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Research Report

Diversity in the labour market: The legal framework and support services for migrants entitled to work in the United Kingdom

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Diversity in the Labour Market: The Legal Framework and Support Services for Migrants entitled to work in the United Kingdom

Alison Hunter

HWWI Policy

Paper 3-5
by the

HWWI Research Programme
Migration Research Group

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VolkswagenStiftung



Diversity in the Labour Market:

The Legal Framework and Support Services for Migrants entitled to work in the United Kingdom

by

Alison Hunter

This is an expert report on the role of regulatory frameworks affecting the incorporation of migrants in the UK labour market, commissioned as part of the study 'Diversity, Integration and the Economy' in collaboration with the Migration Research Group, Hamburg Institute of International Economics, and funded by the Volkswagen Foundation.

Abstract

The paper sets out the legal and regulatory framework which applies to migrants who are legally in the United Kingdom and who have the right to work for at least one year. The first section looks at the rights and restrictions conferred by immigration law which is the basis for considering whether a migrant has the right to work in the UK. The paper then goes on to look at the problems migrants face accessing work and their rights under UK employment law. It also sets out the rights in areas which are closely connected to employment, such as education. The final section reviews the provision available to migrant workers to better their work prospects. The paper argues that the legal framework of immigration law clearly favours highly skilled migrants who, however, are being given little support to access the labour market. Provision of support services is clearly concentrated on refugees and those with humanitarian or discretionary protection.

Author

Alison Hunter, was educated in Switzerland, Germany and the United Kingdom. She read law with French law at King's College, London and went on to do a Masters degree in Human Rights Law at University College, London. After her training at Freshfields, she joined Wesley Gryk Solicitors in 1997 as a solicitor and became a partner at the firm in October 2006. Her practice covers all aspects of immigration and nationality law, with particular emphasis on EU free movement law, asylum and human rights law. She maintains close links with German lawyers and academics working in the field of immigration. She was formerly a visiting lecturer for immigration law at Westminster University and the University of Victoria, Canada and has been a Management Committee Member of the Centre for Advice on Individual Rights in Europe and a board member of the Immigration Law Practitioners' Association.

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GLOSSARY

Accession countries: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, Slovenia.

A8 countries: The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic, Slovenia.

Common Travel Area: the United Kingdom, Ireland, the Isle of Man and the Channel Islands.

Contributions based: Benefits which are only payable if the claimant has paid sufficient national insurance contributions.

European Economic Area: includes the countries of the European Union plus Iceland, Liechtenstein and Norway. Swiss nationals have the same free movement rights as EEA nationals.

Habitually resident: The general habitual residence test is as follows:

- whether a person is habitually resident is a question of fact;
- to become habitually resident, the claimant must have a settled intention to remain in the Common Travel Area and must have been in the United Kingdom for an appreciable period;
- usually the appreciable period will be between one and three months.
- no minimum period is required; more important is the permanent change in the claimant's circumstances. The following are factors taken into account:
 - place of the claimant's main centre of interest,
 - the length and continuity of residence,
 - the length and purpose of any absence for the previous country of residence,
 - the nature of employment in the previous country,
 - the claimant's intentions.

Indefinite leave: leave to enter or remain in the United Kingdom without any time limit.

Means tested: Benefits which are paid based on lack of financial resources and savings below a prescribed limit.

Non-means tested: Benefits which are paid regardless of the claimant's income level or savings and regardless of previous national insurance contributions.

Ordinarily resident: the place where somebody is normally living for the time being. A person cannot be ordinarily resident if they are not legally in the United Kingdom, however the reason for being in the United Kingdom is irrelevant. It is not an immigration status but is used in relation to access to the National Health Service and some other benefits.

Public funds: The term used in the Immigration Rules (para 6 HC395) to describe the welfare benefits which applicants cannot claim if they are prohibited from doing so by their immigration status. 'Public funds' are income support, income based jobseeker's allowance, social fund payments, accommodation from a local authority as a homeless person, allocation of housing accommodation from the housing register of a local authority, housing benefit, council tax benefit, state pension credit, child tax credit, working tax credit, child benefit, attendance allowance, carers allowance, severe disablement allowance and disability living allowance. 'Public funds' do not include NHS treatment, state education or community care services.

Right of abode: being free of immigration control and able to enter the United Kingdom at any time after any period of absence. All British citizens have the right of abode. Commonwealth citizens who were born before 1 January 1983 and had a parent in the United Kingdom (when the father is the parent he must have been married to the mother and women who were Commonwealth citizens before 1 January 1983 and who were married before that date to a man who was born, registered or naturalized in the United Kingdom or who is a Commonwealth citizen with a parent born in the United Kingdom as above.

Right to reside: The following have the right to reside:

- British citizens and citizens of the Republic of Ireland;
- those with indefinite leave;
- those with limited leave (although note that many will be excluded from welfare benefits as their immigration status will not allow them recourse to public funds);
- EEA nationals exercising EU rights of free movement;
- A8 nationals working in the United Kingdom who are registered or exempt from registration
- family members of the last two categories who benefit from free movement rights.

(A8 nationals who are seeking work, A8 nationals who are working but not registered and EEA nationals not exercising free movement rights do not have the right to reside).

Settled status: see indefinite leave.

Subject to immigration control: Term used for to define those not able to access certain welfare benefits (s115(9) 1999 Act). The following are subject to immigration control:

- those who need leave to be in the United Kingdom but who do not have it;
- people with leave but with a condition not to have access to public funds;
- people given leave as the result of a maintenance undertaking;
- people who only have leave as a result of paragraph 17 of Schedule 4 of the 1999 Act (see JCWI p 1254f for further discussion on this relatively small group of people).

EEA nationals are not subject to immigration control, even if they are not exercising rights of free movement.

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The Legal Framework and Support Services for Migrants entitled to work in the United Kingdom

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I. Introduction

The aim of this paper is to set out the legal and regulatory framework which applies to migrants who are legally in the United Kingdom and who have the right to work for at least one year. It will also outline the support services available to these migrants. Not only does it address those migrants who come to the United Kingdom (UK) to be economically active but also those who enter in a different capacity and are granted the right to work, such as students or dependants.

The current debate and changes in the policy regarding managed migration are the background to this paper which sets out the position migrants entitled to work find themselves in at the moment, once legally in the UK. The paper is not concerned with the merits of different methods of entering the UK, but rather the regulatory system of entering the UK and the system once a migrant is in the country.

After its initial focus on asylum in its first term in office, the Labour government carried out a review of all immigration policy after the 2001 general election. The result was the White Paper, 'Secure Borders, Safe Haven – Integration with Diversity in Modern Britain' published in February 2002. One of the main focus points of the paper was the need to ensure that any immigration policy put in place, took into account the needs of Britain, including the interests of British business. The White Paper set out that, 'Migration is an inevitable reality of the modern world and it brings significant benefits. But to ensure that we sustain the positive contribution of migration to our social well-being and economic prosperity, we need to manage it properly and build firmer foundations on which integration with diversity can be achieved'.¹

The new term used for the migration policy was 'managed migration' and the then Home Secretary, David Blunkett perceived that as long as Britain was benefiting from the economic migrants, there was no need to prevent their access to the UK. The paper led to the policies for highly skilled migrants and, to a more limited extent, for less skilled workers, the so-called 'Sector Based Scheme'.

The continuation of this policy to manage migration can be seen in the five year strategy for asylum and immigration policy, 'Selective Admission: Making Migration Work for Britain', published in February 2005. The proposals in this document focus on the economic need for migrant labour and the need to deal with illegal working. The current policy of the government clearly shows that the focus should be on giving priority in access to jobs to the existing workforce (which includes most people in the European Union). In addition, the

cost of migration should not be borne by the taxpayer (therefore there are restrictions on access to public funds for most categories of migrants who are allowed to work and the fees for applications for entry clearance and to the Home Office, were increased to cover actual costs). Perhaps most poignantly, the proposals were intended to allay public concerns about immigration numbers, a debate which frequently confused various types of immigration.

If implemented, the current managed migration categories will be replaced with a five tier system whereby applications are assessed using a points system. This would create a completely different method of assessing who should be allowed to come to the UK to work, than is currently in place. The rationale is to reduce complexity from the more than 80 current immigration categories and to significantly reduce or end low skilled migration from outside the EEA. It is likely that the scheme will be introduced gradually over a long period of time and many of the restrictions set out in this paper will continue to affect migrants applying to come to the UK. To assess where the skills shortages are within the UK, a new Skills Advisory Board would be set up to provide a comprehensive analysis of the skills shortages. The five tiers which are being proposed are as follows:

- Tier 1 – highly skilled individuals;
- Tier 2 – skilled workers with a job offer;
- Tier 3 – low skilled shortage occupations;
- Tier 4 – students;
- Tier 5 – other temporary categories.

It should be noted that Work Permits UK, which is the government body currently responsible for making decisions about work permits, will have a greatly reduced role, as the presumption is that the assessment of whether somebody qualifies, will be made by entry clearance officers in Embassies abroad.

To try to prevent illegal working, the proposal is to have a civil penalty for employers for employing a person not entitled to work in the UK and a criminal offence of knowingly employing such a person (rather than the single offence which currently exists). More details have now been set out in a document entitled 'A Points-Based System: Making Migration Work for Britain'.²

In light of the government's recent pronouncements to make 'managed migration' a key element of its immigration policy, the rights of migrants once in the UK and the restrictions and barriers in relation to work which they face, are of particular importance when trying to

assess the success and changes of policy developments over the past years. The paper will review the following areas: firstly, the categories of people who are regulated as migrants within the UK, the legal framework of their immigration status and the rights in relation to work which they gain from their status. Secondly, employment issues including access to work and the rights that people legally working in the UK benefit from. Thirdly, the restrictions and problems migrants face in work related areas: education, benefits, access to work, health and housing. Finally, the paper will look at services which migrants can access to obtain work, train or enhance their prospects at work.

2. Migrants entitled to work in the UK: the rights and restrictions conferred by immigration law

The framework of law which regulates legal migration in the UK today, finds its roots in the Immigration Act 1971. This came into force on 1 January 1973 and was intended to put an end to major permanent primary migration to the UK, particularly from Africa, the Indian subcontinent and the Caribbean. The legislation has subsequently been amended by the Asylum and Immigration Appeals Act 1993, the Asylum and Immigration Act 1996, the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants) Act 2004.

The Immigration Rules (rather than the Acts themselves), set out who should be given leave to enter or remain in the UK. They also set out the length of time that will be granted to an individual and the conditions to be imposed. The Home Office was granted the power by the 1971 Act to make the Rules and when new Rules are proposed they simply need to be put before Parliament where they are subject to the negative resolution procedure. This means that new rules come into effect straight away, unless Members of Parliament call for a debate. At that debate the Rules cannot be amended but have to be accepted or dismissed in their entirety.

In addition to the Rules, guidance is issued to caseworkers at the Home Office (Immigration Directorate Instructions) and to entry clearance posts (Diplomatic Service Procedures). These set out how the Rules should be applied.

