



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **“Selective Admission: Making Migration Work for Britain”**

### **Response by the Northern Ireland Human Rights Commission**

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,<sup>1</sup> advising on legislative and other measures which ought to be taken to protect human rights,<sup>2</sup> advising on whether a Bill is compatible with human rights<sup>3</sup> and promoting understanding and awareness of the importance of human rights in Northern Ireland.<sup>4</sup> In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding ‘soft law’ standards developed by the human rights bodies.
2. The Commission welcomes the opportunity to comment on the proposals by the Home Office for a points-based, managed migration system for the UK. The Commission wishes to be included in future consultations in this policy area, in particular as regards any legislation that may be drafted once the key policy issues are settled.

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<sup>1</sup> Northern Ireland Act 1998, s.69(1).

<sup>2</sup> *Ibid.*, s.69(3).

<sup>3</sup> *Ibid.*, s.69(4).

<sup>4</sup> *Ibid.*, s.69(6).

## General comments

3. The Commission acknowledges and welcomes the indication that the current proposals are designed to simplify the current overly complicated and bureaucratic system. This system is open to abuse not only by persons who wish to enter the UK irregularly, but also by employers of migrant workers and by immigration control staff. Any policy or legislative change that actually makes the migration system more transparent, objective and robust is to be welcomed. Nonetheless, the proposals in the consultation document raise a number of concerns. The document lacks detailed discussion of the plethora of complicated, intertwined and fundamentally important issues raised.
4. There are no human rights principles that prevent a state from introducing a managed migration system. Human rights principles require, however, that any system which may be introduced must be transparent and fair and take into consideration the international commitments of the state in question. In this context, we welcome the commitment expressed in the document to the creation of managed migration rules that will be compatible not only with the requirements placed on the UK by its membership of the European Union, but also with the UK's other international obligations.
5. While the determination of migration policy is primarily within the scope of action of the executive and Parliament, this does not mean that international human rights obligations assumed by the UK are not applicable in the determination and practical application of policy in this field. The (former) European Commission on Human Rights summarised the situation as follows:

... under general international law a State has the right, in virtue of its sovereignty to control the entry and exit of foreigners into and out of its territory, and... a right or freedom to enter the territory of [a State] is not as such, included among the rights and freedoms guaranteed in [the European Convention on Human Rights] ... however, a State which signs and ratifies the European Convention on Human Rights must be understood as agreeing to restrict the free exercise of its rights under general international law, including its right to control the entry and exit of

foreigners, to the extent and within the limits of the obligations which it has accepted under that Convention.<sup>5</sup>

6. The Commission has therefore considered the ECHR compatibility of the proposals. There are a range of other international obligations assumed by the UK which impact upon the rights of migrant workers. A full examination of these obligations is beyond the scope of these observations. Individual points are dealt with below as they arise.
7. There is also one highly relevant treaty to which the UK is not yet a party. This review represents an opportunity for the UK to place itself in the vanguard of the protection of the human rights of migrants and their families. The signature and ratification of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families would make the UK a leader in this area amongst industrialised countries. In the interim, the state should avoid introducing policy or legislation that runs directly counter to the principles enshrined in the Convention. The Commission would, in particular, draw attention to the provisions of the Convention relating to the transfer of funds by migrants (Articles 32 and 47), access to social rights such as housing (Article 43) and access to education (Article 45), as the consultation document has unsatisfactory treatment of the need to secure these rights to all migrant workers.
8. Issues of concern to the Commission include: (i) the tier system; (ii) the consequences for sending countries of the emigration of highly skilled workers; (iii) the use of biometric and other technologies in migration management; (iv) the proposals not to allow appeals against decisions; (v) the lack of discussion of the criteria to be used to secure an objective system; (vi) proposals for the introduction of bonds and (vii) the particular context of Northern Ireland. The Commission also has some concerns of a more general nature which are set out below.

