. Until now, this condition was optional.

One of the new solutions in the draft law is the possibility to increase the working time or the number of working hours in a week or month, provided that the remuneration is proportionally increased without the need to change or obtain a new work permit.<sup>31</sup>

These changes solve some problems that were there before, such as rigid working hours in a work permit. There will also be no labour market test, which was a sham. However, other unfavourable solutions are being introduced. Limiting the period for which the work permit will be issued from 3 years to 1 year. This will apply in three cases: when the company has been operating for less than a year, when the foreigner's working time is low, and when employment is based on civil law contracts. In the case of use of a civil law

[premier/projekt-ustawy-o-zatrudnianiu-cudzoziemcow](#) (last visited April 20, 2023).

<sup>31</sup> *Id.* at art. 18(1)(4) (Unlike the previous provisions of the Law on employment promotion and labour market institutions, the regulation covers cases where work is performed under an employment contract, but also applies to work performed under a civil law contract.)

contract for employment, a fee will be charged to the employer, which will increase the costs of employing a foreigner in such a manner.<sup>32</sup>

Additionally, penalties for illegal employment of foreigners were increased drastically, to a maximum fine of 30,000 PLN (around 6,800 USD), but in the case of individuals it will be PLN 500 per person. Until now, the disclosure of illegal employment was tantamount to a fine of 2-3 thousand PLN. Now the labour inspector will have no choice but to determine the amount of the fee based on the number of illegally employed foreigners. In the Draft Law, provisions have been introduced according to which a fine should be imposed in proportion to the number of foreigners who were working illegally, in the amount not lower than PLN 500 per foreigner. It is expected that the new solution will increase the severity of the penalty for entities that illegally employ foreign workers.<sup>33</sup>

#### *Strategic litigation.*

Many receiving countries' legislation are not bad regarding labour rights for migrant workers. However, it does not work in many cases. Creating an array of successful, public interest migrant worker litigation cases, can influence the broader agenda and create precedents capable of influencing the legal systems as well as governmental policies.

#### *Informational campaign targeting the local civil society.*

Such campaigns should be aimed at making the abuse of migrants' rights absolutely intolerable by society. Thus, making such abuse not just illegal but condemned by the society.

The local population in the receiving countries should be encouraged to understand that the only way to ensure that migrant workers will not "steal a job" is to create a situation where wage theft from migrant workers is intolerable by the government and society. If a migrant worker will enjoy the same or at least similar level of protection, it will not be cheaper for the employer to employ a migrant worker, thus making both migrant and local workers feel more secure on a labour market with equitable access and wages.

As a conclusion, it is important to underline that

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at art. 76(9).

none of the above can successfully reduce abuse practices and improve access to justice for migrant workers if it is not part of a coordinated effort. Only by coordinated, well-orchestrated efforts, when international organizations, trade unions and civil society organizations working together, would it be possible to protect migrant workers and substantially reduce the abuse and exploitation they currently face.

# IS PORTABLE JUSTICE VIABLE FOR KENYAN MIGRANT DOMESTIC WORKERS IN THE UNITED ARAB EMIRATES (UAE)? ASSESSING THE NEED AND DRAWING KEY INSIGHTS FROM THE HONG KONG MODEL<sup>1</sup>

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### Introduction

Hong Kong and the United Arab Emirates (UAE) have long been attractive destinations for migrant domestic workers (MDWs) for the economic opportunities each potentially provides. However, whilst common barriers of access to justice significantly undermine the rights of migrant workers in both Hong Kong and the UAE, it is our proposition that the establishment of a portable justice system in Hong Kong provides specific legal advantages and protections for MDWs not found within the UAE. This article examines the potential of enhancing access to portable justice for MDWs in the UAE.<sup>2</sup>

*“‘Portable justice’ refers to the prospects of migrant workers being able to formally pursue a legal claim for remedies against former employers or agencies liable for their exploitation in the countries they were working in without being physically present within that jurisdiction.”<sup>3</sup>*

<sup>1</sup> Whilst this article draws lessons from one of the mechanisms available to better enforce the rights of MDWs in Hong Kong, we recognize that the introduction of the National Security Law has caused a dramatic shift in the democratic environment of HK. Many CSOs (including trade unions) have had to adapt their advocacy approaches. The dissolution of the Hong Kong Confederation of Trade Unions and the arrest of the General Secretary of the International Domestic Workers Federation have had a chilling effect on CSO and trade union advocacy spaces. These developments have a negative impact on MDWs rights including the right to freedom of association.

<sup>2</sup> However, even with the establishment and implementation of portable justice in Hong Kong, there remain significant areas of concern pertaining to the exploitation of MDWs that are yet to be addressed.

<sup>3</sup> Cathleen Caron, *Justice Beyond Borders: Portable Justice for Global Workers*, ENTRY FREEDOM COMPETITION, (2006).

Human rights organizations in countries of origin connect with corresponding counterparts in the countries of employment to bring relevant proceedings in local courts and to facilitate the representation of MDWs on the ground through a network of lawyers once migrants have departed.<sup>4</sup> These organizations keep the ‘clients’ (the MDW and human rights organization/unions in her home country) advised of the case progress.<sup>5</sup>

Hong Kong first received MDWs in the 1960s; they constitute nearly 4.5% of its total population and 57% of Hong Kong’s ethnic minorities<sup>6</sup> and contribute to its economic growth.<sup>7</sup> Hong Kong is a party to various international treaties, including ILO conventions<sup>8</sup> which create obligations to promote and protect human rights. Pursuant to this, Hong Kong enacted the Hong Kong Bill of Rights Ordinance<sup>9</sup> guaranteeing various civil and politi-

<sup>4</sup> See e.g. Justice in Motion (Global Workers Justice Alliance), DEFENDER NETWORK, <https://www.justiceinmotion.org/defender-network> (last visited April 24, 2023).

<sup>5</sup> *Id.*

<sup>6</sup> Chenyu Liang, *Maid in Hong Kong: Protecting Foreign Domestic Workers*, MIGRATION POLICY INSTITUTE (October 20, 2016), <https://www.migrationpolicy.org/article/maid-hong-kong-protecting-foreign-domestic-workers>.

<sup>7</sup> See Experian and Enrich Hong Kong, *THE VALUE OF CARE – KEY CONTRIBUTIONS OF MIGRANT DOMESTIC WORKERS TO ECONOMIC GROWTH AND FAMILY WELL-BEING IN ASIA* (2019). [https://enrichhk.org/sites/default/files/2019-09/Final\\_The-Value-of-Care\\_Full-Report.pdf](https://enrichhk.org/sites/default/files/2019-09/Final_The-Value-of-Care_Full-Report.pdf).

<sup>8</sup> Hong Kong is a party to 15 international conventions. See CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU, HONG KONG SPECIAL ADMINISTRATIVE REGION, <https://www.cmab.gov.hk/en/issues/human.htm> (last visited May 25, 2023).

<sup>9</sup> Cap. 383, Laws of Hong Kong (“LHK”). Article 39 of Hong Kong’s Basic Law (“BL”) has entrenched the provisions of the International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights and the ILO Conventions.



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cal rights as well as a range of provisions in the Employment Ordinance<sup>10</sup> and anti-discrimination laws to safeguard against discrimination on the basis of various protected grounds.<sup>11</sup> Whilst many of these provisions have been relied upon by MDWs to advance claims against employers and the government, Hong Kong's robust legal system has loopholes which can enable exploitation; for instance, the 'two-week rule' triggered on termination of employment. It effectively suspends a MDWs right to lawfully remain in Hong Kong unless another contract of employment has been secured within two weeks of the conclusion or termination of the previous contract or an extension of stay is granted by and at the discretion of the immigration department. There is, however, a tendency to grant the extension where the MDW can demonstrate that they have an ongoing legal claim against a former employer or employment agency, or their circumstances warrant special consideration due to the death or relocation of an employer. That said, an extended stay does not permit MDWs to undertake employment pending the outcome of their legal claim, thus creating a financial deterrent to pursue such a claim.

Hong Kong's employment standard form contract provides a minimum payable wage for MDWs, rest days, arrangements for reasonable privacy in living quarters and food allowance<sup>12</sup> yet MDWs remain susceptible to exploitation.<sup>13</sup> For instance, although HK

law prohibits employment agencies from charging more than 10% commission for employment placement fees, many MDWs take a monthly salary cut of 90% and live on just US\$50 per month for 6-8 months just to pay off these fees and may even have their passports and bank cards confiscated. This financial exploitation by employment agencies increases their vulnerabilities in their working and living arrangements; it is reflective of the near universal plight of MDWs as well as the structural constraints of wealth, class, education and language, incapacitating MDWs in pursuance of their rights.<sup>14</sup> Portable justice thus becomes a critical intervention to mitigate the harsh effects of the two-week rule; a primary impediment to the effective enforcement of contractual and other legal protections.

