

# Conference: Developing a Comprehensive Policy Framework for Migrant Labour

## 18 – 19 February 2008

### Recommendations

#### Introduction

Malaysia has been experiencing full employment since the early 1990s. The number of documented migrant workers in the country is 2.1 million and together with those who are undocumented, migrant workers constitute roughly 25% to 30% of the total labour workforce. In fact the percentage of migrants in our workforce is probably the highest in the region or even the world<sup>1</sup>. Malaysia needs migrant labour and will continue to depend heavily on migrant labour for many years to come. In the construction industry, for example, the portion of migrant workers is between 70-90%.

Despite the huge presence of migrant workers in the country, the Malaysian government does not have in place a comprehensive policy framework to deal with migrant labour. What we have instead are a series of interim measures and ad hoc policies. To compound the problem, different government agencies and Ministries have been tasked to deal with different facets of the Migrant issue. After more than 30 years it is unfortunate that Malaysia does not have a properly constituted national mechanism to deal with the issue of migrant labour.

#### Conference

The Conference: Developing a Comprehensive Policy Framework for Migrant Workers was organised to deal with the gaps in existing policy and come out with a comprehensive policy framework that would address the various dimensions of the situation of migrant labour.

The specific objectives of the Conference were as follows:

1. To document the contents, consequences and gaps in existing Malaysian labour migration policies and other relevant policies, as well as their implementation;
2. To compare Malaysian policy and practices with international best practices;

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<sup>1</sup> Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

3. To develop a concrete policy framework for the placement and treatment of migrant workers, as well as a plan of action for its development and implementation;
4. To achieve consensus and mobilize support among stakeholders, governmental and others for measures under the above point 3.

The Conference took place on 18 and 19 February 2008 at the Crystal Crown Hotel in Petaling Jaya and was attended by a broad spectrum of people including representatives from government agencies and ministries dealing with migrant labour, members of the judiciary, representative from the AG's chambers, members of foreign missions and civil society groups including NGOs, academics, Trade Unions and Employers' Organizations.

### Rights Based Approach

We believe that the crux to developing a just way of dealing with migrant workers is to see them as human being and by the adoption of a rights based approach.

The rights-based approach is anchored on the belief that every human being has inalienable rights. This fundamental principle is enshrined in Article 2 of the Universal Declaration of Human Rights which states, " ... everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status".

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs". The principle of non-discrimination and equal rights for all persons is also enshrined in Article 8 of the Federal Constitution.

The rights based approach means that we no longer consider persons as Indonesian, or Bangladeshi or migrant workers, but as a human being whose dignity and well-being we should be concerned about. In accordance with this, the terms and conditions of employment of foreign workers should be no less favourable than that of Malaysian workers<sup>2</sup>. Our treatment of foreign workers should comply with ILO's Decent Work Principles that encompass respect for basic human rights, access to employment, safe and healthy working conditions and social security.

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<sup>2</sup> If we look at the provisions of both the Employment Act and the Industrial Relations Act, we will find that migrant workers are "covered". In fact the Section 60L of the Employment Act makes it an offence for an employer to practice any form of discrimination between migrant workers and local workers

## Comprehensive Labour Policy

The rights based approach should be part of a comprehensive labour policy that provides projections of the type and form of labour that Malaysia needs to respond to the current situation. Such a labour policy should define the kind of skills and capacities to be developed, and all issues pertaining to recruitment and placement.

At the core of this policy should be the principles of respect of basic human rights, access to employment, safe and healthy working conditions and social security. The rights of migrant workers need to be defined and recognised especially in areas of conflict, in the course of exercising the rights enshrined both by international and national instruments. The right to seek redress when there are labour rights violations and the need to seek health care treatment should be recognised by all related agencies so that the legal status requirements are easily met without any form of conditions.

## Recommendations

The Conference came out with 16 recommendations covering three broad areas:

- A. Right to Livelihood
- B. Arrest and Detention
- C. Social Challenges

### **A. Right to Livelihood**

#### **1. Ratification of International Conventions**

The Malaysian government as a show of its commitment to such a rights-based approach should ratify the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and all international human rights conventions and International Labour Standards that are applicable to non-citizen migrant workers. Three specific instruments that were put together to specifically deal with the situation of migrant workers are – ILO Conventions 97 and 143 on migration for employment and the 1990 International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families.