### **(i) The tiered system approach to migration**

9. The Commission is concerned that entering the UK on a particular 'tier' of the managed migration system may be determinative of the professional development of migrant

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<sup>5</sup> Application no. 434/58, *X v Sweden*, Yearbook Volume 2 (1958/59) at page 372.

workers and, most importantly, to their future immigration status, including the opportunity to stay permanently in the UK. The use of the word 'tier' connotes some form of hierarchical or merit- or financial capacity-based determination of the basis on which a person is resident in the UK. This could stigmatise migrants in the 'lower' tiers. It is recommended that an alternative form of designation of the different statuses of migrants be used to avoid such pejorative associations. The Commission would prefer a situation where no distinction was made between the different groups of immigrants, so that the need for different terminologies did not arise at all.

10. The primary concern of the Commission is in relation to the proposed 'Tier Three' workers. The Commission is concerned that the creation of such a 'tier' (or group) of workers, who would largely be from less developed countries and who would have limited access to information and advice, could result in a situation where the rights of workers of this 'tier' (group) are exposed to risk. This vulnerability could be exploited by an undue focus on such workers as a collective group to be recruited and managed by private contractors, rather than on their inherent nature as human beings with rights and obligations. The Commission is particularly concerned that migrant workers in 'tier' three would be subject to exploitation by unscrupulous employers. Certain aspects of the scheme as set out in the consultation document may serve to facilitate such exploitation. For example, the auctioning of work permits may create a situation where the fees paid by an employer are recouped from a person's earnings. The proposal (at paragraph 6.20) to allow operators to control the payment of earnings and to control the person's access to those wages is extremely susceptible to exploitative conduct such as improper deductions or withholding of salary. It also raises issue as to compliance with the right to peaceful enjoyment of one's possessions, as guaranteed by Article 1 of Protocol No. 1 to the European Convention on Human Rights.
11. The UK may wish to facilitate persons in working here for a defined period of time, primarily to meet requirements for particular forms of labour within the economy. Tangible, long-term benefits can accrue to both the individuals concerned and the UK economy. However, it should be recalled at all times that migrant workers enjoy a wide range of human rights. The consultation does not state whether it is intended to seek to limit

- or otherwise restrict the rights of such migrants. Issues such as the terms of their access to healthcare and other rights are not dealt with in the consultation document. In addition, the Commission is not convinced of the merits of the proposal (at section 6.21) to limit the rights of 'tier three' migrants' to professional development and progression without leaving the UK and having to apply for re-entry on a 'higher tier'. This appears to be an unnecessarily restrictive approach.
12. The Commission is concerned that an unbalanced focus on the economic aspects of migration, to the detriment of the human dimension, might foster a culture where migrant workers are seen solely as economic units. All persons lawfully on the territory of the UK, whether they are citizens or not, enjoy essentially the same rights, with a few exceptions. For example, a 'tier three' migrant would enjoy the same rights as a UK citizen in relation to the criminal justice system, right to peaceful enjoyment of their possessions, etc. The Commission would welcome a clear commitment to maintain this in the consultation document.
  13. It is likely that problems will arise when the permission of 'tier three' migrants to remain in the UK expires and they are called upon to leave. Some may have established strong connections with the UK and may wish to stay. A person may have, for example, married or formed a partnership with another person here. The Commission considers that such migrants should, at a minimum, have access to a procedure to apply to stay in the UK on a more permanent basis. A set of clear, objective criteria, could be introduced to decide upon such in-country applications.
  14. Another potential issue is that the situation in the migrant's country of origin may have deteriorated in the meantime, thus giving rise to a situation where a migrant admitted under the points scheme may be forced to seek asylum in the UK. In such a situation, the forced return of a person to such a country may raise issues under Article 3 of the European Convention on Human Rights (where there is a danger of inhuman or degrading treatment or punishment). This Article could also be engaged where a person undergoing medical treatment is to be returned to a country where such medical treatment is unavailable<sup>6</sup>. A

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<sup>6</sup> See *D v United Kingdom*, decision of the European Court of Human Rights of 2 May 1997.

deportation of a person who had developed close personal ties with others in the UK could raise issues under Article 8 of the Convention.<sup>7</sup> Issues could also arise in relation to other rights protected by the Convention and other international human rights instruments.