The categories of migrants who can work are set out below. Each section addresses the criteria that need to be fulfilled to qualify in a certain category, the conditions which are imposed and if or when an individual can apply for indefinite leave to remain (ie permanent

residence). It should be noted that migrants will be able to apply for citizenship as soon as they have completed five years³ of legal residence and had one year of indefinite leave to remain. (If they marry a British national this is reduced to three years).⁴

2.1 Rights gained by migrants under European law

European nationals working in the UK make up the largest group of migrant workers. The relative ease with which they can take up employment is in contrast to nationals outside the EEA and Switzerland. The following sections discuss their rights in more detail.⁵

2.1.1 EEA nationals and their family members (including third country nationals)

Nationals of the European Economic Area (EEA) are entitled to work in the UK on the basis of their nationality. The EEA is made up of the EU countries⁶ and, Iceland, Liechtenstein, and Norway. Nationals of the new member states (the so-called 'A8' states)⁷ are subject to some further restrictions as set out below. The so-called A2 states (Bulgaria and Romania) face very restrictive rights to enter the labour market when compared with other EEA nationals and again are discussed in more detail below. Swiss nationals on the other hand enjoy the same rights as EEA nationals, following an agreement on the free movement of persons between the EU and Switzerland. Under the provisions of UK immigration law, Swiss nationals are treated in the same way as EEA nationals.

EEA nationals have the right to enter and reside in the UK as long as they are exercising a so-called 'Treaty right'. This refers to the European Community Treaty which sets out that nationals of the Member States have a right to work or be self employed in another Member State. These individuals are not subject to immigration control and do not require permission to work.

There is no definition of work within EU law but the European Court of Justice has ruled that the essential element of being a 'worker' is employment for a period of time in the provision of services for and under the direction of another in return for remuneration (*Lawrie-Blum*)⁸. The court has also ruled that provided the work is 'effective and genuine', as opposed to 'marginal and ancillary', the person can benefit from free movement rights. So in the case of *Levin*⁹, a person who was working part time and earning below the social security threshold, still qualified as a worker. EEA nationals are therefore entitled to exercise minimal economic activities which entitle them to remain in the UK. The reason why a worker uses their right of free movement is also irrelevant. So for example, an EEA national can use the right to work purely to gain the benefit of family reunification, if they so

please. The only reasons for which they are allowed to be excluded are on the basis of public policy, security or health.

In addition EEA nationals are not required to satisfy the immigration authorities that they can support and accommodate themselves without recourse to public funds. They will also be eligible to claim benefits as long as they fulfil the qualifying conditions.¹⁰

EEA nationals looking for work or who become involuntarily unemployed and people who stop their economic activity because they become temporarily incapable of work due to illness or an accident do not lose their right to remain in the UK.

The right of EEA nationals and Swiss nationals to work is established purely on the basis of their nationality. However, if they require proof of the right to work and reside in the UK, it is possible to apply for a residence permit from the Home Office which is issued for five years and has only a declaratory status of the individual's status in the UK.

There are a limited number of jobs which are not open to these nationals in the public sector and are jobs which involve the exercise of discretion over British citizens, which is conferred by an act of Parliament.¹¹

Family members of EEA nationals and Swiss nationals who are third country nationals are entitled to the same access to the labour market as the EEA national and this right is not dependent on the nationality of the individual. Family members include the following: spouse and civil partner; children under 21 and dependent children over the age of 21 (of the EEA national or their spouse or civil partner); dependent parents and grandparents.¹² In addition the UK has a duty to facilitate the entry of other dependants who have lived under the same roof as the main applicant in their last country of residence. These people would also automatically gain the right to work in the UK.

As proof of this right, a third country family member can obtain a residence document which would be granted in line with the main applicant's residence permit. This in turn will enable the family member, in practice to prove his or her right to work.

Following the implementation of Directive 2004/38 within the Immigration (European Economic Area) Regulations 2006, individuals who fulfil the criteria set out below, will be able to reside in the UK permanently:¹³

- people who have resided in the UK exercising a Treaty right for a continuous period of five years and their family members; and
- a worker or self employed person who has ceased activity and their family members;

In addition, there are categories of people who gain rights to remain in the UK from EU law (Commission Regulation 2004/38) which has also been implemented in the 2006 Regulations. These include the following:

- people who have been continuously resident in the UK for at least three years and who have been employed in the UK or any other EEA state for the last 12 months and who have reached pensionable age;
- people who have stopped working because they are permanently incapable of work because of an accident at work or an occupational disease which entitles them to a state disability pension;
- people who have stopped working because they are permanently incapable of work and who have been continuously resident in the UK for at least two years;
- family members of people in the above categories; and
- family members of an EEA national who dies during his working life after having resided continuously in the UK for at least two years, or whose death results from an accident at work or an occupational disease

2.1.2 A8 nationals

On 1 May 2004, the European Union was enlarged by a further ten members. The Accession Treaties which brought about the enlargement, made special provision for the free movement of workers for a period of seven years. The existing member states had the right to restrict the employment of workers from the Central and Eastern European states. These are known collectively as the A8. Cyprus and Malta were not included and they benefit from full Treaty rights in the UK.

For the first two years after accession, Member states are allowed to apply so-called 'national measures' to regulate the access of A8 nationals to the labour market. In the next three years, states can continue these measures but must notify the Commission of their intention to do so. In the final two years, member states are allowed to continue with national measures but only if 'there are serious disturbances of its labour market or threat thereof' and the measures must also be notified to the Commission.

The UK government, although not having imposed substantive restrictions on A8 nationals, has imposed procedural requirements. A8 nationals can come to the UK to look for work but must register under the Workers' Registration Scheme within one month of starting work. This incurs a fee of £70. If the A8 national takes a second job or changes employment, he must again register with the authorities but will not be liable for a second fee. Unlike other EU nationals, A8 nationals are not eligible for most benefits within their first year in the UK.

If the individual does not register within the time limit, the employer commits an offence of hiring an illegal worker, although the individual does not commit an offence.

There are exceptions for the need to register, including being an A8 family member of a non A8 EEA or Swiss national or having worked in the UK for 12 months or more. In addition, self employed individuals do not have to register but can apply directly to the Home Office for a residence permit to obtain proof of their right to reside in the UK.

2.1.3 A2 Nationals

Despite entering the European Union on 1 January 2007, people from Bulgaria and Romania have very limited rights to come to the UK to work. The UK, unlike for nationals of A8 countries, invoked its right to restrict access to the labour market for at least five years.

To work in the UK, a Bulgarian or Romanian national would either have to show that they have already completed 12 months of continuous employment in the UK or they can obtain a Accession Worker Card. To do this they will need to show either that they are skilled and meet the criteria for the issue of a work permit (see below) or that they are in low skilled jobs in the food processing sector and meet the criteria of the Sectors Based Scheme.

A2 nationals who are self employed were already able to reside and work in the UK on a self employed basis but now do not need to make applications to the Home Office (although for evidential purposes they may want to). The type of work carried out is irrelevant (so for example, the applicant can work as a window cleaner or an IT consultant) and no investment of capital is required. What amounts to self employment has been controversial, particularly in the construction business when people are employed as contractors but often work exclusively for one employer for long periods of time. Neither the Inland Revenue nor the Home Office have an absolute definition of 'self employed' but will take the following types of things into account: how many people the self employed person works for; who pays tax

and national insurance contributions; who dictates the number of hours and times that are worked; who owns the assets used by the self employed person etc.

Applicants with an Accession Worker Card or who have been self employed will become eligible for indefinite leave to remain after five years.

2.1.4 The Association Agreement with Turkey.

The EC-Turkey Association Agreement does not give Turkish nationals rights per se to enter the UK. However, if a Turkish national has been admitted to the UK in a category that allows access to employment, then after completing a period of one year in employment, a Turkish national has the right to continue in the same employment for a further three years. On completion of the four years, the Turkish national is then free to take up any employment. It should be noted that the rules for admission and residence are not set out in the immigration rules or the EEA Regulations.

In addition, self employed Turkish nationals benefit from a stand still clause which means that their applications have to be treated under the Rules in place when the UK was bound by the Agreement, ie on 1 January 1973. These Rules were significantly less stringent than the current rules, in particular as they did not lay down a minimum investment (which in the current Rules is set at £200,000) or require employment of staff.

Entry clearance applications are currently only being dealt with under the current rules and there is a very high refusal rate (about 95%). Applications from within the UK are suspended pending a reference to the European Court of Justice to clarify which rules should apply.¹⁴

2.2 Migrants who have entered the UK specifically on the basis that they fall within an immigration category which allows them to come for work (either employment or in a self employed capacity).

All the migrants discussed in section 2.2 enter the UK for the purpose of working, ie it is the reason they are allowed to reside in the UK. All these categories have a condition stating that the migrant will not have recourse to public funds. Public funds includes housing and homelessness assistance, attendance allowance, child benefit, council tax benefit, disability living allowance, severe disablement allowance, carer's allowance, housing benefit, income

based job seeker's allowance, income support, social fund payments, working tax credit, state pension credit and child tax credit (for a full list, see Glossary). However migrants who are present for the purpose of employment (with an employer based in the UK) or self employed are allowed to use the National Health Service free of charge¹⁵ and migrant children have access to state schools. Most of the categories below allow the main applicant to bring their spouse and children under the age of 18. Where this is not the case it has been specifically mentioned.

2.2.1 Work permit holders

Work permits are issued to a specific employer for specified work. The largest number of work permits are issued in the category of business and commercial and in 2005, 90 515 work permits were issued (excluding dependants). For all types of permit discussed below, the salary or pay must reflect the rate applicable to the profession or sector in which the work is offered. In addition, all employers must comply with UK legislation in relation to tax and national insurance requirements, professional registrations if required, the Working Time Directive and the national minimum wage. Permits are issued either for the period of employment envisaged (ie the duration of the contract) or if permanent, for five years. A work permit holder can apply for indefinite leave to remain after five years.

The following looks at the various types of work permits which can be issued:

(i) Business and Commercial

These work permits are issued to UK based employers to allow them to fill a vacancy which they cannot fill with a so-called 'resident worker'. A 'resident worker' is a UK resident or an EEA national. This means that the job has to be advertised and can only be filled by a non UK resident or non EEA national, if there is no suitably qualified resident worker. There are some exceptions to this rule which are as follows:

- Intra-company transfer: an individual can be transferred to the UK from within a company where there is common ownership and the employee has been employed for at least six months.
- Board level post or equivalent
- Inward investment: an individual can be employed in the UK if it is essential to an investment project bringing jobs and capital to the UK.
- Short supply occupations: The authorities which issue work permits specify occupations which are in short supply in the UK. This currently includes for

example, a large number of jobs in the medical professions (doctors, nurses etc), vets, school teachers etc.

- Sponsored researcher: these are for people coming to the UK to do research and covers academics. The funding needs to be in place before an application can be made.