*"The right to pursue effective justice across borders must be viewed as a fundamental right and a critical tool for MDWs seeking legal remedies despite their departure from the country of employment."<sup>15</sup>*

### Assessing the Problem: Migrant Domestic Workers in Hong Kong

High income countries tend to attract a large influx of MDWs.<sup>16</sup> In 2016, Hong Kong's Immigration Department estimated that 53% of the city's MDWs were from the Philippines, 44% from Indonesia, and the rest mainly from Thailand, Sri Lanka, and Nepal.<sup>17</sup> It is estimated that Hong Kong's MDWs

[hereinafter Coming Clean]. If this figure is weighted according to the population of HK's MDWs, the total number of trafficking victims should be around 8100. According to the Security Bureau, seventeen MDWs were identified as victims of trafficking between 2016 and 2021, with only three identified in the year 2016.

<sup>14</sup> Justice Without Borders, A PRACTITIONER'S MANUAL FOR MIGRANT WORKERS: PURSUING CIVIL CLAIMS IN HONG KONG AND FROM ABROAD, (2015), <https://forjusticewithoutborders.org/wp-content/uploads/2018/09/JWB-HK-Practitioners-Manual-Bahasa.pdf>.

<sup>15</sup> Caron, *supra* note 3.

<sup>16</sup> *Id.*; John Kang, *Study Reveals 95% of Filipino, Indonesian Helpers in Hong Kong Exploited or Forced Labor*, FORBES (Mar. 2016), <https://www.forbes.com/sites/johnkang/2016/03/18/study-reveals-95-of-filipino-indonesian-helpers-in-hong-kong-exploited-or-forced-labor/?sh=1e88b0ea7f0d>.

<sup>17</sup> Rachel Blundy, *Hong Kong domestic helpers: Doubts expressed about viability of government code of practice*

<sup>10</sup> Cap. 57, LHK.

<sup>11</sup> Sex Discrimination Ordinance (Cap. 480, LHK), Family Status Discrimination Ordinance (Cap. 527, LHK), Disability Discrimination Ordinance (Cap. 487, LHK) and Race Discrimination Ordinance (Cap. 602, LHK).

<sup>12</sup> Immigration Department, 'Forms' (Standard Employment Contract and Terms of Employment for Helpers, [https://www.immd.gov.hk/eng/forms/forms/fdhcontractterms.html#:~:text=The%20standard%20Employment%20Contract%20\(ID,a%20domestic%20helper%20from%20abroad](https://www.immd.gov.hk/eng/forms/forms/fdhcontractterms.html#:~:text=The%20standard%20Employment%20Contract%20(ID,a%20domestic%20helper%20from%20abroad)).

<sup>13</sup> Around 2.4% of the sampled respondents to a survey targeting MDWs met the conditions for forced labour and were considered as having been trafficked given their recruitment into HK. Justice Centre Hong Kong, *COMING CLEAN: THE PREVALENCE OF FORCED LABOUR AND HUMAN TRAFFICKING FOR THE PURPOSE OF FORCED LABOUR AMONGST MIGRANT DOMESTIC WORKERS IN HONG KONG* (2016) (found that nearly 95% of MDWs were exploited or forced into labour in Hong Kong), <https://www.justicecentre.org.hk/framework/uploads/2016/03/Coming-Clean-The-prevalence-of-forced-labour-and-human-trafficking-for-the-purpose-of-forced-labour-amongst-migrant-domestic-workers-in-Hong-Kong.pdf>

contribute around US \$12.6 billion to the city's economy, representing 3.6% of the city's gross domestic product (GDP).<sup>18</sup> The countries of origin benefit from up to US \$1 billion each in the Philippines and Indonesia<sup>19</sup> from the remittances sent back home by MDWs.

Hong Kong has been criticised for laws which fail to protect MDWs despite the perception that Hong Kong has greener pastures, whilst countries of origin such as Kenya, Indonesia and Philippines, are also accused of prioritising profits over labour rights, failing to stand up to host countries for fear of reprisals and losing lucrative remittances.<sup>20</sup> Oftentimes, ignorance of MDWs as to their rights and gaps in legal protections against specific acts of exploitation such as trafficking<sup>21</sup> as well as exclusion from certain rights<sup>22</sup> and circumstantial barriers further entrench MDWs in their pre-

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for maid agencies, SOUTH CHINA MORNING POST, (May 28, 2016), <https://www.scmp.com/news/hong-kong/education-community/article/1956749/hong-kong-domestic-helpers-doubts-expressed-about>.

<sup>18</sup> Raquel Carvalho, *Migrant domestic workers prop up Hong Kong's economy, so why are they excluded?*, SOUTH CHINA MORNING POST, (Mar 2019), <https://www.scmp.com/week-asia/economics/article/2188754/migrant-domestic-workers-prop-hong-kongs-economy-so-why-are-they>.

<sup>19</sup> *Id.*

<sup>20</sup> In 2015, the Centre for Comparative and Public Law at the University of Hong Kong, in collaboration with the Hong Kong Public Interest Law and Advocacy Society, organised a Domestic Worker Roundtable to bring together various stakeholders including MDW unions, lawmakers, employer rights groups, academics, law firms, consular staff from the countries of origin of MDWs in Hong Kong and representatives from the relevant HKSAR government. See HKU Legal Scholarship Blog, DOMESTIC WORKERS' ROUNDTABLE HOSTED BY CCPL (24 APRIL 2015) <http://researchblog.law.hku.hk/2015/04/domestic-workers-roundtable-hosted-by.html> (last visited April 24, 2023). Its proposal to establish an inter-governmental taskforce to swiftly coordinate in cases where urgent action was required to address cross-border exploitative practices and to enable speedy justice where MDWs needed to be extracted from seriously abusive situations has been partially implemented. See Hong Kong Police Force, TIP: CRIME MATTERS, [https://www.police.gov.hk/ppp\\_en/04\\_crime\\_matters/trafficking.html](https://www.police.gov.hk/ppp_en/04_crime_matters/trafficking.html) (last visited 19 MAY, 2023).

<sup>21</sup> For instance, HK lacks legislation targeting offenses of trafficking for the purposes of forced labour although this issue was considered by the Hong Kong Court of Final Appeal in *ZN v SECRETARY FOR JUSTICE* [2019] HKCFA 35; [2020] HKCU 120. It was determined that Article 4 of HK's Bill of Rights Ordinance did not extend to the concept of 'human trafficking' in its prohibition of slavery, servitude or compulsory or forced labour.

<sup>22</sup> Two notable examples are exclusion from Hong Kong's minimum wage legislation (s. 7(3) of the Minimum Wage Ordinance (Cap. 602, LHK) and eligibility to apply for permanent residency after having resided in Hong Kong for 7 years as is affordable to all other residents in Hong Kong (s.2(4) of the Immigration Ordinance (Cap. 115, LHK).

dicament.<sup>23</sup>

Hong Kong has no comprehensive legislation or policies to tackle forced labour or trafficking.<sup>24</sup> Yet, the government maintains that there are over 50 provisions that characterise trafficking in person offences. Despite this, the statistics proffered by the government address cases of trafficking for the purposes of sex but not labour.<sup>25</sup>

Hong Kong's legislative gap with respect to trafficking for the purposes of labour and the minimal numbers of victims screened for trafficking for the purposes of sexual exploitation exposes MDWs to continued mistreatment and financial exploitation; by much the same tactics as observed in the Middle East, namely, false promises about the nature and terms of employment, debt bondage before exiting country of origin, hefty placement fees for employment, lack of recourse against exploitation for fear of reprisals against family in home country and the confiscation of travel documents by recruitment agencies until placement fees are paid.<sup>26</sup> With weak enforcement in both origin and host countries the rights of MDWs remain but a chimaera. In many situa-

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<sup>23</sup> Justice Centre Hong Kong, COMING CLEAN, *supra*, note 13; See also, John Kang, *supra* note 16.

<sup>24</sup> U.S. State Department, TIPS REPORT 2022: HONG KONG, (2022) <https://www.state.gov/reports/2022-trafficking-in-persons-report/hong-kong/>.

<sup>25</sup> Know Your Country, HUMAN TRAFFICKING, <https://www.knowyourcountry.com/human-trafficking> (last visited April 24, 2023). Hong Kong has been listed by the US Trafficking in Persons Report as a source, destination or transit area for human trafficking and forced labour and has been placed on the Tier 2 watch list since 2015, putting it in the company of many Middle Eastern nations. This ranking has however been rejected by the HKSAR government. See The Government of Hong Kong Special Administrative Region (HKSAR), PRESS RELEASE: HKSAR GOVERNMENT VEHEMENTLY OBJECTS TO UNITED STATES TRAFFICKING IN PERSONS REPORT 2022, (July 20, 2022) <https://www.info.gov.hk/gia/general/202207/20/P2022072000199.htm> (last visited April 24, 2023). In March 2018, the HKSAR government established a high-level Steering Committee to Tackle Trafficking In Persons and to Enhance Protection of FDHs and promulgated the Action Plan to Tackle TIP and Enhance Protection of FDHs in Hong Kong (Action Plan). In December 2019, the Immigration Department set up a Foreign Domestic Helper Special Investigation Section to enhance scrutiny of visa applications and screen for potential victims of TIP and exploitation. These measures cover various aspects including victim identification, investigation, enforcement, prosecution, victim protection and support, prevention, and partnership with various stakeholders. Despite this, only one victim in 2021 and three victims in 2020 were screened as having been trafficked.