#### **2. Giving the Ministry of Human Resources the Leading Role**

At the heart of a comprehensive policy on migrant workers is the issue of “work” not security. Hence the power to permit companies to recruit migrant workers should rest with the Ministry of Human Resources rather than the Ministry of Home Affairs.

If there is a demand for foreign labour then the Ministry of Human Resources is in the best position to determine the specifics of such a demand i.e. in which industries and why such a demand exists. In fact since it is the Ministry of Human Resources to which migrant workers turn to when they faced problems at the workplace, it seems painfully obvious that it should be the Ministry of Human Resources which is in the best position to determine which companies deserve to be given the permission to recruit migrant workers.

The central role played by the Ministry of Human Resources should be complemented by the formation of an Inter-Ministerial Coordinating Body.

Various Ministries and government agencies are involved in the management of migrant workers, but this work is poorly coordinated. The Ministry of Home Affairs (KHEDN) is responsible for approving outsourcing companies and approving applications for those who want to bring in migrant workers. The running of detention centres for migrant workers is under the Jabatan Penjara which used to be under the Ministry of Internal Security (KKDN). Meanwhile when migrant workers face work related problems they turn either to the Labour Department or the Industrial Relations Department, which are under the Ministry of Human Resources.

An example of poor coordination between different government agencies is epitomized by the recent story in the NST<sup>3</sup> that 442 foreigners continue to remain in prison even after having served their sentences as a result of lack of coordination between the Prisons Department and the Immigration Department. The lack of inter departmental coordination is also evident when hundreds of migrant workers are denied a special pass by officials in the Immigration Department despite the fact that they need to remain in the country to pursue claims that they have made in the Labour Office or Industrial Relations Department.

The current Inter-Ministerial Coordinating Body, which is a Cabinet Committee, does not work. There is a lack of transparency and questions arise about its effectiveness.

An inter-ministerial/departmental body needs to be set up to deal with all matters pertaining to the recruitment, placement and employment of foreign workers. Such a body should see representation from the following Ministries – Human Resources, Home Affairs, Health and Education. A body of this nature, which houses Ministries and Departments, which deal with, the various dimension of the situation of migrant workers, would be a minimum starting point to the developing of coherent and workable policy pertaining to migrant workers. This body will set in place monitoring and evaluation mechanism as well as address areas of conflict, developing a consolidated approach including capacity building, and conducting multi-stakeholder dialogues and consultation.

Such a coordinating body should be chaired by the Ministry of Human Resources that has been identified as the pivotal Ministry for the management of migrant workers.

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<sup>3</sup> Free, but they're still in jail: NST 9 February 2008

### **3. Giving Foreign Workers Real Access to Justice**

It is extremely difficult for a migrant worker to remain in the country, in order to pursue a claim in the courts, when he/she no longer has a valid work permit.

The current policy of issuing a special pass to migrant workers caught in such a situation is fraught with problems. Employers often flaunt the law and deny migrant workers their rights in law. When asked to account, employers have the luxury of arbitrarily cancelling the work permit of their foreign workers, refusing to take part in negotiations and delaying the court process. They do this with impunity because they know that the foreign worker caught in such a situation has great difficulty remaining in the country to pursue his legal rights.

In order to remedy this situation mechanisms and procedures need to be developed in so that:

- (a) A migrant worker is allowed to remain in the country in order to pursue a claim which he/she has lodged;
- (b) The migrant worker is allowed to work during this period in order that he/she can support himself/herself; and
- (c) All cases involving migrant workers are fast tracked.

This can be done by first issuing the migrant worker with a Special Pass and then a Visit Pass.<sup>4</sup> The Special Pass would allow the migrant worker to remain in the country and seek employment. Upon obtaining employment the migrant worker can then be issued with a Visit Pass so that he/she can work while waiting for the outcome of the legal action. The Visit Pass obtained under such circumstances will cease once the migrant worker's case is amicably settled or the relevant court makes a final decision.

### **4. Scrapping Labour Outsourcing**

Thousands of migrant workers have been exploited and left stranded without jobs or food as a result of the policy of allowing outsourcing companies to operate. Migrant workers have lost thousands of ringgit as a result of unscrupulous agents. The system has failed and has led to a form of bonded labour and trafficking in human persons.