Work permits are not issued for low skilled or manual jobs. To be issued a permit, an employer must show that the person being recruited is skilled. This means he must have the equivalent of a UK degree level qualification, a Higher National Diploma level occupational qualification which entitles a person to do a specific job, a general Higher National Diploma level qualification plus one year's work experience doing the type of job for which the permit is sought, or at least three years' high level specialist skills acquired doing the type of job for which the permit is sought. This type of job should be a National Vocational Qualification (NVQ) level 3 or above. This is defined as requiring 'the application of knowledge in a broad range of varied work activities, performed in a wide variety of contexts, most of which are complex and non-routine. There is considerable responsibility and autonomy and control or guidance of others is often required'.¹⁶

(ii) *Sports and Entertainment*

This is a limited category and is intended for people who have already established themselves in their home country.

Sports people must be internationally established at the highest level in their sport and their employment must make a significant contribution to the development of that sport in the UK. Internationally established sports coaches may also qualify.

Entertainers who have performed at the highest level and have established a reputation in their profession and individuals or groups who are engaged to perform or do work which only they can do, will qualify for a work permit. In addition, companies of entertainers who have regularly performed together and toured overseas as part of an established production before coming to the UK can apply. This category would apply to orchestras, ballet corps or theatre productions.

Artists who are skilled in foreign arts that are rare or unavailable in the UK and can make a contribution to the arts, cultural relations and cultural awareness will also qualify, as will technical and support personnel whose work is directly related to that of an artist who

qualifies in his own right. The individual will need to be able to prove technical or other specialist skills.

(iii) *Training and Work Experience (TWES)*

Unlike the main business and commercial category, this permit is not to fill a vacancy but allows an individual to undertake training required for a professional qualification or a period of work experience. Unlike the business permits, the individual must have the intention to leave the UK at the end of the training and work experience. This is underlined by the fact that somebody who has had a TWES permit will need to spend at least a year outside the UK before being able to apply for a business work permit. The length of time increases to two years if the individual held a TWES permit for over a year.

The minimum skills threshold in this category is that the training or work experience must be at least NVQ level 3 and the individual must have an academic or vocational qualification at least at NVQ level 3 or equivalent in order to benefit from the level of training expected under TWES.

If the permit is for training, it is issued for the shortest time required to obtain the qualification. For work experience, the maximum duration is two years and this is not an immigration category which leads to indefinite leave to remain.

(iv) *Sectors Based Scheme*

This is a quota based scheme which was introduced on 1 May 2003. It initially allowed permits to be issued for low skilled jobs in the hospitality and food-processing sectors.

The scheme was completely halted for the hospitality industry in July 2005 and restricted in the area of food processing, after a review by the Home Office. Currently therefore, Sector Based Scheme permits are still issued for specified jobs such as fish filleters and packers, animal gut removers, meat bone breakers, extractors, cutters, packers and trimmers and mushroom processors. The reason given for the restriction of permits, was that after the expansion of the EU in May 2004 there were now enough workers who could fill low skilled positions and it was also considered that the scheme was being abused. The scheme was completely phased out in December 2006 although it has been retained in the field of food manufacturing for Bulgarians and Romanians.

Individuals have to be aged between 18 and 30 and must intend to leave the UK at the end of their permit. Permits are issued for one year. The individual must then leave the UK for one month before being able to reapply to come to the UK. Individuals are not able to bring dependants and this category does not lead to indefinite leave to remain.

2.2.2 *Employment without a work permit*

The immigration rules set out a number of occupations for which work permits are not required. In all the categories set out below, the migrant will need to obtain entry clearance in the specific category (rather than a work permit), have an intention to work full time in that particular capacity and not to take any other employment and be able to maintain and accommodate him or herself without recourse to public funds.

After five years of being in the UK these migrant workers can apply for indefinite leave to remain.

(i) *Ministers of religion*

Ministers are allowed into the UK to take up full time posts, if they can show that they have been working as a minister of religion for at least one year in the five years preceding the date of application or where ordination takes place as the sole means of entering the ministry, the individual can show that he is ordained and has completed one full time year of training.

The individual must work full time, seek no other employment, be able to maintain and accommodate himself and in addition be able to show an English qualification to show that he speaks English.

There are also provisions which allow missionaries and members of religious orders to enter the UK on a permit free basis.

(ii) *Representatives of overseas newspapers, news agencies and broadcasting organisations on long term assignments in the UK*

The permanent employment for individuals in this category must remain outside the UK. They must have been engaged outside the UK and be spending prolonged periods of work in the UK to qualify in this category.

(iii) *Sole representatives*

These are representatives of overseas firms who come to the UK to set up a branch or subsidiary for the overseas company. The representative must have been recruited abroad and must be senior enough to take decisions and negotiate on behalf of the company. The representative must be a full time employee and must not be a majority shareholder in the company.

(iv) *Private servants of diplomats*

To enter the UK as a private servant of a diplomat, an individual needs to show that he is over 18 and employed full time by a diplomat or the family member who forms part of the household of a diplomat.

(v) *Operational ground staff of overseas airlines*

Overseas airlines can transfer full time workers who work as managers for an airline based overseas which operates flights to and from the UK.

(vi) *Domestic worker in a private household*

A domestic worker has to be between the ages of 18 and 65 and be able to show that he was employed one year or more immediately prior to the application for entry clearance by the employer in his house. When coming to the UK, he must travel in the company of his employer, employer's spouse or civil partner, or minor child. Once in the UK he must not take up any other employment, must work full time and is not allowed recourse to public funds.

The Home Office paper on the points-based migration system, presented to Parliament in March 2006 does not specifically include domestic workers. However, shortly after the publication of that paper, the Immigration and Nationality Directorate (IND) presented their proposals to Kalayaan¹⁷, a campaigning and support group for domestic workers. The proposals would restrict domestic workers accompanying their employers to a maximum of 6 months leave in the UK, with no right to change employers and no route to settlement.

(vii) *Overseas government employees or a person employed by the United Nations or other international organisation of which the UK is a member*

Individuals in this category must have formal contracts of employment with the international body or overseas government, be working full time, not intend to pursue any further employment and not have recourse to public funds.

2.2.3 *Business/Work purposes*

Highly Skilled Migrants

This scheme has been in operation since January 2002 and allows for individuals with skills and experience to make an application to come to the UK. Unlike the work permit scheme, the individual does not have to have a job prior to coming to the UK. Individuals can then be employed or self employed once in the UK. The scheme was changed at the end of 2006 after a review carried out in July of that year. The implementation of the new scheme was controversial as there was a period of just under a month when the scheme was suspended with less than two days notice given to applicants.

The current scheme is based on the individual obtaining points in the following categories:

- academic qualifications (degree or above);
- income in the twelve months preceding the application (the calculation of the income is made by reference to the country in which the income was earned and where the applicant was resident);
- age assessment; and
- experience in the UK.

In addition, applicants need to demonstrate that they will be able to continue their career in the UK, can speak English, intend to make the UK their main home and can maintain and accommodate themselves without recourse to public funds. In 2005, the MBA provision was introduced which enables those who have completed MBA programmes at designated universities to score a large number of points virtually ensuring they will qualify under the criteria of the HSMP.

Applicants are initially granted two years leave in the UK. After the first period applicants can then apply for a further three years, after which they qualify for indefinite leave to remain.

Working holiday makers

This scheme was intended to allow young Commonwealth citizens to come to the UK to pursue a holiday and do some work.

In February 2005, the working holiday maker rules were amended back to those in place in August 2003. In the interim the rules had been more lenient and had allowed an individual to work for the full two years of leave that could be granted to remain in the UK. In addition, a working holiday maker could pursue and develop a career. A further amendment made in February 2005, was that potential applicants are no longer defined as Commonwealth citizens but are listed and can vary from time to time (although broadly speaking it remains open to nationals of Commonwealth countries).

The current rules state that:

- Working holiday makers are only to take work in the UK which is an incidental part of their working holiday;
- Working holiday makers must not spend more than 12 months of their stay in employment and must intend to spend the rest of their stay pursuing a holiday; and
- Working holiday makers must not engage in business or provide services as a professional sportsperson or entertainer.

A working holiday maker's visa is granted for a maximum of two years and does not lead to indefinite leave to remain. Once in the UK, a working holiday maker cannot switch to work permit employment other than if filling a position which is on the list of designated shortage occupations. Working holiday makers may still switch into innovators and the highly skilled migrant programme.

Individuals coming to the UK in this category are not allowed to bring their spouse with them, unless he or she qualifies in his or her own right. If the couple have children, they are only allowed to come to the UK if they are under the age of five.

Innovators

The innovator scheme was introduced in July 2002, with the stated aim of attracting outstanding entrepreneurs from overseas whose business proposals were to bring exceptional economic benefits to the UK. The scheme was set up with a particular

emphasis on hi-tech, science and technology based sectors to aid the development of e-commerce and other new technologies in the UK.

No minimum investment is required and third party funding is permitted. The applicant must maintain a minimum 5% shareholding of the equity capital in the business. Like the HSMP, the innovator scheme is based on point scoring. The categories are as follows:

- Personal characteristics – business experience and educational qualifications and references;
- Business plan viability – financial viability, commercial and technical viability, management plan;
- Economic benefit – the creation of two jobs and the amount of innovation

Applicants need to show that they will be able to support and accommodate themselves without recourse to public funds or employment. Initially the migrant will be granted two years leave. The extension, if they continue to fulfil the requirements and have established a successful business with two employees, will be for three years after which the applicant is eligible for indefinite leave to remain.

Business people

To be able to come to the UK to set up a business, individuals need to show that they have at least £200,000 capital of their own to put into the business. This has to be readily available capital and cannot be borrowed. The individual applying to come in this category must intend to be involved full time in running the business. They will not be able to engage in any other employment.

The migrant must have a controlling or equal interest in the business which is proportionate to the investment made in it (ie they must be genuine owners). In addition, two new full time jobs need to be created and they must be able to maintain and accommodate themselves and any dependants without recourse to public funds.

Business people are granted leave to remain for two years initially. Extensions are then granted for a further three years, after which the applicant can apply for indefinite leave to remain.

Writers, composers and artists

Writers, composers and artists who are established outside the UK and are primarily engaged in producing original work which has been published, performed or exhibited for its literary, musical or artistic merit can come to the UK. It should be noted that performers, such as actors, dancers or musicians do not qualify in this category.

Applicants must not intend to work other than in a self employed capacity in their field of expertise. They must also show that they have maintained and accommodated themselves from their resources without working other than as a writer, composer or artist and show that they can maintain and accommodate themselves and any dependants without recourse to public funds. Individuals in this category will qualify for indefinite leave to remain after five years.

Fresh Talent: Working in Scotland Scheme

This scheme, which has been in place since June 2005, enables non-EEA nationals who have successfully completed an HND, degree course, Masters or PhD at a Scottish university and have lived in Scotland during their studies, to apply to stay in Scotland for up to two years after completing their studies to seek and take work. It is administered by the Home Office and is likely to be extended to the rest of the UK in 2007.

To qualify the individual needs to show that they will be able to accommodate themselves and any dependants without recourse to public funds and show that they intend to work in Scotland. In addition, they have to have the intention to leave the UK after the two years, unless they are able to qualify at that point in time as a work permit holder, highly skilled migrant, business person or an innovator.