<sup>26</sup> Raquel Carvalho, *Illegal fees, little rest and no documents: domestic helpers in Hong Kong continue to fight for their rights*, SOUTH CHINA MORNING POST (October 30, 2016) <http://www.scmp.com/news/hong-kong/education-community/article/2041263/illegalfees-little-rest-and-no-documents>.

tions, these conditions effectively amount to modern slavery and human trafficking given the pattern of recruitment, deception, entrapment into unfavourable working and living conditions that are typical for many MDWs.

Therefore, MDWs in Hong Kong routinely find themselves vulnerable: A complaint can trigger termination by the employer, leaving a MDW vulnerable to the two-week rule. These challenges underscore the importance of ensuring that access to justice for MDWs is strengthened. Innovations such as portable justice at a global level have breathed new life into paper protections, making them more realisable in practice.

### Application of Portable Justice in Hong Kong

The door to portable justice, which has been in use in Hong Kong for several years, was opened in *Re Chow Kam Fai*,<sup>27</sup> where the court used the following criteria to guide its determination of whether to permit the use of video conference facilities (VCF) by a claimant to give evidence:

- The applicant must show good reason for departing from the general rule of in person testimony;
- A good reason must be the 'interests of justice' and the 'efficient disposal of the proceedings';
- The use of such procedure as a tactical manoeuvre by the applicant or the opposing party to gain a collateral advantage or with ulterior motives will be a relevant consideration;
- Video link access will not be permissible where the matter hinges on witness credibility and the physical presence of the witness in court would assist in the assessment of their credibility.

Hong Kong set up access to justice mechanisms that allow for VCF in certain types of labour cases, namely those in the Small Claims Tribunal (SCT), the Labour Tribunal<sup>28</sup> and the use of appointed representatives (local trade union members or local lawyers) to attend conciliation meetings at the Hong Kong Equal Opportunities Commis-

sion.<sup>29</sup> However, the Employment Agencies Administration, which oversees complaints against recruitment agencies requires the complainant be willing to return to Hong Kong and stand as a prosecution witness in court because of the criminal rather than civil nature of the justice pursued.<sup>30</sup>

In 2018, the landmark case of *Mallorca Joenelyn Domingo v Ng Mei Shuen*<sup>31</sup> set a precedent for MDWs pursuing claims from outside Hong Kong. A Philippine national who worked as a MDW in Hong Kong brought allegations of physical assault and summary dismissal without cause against her employer. The Presiding Officer at the Labour Tribunal dismissed the claimant's application to transfer the proceedings to the Technology Court for her evidence to be given through VCF and to have an office bearer of a registered trade union represent her in the proceedings.<sup>32</sup> The decision was appealed.

The Court of First Instance (CFI) noted that the Presiding Officer had failed to consider that s 23 of the Labour Tribunal Ordinance (Cap. 25) specifically allows (subject to the Tribunal's discretion) representation by trade union officers. Thus, the legislature contemplated representation by persons with training provided by the trade union and experience in dealing with labour cases.<sup>33</sup> The court concluded that the reasons provided by the Presiding Officer to dismiss the application were not sound in law and ordered that both the VCF Application and the Representation Application be remitted to the Tribunal to be heard before another presiding officer in the restored procee-

<sup>29</sup> The Hong Kong Equal Opportunities Commission (EOC), accepts complaints of discriminatory treatment based on gender, race or family status, even if the aggrieved person is no longer working or residing in Hong Kong. A complaint can be lodged with the EOC by mail, fax or email, with the assistance of an NGO representative. Where the EOC invites the parties to attend a conciliation meeting, the appointed representative and/or a pro bono lawyer can attend the meeting and discuss the matter with the respondent on behalf of the complainant. See EOC DISCRIMINATION LAWS, <https://www.eoc.org.hk/en/discrimination-laws/family-status-discrimination/faq#:~:text=Yes%2C%20you%20can%20represent%20an,per%20to%20to%20lodge%20the%20complaint> (last visited April 24, 2023)

<sup>30</sup> See HKSAR, Labour Department, <https://www.labour.gov.hk/eng/faq/content.htm> (last visited April 24, 2023).

<sup>31</sup> In the High Court of the Hong Kong Special Administrative Region Court of First Instance Labour Tribunal Appeal No 8 OF 2017 (On Appeal from Labour Tribunal Claim No 3464 of 2016). [2018] 3 H.K.L.R.D. 694.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at para 77.

<sup>27</sup> *Re Chow Kam Fai* [2004] 1 H.K.L.R.D. 161.

<sup>28</sup> These measures have been implemented as part of Phase III, as of 2 January 2021. See Hong Kong Judiciary, REMOTE HEARINGS FOR CIVIL BUSINESS IN CIVIL COURTS, [https://www.judiciary.hk/en/court\\_services\\_facilities/gap\\_remote\\_hearing.html](https://www.judiciary.hk/en/court_services_facilities/gap_remote_hearing.html) (last visited April 24, 2023).



dings.<sup>34</sup> Importantly, the CFI affirmed the widespread use of technology in the administration of justice and the availability of VCF at various levels of court, noting in particular the efficiency and effectiveness of this means of giving oral evidence in a range of circumstances, not just necessity but equally, to promote expediency, efficiency and convenience in the administration of justice.

In February 2019, the Labour Tribunal reconsidered the matters remitted to it and issued ground-breaking orders that enabled for the first time, the use of VCF by the MDW to give oral evidence from the Philippines and approved a representative of a trade union to represent her during the substantive proceedings. The *Mallorca* case was a test case which opened up the pathway for making oral evidence given by VCF a viable and effective alternative for those unable to be present at the proceedings, while ensuring effective representation to overcome barriers such as language, ignorance of rights, or insurmountable costs or hurdles of remaining in Hong Kong was available.

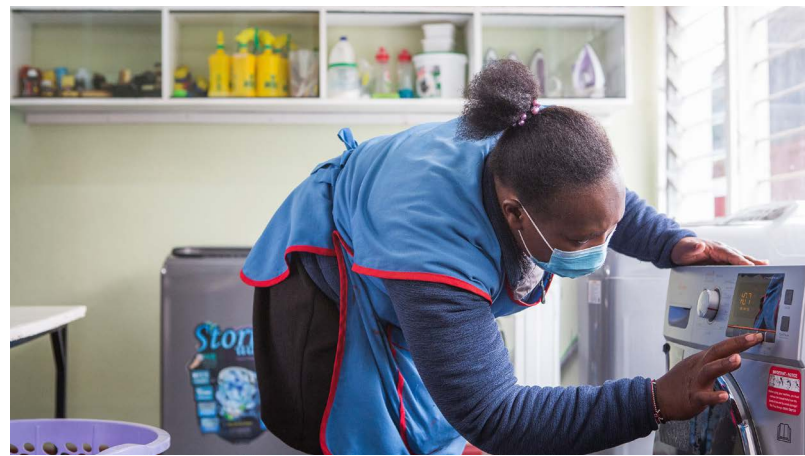
*“The Labour Department, Labour Tribunal and SCT of Hong Kong now accept claims of MDWs who are in their countries of origin. They participate telephonically or through VCF whilst a representative from a non-governmental organisation or trade union appears in person with written authorisation and handles all procedural matters, attends pre-trial proceedings, and responds to the Tribunal’s queries during the hearing.<sup>35</sup> They report the Tribunal’s directions back to the claimant during breaks or after the hearing.”*

In the wake of COVID-19, accelerating cross border access to civil justice for migrant workers in Hong Kong gained significant importance.<sup>36</sup> This

<sup>34</sup> *Id.* at para 97.

<sup>35</sup> Legal training is not required to be eligible to be appointed as a representative for a MDW lodging an overseas claim.

<sup>36</sup> Justice Without Borders, BUILDING CROSS-BORDER ACCESS TO JUSTICE FOR HONG KONG’S MIGRANT WORKERS (May 2020), <https://forjusticewithoutborders.org/publication/building-cross-border-access-to-justice-for-hong-kongs-migrant-workers/>. See JUSTICE WITHOUT BORDERS, [www.forjusticewithoutborders.org](http://www.forjusticewithoutborders.org) (last visited April 24, 2023). JWB has developed an operations manual for NGOs and lawyers, benchmarking best practices on portable justice in Hong Kong to facilitate access to justice for MDWs who have returned to the Philippines and Indonesia. See Justice Without Borders, JUST COMPENSATION: A TOOLKIT FOR CROSS-BORDER ACCESS TO JUSTICE FOR MDWS IN HONG KONG (May 2022), <https://forjusticewithoutborders.org/wp-content/uploads/2022/06/FINAL-PRINT-VERSION-Just-Compensation-Toolkit-2022.05.25.pdf>.



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breakthrough in portable justice was made possible through the unprecedented collaboration of various NGOs in Hong Kong and the Philippines, pro bono lawyers, the Hong Kong Confederation of Trade Unions and the Hong Kong Federation of Asian Domestic Workers.