Only employers should be given the right to recruit. Contractors for labour should not be given this opportunity. Such direct recruitment will take place within the framework of MOU's signed between the Malaysia and the sending countries, which must stipulate the need to adhere to the ILO's Basic Work Principles.

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<sup>4</sup> The details of this proposed mechanism are outlined in the Bar Council Memorandum on Special Pass.

## **5. Recognising Domestic Servants as Workers and Providing them all Basic Benefits and Rights**

Around 380,000 migrant workers are employed as domestic servants. The Employment Act provides very minimal protection to domestic servants. There is no provision that domestic servants receive a rest day, sick leave, annual leave or paid public holidays. There is no provision for overtime and also no restriction on the number of hours that a domestic servant can be made to work. It cannot be right that domestic servants be made to work 24 hours a day, 365 days a year!

Since domestic workers work in individualised and isolated work conditions, state intervention is necessary to ensure worker rights are accorded and protected. Thus domestic workers must be recognized as workers.

A new domestic workers act should be developed where forms of work are defined; a comprehensive standard contract signed in source country and attested in Malaysia is enforced; days off determined; mechanisms for monitoring established; benefits such as basic social security and contract completion bonus are defined and responsibilities and penalties stated.

## **6. Recognizing the Right of Migrant Workers to become Members of Trade Unions and to take part in Trade Union Activities**

The Trade Union Act does not prohibit migrant workers from becoming members of trade unions or taking part in trade union activities. The Employment Act specifically states that nothing in the employment contract shall restrict the right of a worker to join, participate in or organize a trade union.<sup>5</sup>

Notwithstanding this, many standard employment contracts that are furnished to migrant workers provide an express prohibition against becoming a member of a trade union or taking part in trade union activities. All employers must be advised on the proper position in law and care must be taken to ensure that all employment contracts are free of such repugnant provisions. Sanctions should be imposed on employers who deny their migrant workers their basic rights to unionize.

## **7. Introducing Strong Sanctions in case of Exploitative Labour Practices**

Employers have no qualms about denying their workers their rights in law because the sanctions against such exploitative labour practices are so weak. The maximum fine, for example, of a breach of provisions in the Employment Act is a mere RM10,000. There is no provision for jail terms. As long as there is no threat of strong sanctions, employers will flaunt the law. The only way to ensure that employers have a greater regard for the

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<sup>5</sup> Section 8, Employment Act

law is to introduce harsher penalties including jail terms for employers who blatantly and wilfully deny their workers their basic rights as outlined in law.

In many cases involving the non-payment of wages, the labour department appears reluctant to fine the employer even where severe exploitation is present and complaints are made. Cases are conveniently classified as claims under Section 69 of the Employment Act, which involves protracted litigation when the issue could have been expeditiously solved.

## **8. Setting up Wages Councils**

Wages Councils need to be set up in sectors where wages are particularly depressed and it is difficult for workers to form trade unions. For a start Wages Councils need to be set up to provide for minimum wages in the following sectors – Construction industry, restaurant outlets and domestic servants.

## **9. Giving Refugees, Asylum Seekers and Stateless Persons the Right to Work**

Refugees, asylum seekers and stateless persons are not given the opportunity to work. In order to survive they are forced to accept employment in the informal sector of the economy and in the kind of jobs that regularised workers would generally avoid. Their “illegal” status means that they are not in the position to complain or combat instances of abuse. They suffer great hardship and are prone to much exploitation.

We propose that refugees, asylum seekers and stateless persons who are in Malaysia be allowed to work based on the terms and conditions granted to migrant labour.

### **B. Arrest and Detention**

#### **1. Develop a Simple Way to Determine if a Migrant Worker is Documented**

It is unfortunate that after all these years the authorities have yet to devise a simple mechanism and procedure to determine the legal status of migrant workers. In light of this there is all the more reason why the authorities should uphold and reaffirm the right of all migrant workers to keep their passports.

The i-kad that the Ministry of Home Affairs proposes to introduce for all documented workers is a good idea, but the authorities should issue such a card to the migrant worker within two weeks of his/her arrival in the country.