The scheme allows students who have just graduated to qualify or individuals who completed their studies up to one year before the application is made.

Science and Technology graduates

This scheme allows non-EEA nationals who have graduated from UK higher or further education establishments in certain physical sciences, mathematics and engineering subjects to remain in the UK for 12 months after their studies in order to pursue a career. It was brought into effect from the summer 2004 after a review entitled 'The Supply of People with

Science, Technology, Engineering and Mathematics Skills' showed that the UK was suffering a shortage of students in these fields.¹⁸

To qualify, individuals must have successfully completed a degree course (with second class honours degree or higher) or a course on a list of courses maintained by the Department for Education and Skills, be able to maintain and accommodate themselves and any dependants without recourse to public funds and intend to leave the UK at the end of their stay unless they are granted leave as a work permit holder, highly skilled migrant, business person or innovator.

This category was widened in early 2006, to allow anybody who has started a Masters degree or PhD on or after May 2006 in the UK, irrespective of the subject, to remain with the same conditions as set out above. Unfortunately, the name given to the scheme has rather confusingly remained the same.

2.3 Migrants who have obtained status in some other capacity but are granted the right to work as part of their conditions

A large number of migrant workers in the UK did not come into the country for the purpose of working but were granted some other immigration status which allows them to work. This section looks at the categories of people which fall into this group.

Students

Students who come to the UK to study for six months or more will be entitled to work for 20 hours per week during term time and full time throughout the holidays. Students are not allowed to engage in business, self employment or provide services as a professional sportsperson or entertainer. In addition, they should not pursue a career. Any position should therefore be temporary in nature. There are no statistics on how many students take up work but to give an idea of their likely significance in the labour market one only has to look at the statistics: in the financial year 2005/6, 194,872 new student visas were issued at entry clearance posts.

Students who are studying are allowed to have their dependants with them as long as they can show that they can support and accommodate them. Student status does not lead to permanent residence.

Family Members

Family members of individuals granted under the various immigration categories make up a significant number of the migrants working in the UK. To give an example, 45 520 dependants were admitted with work permit holders alone, in 2005. In addition, 14 280 husbands and 27 280 wives were admitted in the same year, to be with their spouses who were British or had indefinite leave in the UK. In all the categories set out above, except working holiday makers and the sector based scheme family members will be able to gain status on the basis of that of the main applicant. Family members include spouses, unmarried partners and dependent children under the age of 18¹⁹ and registered partners under the Civil Partnership Act.

The advantage for family members is that they are not caught by the restrictions placed on the main applicant. The spouse, for example of a work permit holder, has free access to the labour market unlike the main applicant who is tied to a particular employer. They are entitled to indefinite leave to remain when the main applicant is eligible. However, until they receive indefinite leave to remain, they are dependent on the immigration status of the main applicant to be able to remain in the UK.

Commonwealth citizens

British citizens have the so-called 'right of abode' which allows them to enter the UK at any time and to work. This also applies to some Commonwealth nationals. To qualify for the right of abode, individuals must have been citizens of a Commonwealth country when the British Nationality Act 1981 came into force (ie 1 January 1983) and either have a parent who was born in the UK or have married, before January 1983, a man with the right of abode.

Citizens of Commonwealth countries can also be admitted to the UK and are allowed to work, if they can show that one of their grandparents was born in the UK. They must intend to take or seek employment and be able to work. They are granted an initial two years and then three years, after which they can apply for indefinite leave to remain.

Refugee Status

Refugee status is granted to those who fall within the definition of refugee as set out in the Convention on the Status of Refugees, Article 1(A). This defines a refugee as an individual who is outside his or her state of nationality and due to a fear of persecution on the basis of

race, religion, nationality, political opinion or social group is unable or unwilling to seek the protection of his or her own state.

Individuals granted refugee status are currently granted five years leave to remain after which they can apply for indefinite leave to remain. Previously refugees obtained indefinite leave to remain as soon as they were granted status in the UK and it is as yet unclear whether there will be a significant active review after a refugee has had five years of leave which may lead to them having to return to their home country. Refugees have full rights to work and as can be seen below (section 3) are given some assistance to find work.

Humanitarian Protection

Humanitarian Protection is granted to individuals who do not fulfil the definition of a refugee but who would face a serious risk to life or person which would violate Articles 2 or 3 of the European Convention on Human Rights. This means that anybody who would face the death penalty, unlawful killing, torture, inhuman or degrading treatment or punishment will be given leave in the UK.

Humanitarian Protection is usually granted for five years after which an active review takes place by the Home Office. People with humanitarian protection have full rights to work. If it is decided that the individual continues to need protection he will then usually be granted indefinite leave to remain.

Discretionary Leave

Discretionary leave is granted for a number of limited cases, including medical grounds, if removing a person would result in them facing inhuman or degrading treatment; if removal would violate the right to family or private life (Article 8 ECHR); if removal of a minor child is not possible due to lack of adequate reception conditions in their country of origin; or if somebody can demonstrate compelling reasons why removal would not be appropriate.

Discretionary leave is usually granted for three years after which there is an active review procedure. Individuals with discretionary leave have full rights to work. If the person is still in need of protection, the most likely outcome is that a further three years of leave will be granted. An individual will become eligible for indefinite leave to remain after six years of discretionary leave.

3. Access to Work and Rights under UK Employment Law

This section looks at the problems migrants face when trying to obtain work. The second part sets out the most relevant rights migrants will have, once they have secured a job.

3.1 Access to Employment

Access to employment in the UK is first of all a matter of immigration status. As set out in the conditions of each category, being allowed to have free access to the labour market is only possible in certain migrant categories. So for example, a refugee, somebody with humanitarian protection or discretionary leave, EU nationals, people with indefinite leave to remain etc will have free access to virtually the whole labour market. Other migrant categories are far more restrictive: work permit holders for example are bound to work for a specific employer and if they seek new work their new employer needs to reapply for a work permit, as set out above.

In addition, there are more covert practices and regulatory restrictions which make it more difficult for migrant workers to access the labour market. One difficult issue for some migrant workers is simply understanding how the job market operates and how people obtain employment, including replying to advertisements, setting up a curriculum vitae etc. The following pose additional problems to migrant workers:

3.1.1 The correct documentation to obtain work

Section 8 of the Asylum and Immigration Act 1996 introduced a requirement for employers to undertake certain checks in respect of prospective employees. The checks are intended to make it harder for people who are not legally allowed to work to obtain employment and for the government to take action against employers who use illegal labour.

Section 8 sets out that it is a criminal offence to employ anybody who is not entitled to work in the UK or who is not entitled to do the work they are employed to undertake. To ensure that the employer complies with his obligations and has a defence if he were to employ an illegal worker, he will need to see particular documents. Acceptable documents are listed in two lists.²⁰ The first list sets out one document that will be sufficient to prove that a prospective worker is entitled to work. This includes a British passport, a passport endorsed with indefinite leave to remain etc. If this is not available two documents can be shown from list 2. This includes various combinations of documents.

The problem for migrant workers is often their lack of documentation. For example migrants may well not hold their own passport. Obtaining a national insurance number (one of the documents listed on list 2) can be difficult if the migrant does not have a job – leaving a jobseeker in a catch 22 situation. Long delays by the Home Office in issuing documents (particularly indefinite leave to remain papers after having had exceptional leave to remain) often means that migrant workers are left without papers to prove their status to their employers and at times this has led to their dismissal.

3.1.2 The recognition of qualifications²¹

In some sectors, particularly in areas such as education, architecture, health, law and accountancy, applicants for jobs will need to be able to show that they have the necessary qualifications before they can be offered the job.

Within the EU states, directives exist on equivalency of qualifications. So for example Council Directive 89/48 covers the equivalence of degree and higher level qualifications. Therefore, a teacher who is qualified in one Member State has the right to work in another Member State without having to requalify.

If the migrant worker is not from the EU, recognition of qualifications will usually depend on a list drawn up by the professional or government body. So for example, migrant workers who want to teach and whose qualifications are not recognised as equivalent would have to undergo a training programme for overseas teachers while working in schools to obtain full teacher status. Similarly nurses need to undergo ‘supervised experience’ for around six months. For non-professional qualifications, recognition is dependent on the individual employer.²²

The National Recognition Information Centre (NARIC)²³ provides information to individuals and employers about how qualifications gained overseas relate to those in the UK.

3.1.3 Restricted Jobs – Civil Service

Civil service jobs are open to anybody who is a UK citizen or somebody who holds dual nationality, one part being British. About three quarters of the jobs available are also open to Commonwealth citizens and EEA citizens. The quarter of jobs reserved for UK nationals are done so on the basis that they require allegiance to the state and include posts in the area of defence, foreign affairs, diplomatic service and the home civil service. As the Guidance notes set out the restrictions are ‘... to ensure that employees in specific posts

are sufficiently closely identified with the UK by descent, residence or otherwise to provide assurance of their loyalty and of their fitness, if necessary, to represent the UK overseas.’²⁴

3.2 *Rights of migrants entitled to work under UK Employment Law*

Once individuals fall within an immigration category set out above and have entered legal employment in the UK, they will be subject to UK employment law. The impact of employment law however is often different for migrants than for people with the right of abode because of the more circumscribed relationship they will often have with the person giving them employment, due to the conditions imposed on them by their immigration category. The underlying question is therefore not only whether migrant workers are covered by the same rights and standards as other workers but whether they can enforce these as readily as resident workers and whether they in reality suffer disproportionately because of their immigration status.

The following is the legislation in which migrants will find protection of their rights and which are discussed below: Employment Rights Act 1996; Race Relations Act 1976 and the Working Time Regulations 1998.

3.2.1 Statutory and contractual employment rights, including statement of employment terms

The Employment Rights Act 1996, gives employees the right to a written statement of employment terms. These include the names of the employer and the employee, the date the employment began, the rate of pay, the hours of work, any terms in relation to holidays and sickness, the job description, the employee’s place of work and details of the employer’s disciplinary and grievance procedures.

This is of particular importance to migrant workers as they are likely to have less information about their rights than resident workers and written statements of terms can therefore be of greater importance. The fact that it has to be in writing also enables the migrant to have it translated into a language he can understand.

Non-compliance on the part of employers can only lead to the remedy of an application to an employment tribunal to determine what the statement should have said and

compensation of up to four weeks pay. This is therefore in reality very little compulsion to ensure that an employer complies.

Migrants have the same statutory employment rights as resident workers. These include the following which are discussed below in more detail:

- the right to be paid the National Minimum Wage;
- the right not to be unlawfully discriminated against;
- the right not to have to work more hours and have holidays in line with the Working Time Regulations.

If they are employees (rather than a worker, see below), they will also benefit from the following rights:

- to be given statutory notice if their contract is terminated;
- unfair dismissal and redundancy protection;
- maternity and parental rights.

It should be noted that if a migrant worker is undocumented and therefore illegal, the basic rule is that the contract is illegal and unenforceable and the migrant will not have rights against the employer.