Although these developments are very recent, several MDWs have begun, based on this precedent, their journey of pursuing justice which remained elusive until now. COVID-19 further underscored the critical nature of such avenues to ensure that justice continued to be accessible. Given the potential for portable justice to upend the systemic barriers that hinder effective access to justice for MDWs in pursuing employers and employment agencies for the breach of contractual and other rights, the urgency now pertains to making the knowledge of such a mechanism more widespread among MDWs and to support them through this process. This could prove key to their empowerment and rooting out exploitative and unscrupulous practices and oppressions. However, the dissolution of some trade union groups and NGOs in response to the implementation of Hong Kong’s national security law, raises serious questions as to the continued viability of this model. That said, Hong Kong’s civil society groups and unions advocating the rights of MDWs remain active even in this new climate.

Portable justice mechanisms have been operative in HK for nearly a decade and are entrenched through legal provisions. For now, cases in which such mechanisms might implicate national security concerns when enforcing the rights of MDWs seem few and far between making it unlikely that portable justice will become a casualty under the reach of these new laws.

The next section explores the viability of portable justice for Kenyan MDWs in the UAE by drawing on the experiences of the implementation of portable justice in Hong Kong. We critique the UAE's recent legislation and its potential to serve as a springboard for the realisation of portable justice for Kenyan MDWs working in the UAE. We also consider the socio-cultural and political context of the UAE and interrogate political will on the part of the Government of Kenya as likely barriers to achieving portable justice.

### Assessing the Problem: Kenyan Migrant Domestic Workers in the UAE

Kenyan domestic workers began arriving in significant numbers in the Gulf countries after Ethiopia temporarily banned the deployment of its domestic workers in 2013.<sup>37</sup> Reports from the State Department for Labour indicated that 29,448 Kenyan migrants were working in Saudi Arabia as homecare managers (also a form of domestic work) between March 2019 and January 2020.<sup>38</sup> High levels of unemployment along with harsh socio-economic conditions are push factors of migration for Kenyans<sup>39</sup> to the UAE. The Government of Kenya benefits significantly from remittances<sup>40</sup> earned by Kenyans in the diaspora including MDWs in the UAE.<sup>41</sup>

Whilst both male and female migrant workers are subjected to exploitation, it is the domestic workers (predominantly women) who face specific forms of gender-based violence.<sup>42</sup> Stories of

domestic servitude, sexual abuse, torture and acute violation of terms of employment are common yet the push and pull factors remain intact even as the risks escalate.<sup>43</sup> There has also been an escalation of the criminalisation of human trafficking and the regulation of labour migration<sup>44</sup> thus adding urgency for safe, orderly, and regular migration<sup>45</sup> and access to justice<sup>46</sup> through portable justice mechanisms.

### The Promise of Portable Justice for Kenyan Migrant Domestic Workers

The paper now turns to look at the prospects of portable justice for Kenyan MDWs in the UAE<sup>47</sup> and in light of a law enacted in 2022 aimed at improving the working conditions of MDWs.

The UAE is an authoritarian State with a federal court system with three main branches within its court structures: civil, criminal and Sharia law. Both criminal and civil courts apply elements of Sharia law codified into its criminal code and family law. The application of the '*Kafala*' system which legally binds migrant workers to their employer creates slave like conditions<sup>48</sup> with serious impediments to the enjoyment of basic rights such as freedom of expression and freedom of association.<sup>49</sup>

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status), <https://www.routledge.com/Women-Migrant-Workers-Ethical-Political-and-Legal-Problems/Meghani/p/book/9781138546332>. See also International Labour Organisation (ILO), LABOUR MIGRATION: FACTS AND FIGURES, <https://www.ilo.org/beirut/areasofwork/labour-migration/lang--en/index.htm> (last visited April 24, 2023).

<sup>37</sup> Froilan Malit, Jr. & Ali Al Youha, *Kenyan Migration to the Gulf Countries: Balancing Economic Interests and Worker Protection*, MIGRATION POLICY INSTITUTE (May 18, 2016), <https://www.migrationpolicy.org/article/kenyan-migration-gulf-countries-balancing-economic-interests-and-worker-protection>.

<sup>38</sup> See United Nations Department of Economic and Social Affairs, Population Division, INTERNATIONAL MIGRATION STOCK 2020 (2020) [hereinafter International Migration Stock], [https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesd\\_pd\\_2020\\_ims\\_stock\\_by\\_sex\\_destination\\_and\\_origin.xlsx](https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesd_pd_2020_ims_stock_by_sex_destination_and_origin.xlsx).

<sup>39</sup> Eng. Peter K. Tum, O.G.W., *Kenya Labour Migration: Trends, Challenges, Management and Potential Areas for Cooperation*, The Regional Ministerial Forum on Harmonizing Labour Migration Policies in the East and Horn of Africa Scheduled at Intercontinental Hotel, (Jan. 20, 2019), <https://laboursp.go.ke/wp-content/uploads/2020/01/PS-Presentation-for-Regional-LM-Forum-FINAL.pdf>.

<sup>40</sup> Central Bank of Kenya, 2016 DIASPORA REMITTANCES, <https://www.centralbank.go.ke/diaspora-remittances/> (last visited April 24, 2023).

<sup>41</sup> International Migration Stock, *supra* note 38.

<sup>42</sup> Zahra Meghani, WOMEN MIGRANT WORKERS: ETHICAL, POLITICAL AND LEGAL PROBLEMS (2016) (Indicated how women migrants are double discrimination on account of their sex and migration

<sup>43</sup> The Economist, IN THE GULF 99% OF KENYAN MIGRANT WORKERS ARE ABUSED, A POLL FINDS, (Sept. 2022), <https://www.economist.com/middle-east-and-africa/2022/09/15/in-the-gulf-99-of-kenyan-migrant-workers-are-abused-a-poll-finds>

<sup>44</sup> Mohamed Daghar, *Human trafficking: Kenya's reforms are not protecting its people from trafficking*, ENACT, (Jan. 2020), <https://enactafrica.org/enact-observer/kenyas-reforms-are-not-protecting-its-people-from-trafficking>.

<sup>45</sup> Judy Kaberia, *How migrant workers fall victims to flaws in Kenyan law and fragmented policies*, THE STANDARD, (2021) <https://www.standardmedia.co.ke/commentary/article/2001380757/how-migrant-workers-fall-victims-to-flaws-in-kenyan-law>.

<sup>46</sup> Mohamed Daghar, *supra* note 44.

<sup>47</sup> Hesam Mohammed Jalil Sultan Al-Ulama, THE FEDERAL BOUNDARIES OF THE UNITED ARAB EMIRATES, (1994), <https://people.exeter.ac.uk/nsaa201/UAE%20Federal%20Boundaries.pdf>.

<sup>48</sup> Khan, Azfar & Hélène Harroff-Tavel, *Reforming the Kafala: Challenges and Opportunities in Moving Forward*, 20(3-4) THE FEDERAL BOUNDARIES OF THE UNITED ARAB EMIRATES., 293, 293-313 (2011), <https://journals.sagepub.com/doi/abs/10.1177/011719681102000303?journalCode=amja>.

<sup>49</sup> The UAE's media is annually classified as "not free" in the Freedom of the Press report by Freedom House. The UAE

The non-recognition of trade unions and prohibited related activities such as collective bargaining and the right to strike further exacerbate the risks faced by MDWs,<sup>50</sup> as participation in protests can cause work permits to be cancelled leading to deportation.<sup>51</sup>

The UAE passed the Federal Decree Law No. 9<sup>52</sup> to address exploitation of MDWs. It has two main objectives: (1) to establish a framework for employment relationships with domestic workers within the state, outlining the responsibilities of the parties in a manner that ensures an equitable balance between the rights of both parties; and (2) to maintain a safe and healthy working environment for MDWs in compliance with local laws and international agreements.<sup>53</sup>

*“This law recognises the triangular relationship between the MDW, recruitment agency and employer, as well as contractual obligations which arise between the MDW and employer (wage arrears, underpayment, hours, occupational, safety and health concerns (OSH) and gender-based violence) and between the employer and recruitment agency (illegal and unethical recruitment practices, financial exploitation during recruitment, confiscation of travel documents).”*

The recruitment of MDWs by unlicensed recruitment agencies is prohibited;<sup>54</sup> their illegal acts include demanding or accepting directly or indirectly, any commission for securing a job for any MDW.<sup>55</sup> In terms of disputes between employers and MDWs, proof of payment of wages is now required and evidenced through the use of a wage book to be signed by the employer and

MDW for each wage payment made.<sup>56</sup> The employment contract should clearly describe the work that the MDW must do, hours of work, leave/rest days, compensation for overtime and any workplace injuries.<sup>57</sup> Furthermore, to prevent the risk of MDWs being homeless or situations where MDWs become stranded in the UAE, the employer is required to incur the costs of repatriating a MDW back to country of origin.<sup>58</sup>

Much of the UAE labour law provisions are similar to the standard form provisions in Hong Kong’s contract governing the relationship between employers and MDWs (except there is no requirement of a wage book, although recruitment agencies provide one to keep a record of wages paid by obtaining the MDWs signature on monthly payments).