## **(ii) Consequences for sending countries**

15. The acknowledgement in the consultation document of the impact of labour recruitment upon sending countries is welcomed. The Commission recommends that further thought be given to the consequences for sending countries of the departure of skilled workers, who may have been trained at high cost to that country, and whose departure may impact negatively upon the sectors where they were previously employed. This could impact directly on the access of sending-country populations to fundamental rights, for example if the health care sector is drained of skilled personnel.
16. It cannot be acceptable for a highly developed country to import workers trained at the expense of a less developed country without regard to the social and economic repercussions. There are obvious ways in which international aid programmes could be deployed to mitigate such impacts, and with the emergence of fairly clear patterns of labour migration it should not be difficult for government to join up these two policy areas. The Commission would welcome further information on the types of initiatives planned to support education, training and working conditions in communities affected by labour migration.

## **(iii) Use of biometric technology**

17. The consultation document makes frequent reference to the use of biometric and other technologies in migration matters. While these technologies do not of themselves violate human rights standards, the Commission has concerns regarding their use, in particular the scope for inappropriate exploitation of information collected, the potential for discriminatory treatment in relation to persons who are not UK citizens and the negative impact upon the rights of the individual that this would cause. In particular, the Commission is concerned that the requirement for biometric

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<sup>7</sup> See *Razgar and Nadarajah v Secretary of State for the Home Department* [2003] EWCA Civ 840.

data seems to apply only to migrants from outside the EU/EEA. The use of information held on persons subject to immigration control (as for all persons) must be strictly regulated and be subject to effective oversight. Appropriate safeguards are necessary, such as limitations on access to data by other bodies, rights of access of individuals to information held about them, and the right to have inaccurate or inappropriate information amended.

#### **(iv) Lack of any right of appeal**

18. The consultation document proposes that there should be no right of appeal against unfavourable decisions on applications (in section 1.9). This could lead to a situation where a person is improperly denied a work permit, without any right to challenge such a decision. For example, the hypothetical case of Ragesh on page 26 of the consultation document highlights some of the difficulties that could arise in practice. The assessment of Ragesh's 'commitment' to Scotland and its implications for his application to remain as a 'Tier Five' worker is by its very nature a subjective exercise. The lack of a right of appeal against any negative decision means that an inappropriate denial of a work permit to Ragesh would lead to his forced removal from the UK. In effect, for the system to work fairly, 100 per cent of all decisions must be made correctly.
19. The Commission is aware that there may be a tendency on the part of many unsuccessful applicants to lodge appeals, and that if this is not provided for it could lead to delays in the system. Such a state of affairs is, of course, undesirable for a number of reasons, not least the effect of such delays on new applicants and the strain it places on the migration system. The Commission considers that it would be appropriate to have in place at least a limited right of appeal, where a challenge could be made alleging, for example, that a decision had been taken in ignorance of material evidence. Time limits for the lodging and processing of appeals could be set to allow for the speedy resolution of such appeals.

#### **(v) Lack of objective criteria**

20. The consultation paper does not put forward detailed criteria for determining which categories of persons and with which skills should be eligible to enter the UK under the scheme. This may

well be due to the fact that the consultation paper is an initial document and such matters are beyond its scope, or envisaged as subject to reappraisal from time to time. However, the determination, publication, application and review of such criteria are critical to the transparency and success of the scheme. There should be consultation, in detail and without delay, as to what is proposed for the initial criteria. This should engage civil society groups, both in the UK and in a range of sending countries, as well as employers, industry, trade unions and other key stakeholders.