3.2.2 *Employment status: employee or worker?*

Whether an individual is an employee or worker has a significant impact on the employment rights that the individual enjoys. This is a distinction which is drawn in employment law and not immigration law. An employee is somebody who is employed under a contract of employment. A worker, on the other hand, is employed under a contract of services. So for example, many A2 self employed people will fall within the employment status of 'worker'.

Workers have more limited rights than employees and do not benefit from such rights as the right not to be unfairly dismissed, redundancy rights, minimum notice periods, maternity and paternity rights and implied contractual terms. They do still benefit from the right not to be discriminated against, the right to the national minimum wage, the right to be paid annual leave and are subject to the Working Time Regulations.

The test whether somebody is an employee was set out in the case of *Ready Mixed Concrete (SE) v Minister of Pensions and National Insurance* ²⁵ and establishes the following criteria to assess whether somebody is an employee:

- does the employee agree to work for the employer?;
- does the employee agree to be subject to the employer's control?;
- are the provisions of the contract consistent with it being a contract of employment?

The issue of whether the individual is an employee or worker is of particular importance to migrants as many are employed through agencies and therefore do not enter into direct contractual relationships with the people or company for whom they are actually carrying out the work.²⁶ They therefore have to establish an employer-employee relationship with the agency to enforce rights and the above test often means that insufficient control can be attributed to the agency or the potential employer for the migrant to argue he is employed. If they are considered to be self employed and providing services (as many people working in for example the construction industry are) they will not benefit from the same level of protective legislation which employees do.

3.2.3 *Establishing who the employer is*

This issue is closely linked with the above. Migrant workers frequently work through agencies or gangmasters and in such situations it is often not clear who the employer is. Is it the intermediary, the undertaking for which they are carrying out the work or neither of these two? If the migrant is not able to establish who the employer is, it obviously becomes even harder to enforce rights.²⁷

3.2.4 *National Minimum Wage*

All workers and employees in the UK have the right to the minimum wage under the National Minimum Wage Act 1998. This is currently set at £5.35 an hour for those who are 22 or over, £4.45 for those aged 18 to 21 and £3.30 for 16 and 17 year olds.

Given the concentration of certain migrant worker groups in lower paid employment and their greater vulnerability, the failure to respect the minimum wage means that they are disproportionately affected. This coupled with the fact that there are only limited penalties

for employers who do not pay the minimum wage means that non-compliance is of particular concern to migrant workers.²⁸

3.2.5 *Working Time and Holiday Entitlement*

The restriction of working hours and ensuring people were entitled to a minimum amount of holiday was decided on at EU level and implemented by the UK in the Working Time Regulations 1998. The maximum average working week is 48 hours, averaged out over a 17 week period, but employers in the UK can ask their employees to opt out of this protection. In addition, employees are entitled to four weeks paid holiday per year.

Migrants often do low skilled work and supplement their income by doing additional shifts or work longer hours, particularly as they are often supporting themselves and a wider family of whom many may still be in their home country. It is at least conceivable that, due to their lack of English, many migrant workers do not realise that they are signing an opt out clause.

3.2.6 *Discrimination*

Employment legislation in the UK prohibits discrimination on various grounds including race, religion or belief, sex, disability, and sexual orientation. The Race Relations Act 1976 prohibits discrimination on 'racial grounds'. This is defined to mean 'colour, race, nationality or ethnic or national origins'.²⁹

There is evidence from unions and Citizens Advice Bureaux that racism and race discrimination is a concerning issue for migrant workers.³⁰ They often are unaware of their rights and even if they are, it is questionable whether prohibiting discrimination on 'racial grounds' is adequate to protect migrant workers. Often the discrimination is purely due to the migrant's immigration status (rather than their nationality) and is not necessarily due to prejudice against a specific nationality which allows employers to take advantage of them. This means the migrant worker is left without any recourse against the employer.³¹

Under section 4(3) of the Race Relations Act 1976, employment in private households is specifically excluded from discrimination law, ie employers are allowed to discriminate when employing somebody. Migrants who make up a large percentage of domestic workers will

therefore have no protection against discrimination if they are employed by a private household.

3.2.7 *Pay Deductions*

Pay deductions for accommodation to cover board and lodging are not unlawful under UK law. These must be agreed with the individual in writing in advance before a deduction can be made. Again, it is therefore vital that the individual fully understands what he is signing. The impact of such deductions can be particularly harsh if they are set as a percentage of the individual's earnings. This means that if an individual chooses to work a large number of hours he will end up paying more for the provision of his housing. In addition, it should be noted that there is a maximum amount that an employer can deduct for accommodation if the individual is earning the minimum wage.

Fees charged by agencies to place an individual in work are illegal under the Employment Agencies Act 1973. Some agencies charge migrant workers significant sums in return for finding jobs in the UK. The union responsible for nurses in the UK (UNISON) has uncovered cases of nurses being charged more than £4000 with deductions being made at the rate of £100 per month from the individual's weekly UK wage. Such a contract is illegal in the UK.³²

3.2.8 *Redundancy and Dismissal Rights*

Being made redundant or being dismissed can have the consequence of a migrant worker losing the right to remain in the UK. So for example, a work permit holder who is made redundant within the first five years of being in the UK will not be able to apply successfully for indefinite leave to remain etc. As many migrants are dependent on remaining in employment for their immigration status, they are particularly vulnerable to unreasonable treatment by their employers or bad employment conditions. Although dismissal is automatically deemed to be unfair in some situations, for example if a health and safety issue is raised, where a statutory employment right is being asserted, or where action is being taken to enforce the minimum wage,³³ people who complain about things where a specific statutory right is not involved, are not covered.³⁴ This means that the position of migrant workers is particularly weak if they want to make a complaint about their treatment.

Once again if a migrant worker does not understand sufficient English, it seems unlikely that he will be able to challenge the decision to dismiss him, meaning that he will be in a weaker position than a resident worker.

In addition, unfair dismissal or redundancy rights are only enforceable after the employee has one year of service. Migrant workers, particularly low skilled ones, are far more likely than an average worker to move frequently from job to job, meaning that they are unable to benefit from the protection that longer service provides.

3.2.9 *Changing Employer*

The basic principle is that it is unlawful for an employer to refuse to allow a worker to resign and leave work, provided that the worker gives the appropriate contractual notice. It is therefore illegal for employers to retain an individual's documents or demand fees to pay back agencies, practices which have been documented and which disproportionately affect migrants.³⁵

It should also be noted that work permit holders cannot easily switch employers. The work permit is issued to the employer and if the migrant changes jobs their new employer must obtain a new work permit (although they do not have to readvertise the job if it is in the same field as that of the original job that the work permit holder was doing). This clearly makes it far more difficult for a work permit holder to access the labour market freely. In addition, individuals on the Highly Skilled Migrant Programme will also need to be careful, depending on the timing of their application to the Home Office for extensions of leave, when they leave their employers and how long they can be without work, as information of their current employment will need to be provided for an extension of leave to be granted.³⁶

4. Regulation of employment related areas for migrants entitled to work

This part of the paper gives an overview of the rights of migrant workers in areas closely related to work. What happens in these areas often has a direct link to whether a migrant worker can find work successfully and whether it is at a skill level which is appropriate to the individual.

4.1 Education

This section deals with education and who is entitled to it above the age of sixteen.³⁷ It also reviews what access to further and higher education and access to grants and loans migrant workers have.³⁸

Overseas students normally have to meet the full costs of their course,³⁹ unless they can show that they have been 'ordinarily resident' in the UK throughout the three year period preceding the 1 January, 1 April or 1 September (whichever is closest to the beginning of the first term of their course). Whether a person is 'ordinarily resident' was defined in the case of *Shah* in the House of Lords⁴⁰ as meaning that their 'abode [is] in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration'. Ordinary residence may therefore begin on the person's day of arrival or the test can be fulfilled even if the person is in the UK for a temporary purpose for example as a student. In addition, so as not to have to pay fees, they must show the following:

- At no time during the period were they in the UK wholly or mainly to receive full time education; and
- that they are settled.

The only migrant group for whom these rules do not apply are refugees or those granted humanitarian or discretionary leave after an application for asylum, as they do not have to show that they have been ordinarily resident for three years before qualifying for home fees. Those who are awarded home fees (which are significantly lower than overseas fees) will generally also be eligible for other support such as grants and student loans. (Note however, that people granted humanitarian or discretionary leave will only be eligible for these funds after three years of residency in the UK.) The most common forms are for students in higher education and include grants for low-income students and student loans for living costs.

Different rules also apply for EEA students which are derived from Directive 2004/38. This states that students will have free movement rights if they can show the following:

- That they are enrolled at a recognised educational establishment for the purpose of following a vocational training course;
- They have made a declaration to show that they will not become a charge on public funds; and

- That they are covered by all-risk sickness insurance. In practice, in the UK, this need not be proved as these students would have access to the NHS.

EU students are entitled to pay home fees if they have been ordinarily resident in the EEA for the three years leading up to the 'relevant date' and will also be eligible for loans and grants available to British students.⁴¹ Note that this is not applicable to all EEA nationals but only EU nationals. EEA nationals have to have been workers for the preceding three years to benefit from home fees.

4.2 Benefits⁴²

In most of the categories set out in Section 2 of this paper, the migrant will not be entitled to public funds. This means that he will not be entitled to the benefits set out below. However, migrants who are not subject to this restriction will be able to benefit if they are out of work. This paper focuses on the benefits directly related to being out of work because of redundancy, ill health or disability. There are related benefits which are not set out here, including tax and pension credits etc.⁴³

The legislation which is relevant in relation to social security benefits is as follows: the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995, the State Pension Credit Act 2002 and the Tax Credits Act 2002. Under the legislation there are then regulations which set out the detail of the benefits.

To establish whether somebody is eligible for benefits in the UK it is necessary to see whether they are 'subject to immigration control'.⁴⁴ To establish who is 'subject to immigration control' it is best to establish those who are not subject to the control, meaning everybody else outside this group is subject to immigration control. The following groups are NOT subject to immigration control, ie if a migrant falls within one of these groups they will potentially be able to qualify for the benefits (subject to the requirements imposed by each benefit):

- Those with the right of abode which includes British citizens;
- EEA nationals (but see below for A8 and A2 nationals);
- Non- EEA national family members of EEA nationals provided they qualify for free movement rights;
- Those exempt from the requirement to obtain leave (eg diplomats);

- Those who have leave which is not subject to a condition that they will not have recourse to public funds (eg humanitarian leave); and
- Those with indefinite leave to remain.