Notably, the UAE does not share jurisdiction with any court outside of the UAE and its law is silent as to what the process is where a party to the dispute no longer physically resides in the UAE and beyond the jurisdictional reach of the UAE.<sup>59</sup> The mechanics of this law does not contemplate portable justice as MDWs must be physically present in the UAE when actions and applications are filed. It does however contemplate potential circumstances where a MDW falls into conflict with the law.<sup>60</sup> Dispute resolution and complaint handling procedures between the employer and MDW are also prescribed.<sup>61</sup> The Ministry of Labour is authorised to resolve disputes amicably or refer it to the competent UAE courts.<sup>62</sup>

When bringing disputes before the courts, this law also stipulates that only contracts which have complied with the procedures under the Decree Law and its Implementing Regulation will be considered.<sup>63</sup> This effectively excludes scenarios where a MDW signs an employment contract due to misrepresentation, under duress or is trafficked into the UAE and without a contract. Undue hardship to MDW can only result from such hard-line laws as they fail to consider literacy capacity, poverty and the power dynamics involved around the signing of a contract.

ranks poorly in the annual Press Freedom Index by Reporters Without Borders. See Reporters Without Borders, UNITED ARAB EMIRATES, <https://rsf.org/en/index> (last visited April 24, 2023).

<sup>50</sup> U.A.E. Labour Law, Federal Law No. (8) of 1980, <http://www.mohre.gov.ae/MOLWebsite/en/labour-law/labour-law.aspx>. See also, Rebecca Kelly & Christopher Brinley, *United Arab Emirates* in *LABOUR & EMPLOYMENT 2022* at 3 (Matthew Howse, eds. 2022), <https://www.morganlewis.com/-/media/files/special-topics/gtdt/2022/getting-the-deal-through-labour-employment-2022-uae.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> Federal Decree-Law No.9 of 2022 Concerning Domestic Workers (U.A.E.), <https://u.ae/-/media/Mohre-resolutions/Federal-DecreeLaw-No-9-of-2022-Concerning-Domestic-Workers-1.ashx>

<sup>53</sup> *Id.* at art. 24

<sup>54</sup> *Id.* at art. 4 and 5.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at art. 5(8) & 15(2).

<sup>57</sup> *Id.* at art. 9, 10 and 11.

<sup>58</sup> *Id.* at art. 11 (15).

<sup>59</sup> *Id.* at art. 26 (1).

<sup>60</sup> *Id.* at art. 17.

<sup>61</sup> *Id.* at art. 23.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

The possibility of applying portable justice within the UAE is further diminished by requiring that ‘a lawsuit concerning any of the entitlements referred to under the provisions of this Decree-Law shall not be heard after the lapse of three months from the date of termination of the employment relationship.’<sup>64</sup> Such a provision, coupled with the legal difficulties of remaining legally in the UAE once an employment contract is terminated, increases the likelihood that a MDW would be back in their country of origin.

However, despite the negatives, the UAE law does provide a ray of hope that there is a sense of awareness and sensitivity to the plight of MDWs within the UAE.

On the other hand, transformation within the UAE towards enhancing MDW rights is futile without the Government of Kenya playing a critical role domestically and through diplomatic channels. Human rights violations which domestic workers within Kenya are subjected to are merely amplified in foreign countries. The Government of Kenya must address the push factors wrapped in poverty related challenges; it must also address legislative loopholes and enforcement mechanisms relating to trafficking in persons and strengthen domestic laws by ratifying ILO C190<sup>65</sup> and ILO C189.<sup>66</sup> This would send a clear signal to Kenyans and the UAE that it takes the rights of MDWs seriously.

At the intersection of the duties and obligations that connect Kenya and the UAE in relation to MDWs is portable justice; a viable solution to the injustices suffered by Kenyan MDWs and many other MDWs globally.

## Conclusion

We have established that in the absence of effective cross-border support and recognition of the viability of cross-border claims, MDWs often abandon claims against their employers and are shut out of justice systems.

Whilst there are some procedural and logistical challenges related to portable justice, it repre-

sents a promising, viable option for securing justice for MDWs who have returned home.

Our proposal on working towards achieving portable justice for MDWs in the UAE is framed around the Domestic Worker Roundtable<sup>67</sup> which propelled the establishment of the inter-agency taskforce to respond to illicit and unethical recruitment of MDWs. This taskforce can work together to track and expose trafficking in persons syndicates exploiting MDWs for labour and sex. The opportunity for such a collaboration has presented itself through the 2022 UAE Decree Law whose provisions do indicate goodwill on addressing some of the root causes pertaining to the exploitation of MDWs.

The Domestic Worker Roundtable model could be used as a springboard to engage with local lawyers within the UAE as well as international law firms with presence in both the migrant sending and receiving countries. They would partner with trade unions and lawyers from the migrant sending countries and establish regular channels of communications and develop networks to support MDWs seeking portable justice.

The prioritisation of profits over human rights and the welfare of MDWs must no longer be tolerated. In the absence of portable justice, many workers in the UAE return home without any compensation for their hard work and without any justice for the often-gross human rights violations they experience. This underscores the indispensability of adopting tried and tested measures to enhance meaningful access to justice for MDWs in the UAE and beyond.

Hong Kong, despite various shortcomings, has provided relief to MDWs in a range of cases and as such it remains a useful model to draw on for building strategic advocacy and collective action to implement portable justice for MDWs globally. Its dissemination through raising awareness and resource building is indispensable to make this vision a reality.

<sup>64</sup> *Id.* at art. 26

<sup>65</sup> ILO, Violence and Harassment Convention 2019 (No. 190), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C190,](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190,)

<sup>66</sup> ILO, Domestic Workers Convention, 2011 (No. 189), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C189.](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189)

<sup>67</sup> See Domestic Worker Roundtable, *supra* note 20.

# REMEDICATION UNDER U.S. SECTION 307 OF THE TARIFF ACT OF 1930: OPPORTUNITIES FOR FORCED LABOUR REMEDIATION FOR MIGRANT WORKERS

## AVERY KELLY & ALLIE BRUDNEY

Dominican Republic | Originally written in English

### Introduction

On July 31, 2017, David Michel, a Haitian migrant sugarcane worker in his late sixties, was hit in the face with a tear gas canister, splitting open his right cheek and fracturing his jaw. Riot police fired the canister that hit Michel while he was marching in the capital of the Dominican Republic, shoulder to shoulder with other cane workers (known as *cañeros*) of his generation. Michel and his fellow *cañeros* were demanding access to the pensions they had paid into over decades of hard labour in the Dominican sugarcane fields and calling for regularization of their immigration statuses.<sup>1</sup> Although many aging *cañeros* like Michel came to the Dominican Republic legally under a migrant labour agreement between the Dominican and Haitian governments more than fifty years ago, most are no longer documented and are denied their pensions on that basis. Michel's community claims that by the time of the protest, he had worked as a *cañero* between two companies for more than forty years and had even lost his left thumb in an accident at work. Michel allegedly required an expensive jaw surgery for his injury at the protest and had no insurance to cover it because of his immigration status.

For more than a century, the Dominican sugar industry has relied almost exclusively on the labour

of Haitian migrants and people of Haitian descent – including Dominican-born children and grandchildren of migrants – to cultivate, tend, and harvest the fast-growing and sturdy crop upon which the industry depends.<sup>2</sup> *Cañeros* work long hours on sugar plantations in the hot sun for little pay, doing hard and dangerous work. They often live in cramped company-owned housing that lacks electricity and plumbing, and they are especially vulnerable because they lack legal status, as many are undocumented or stateless.<sup>3</sup> Much of the sugar produced on the backs of these *cañeros* goes to the United States, which imports more sugar from the Dominican Republic than from

<sup>2</sup> Sandy Tolan & Michael Montgomery, *US Bans Sugar Imports From Top Dominican Producer Over Forced Labor Allegations*, PULITZER CENTER (Nov. 23, 2022), <https://pulitzercenter.org/blog/us-bans-sugar-imports-top-dominican-producer-over-forced-labor-allegations>.

<sup>3</sup> See, e.g., United States Department of State, *2021 Country Reports on Human Rights Practices: Dominican Republic* (2022), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/dominican-republic>; United States Department of Labor, *Seventh Periodic Review of Implementation of Recommendations in the U.S. Department of Labor's Public Report of Review of Submission 2011-03 (Dominican Republic)* (Sep. 13, 2022), <https://www.dol.gov/sites/dolgov/files/ILAB/DOL-Seventh-Periodic-Report-on-Submission-2011-03-Dominican-Republic-Sugar-v2.pdf>; Sandy Nolan & Euclides Cordero Nuel, *The Bitter Work Behind Sugar*, REVEAL (Sep. 18, 2021), <https://revealnews.org/podcast/the-bitter-work-behind-sugar/> [hereinafter *The Bitter Work Behind Sugar*]; Sandy Tolan, *The High Human Cost of America's Sugar*, MOTHER JONES, (Sep. 17, 2021) <https://www.motherjones.com/politics/2021/09/sugar-central-romana-fanjul-dominican-republic/> [hereinafter *The High Human Cost of America's Sugar*]; Sandy Tolan & Euclides Cordero Nuel, *Paramilitary-Style Guards Instill Fear in Workers in Dominican Cane Fields*, THE INTERCEPT, (Oct. 14, 2022) <https://theintercept.com/2022/10/14/dominican-sugar-central-romana-fanjul-domino/> [hereinafter *Paramilitary-Style Guards Instill Fear in Workers in Dominican Cane Fields*].