As it is, the kad jalan that is issued is often only issued weeks after the migrant worker comes to the country, and this places the migrant worker in a very vulnerable situation –

where he often does not have either his passport or any other documentation with him/her. In addition to issuing the i-kad, arrangements must be made to have sufficient i-kad “readers” made available to enforcement agencies.

## **2. Disband RELA**

Raids should only be conducted by those who are properly trained to handle arrests and only by those who have the necessary equipment to recognise if the documents carried by the migrant worker (including the i-kad) are genuine.

Far too often, raids are carried out by departments and agencies, for example RELA, which do not have the ability to determine the authenticity of documents in the processions of migrant workers. The result of such raids is that they are ineffective and prove a great inconvenience to a large number of migrant workers who are documented. RELA has been formed through the emergency ordinance regulations. The perspective is then derived from the angle of security. The record of abuses and RELA’s framework demands that RELA should be disbanded.

If the Immigration department lacks capacity, then the department needs to be expanded and strengthened.

## **3. Stop draining the resources of the Prison System**

There are presently 11,900 foreigners in our prison system. Foreigners make up 33% of the prison population. It has to be pointed out, however that foreigner only account for 2%<sup>6</sup> of the crimes committed in Malaysia and that the vast majority of foreigners in our prison system, are there as a result of immigration offences.

The overcrowding in prisons causes many problems to the Jabatan Penjara and makes it difficult for them to concentrate on rehabilitation. We propose that it become policy to:

- (a) Deport migrant workers who are found guilty of immigration offences. Putting them into the prison system is a drain on valuable resources<sup>7</sup>;
- (b) Doing away with the punishment of whipping which we consider to be a form of cruel and inhumane treatment;

No one should be deported without due process and those arrested for alleged immigration offences must have access to legal representation.

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<sup>6</sup> Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

<sup>7</sup> It is estimated that it cost roughly RM25 per day to maintain a person in prison. What this means is that when a Session Court judge sentences a migrant worker to 3 months in jail, it cost the taxpayer RM2150. Much more than the cost of paying for the deportation of the migrant worker concerned.

#### **4. Providing amnesty and opportunities for regularization**

Providing amnesty and opportunities for undocumented workers to be regularised should be part of the policy framework. Mechanisms should exist where those who are undocumented can surrender and leave the country when they want to, without any threat of sanctions.

### **C. Social Challenges**

#### **1. Health**

Migrant workers should be entitled to the same medical benefits that Malaysian citizens are entitled to in the public health system. The present system of making migrant workers pay exorbitant rates for treatment in government hospitals is ill conceived. Discouraging migrant workers from seeking treatment is detrimental to everyone in the long run.

There should be proper screening of all migrant workers to prevent the spread of infectious diseases. However, regular mandatory testing of migrant workers is discriminatory, threatens the job security of workers and with deportation included, makes access to treatment a problem. This form of screening brings about a profiling of migrants as vectors of diseases and creates a false sense of security that Malaysians are free from diseases. If there is a need to screen the health of migrants, then the health screening must be done with consent and counselling and the principle of confidentiality upheld.

#### **2. Education**

Education is a fundamental right. Children of migrant workers, refugees, asylum seekers and stateless persons should be entitled to free schooling along the same lines as that of Malaysian children.

The argument that providing health and education to such classes of people is a drain on the resources of the nation is ill conceived. Migrant workers make significant contribution to the GDP. In addition to this, it is important to point out that they pay a levy. Between 1998 and 2002, RM700 million was collected in levies, but only between RM6 – RM14 million a year of this is used in direct operating expenditure.<sup>8</sup>

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<sup>8</sup> Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

### **3. Media**

In order to change attitudes about migrant workers, the media needs to play an important role. The media rather than reinforcing stereotypes about migrant workers should raise awareness of migrant workers' rights, highlight human rights violations, give migrants a voice and highlight the important and positive contribution that migrant workers make to the Malaysian economy.

### **Conclusion**

The above recommendations can only work if principles of governance namely democracy, transparency and accountability are adhered to and corruption is eliminated.

It is important that we develop a meaningful and effective system of social dialogue so that all stakeholders concerns will be discussed and effectively resolved through regular meetings.

Recommendations from the  
Conference: Developing a  
Comprehensive Policy Framework  
for Migrant Labour

Bar Council

16 July 2008