Therefore if a migrant does not fall within one of the points set out above s/he will be 'subject to immigration control'. Even if an individual does fall within the category of 'subject to immigration control', it is still possible that they may fall within the exceptions and therefore qualify for some benefits. The most important exception in relation to migrant workers is whether the migrant is a national of a state which has ratified either the European Convention on Social and Medical Assistance (ECSMA) or the Council of Europe Social Charter (CESC)⁴⁵ and who is lawfully present in the UK.⁴⁶ Migrant workers though need to be aware that even if they are entitled to benefits under these Treaties, claiming may harm their immigration position.⁴⁷

Both income support and jobseekers' allowance also require the applicant to be 'habitually resident' in the UK. This is a term used in social security law and is dependent on all the facts of the case. An individual needs to show that they have spent an 'appreciable' amount of time in the UK⁴⁸ but there is no minimum specified. The House of Lords has accepted that the period may be as little as one month but that there should be an intention to live in the UK. The type of other factors which are taken into account are family connections, possessions, friends, work in the UK etc. There are exceptions to those who need to be considered to be habitually resident, including those resident in the UK for over two years, refugees and those with humanitarian or discretionary leave.

In addition, to claim these benefits, individuals also need to show that they have the 'right to reside'. The main effect of this test is to exclude A8 nationals who have not worked lawfully in the UK for 12 months or who are not registered as working. In summary, A8 nationals cannot access mainstream benefits on arrival in the UK, as they do not have the 'right to reside'. Once they have obtained work and registered with the Home Office, they then obtain the 'right to reside' and are then eligible for the benefits which can be claimed in work (eg child benefit, housing benefit etc). A8 and A2 nationals who are self employed, have the same benefit rights as other EEA nationals.⁴⁹

4.2.1 Income Support

This is a means tested benefit for people working less than 16 hours per week. An individual can receive income support if he fulfils the following criteria:

- Is aged 16 or over;
- Is not in full time, non-advanced education; and
- Is not working for more than 16 hours a week.⁵⁰

In addition, a person must not be subject to immigration control (although if an individual is a national of a country which has signed the ECSMA and is lawfully present in the UK, they may qualify). A worker or service provider from an EEA state or family member would also be entitled, although an A8 national will only be eligible if he has been registered as a worker for at least one year or who has a right to reside (eg as a self employed person).

To be eligible to qualify for income support, an individual would need to fall within a particular category, for example, being unable to work because of ill health or a disability, Caring for a disabled person or being a lone parent responsible for looking after a child, etc. The amount an individual can claim is the minimum the government sets down that somebody needs to live on.

4.2.2 *Jobseeker's Allowance*

There are two types of Jobseeker's Allowance: contribution and income based. Income based jobseeker's allowance is means tested and contribution based is not, but depends on having paid enough national insurance contributions during the last two tax years. This restriction frequently means that migrants are unable to claim. To receive jobseeker's allowance the individual needs to be over 18, be out of work or working less than 16 hours per week and be available for work for at least 40 hours a week.

To qualify, an individual must not be subject to immigration control (unless he is from a state which has signed ECSMA), have indefinite leave to remain, discretionary leave, humanitarian protection or leave as a refugee, be an EEA worker, service provider or dependant (excluding a national of an A8 country who has been registered in the UK for less than one year).

4.2.3 *Benefits for ill health and disability*

Incapacity benefit is paid to those who are unable to work full time (ie 16 hours or more) because of an illness or disability. It is not means tested but to qualify sufficient national insurance contributions need to have been paid⁵¹ and it can be claimed by a person subject to immigration control, subject of course to the effect this could have on an individual's immigration status. Claims for incapacity benefit must be supported by medical evidence.

Statutory Sick Pay is paid to qualifying employees who are absent from work due to sickness and is paid for a maximum of 28 weeks. There are no restrictions on migrant workers receiving this payment even if their leave is subject to them not being reliant on public benefits. To be eligible an individual needs to be incapable of work for four days or more in a row because of a sickness or disability. In addition, their earnings have to have been above a set amount during the eight weeks before becoming sick.

Disability Living Allowance is for people who need help looking after themselves and for people who find it hard to walk or get around. The benefit is made up of a care and a mobility component and before a claim can be made an individual must have needed help for at least three months (unless the individual has a terminal illness and their death can reasonably be expected within six months). A migrant worker would be eligible for disability living allowance as long as he is not subject to immigration control (unless they are a national of a state which has signed the ECSMA and they are legally present in the UK), other than as a refugee, somebody with humanitarian protection or discretionary leave, an EEA national or family member of an EEA national exercising Treaty rights or a national of a state which has a reciprocal agreement with the UK which covers disability living allowance. It should also be noted that to receive this benefit the applicant has to be 'ordinarily resident' in the UK.

4.3 Access to health services

People who are 'ordinarily resident' in the UK are entitled to treatment on the National Health Service, including treatment by a GP and hospital treatment.

Overseas visitors can be charged for NHS treatment and are defined as 'not ordinarily resident'.⁵² Included in the group of people who are considered to be ordinarily resident are people in the UK for the purposes of employment (including A8 nationals), people who have lived in the UK for one year immediately before the services are provided, refugees and nationals of countries with which the UK has a reciprocal agreement.

All the immigration categories set out in this paper above will be covered for treatment on the NHS.

4.4 Access to housing related benefits

As the section on benefits sets out, many of the migrant categories which are allowed to work in the UK will be subject to a prohibition on the use of public funds and will therefore not be eligible for housing benefit or council tax benefit.

EEA citizens may be eligible (although not A8 nationals in their first year of working in the UK), as will refugees and migrants with humanitarian or discretionary leave.

Applicants for housing benefit or council tax benefit have to satisfy the test that they are 'habitually resident' within the UK and have the right to reside.

4.4.1 Housing benefit

This is paid to people on a low income to pay their rent. A person will be eligible if:

- They are liable to pay rent;
- Their income is low enough;
- Their capital is below £16 000; and
- Savings are below £3000.⁵³

The amount received depends on the amount of rent payable and the amount of income and capital a person has and the number of people who can be claimed for.

4.4.2 Council Tax Benefit

This is a benefit paid to people with a low income to pay their council tax (a local tax). This again is means tested and the same rules apply for payment as for Housing Benefit (but note that homeowners are also eligible).

4.4.3 Destitution⁵⁴

Even if a migrant worker does not fulfil the 'habitually resident' test, he may be eligible for help under the homelessness provisions. The main groups which will qualify even though they are subject to immigration control are refugees, people with humanitarian protection or discretionary leave, nationals of states which have signed ECSMA or the Social Charter and are lawfully present in the UK.⁵⁵

4.4.4 Allocation of housing accommodation⁵⁶

Local authorities maintain registers of people who have applied to be housed by them. Accommodation is normally allocated on the basis of a points system. A migrant worker who is subject to immigration control will not qualify unless he fits into one of the following:

- has refugee status, humanitarian protection or discretionary leave;
- is habitually resident in the UK or Ireland and is either a national of a state which has ratified ECSCMA or the Social Charter and is lawfully resident in the UK.⁵⁷

5. Assistance to migrant workers: Mainstream and specific service provision to enhance migrant workers' employment prospects

This last section of the paper outlines the services that migrant workers can access. It looks initially at the mainstream programmes available to people both in and out of work and assesses which categories of migrants are eligible. The second part looks at examples of services provided by organisations which are designed specifically for migrant workers.

5.1 Mainstream programmes: employment programmes⁵⁸

This section sets out the mainstream programmes that migrant workers can access when they are out of work. In practice, the number of categories which will be able to access these programmes is limited as under immigration law migrants, as has been seen, often work for a specific employer. The main categories which will benefit from these programmes are EEA nationals, refugees and those with humanitarian or discretionary leave. Other Migrants with a national insurance number can also access provision in relation to obtaining employment (although their eligibility for help is limited if they are not entitled to benefits). The section briefly outlines the purpose of each programme and the eligibility criteria. The point of access for the programmes is the Jobcentre or Jobcentre Plus.⁵⁹ These are government funded agencies which provide information and pay benefits and allowances to work seekers and administer discretionary payments. They are also responsible for offering a wide range of services and programmes for jobseekers, including holding lists of open jobs in their area and providing help to look for work or training. The relevant programmes administered by Jobcentre Plus are set out below. (It should be noted that the first two operate nationwide, the others are specific to particular areas of the country.)

5.1.1 *Work focused interviews*⁶⁰

The aim of these interviews is to encourage people who have been out of work for a significant amount of time to consider ways of entering the labour market. They are compulsory for some people, for example for people making new or repeat applications for income support. If an individual is invited to a work focused interview and does not attend, benefits can be reduced.

5.1.2 *New Deal programmes*⁶¹

There are various new deal programmes, two of which are for the long term unemployed jobseekers (New Deal for Young People (18-24) and New Deal 25 plus) and five further programmes (for people aged over 50, lone parents, disabled people, partners of unemployed people and for musicians)

The aim is to get people into sustainable work as quickly as possible and becomes mandatory for the 18-24 group once they have been on Jobseeker's Allowance for more than 6 months and for the over 25s if they have been claiming the benefit for 18 of the previous 21 months. The programmes help with a variety of training, work placements and other support as required. In particular in the New Deal for over 25s, employers can apply for a subsidy if they take on a person who has been involved in the programme.

5.1.3 *Ambition*⁶²

The Ambition programme is set up to provide training for people in areas where there are recognised skill shortages in specific occupations. There are currently two areas in which the programme operates: energy and health. The training has been designed with employers to ensure their entry requirements are met by the individuals undertaking the training. So for example in the energy sector the range of occupations covers gas installation and maintenance, gas network operations, water leakage detection etc. The programme includes attending an information and selection day, intensive training for successful candidates, including classroom activities and work experience and then full employment (combined with further training if necessary).

Eligibility varies and the programmes are only available in some areas of the UK but is generally open to people who are eligible for the New Deal programmes and have been unemployed for significant periods or who suffer a particular labour market disadvantage.

This includes individuals whose first language is not English and refugees or people with discretionary leave or humanitarian protection.

5.1.4 Action Teams⁶³

Action Teams were set up to help those who are considered to experience particular barriers getting into employment or staying in work, such as the long term unemployed, those whose first language is not English and refugees. Eligibility is not restricted though to these groups and anybody can benefit if they live within one of the Action Team areas. There are 65 Action Teams located in England, Scotland and Wales. The scheme is intended to be responsive to local needs and flexible in solving problems between the unemployed and what employers require. The characteristics of Action Teams are that they reach out to individuals who might otherwise not have access to support and provide individually tailored help. They also develop links to employers locally to help to identify and tackle their recruitment needs.

5.1.5 Progress to work⁶⁴

This programme is to support people with a history of drug misuse to take up or remain with mainstream provision and to secure and then sustain employment. Eligibility is for those who are disadvantaged in the labour market due to drugs misuse and who are claiming jobseeker's allowance, income support, incapacity benefit or disability living allowance.

A further programme, called Progress2Work-LinkUP, for people facing significant labour market disadvantage due to an offending background, homelessness or alcohol misuse, has also been started and operates in a similar way to the Progress2Work programme.

5.1.6 Pathways to work⁶⁵

This is currently being piloted and is available to recipients who are receiving incapacity benefits. Applicants for incapacity benefits in the three areas where the scheme is operated are referred to a Pathways Personal Adviser when they make a claim. A series of meetings then follows to discuss the difficulties which are preventing an applicant obtaining work and to consider practical and financial support to support the individual to obtain employment.