<sup>1</sup> Associated Press, *Dominicana: haitianos piden sanción por violencia en marcha*, EL CARIBE (Aug. 1, 2017), <https://www.elcaribe.com.do/panorama/dominicana-haitianos-piden-sancion-violencia-marcha/>; *Bombas y tiros: cañeros envejecientes denuncian ataques de la Policía Nacional durante marcha*, ACENTO, (Aug. 1, 2017), <https://acento.com.do/actualidad/bombas-tiros-caneros-envejecientes-denuncian-ataques-la-policia-nacional-marcha-8479310.html>.

any other country.<sup>4</sup>

In this article, we discuss a U.S. trade law, Section 307 of the Tariff Act of 1930 (Section 307), under which goods produced with forced or prison labour are prohibited from entering the United States. We suggest that civil society and unions can leverage this law more effectively to benefit migrant workers, who are disproportionately impacted by forced labour, by preparing early for Section 307 remediation and working with companies when they face Section 307 enforcement action to develop and implement remediation plans based on proven methods to root out forced labour for the long run. This article advocates for civil society groups that leverage Section 307 to maximize benefits to workers more generally to focus at least as much on the *post*-WRO remediation phase as on the *pre*-WRO part of the Section 307 process – at least for cases in which companies are interested in having the WRO modified rather than foregoing access the U.S. market.

We will use the Dominican sugar industry as an example of such an opportunity. U.S. Customs and Border Protection (CBP) is the U.S. agency charged with enforcement of Section 307 through the issuance of Withhold Release Orders (WRO) that block goods suspected to have been produced with forced labour from entering the United States. In November 2022, CBP issued a WRO against all sugar and sugar products produced by Central Romana Corporation, Ltd. (Central Romana), the largest sugar producer in the Dominican Republic.<sup>5</sup> This is a unique opportunity for

all stakeholders in the Central Romana case to rally around a proven model (worker-driven social responsibility) for uprooting forced labour. We hope the moment will spark lasting change at Central Romana, as well as across the Dominican sugarcane industry, and will exemplify the range of possibilities for advancing human and labour rights by means of Section 307.

## Forced Labour in the Dominican Sugar Industry

Abusive conditions for Haitian migrant workers and workers of Haitian descent and their families working and living on sugar cane producers' grounds in the Dominican Republic are multifaceted and systemic. The Dominican government has repeatedly passed laws that discriminate against Haitian migrants and Dominicans of Haitian descent, creating the conditions for the Dominican sugar industry to wield enormous control over a desperate workforce with few public avenues to enforce their rights. Additionally, for generations, the Dominican and Haitian governments have periodically entered into migrant labour agreements often supplemented by waves of racist immigration policy in the Dominican Republic, including the revocation of birth-right citizenship in 2015.<sup>6</sup> These policies have facilitated the exploitation of Haitian migrants and people of Haitian descent.<sup>7</sup>



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<sup>4</sup> Trade Representative, Office of the United States, Fiscal Year 2022 Tariff-Rate Quota Allocations for Raw Cane Sugar, Refined and Specialty Sugar, and Sugar-Containing Products, (Sept. 16, 2021), <https://www.federalregister.gov/documents/2021/09/16/2021-19951/fiscal-year-2022-tariff-rate-quota-allocations-for-raw-cane-sugar-refined-and-specialty-sugar-and>; The United States is also the largest importer of Dominican sugar. United States Department of Agriculture Foreign Agricultural Service, Sugar Annual (Apr. 18, 2022) [https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Sugar%20Annual\\_Santo%20Dominican%20Republic\\_DR2022-0004.pdf](https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Sugar%20Annual_Santo%20Dominican%20Republic_DR2022-0004.pdf).

<sup>5</sup> U.S. Customs and Border Protection, *CBP Issues Withhold Release Order on Central Romana Corporation Limited* (Nov. 23, 2022), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-central-romana-corporation>. In issuing this WRO, CBP identified the presence of five ILO indicators of forced labour in Central Romana's sugar supply

chain: abuse of vulnerability, isolation, withholding of wages, abusive working and living conditions, and excessive overtime. U.S. Customs and Border Protection, *CBP Issues Withhold Release Order on Central Romana Corporation Limited*, (Nov. 23, 2022), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-central-romana-corporation>. CBP failed to identify the ILO forced labour indicators of intimidation and threats, restriction of movement, physical violence, and debt bondage. However, there is mounting evidence that these indicators are also present in Central Romana's sugar cane fields and bateyes and must be remediated if the conditions driving forced labour at Central Romana are to be comprehensively addressed.

<sup>6</sup> Jonathan Katz, *What Happened When a Nation Erased Birthright Citizenship*, THE ATLANTIC, (Nov. 12, 2018) <https://www.theatlantic.com/ideas/archive/2018/11/dominican-republic-erased-birthright-citizenship/575527/>.

<sup>7</sup> Evidence suggests many of the conditions discussed in this article are not unique to Central Romana but are endemic to the industry in the Dominican Republic.

Some of the abusive conditions *cañeros* face, which CBP has found to amount to a reasonable indication of forced labour at Central Romana, are described below to contextualize both the necessity of, and the opportunity for, holistic remediation designed and implemented with impacted workers at the centre.

It was not uncommon 100, or even 50 years ago for Haitian boys and young men from rural communities to be kidnapped and forcibly brought to work in Dominican sugar fields. On a recent visit to the Dominican Republic, the Corporate Accountability Lab (CAL) team met a 75-year-old labour organizer and *cañero* who alleged that he was kidnapped at age fourteen and brought to work in in the Dominican sugarcane fields, where he has worked cutting cane for the last six decades. (This elderly man showed us a week-old machete wound on his shin from cane cutting. He, along with his children and grandchildren who were born in the Dominican Republic, does not have valid documentation and therefore cannot access many social services, including healthcare.)

Today, fewer workers are kidnapped from Haiti, but many still pay high recruitment fees – as much as 15,000 pesos (about USD \$273), which is more than a cane cutter earns in a month – to private recruiters called *buscones*. These recruiters do not always tell Haitian migrants where they are going to work (neither geographically nor the industry in which they will work) or that their pay will be so low that the only way to pay back the predatory recruitment fees will be to immediately begin working. On site, *cañeros* perform gruelling work cutting and loading sugarcane into oxen-pulled wagons during the harvest season, clearing paths in the dense cane for oxen, sowing new cane, and engaging in other heavy manual labour essential to the production of sugarcane.<sup>8</sup> *Cañeros* are paid by the weight of the cane cut every week, yet they are often excluded from the weighing process to ensure accurate payment. Pay is so low that *cañeros* and their families often do not have enough to eat. Yet a variety of factors – including fear of deportation, intimidation and threats, and debt bondage – keep them working for companies that produce sugar for the United States and other markets.<sup>9</sup>

<sup>8</sup> *The Bitter Work Behind Sugar*, *supra* note 3.

<sup>9</sup> See, e.g., *Paramilitary-Style Guards Instill Fear in Workers in Dominican Cane Fields*, *supra* note 3.

On the job, *cañeros* very rarely have access to potable water, food, bathrooms, or adequate personal protective equipment. Many work from their teenage years well into their seventies and eighties, unable to retire without retirement benefits paid by the company or access to the state-provided pension that they have paid into for decades because the Ministry of Labour turns them away for lacking required documentation.<sup>10</sup> *Cañeros* across the industry, who are almost exclusively men, live on company-owned or controlled property in company-provided *bateyes* with their families. Conditions in the *bateyes* are often substandard, and none have in-house bathrooms, but they vary in fundamental aspects including access to electricity, the condition of housing structures, and access to basic education.<sup>11</sup> In general, the more isolated the *batey*, the worse the conditions. Most families of *cañeros* share one-bedroom dwellings. On a field visit in January 2023, CAL staff met a woman whose family of nine shares one bed. These conditions are the result of public and private policies that have been put in place with the knowledge that a primarily undocumented or stateless migrant and migrant descendant workforce will be unable to resist.

### Civil Society Engagement with Section 307 of the Tariff Act

For the past few years, Section 307 of the U.S. Tariff Act of 1930 – which prohibits the importation of goods produced with forced or prison labour – has been an important human rights tool.<sup>12</sup> Although initially enacted for protectionist ends, Section 307 has become an effective, if piecemeal, mechanism for addressing forced labour and prison labour in the supply chains of companies importing goods to the United States.<sup>13</sup> Under Section 307, a WRO can be very narrow,

<sup>10</sup> See, e.g., *The High Human Cost of America's Sugar Habit*, *supra* note 3.

<sup>11</sup> See *id.*

<sup>12</sup> 19 U.S.C. § 1307 provides that: “All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labour or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision.”