#### **(vi) Bonds**

21. The proposed use of bonds creates an inappropriate association of sanction and punitive action on the part of the administrative authorities. This could lead to a situation where migrant workers are stigmatised as being under controls akin to bail, despite their having committed no wrongdoing whatsoever. This could have the effect of reinforcing certain existing negative stereotypes of migrant workers in society.
22. Other concerns are more practical, such as the effect on migrants of the inability to dispose of their limited capital, which could expose them and their families to poverty or restricted opportunity. The question of how persons from less developed countries would raise the funds needed to pay a bond is also problematic, and it could force them to become indebted or deter them from migrating, thus depriving them and UK society of the benefits of managed migration.
23. The proposals appear to focus on countries where there is a higher incidence of irregular migration, which are often the poorest countries. This could result in a situation where those with the least access to funds are required to pay comparatively large sums of money, with no interest payable, to remain in the UK. The provisions regarding repayment of the bond are unclear and the investigations required to establish whether a person has returned to his or her country of origin could become very time-consuming, expensive and add a further layer of bureaucracy to the system.
24. The Commission would welcome more detailed information on the evidential requirements for establishing whether a person left or is planning to leave the UK. For example, it is proposed

that a 'one-way' ticket to the country of origin is not going to constitute enough 'proof' that a person is indeed going to leave the country. It is proposed that a documentary proof of their taking up employment in the country of origin would be. Considering that it is often the limited opportunity in the labour markets of countries of origin that motivates migration, for many returning migrant workers gaining and proving employment may be impossible. Moreover it is proposed to charge migrants for the costs of administering this system. The necessity to provide bonds against departure and to cover costs of any procedures in connection with administering the bond system will almost certainly prevent many migrant workers from accessing the UK labour market.

25. In conclusion, the Commission opposes the use of bonds or any similar system. A modern migration management system should be able to ensure a high degree of compliance with the applicable legislation and other applicable rules. The need for bonds is not demonstrated.

#### **(vii) The particular context of Northern Ireland**

26. The consultation paper does not make any reference to particular circumstances of Northern Ireland. Immigration is not a devolved matter so the Commission presumes that any changes to the current system would also apply in Northern Ireland.
27. Northern Ireland does have a number of special characteristics which warrant careful consideration. It has a large, uncontrolled border with another member state of the EU, the Republic of Ireland, with which the UK has a Common Travel Area. The practical consequences of this should be taken into account in the creation of any policy.
28. Northern Ireland has, until quite recently, been a source of migrant workers rather than a destination. However, this situation has changed. The nature of migration to Northern Ireland is in many respects different from that applying in other parts of the UK. For example, large numbers of migrants tend to be concentrated in particular localities or industries (e.g. agri-food workers in Dungannon or Portadown). These phenomena raise particular opportunities and challenges which require different solutions from different parts of the country.

29. The consultation document makes reference (at section 3.8) to the special needs of Scotland. The Commission considers that a focus on the particular needs of Northern Ireland, including the establishment of a dedicated Skills Advisory Body, is necessary.

## **Cross-cutting issues**

### *Rights-based approach*

30. The Commission urges the Home Office to place human rights at the core of migration policy and practice. A rights-based approach will bring the most benefit to individuals and society through increased opportunity, both in economic and development terms and in human terms. The Commission considers that examples of the application of a rights-based approach in this field include ensuring a transparent process with the right to appeal against unfavourable decisions, and a focus on particularly vulnerable groups such as women, children and those from disadvantaged backgrounds.

### *Undue focus on economic benefits*

31. Another issue of concern is that the consultation document focuses unduly on the economic benefit to the UK of migration. The Commission recognises and appreciates that this is a key concern, as increased prosperity benefits the development of all persons in the country. However, economic issues should not be the dominant focus of migration policy, to the exclusion of other concerns. The Commission would welcome a stronger focus on the benefits to the individual through migration, through the huge range of opportunities presented by working and living in the UK. Such a focus, as opposed to the undue emphasis on individuals as economic units, would foster a stronger respect of the human rights of migrants. In addition, it would highlight and value the developmental benefits that flow not only to migrants themselves and their home countries, but also to the UK.

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