5.1.7 *Employment Zones*⁶⁶

Employment Zones are designed to help the long term unemployed. To be eligible the individual has to live in one of the 15 areas in which they operate. These areas have been chosen because of the high levels of long term unemployment. Employment Zone programmes are obligatory for those on jobseeker's allowance, who are over 25 and have been getting jobseeker's allowance for 18 of the previous 21 months. For the age group 18 to 24, the programme is obligatory if they have finished a period of New Deal for Young People and have been getting jobseeker's allowance continuously for six months without breaks of more than 28 days. It may be possible to start the programme early, for example, if English is not the first language spoken or they hold refugee status, humanitarian protection or discretionary leave. Once they have started this programme, they cannot stop it without incurring sanctions. The programmes are carried out by contractors and vary slightly from provider to provider. Broadly speaking though, the programme will include drawing up a plan of action for the unemployed individual. Initially jobseeker's allowance continues to be paid. After four weeks, jobseeker's allowance is stopped and the individual receives an allowance from the Employment Zone contractor for a maximum of 26 weeks. As soon as the migrant starts a job the Employment Zone contractor receives a bonus and a further bonus if they are in employment still after 13 weeks.

5.1.8 *StepUP*⁶⁷

StepUP is a programme to help individuals increase their work experience and in particular to provide them with a reference to enable them to get another job. It is designed to help those who have been through the New Deal programmes and are still claiming jobseeker's allowance. To be eligible an individual must have been claiming jobseeker's allowance for at least 18 months and continued on jobseeker's allowance after having taken part in the New Deal programme.

The programme is designed to give people jobs in the normal workforce for 50 weeks and the employer pays at least the minimum wage. In addition, the individual taking part has an independent support worker. In particular, the support worker will help in the job search to ensure employment continues after the 50 week period. Throughout the programme, the individual is mentored at his place of work.

5.1.9 *The Jobseeker Mandatory Activity*

This new pilot scheme aims to help individuals who are aged 25 or over to become better prepared for work, and to find work. If an individual lives in a pilot area, is aged 25 or over, and has been claiming Jobseeker's Allowance or National Insurance Credits for six months, they will be required to participate.

The programme consists of a three-day motivational course to improve job-search skills and to draw up a Personal Action Plan. This will be followed by three mandatory follow-up interviews with a Personal Adviser.

5.2 **Mainstream programmes: training to help find work⁶⁸**

5.2.1 *ESOL*

There are various ways that migrant workers can obtain lessons to learn English. Most English courses are provided through Further Education Colleges, Adult Education Colleges and Refugee Community Centres and many are free although this may be dependent on immigration status (eg refugees will often be entitled to free lessons). In addition to these providers, some courses are available through Jobcentres and private language schools. There are also programmes for people in work to improve their English through Employer Training Pilots (see below) or individuals can, like unemployed individuals, take courses at local colleges.

5.2.2 *Work Based Learning for Adults⁶⁹*

This programme is intended to enhance individuals' skills to improve their employability. It is aimed at building confidence and developing skills to meet the skills shortages employers suffer. So for example, it could be used to help improve a migrant worker's English or basic skills to obtain employment.

To be eligible, the individual has to be over 25, to be registered as unemployed for 6 months or more and be in receipt of specific benefits. These include, but are not restricted to jobseeker's allowance, income support and incapacity benefit.

This programme could be of particular use to migrant workers as they do not have to fulfil stringent criteria to qualify and, in particular, they can refer themselves to the programme.

Unlike most other programmes, it is open to people who are subject to immigration control (and who would normally be excluded from benefits).

The programme is split into the following four sections:

- Basic Employability Training – this is intended for people to overcome basic skills’ deficits and for people who need to improve their English to enter the labour market successfully.
- Short Job Focused Training – this focuses on occupational skills and lasts for a maximum of six weeks and is designed to be very practical.
- Longer Occupational Training – this is intended to help individuals to acquire new skills or update existing ones and provides specific training to help individuals to find work. The provision can last between 7 and 52 weeks.
- Self-Employment Provision – this is intended to help individuals move into self employment. Individuals have access to advice and support and can undertake periods of test trading to ensure that being self employed is the right option for them.

To take part in this programme, an individual can be referred by their personal advisor, be recruited by a local training provider, or apply themselves to a particular programme.

5.2.3 Programme Centres⁷⁰

These are centres run by the public, private and voluntary sectors. They give advice on possible jobs, training, increasing confidence and motivation and how to go about applying for jobs.

The provision of the training is in the form of short courses or one to one support and advice. In addition, individuals will be able to use facilities, such as photocopying, phones, computers etc.

To be eligible individuals have to be 25 or over and have been unemployed for more than six months. In addition, they have to be in receipt of one of three specified benefits, including jobseeker’s allowance or income support. There is also some provision for younger individuals on the New Deal programmes. Most importantly for migrant workers is the fact that if they can show that they are unemployed and English is not their first language or they have, for example, literacy difficulties, they may attend a Programme Centre even if they have not been unemployed for the usual six months.

To attend a Programme Centre, an individual can either be recruited by the provider or referred by Jobcentre staff.

5.2.4 Employer Training Pilots⁷¹

These are designed to encourage employers to employ people with few skills. The individuals employed are then sent on training for which they are paid. The idea is for employers to fill skill gaps while employees improve their skill levels in areas of work in which there is a need for employees.

The training is for people who do not have even a relatively low level of qualification.⁷² Employers have to pay the employees while they train and must be in a participating local area. As an employee the individual needs to be above 19 and have no qualifications or very low level qualifications. The programme is coordinated by the Learning and Skills Council (LSC) and is employer led, ie companies or organisations approach the LSC, rather than individuals. A migrant business owner would be allowed to apply in the same way as a British or EEA national owned business.

5.2.5 Apprenticeships⁷³

There are over 150 different apprenticeships in a wide range of industries. Their aim is to provide learning which is required by a particular sector of the economy or industry.

There are no set entry requirements, other than being aged between 16 and 24. Some additional qualifications may also be required which can be more difficult for migrants to comply with (for example, if a specific qualification from the UK is required). It should however be noted that employers and learning providers can agree to allow applicants on the programme who do not have the qualifications usually required. The programmes are very occupational and practice orientated and successful completion of the programmes leads to a certificate in Modern Apprenticeship. The method used is usually a mixture between on the job training and off the job learning. Apprenticeships can be done at a basic and an advanced level.

5.2.6 Entry to Employment

This is a programme for people aged under 19 (although under certain circumstances older people can participate), particularly for those who are not engaged in any form of learning or

have had particular problems which mean that they are at a disadvantage in the job market such as alcohol abuse, drug abuse or homelessness.

The three main areas of learning are: basic and key skills; vocational development; and personal and social development. These are taught in a wide variety of ways and there is no time limit as the scheme is designed purely for the needs of the individual. It can lead to a formal qualification, although it may not necessarily do so.

5.2.7 Learndirect⁷⁴

Learndirect is a government funded initiative that provides computer-based, online courses at more than 2000 online learning centres throughout the country. The centres sometimes include facilities like crèches and cafés, and some have weekend and evening opening hours. They provide a flexible learning environment which allows individuals to learn at their own pace and when it best suits them.

5.2.8 Adviser's Discretion Fund

This is a fund which can be used to buy goods or services (up to a maximum of £300) to help those receiving certain benefits, including New Deal. The fund is administered by personal advisers at the Jobcentres and any benefit received by an individual is purely at the discretion of their personal adviser. The aim of the fund is to allow funds to be distributed to help individuals obtain work. So for example, it could be used to pay travel costs or to buy clothes.

5.2.9 Ethnic Minority Outreach

This programme started in 2002 to increase employment rates for individuals of ethnic minority communities who had been claiming jobseeker's allowance for under six months. The aim is to provide support to them to enter the employment market (eg paying for specific training) and for them to use appropriate support provided by Jobcentre Plus. The project advisers are not based in jobcentres but actively approach individuals by going to places such as markets or places of worship. It also works with employers to ensure they consider employing from groups they may have overlooked and provides specialist support, such as ESOL, to allow individuals who take part in the programme to be better able to compete for jobs. Individuals are provided with support for up to 13 weeks.

5.3 Specific programmes for migrants entitled to work

Specific programmes are focused primarily on refugees (although those with discretionary leave or humanitarian protection may also be able to benefit). The Department of Work and Pensions has declared that it intends to tackle the high rate of unemployment of refugees 'by giving them the initial support they need to start work and participate in society'.⁷⁵

The programmes outlined below range from a set of aims to more specific programmes which refugees can participate in to enhance their ability to obtain work. This section is by no means a fully comprehensive outline of all the programmes available but aims to show the range of programmes a migrant may be able to access.

5.3.1 Programmes at a National Level

At a national level the focus has been on development of programmes administered by Jobcentre Plus. So for example, a programme called Refugee Operational Framework is in place which supports Jobcentre staff in dealing with refugees and in particular in developing local partnerships and services that meet the needs of refugees. The aim is also to encourage unemployed refugees to use Jobcentre Plus services.

In addition, cooperation at the non governmental level has led to nationwide programmes. So for example, the Partnership for Refugee Employment through Support, Training and Online Learning (PRESTO) is a consortium of specialist agencies in the field of refugee integration. The aim of the programme is to support training and employment programmes supporting, in particular, professional refugees. The consortium has also within its remit to develop training for refugee women, refugee entrepreneurs and refugees with disabilities.

Also run by a charity (TimeBank) but funded by the Home Office, is a project aimed at integration of refugees. The Time Together Project aims to pair up volunteer mentors with refugees for five hours a month to help them achieve their goals in education and employment. The aim is to have the programme in 24 cities across the UK.

In 2005, the government launched the SUNRISE⁷⁶ initiative. It is operated by local authority asylum teams and refugees and the support offered is intended to help those with refugee status, humanitarian protection and discretionary leave with housing, health and child education needs and to ensure that they have access to benefits and employment advice.

Each individual works with an allocated caseworker to manage the transition from asylum seeker to somebody with a legal immigration status in the UK.

5.3.2 Programmes at a Local Level

Trellis is a programme which is aimed at refugee jobseekers in Birmingham. It combines the skills of various agencies, such as Jobcentre Plus, the Learning and Skills Council and West Midlands Local Government Consortium to make services more accessible to refugees and to introduce effective ways of getting refugees into employment and raise employer awareness of the skills refugees have.

In London, the Migrants' Qualification Project is aimed at enhancing the employment opportunities for migrants in key sectors of the London economy, in for example the areas of health care and construction. The idea is to identify skills and qualifications of migrant workers and support them to fulfil their potential in the employment market. In west London, there is a programme called 'Refugees into Jobs' which provides information, advice and guidance to refugees in the areas of employment and training. It also has specialist projects for refugee professionals. More specific to jobs in the health sector, the North East London Strategic Health Authority has developed a website to provide career advice and information for refugee health professionals aiming to facilitate their entrance into the labour market.

5.3.3 Voluntary Sector programmes

The main organisations working in this field are the Refugee Council and then smaller community groups which deal more specifically with the needs of their particular communities. These are often fairly small scale programmes and are too numerous to list.