<sup>13</sup> It is ironic – and protectionist and immoral – that it is illegal to import goods produced with prison labour but it is not illegal to produce goods using prison labour within the United States. See Corporate Accountability Lab, *Convicted: How Corporation's Exploit the Thirteenth Amendment's Loophole for Profit* (Nov. 2022) <https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/6362ce034ff->

focused on goods produced at specific factories, farms, or fishing vessels; alternatively, it can be broad, focusing on goods produced by a company in a specific region or country, or even on all goods of one type (e.g., cotton or tobacco) produced in an entire region or country.

*“The potential to have goods blocked from entering the United States provides a powerful incentive for companies to address the forced or prison labour conditions identified in its supply chain to regain access to the U.S. market. In fact, the law has been so effective that other countries are developing similar import ban regimes based on Section 307.”<sup>14</sup> “*

And yet, the law is not nearly as effective as it could be. This is partly because CBP, the entity charged with Section 307 enforcement, could – and should – be issuing far more WROs each year. CBP issued only three WROs in 2022, eight

[96629396013dd/1667419656303/CAL+Convicted+-+Re-port+02.11.22.pdf](https://www.cbc.ca/news/canada/canada-stop-forced-labour-imports-1.6252283).

<sup>14</sup> Under the USMCA, both Mexico and Canada are required to implement similar import prohibitions. Canada has passed a law prohibiting the import of goods produced with forced labour (and it already had a law prohibiting the import of prison-made goods). However, the Canadian government has rarely used it. The Canadian customs authorities stopped one shipment containing women’s and children’s clothing from China in late 2021. The Canadian government also asked Supermax Healthcare Canada, which is a subsidiary of Malaysian company Supermax Corporation to stop all deliveries until it could show that it was not using forced labour in producing rubber gloves. See Caitlin Taylor, Katie Pedersen, Eric Szeto, *Canada halts import of goods linked to forced labour from China, Malaysia*, CBC, (Nov. 17, 2021), <https://www.cbc.ca/news/canada/canada-stop-forced-labour-imports-1.6252283>. In February 2023, Mexico’s Ministry of Economy published an administrative regulation, the Forced Labor Regulation, in the Federal official Gazette. This regulation will go into effect on May 18, 2023. See José Hoyos-Robles, Adriana Inarra-Fernandez & Eunkyung Kim Shin, *Mexico: Mexico Implements the United States-Mexico-Canada-Agreement Forced Labor Import Ban*, GLOBAL COMPLIANCE NEWS, (March 15, 2023), [https://www.globalcompliancencews.com/2023/03/15/https-insightplus-bakermckenzie-com-bm-international-commercial-trade-mexico-the-implementation-of-united-states-mexico-canada-agreement-forced-labor-import-ban\\_02272023/](https://www.globalcompliancencews.com/2023/03/15/https-insightplus-bakermckenzie-com-bm-international-commercial-trade-mexico-the-implementation-of-united-states-mexico-canada-agreement-forced-labor-import-ban_02272023/); Office of the United States Trade Representative, STATEMENT FROM AMBASSADOR KATHERINE TAI ON MEXICO’S ACTION ON IMPORTS PRODUCED WITH FORCED LABOR, (February 17, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/february/statement-ambassador-katherine-tai-mexicos-action-imports-produced-forced-labor>. The European Union is in the process of passing a regulation. European Commission, *Commission moves to ban products made by forced labour*, (Sept. 14, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_5415](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5415).

in 2021, and fourteen in 2020.<sup>15</sup> Not only would the issuance of more WROs impact more goods tainted by forced labour practices, but it would also make the threat of WROs more visible to all companies importing goods to the United States, encouraging a broader reckoning with supply chain conditions. The Section 307 regime could also be more effective if civil society and unions paid more attention to the opportunities presented *after* a WRO is issued – by advocating for effective remediation and structural change in the supply chains of companies against whose goods CBP has issued WROs.

### Pre-WRO: Advocating for Section 307 Enforcement

The timeline from submitting information to CBP regarding potential forced labour in a supply chain to CBP issuing a WRO blocking the pertinent goods can be long. To issue a WRO, CBP must find there is “reasonable suspicion” that supply chain conditions rise to the level of forced (or prison) labour. Forced labour is defined as “[a]ll work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.”<sup>16</sup> CBP often relies on information submitted by civil society organizations to open investigations into specific industries,<sup>17</sup> although it can also self-initiate investigations.

CBP applies the International Labour Organisation’s (ILO) eleven indicators of forced labour to determine whether there is reasonable suspicion of forced or prison labour to justify issuing a WRO.<sup>18</sup> The eleven indicators are: abuse of vulnerability; deception; restriction of movement; isolation; physical and sexual violence; intimidation and threats; retention of identity documents; withholding of wages; debt bondage; abusive working and living conditions; and excessive overti-

<sup>15</sup> U.S. Customs and Border Protection, *Withhold Release Orders and Findings List*, <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings> (last visited April 10, 2023).

<sup>16</sup> 19 U.S.C. §1307. The language is modelled on the International Labour Organisation’s Forced Labor Convention, 1930.

<sup>17</sup> The Human Trafficking Legal Center has a helpful guide for civil society on drafting 307 petitions. See Anasuya Syam and Meg Roggensack, *Importing Freedom: Using the U.S. Tariff Act to Combat Forced Labor in Supply Chains*, HUMAN TRAFFICKING LEGAL CENTER, (2020), [https://htlegalcenter.org/wp-content/uploads/Importing-Freedom-Using-the-U.S.-Tariff-Act-to-Combat-Forced-Labor-in-Supply-Chains\\_FINAL.pdf](https://htlegalcenter.org/wp-content/uploads/Importing-Freedom-Using-the-U.S.-Tariff-Act-to-Combat-Forced-Labor-in-Supply-Chains_FINAL.pdf).

<sup>18</sup> ILO, INDICATORS OF FORCED LABOUR, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_203832.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf).





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me. International standards do not require the presence of all indicators to determine that forced labour is occurring. In fact, in some instances the presence of one indicator is sufficient to determine the existence of forced labour.<sup>19</sup> Once CBP has issued a WRO against goods, such goods are not permitted entry into the United States.

Civil society organizations and human rights advocates (including CAL) have often focused on providing information to CBP so that the agency *could* issue a WRO (citing reasonable suspicion of forced labour), rather than focusing on the opportunities presented when CBP *does* issue a WRO. For instance, prior to CBP issuing the WRO against sugar produced by Central Romana, civil society focused on providing enough information for CBP to issue the WRO. In addition to submitting a petition to CBP that provided evidence of forced labour in Central Romana's sugar cane fields and *bateyes*,<sup>20</sup> human rights advocates and unions wrote a letter to the Biden Administration urging the government to issue the WRO.<sup>21</sup>

Even at this first stage of advocating for a WRO, it is essential that civil society and unions also think about possibilities for remediation of the forced labour conditions if CBP issues a WRO. Our collective efforts can be more effective if the informa-

<sup>19</sup> *Id.* at 3.

<sup>20</sup> Allie Brudney, *Advocates Urge CBP to Block Imports of Sugar From the Dominican Republic, Citing Forced Labor*, CORPORATE ACCOUNTABILITY LAB, (Aug. 18, 2022), <https://corpaccountabilitylab.org/calblog/2022/8/18/advocates-urge-cbp-to-block-imports-of-sugar-from-the-dominican-republic-citing-forced-labor>.

<sup>21</sup> OPEN LETTER ON DR SUGAR, (Nov. 8, 2022), <https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/636a9b9f459fe04fe6a21810/1667931039708/CSO+Sign+on+Letter+re+DR+Sugar.pdf>.

tion provided to CBP and related advocacy tees up possible remediation. CAL and others have attempted to do this by providing suggestions in petitions to CBP for steps companies would have to take to successfully show that they have remediated the forced labour.<sup>22</sup> Because each situation is unique, this list of necessary steps from civil society organizations and unions, where present, with relevant expertise can be a helpful tool for CBP to better understand how forced labour in that specific industry functions.

### Post-WRO: Towards Effective Remediation

Once CBP has issued a WRO, the company or companies whose goods are covered by the WRO can attempt to have it lifted by remediating the forced labour. While much of how CBP operates remains a black box, CBP's process reportedly begins with a third-party audit that establishes the baseline conditions for remediation. The company then must work to remediate each ILO indicator that CBP found in issuing the WRO.<sup>23</sup> The company must prove to CBP that it has remediated the conditions of forced labour and verify that with a follow-up or "exit" audit. This can be a long process, lasting eighteen months or more.