The Refugee Council runs ESOL courses and a work based training scheme, including help finding work placements, job search workshops, mentoring and help with job seeking. In particular though, it provides training to individuals from refugee community organisations so that they can then assess what refugees require and then provide services to support refugees to obtain employment.

Another active organisation involved in supporting refugees into work is the Refugee Education and Training Advisory Service (RETAS). Their aim is to offer information, advice and guidance on education, training and employment for refugees. It offers specific services for health professionals and marginalised groups, such as refugees with disabilities, women

and young people. Its main service is to provide interviews with advisers who then provide refugees with information on subjects such as their rights in education and employment, work placements, voluntary work and employment opportunities, support with curriculum vitae writing and job applications and advice on other services and educational grants.

5.3.4 Programmes for professionally qualified migrants

In the field of health, the British Medical Association, the Royal College of Nursing and the British Dental Association all have initiatives to support refugees. So for example, the British Medical Association has a refugee liaison group to address the concerns of refugee doctors.

Programmes to enhance the employability of refugee teachers have been set up by a consortium of voluntary sector providers and the Department for Education and Skills to try to ensure refugee teachers are able to build on the skills they already have to enter schools in the UK and work as fully fledged teachers.

Similar initiatives have also been started for engineers. Although this group is not regulated in the UK, refugee engineers have often found it difficult to obtain employment. A group of organisations in the field has been able to organise work placements to enable refugee engineers to gain work experience.

6. Conclusion

In summary, there are very varied categories of migrants who are allowed to work in the UK. The government limits most labour migration to highly skilled categories (work permits, highly skilled migrant programme). EEA migration and in particular the relatively recent migration of A8 workers, has led to migrants filling a range of lower skilled jobs. In addition, there is a large group of dependants who need not qualify to come to the UK in their own right but have free access to the labour market once here within the UK. Once legally in the UK, provision of services to assist migrants in access to jobs varies depending on their exact immigration status. There is a range of provision for refugees and EEA nationals but very limited for most migrants in the UK on the basis of work. It is unlikely

that the points based scheme, which is to be implemented in the course of 2008, will have a significant impact on the issues raised in this paper.

The government has accepted that the economy of the UK requires migrant workers. In its drive against social exclusion, it has also recognised the importance of integrating migrant populations and in particular the importance, within that strategy, of migrants working. Much of the focus of the drive to get migrants into work has been on refugees who will generally be in the UK long term. Many of the other groups of migrants entitled to work are unable to access the programmes which would facilitate access to the employment market because of their immigration status.

The UK attracts people to do jobs that the economy requires but then leaves many immigration categories in a position which makes integration in the labour market (at least initially) only a limited possibility. Most immigration categories only allow the individual to do a specific job, although notably the spouses of many of the restricted categories have full, unrestricted access to the employment market, making up a significant group of migrant labour. So although these migrants initially come to the UK to work and thereby support the economy of the UK, until they obtain indefinite leave to remain, most will not be eligible to access the entire job market or programmes to find work. And if they find themselves out of work, many are not entitled to support.

¹ Home Office, Secure Borders, Safe Haven – Integration with Diversity in Modern Britain (2002), p3.

² A Points-Based System: Making Migration Work for Britain, March 2006, Cm 6741.

³ If married to a UK citizen this is reduced to three years and the applicant need only have indefinite leave to remain at the time of making the application (rather than having completed a full year).

⁴ Further conditions are that applicants need to show that they can speak English, are of good character, have not been out of the country for long periods which are strictly defined and can show knowledge of the British way of life.

⁵ See the Immigration (European Economic Area) Regulations 2006.

⁶ Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom.

⁷ The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic, Slovenia.

⁸ *Lawrie-Blum v Land Baden Wurttemberg* (66/85) [1986] ECR 2121.

⁹ *Levin v Secretary of State for Justice* (53/81) [1982] ECR 1035.

¹⁰ Note the different treatment of A8 nationals, as set out below.

¹¹ Further information can be found at 3.1.3 below and at

www.civilservice.gov.uk/careers/nationality_rules/guidance_on_checking_eligibility/index.asp.

¹² Students are only entitled to bring their spouses and dependent children.

¹³ Paragraph 15, the Immigration (European Economic Area) Regulations 2006.

¹⁴ *Dari and Tum*.

¹⁵ National Health Service (Charges to Overseas Visitors) Regulations, 1989.

¹⁶ For further explanation of NVQs, see www.qca.org.uk/610.html.

¹⁷ <http://www.kalayaan.org.uk/>

¹⁸ Report by Sir Gareth Roberts.

¹⁹ There is a concession outside the Immigration Rules which allows children over the age of 18 and dependent on parents of work permit holders who are intra company transferees to come to the United Kingdom if they are genuinely dependent and intend to remain as part of the family unit.

²⁰ For a full list of acceptable documents, see Somerville – Documentation, p318ff.

²¹ For an analysis of problems refugees in particular face, see Bloch A (2002) *Refugees' Opportunities and Barriers in Employment and Training*, Research Report 179, Leeds: DWP, <http://www.dwp.gov.uk/asd/asd5/rrep179.asp>.

²² TUC p39f

²³ www.naric.org.uk

²⁴ Cabinet Office, Civil Service Nationality Rules, Guidance on Checking Eligibility, paragraph 3. [1968]2QB 497

²⁵ See TUC, p47.

²⁶ For further discussion, see Somerville – Employment Rights, p370ff.

²⁷ For further discussion, see Ryan p.92.

²⁸ Although this paper deals with migrants who have the right to work, it is worth mentioning that British courts have held that workers who that a person should not be able to profit from their wrong. So for example, somebody working illegally would not be able to enforce an employment contract or statutory rights. This also includes relying on protection under the Race Relations Act (*Vakante v Addey and Stanhope School* [2004] 4All ER 1056).

²⁹ Ryan p88 and TUC p53.

³⁰ For further discussion see Ryan p88f.

³¹ TUC p40.

³² Employment Rights Act 1996, ss100, 104 and 104A.

³³ Ryan, pp98f.

³⁴ TUC, p56.

³⁵ Under the new proposals for managed migration, changing jobs for individuals will become more difficult as employers will be required to ensure that individuals for whom they get work permits leave the country at the end of the validity of the permit.

³⁶ Skills based training is dealt with in section 5 below.

³⁷ For further information see UKCOSA (The Council for International Education), www.ukcosa.org.uk or the Department for Education and Skills, www.dfes.gov.uk/studentsupport.

³⁸ The Education (Fees and Awards) Regulations 1997.

³⁹ *Shah v Barnet LBC* [1983] 2 AC 309

⁴⁰ For further discussion about what conditions a state can impose before providing financial assistance see *Bidar C-209/03*.

⁴¹ For a more detailed analysis, see JCWI, chapter 39.

⁴² For a more detailed discussion see Somerville, Chapter 4..

⁴³ Section 115(9) Immigration and Asylum Act 1999.

⁴⁴ The EEA states and Turkey have ratified either the ECSMA or the CESC.

⁴⁵ For further details about the reciprocal agreements and for which nationals qualify for which benefits, see www.dwp.gov.uk/lifeevent/benefits/social_security_agreements.asp.

⁴⁶ For an excellent overview of migration and social security rights, see Somerville pp115f.

⁴⁷ *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677.

⁴⁸ For more detail, see JCWI pp1268ff.

⁴⁹ There are a few exceptions to this. In addition, if the individual has a partner who is working more than 24 hours per week they will not be eligible for income support.

⁵⁰ Note that there are different eligibility rules for individuals under 25.

⁵¹ The National Health Service (Charges to Overseas Visitors) Regulations 1989 (as amended).

⁵² Note that slightly different criteria apply if an individual is aged 60 or over.

⁵³ For a more detailed discussion see JCWI pp1291ff.

⁵⁴ For a more detailed analysis of the groups which will qualify, see JCWI p677.

⁵⁵ The Homelessness Act 2002.

⁵⁶ For a more detailed analysis of who qualifies, see JCWI pp1294f.

⁵⁷ For more detailed description of the programmes and the criteria, please see Somerville.

⁵⁸ Jobcentre Plus offices offer integrated work and benefits services and will be introduced throughout the United Kingdom by the end of 2006.

⁵⁹ <http://www.jobcentreplus.gov.uk/jcp/partners/workfocusedinterviews/index.html>

⁶⁰ http://www.jobcentreplus.gov.uk/JCP/Customers/New_Deal/index.html

⁶¹ <http://www.jobcentreplus.gov.uk/jcp/employers/helpwithyourrecruitment/ambitionprogram/index.html>

⁶² <http://www.jobcentreplus.gov.uk/jcp/Customers/Programmesandservices/Actionteams/index.html>

⁶³ <http://www.jobcentreplus.gov.uk/jcp/Partners/progress2work/index.html>

⁶⁴ http://www.jobcentreplus.gov.uk/jcp/customers/programmesandservices/pathways_to_work/index.html

⁶⁵ http://www.jobcentreplus.gov.uk/jcp/customers/programmesandservices/employment_zones/index.html

⁶⁶ http://www.jobcentreplus.gov.uk/jcptext/stellent/groups/jcp/documents/websitecontent/dev_010598.do

⁶⁷

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- ⁶⁸ <http://www.jobcentreplus.gov.uk/jcp/Customers/Helpwithtraining/index.html>
- ⁶⁹ http://www.jobcentreplus.gov.uk/jcp/static/Dev_008531.pdf
- ⁷⁰ http://www.jobcentreplus.gov.uk/JCP/static/Dev_008532.pdf
- ⁷¹ <http://www.dfes.gov.uk/research/data/uploadfiles/ETP1.pdf>
- ⁷² National Vocational Qualification Level 2; Basic Skills Qualifications Levels 1 and 2.
- ⁷³ See http://senet.lsc.gov.uk/guide2/apprenticeships_policy?G2ApprenticepolicyGO4Sep05.pdf
- ⁷⁴ <http://learndirect.co.uk>
- ⁷⁵ Working to rebuild Lives – A refugee employment strategy, p5.
- ⁷⁶ <http://www.ind.homeoffice.gov.uk/lawandpolicy/refugeeintegration/sunrise/>

BIBLIOGRAPHY

Labour, Migration and Employment Rights (2005), Ryan (ed) (The Institute of Employment Rights).

Discrimination Law Handbook (2002), Palmer, Gill, Monaghan, Moon, Stacey (Legal Action Group).

The Legal Status of Migrants admitted for Employment (2004), Cholewinski (Council of Europe Publishing).

Immigration, Nationality and Refugee Law Handbook (2006), Seddon (Joint Council for the Welfare of Immigrants).

Immigration, Nationality and Refugee Law Handbook (2002), Seddon (Joint Council for the Welfare of Immigrants).

Employment Law – An Adviser’s Handbook (2005), Lewis (Legal Action Group).

Working in the UK: Newcomer’s Handbook 2nd Edition (2006), Somerville (ed) (Centre for Economic and Social Inclusion).

Migrant Workers – A TUC Guide (2002), (Joint Council for the Welfare of Immigrants).

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