When CBP finds that all of the identified conditions of forced labour have been remediated, CBP will "modify" the WRO, making it "inactive" as long as the company does not backslide on con-

<sup>22</sup> See *Re: Petition to exclude cocoa produced in Cote D'Ivoire and imported to the U.S. by Nestle, Mars, Hershey, Barry Callebaut, World's Finest Chocolate, Inc., Blommer Chocolate Co., Cargill, Mondelez, and Olam unless and until within 180 days any specific "importer establishes by satisfactory evidence that [its] merchandise was not ... manufactured in any part with" forced or trafficked child labor.* 19 C.F.R. § 12.42 (g), Feb. 14, 2020; *Re: Petition under 19 U.S.C. §1307 concerning the Xinjiang Uyghur Autonomous Region of China*, (Aug. 28, 2020), <https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/618aa95ceadc0c5ec40d0832/1636477277345/Section+1307+Petition+Xinjiang+August+28+2020-2+table+%281%29.pdf>; Corporate Accountability Lab & International Rights Advocates, *CAL AND IRADVOCATES PROVIDE NEW EVIDENCE OF FORCED CHILD LABOR IN MAJOR CHOCOLATE PRODUCERS' SUPPLY CHAIN*, (June 25, 2021), <https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/60d602b5815e265a8d3e5abb/1624638133368/Press+Release+Supplemental+Petition+June+2021.pdf>; Brudney, *supra* note 20.

<sup>23</sup> U.S. Customs and Border Protection, Forced Labor Division Forced Labor Enforcement, WRO MODIFICATION/REVOCAION PROCESSES OVERVIEW\*, [https://www.cbp.gov/sites/default/files/assets/documents/2021-Mar/Final\\_Modification%20Revocation%20Process%5B5%5D.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2021-Mar/Final_Modification%20Revocation%20Process%5B5%5D.pdf) ("CBP advises petitioners to provide certain information for modification/revocation requests, and emphasizes the need for evidence demonstrating that all identified ILO indicators of forced labor are remediated. Information that CBP generally considers beneficial includes, but is not limited to: Evidence refuting each identified indicator of forced labor...").

ditions.<sup>24</sup> CBP has the power to re-impose – that is, make active – the WRO at any time. While this has not yet been done, this threat could act as a strong incentive for companies to permanently eliminate the policies and practices that led to CBP’s determination of a reasonable indication of forced labour in the first place.

*“The remediation process provides a significant opportunity for civil society and independent unions, where present, to be instrumental in advocating for sustainable, systematic remediation and prevention initiatives. CBP is not prescriptive on the remediation process for companies. This gives civil society and workers an opening to promote – to CBP, companies and auditors – best practices.”*

The conditioning of access to the U.S. market on remediation of forced labour conditions affords workers and human rights lawyers, who may generally be more adversarial to companies, a unique opportunity to work collaboratively with them to address structural issues that lie at the root of the restrictions on U.S. importation.

Once a WRO is issued, worker and civil society interests suddenly align with company interests in significant ways. Both are looking to remediate the forced labour, and generally, for the WRO to be modified. While the reasons may be different – companies want to regain market access to continue to earn a profit while civil society is focused on remediating the harm to workers, ensuring systems are in place so forced labour will not occur again, and ensuring that workers retain their jobs – the overall goals with respect to the WRO align. What results is an opportunity for meaningful, time-sensitive collaboration with a corporate audience. This is an ambitious task, one that requires time, energy, resources, and collaboration. But we believe that it is worth the investment.

### **An Opportunity: Central Romana and Worker-Driven Remediation**

An opportunity emerging at the time of this writing surrounds post-WRO remediation of conditions at Central Romana’s sugar cane fields and *bateyes* in the Dominican Republic. The broad scope and structural nature of the reasonably indicated abuses against *cañeros* at Central Romana and the broader population that lives in Central

Romana *bateyes* – like those across the industry – necessitates more than box checking. Meaningful remediation will require creative, comprehensive, and structural changes at the company. This can best be done in collaboration with civil society organizations and an independent democratic union or worker organization representing *cañeros* – key elements of a broad effort to upend the status quo structures and practices that have resulted in conditions of forced labour.

One approach to fulsome remediation of conditions in this post-WRO moment is to consider the development and implementation of a worker-driven social responsibility (WSR) program at Central Romana that could address ongoing abuses, mitigate future risks, and serve as a model for the rest of the Dominican sugar industry.

WSR programs like the Coalition of Immokalee Workers’ Fair Food Program and the Bangladesh Accord, have been shown to create lasting change and continuous improvement, including in tomato fields that U.S. federal prosecutors once referred to as “ground zero for modern slavery” in the United States.<sup>25</sup>

A WSR program at Central Romana could institutionalize the changes the company will have to make to regain access to the U.S. market. A WSR program at Central Romana would include, among other things, a legally binding agreement between workers, an independent democratic union or worker organization, supporting civil society groups, and the company on standards and enforcement mechanisms. It would involve worker-led education and empowerment campaigns, and stringent and continuous monitoring and enforcement, even after the company regains access to the U.S. market, which would be one of the program’s aims given the post-WRO remediation opportunity. Such a program would institute independent monitoring and oversight to mitigate the risk of backsliding and make the WRO’s remediation effect more sustainable and long-lasting. A WSR program at Central Romana would need to be designed, monitored, and enforced with Haitian and Haitian descendant *cañeros* at the centre. The nature of such a program calls for guidance from civil society organizations and unions experienced with WSR programs and principles. This is especially true in this context, where the long, layered history of exploitation

<sup>24</sup> *Id.*

<sup>25</sup> Fair Food Program, WORKER DRIVEN SOCIAL RESPONSIBILITY, <https://fairfoodprogram.org/worker-driven-social-responsibility/> (last visited April 10, 2023).

has sown deep distrust between stakeholders, and much of the workforce has internalized the dominant narrative that Haitian migrants and undocumented and stateless people of Haitian descent have no rights.

*“Worker-driven social responsibility programs, as opposed to social responsibility programs that are devised by companies to benefit workers but lack worker leadership, have become the gold standard for private regulation of human rights and labour abuses in supply chains.<sup>26</sup> WSR models are fundamentally different from corporate social responsibility schemes in that they are driven by workers and independent worker organizations, require companies to sign binding compliance agreements, and are continually monitored and improved with the oversight of an independent body through periodic audits,<sup>27</sup> information sharing, and a complaint mechanism.<sup>28</sup>”*

WSR programs aim to eliminate root causes of forced labour, such as worker fear, vulnerability, and a lack of worker voice. Post-WRO remediation in this case would open the door to addressing the ILO forced labour indicators relevant for CBP, and, beyond that to a create a transformative system to ensure fair working conditions for workers for the long term that could make Central Romana a model for other companies in the Dominican sugar cane industry to follow. Time will tell if this ambitious project is possible.

<sup>26</sup> Worker-Driven Social Responsibility Network, *What is WSR?*, <https://wsr-network.org/what-is-wsr/>.

<sup>27</sup> There is growing consensus in the human and labour rights community that traditional one-time social audits that are not worker-driven are often incomplete and misleading snapshots that tend to miss indicators of forced labour. See Business and Human Rights Resource Center, *BEYOND SOCIAL AUDITING*, <https://www.business-humanrights.org/en/big-issues/labour-rights/beyond-social-auditing/> (last visited April 10, 2023). Studies have shown that social auditors fail to identify evidence of labour and human rights abuses regularly. ELEVATE, a social auditing company that has conducted thousands of audits in more than 10 countries, “acknowledge[d] that social audits are not designed to capture sensitive labor and human rights violations such as forced labor and harassment.” Aruna Kashyap, *Social Audit Reforms and the Labor Rights Ruse*, HUMAN RIGHTS WATCH, (Oct. 7, 2020), <https://www.hrw.org/news/2020/10/07/social-audit-reforms-and-labor-rights-ruse>. Significant obstacles should be considered: worker fear and intimidation, threat of retaliation against workers, undocumented sub-contracting, and the pervasive falsification of records.

<sup>28</sup> *Id.*

## Conclusion

Section 307 of the United States Tariff Act of 1930 provides enormous and important opportunities for civil society to push companies towards sustainable and ongoing change in their supply chains. Civil society must rise to the occasion as soon as CBP issues a WRO. This is often a gargantuan task: for those of us based in the Global North – in the countries that have or soon will have import prohibitions like Section 307 – we must make sure to have close local partners, including unions; we must know what conditions need to change as a baseline; and we must be ready to invest vast amounts of time and resources into the work around sustainable remediation. No single program, process, or system will be successful across a variety of industries for which CBP issues a WRO. But focusing on the opportunity for remediation that import prohibitions like Section 307 create and having robust and ambitious plans in place for this long – but vital – part of the process can allow civil society to make these laws an even more effective tool for addressing forced labour in international supply chains.

In the case of Central Romana, which now faces a crossroads for if and how it will remediate the forced labour conditions CBP identified, there is an opportunity for strange bedfellows to work together toward remediation that transforms conditions for migrant and migrant-descendant *cañeros* and become an example in the industry. We hope that this will come to fruition in this case, involving the groups that advocated for a WRO in the first place, and that civil society and worker organizations advocating for WROs in other cases will also push the envelope for human and labour rights by envisioning and preparing for comprehensive forced labour remediation from the start.

The International Lawyers Assisting Workers (ILAW) Network is a membership organization composed of trade union and workers' rights lawyers worldwide. The core mission of the ILAW Network is to unite legal practitioners and scholars in an exchange of information, ideas and strategies in order to best promote and defend the rights and interests of workers and their organizations wherever they may be.