Authorised persons to control immigration law employment essay

Law

The ILO has a Committee of Experts on the Application of Conventions and Recommendations which consists of twenty experts, who assess the application of conventions and recommendations. In case a State has not been complying with a ratified convention the Committee will publish the findings in the Committee of Experts Annual Report of Observations and will request the State to take necessary actions. The Committee does not condemn States for non compliance to human rights, but instead only draws the attention of the State to the discrepancy and requests for any remedial action. 10In the case of Woods V Pasab Ltd, the claimant is a religious Irish woman employed at the respondent`s pharmacy in Birmingham. The claimant is making an appeal against the decision of the Employment Appeal Tribunal. The main issue is the use of the word " a little Sikh club" used by the claimant to qualify the respondent during a discussion at work regarding prayer breaks. The latter sued the employee as he considered the use of those words to be a racist remark. However, the Tribunal found that it was only a remark made out of frustration and was not due to racism. Yet, the employee was dismissed by her employer for bad punctuality. She is now suing his employer for discrimination. The court held that there was no discrimination in the dismissal as it was only due to the employee`s performance at work. 15

Acknowledgements

Table of Cases

List of Adjudications

Table of Statutes

Dissertation Declaration Form

List of Abbreviation

Introduction

CHAPTER ONE – FREEDOM OF MOVEMENT AND THE RIGHT OF ENTRY

The Universal Declaration of Human Rights 1948 (UDHR) provides a freedom of movement to each and every individual[1]. According to this article an individual has the right to freely leave his country and to come back. On the other hand, every State has the right to control the immigration in its territory. In the case of The East India Company V Sandys[2], Jeffreys CJ held that restricting access to foreigners in the country has since long been the absolute power of the King. A State can either completely restrict an individual from entering its territory, or can require formal documents to be presented in order to gain entry in the country. These documents can take the form of a residence permit, an exit-entry visa[3], or only a valid passport. In the present chapter, the freedom of movement exercised by migrant workers will be analysed (Section 1), then the recruitment procedure will be assessed (Section 2), and lastly, the documents usually required from the migrant workers so as to gain access to a country will be examined (Section 3).

Section 1: Freedom of movement

Individuals have a freedom of movement but limited to the power of States to control immigration in their territory. Migrant workers coming to Mauritius are regulated by the Immigration Act 1973, the Non-Citizens (Employment Restriction) Act 1973, and the Recruitment of Workers Act 1993. According to Lord Atkinson, « Aliens, whether friendly or enemy, can be lawfully prevented from entering this country and can be expelled from it.»

Sub - section 1 : Authorised persons to control immigration

Section 5 of the Non-Citizens (Employment Restrictions) Act 1973 empowers the Immigration officer to ensure compliance with this Act. The latter therefore has the authority to ask any migrant worker in the country to prove as when required, its legal status as a worker in the country. In the case of Regina V Immigration Officer at Prague Airport & Anor[4], the applicants, all from the Czech Republic, were refused entry on the UK territory by the immigration officers. Section 4 of the Immigration Act 1971 allows the British Immigration Officers to refuse leave to enter the country. The applicants sued the Immigration Officers on the grounds of racial discrimination on the people of Roma. The House of Lords held that there was no such discrimination as preventing the Roma from entering the country at that time was a general activity which applied to every people from Roma.

Sub - section 2 : Right to exercise freedom of movement

Freedom of movement is a basic human right which has been incorporated in constitutions of various States, such as the US[5], Canada[6], Africa[7]and Russia[8]. Such countries allow their citizens to freely exit the territory and

to come back when they want. In the case of Corfield V Coryell[9], the US Supreme Court considered freedom of movement to be a basic constitutional right. In the case of Commission V Belgium[10], the issue was whether Belgium is restricting the freedom of movement of nationals of other member states, by verifying residence permit on the borders. The European Court held that the Belgian Government should not limit the freedom of movement of other member States by systematically verifying residence permit, but it is allowed to do so in the same way as it would check whether the Belgian had their identity card in their possession. In the case of Commission V Germany[11], the Commission is complaining about the number of migrant workers the German authorities have threatened to deport, due to their housing which was not up to the standard of the local neighbourhood. Article 7 of the Residence Act 2004 establishes that for a migrant worker to have its residence permit extended, its family should be living in a decent accommodation in Germany. The European Court held that decent living conditions shall only be considered when the family joined the migrant worker in the country. Any event occurring in the future which negatively affects the housing condition cannot be a reason to deport the worker. The same treatment which would have been given to nationals shall be given to the latter. In addition, deportation is against the freedom of movement and considering the gravity of the violation, it is not an appropriate sanction.

Sub - section 3 : States power to control immigration

States right to control immigration on their territory should not negatively affect the right to freedom of movement of migrant workers. States shall

control its border to the extent that such control does not discriminate migrant workers against nationals, and the control shall not violate the fundamental human rights of individuals. In the case of Hirsi Jamaa & others V Italy[12], the applicants are Somali nationals who were found on the Italian coasts and were arrested for illegal presence on the Italian territory. The latter were not given any explanation about their detention and were simply put on the Italian military ships. The Judge of the ECHR, Pinto de Albuquerque, held that the State has a duty to protect the human rights of asylum seekers in its territory. It also concluded that a State has the right to control immigration in the country subject to human rights standard. Countries like France, the Federal Republic of Germany, and the Benelux countries are willing to provide for a frontier free zone, thereby allowing nationals from member States to freely access their territory. For others, like the United Kingdom, Denmark, Greece, and Ireland, such a practice is nearly impossible as it would result in illegal immigration, arms and drugs trafficking.

Section 2 : The Recruitment Procedure

In Mauritius, the Ministry of Labour, Industrial Relations and Employment (MLIRE) acts as a facilitator in the employment of foreign workers.

Sub - section 1 : The Labour Market Test

Any employer in Mauritius who wishes to recruit foreign workers shall first of all satisfy the following conditions:(1) the import of labour has to be justified. That is, the quantity or quality of labour required must not be available on the local market and;(2) the employer must also demonstrate an attempt to

recruit Mauritian workers for the specified job. Similarly, a Canadian employer who wishes to recruit foreign workers in Canada will have to prove to the Labour Market Opinion that the vacant post has been advertised in a minimum of two local mediums. Employers in US who wish to employ foreign workers have to first of all obtain the foreign labour certification, and then show that there is a lack of the required labour in the country. An employer in Egypt can only recruit a maximum of 10% of foreign worker in his firm. In the case of Bapio Action Ltd & Anor V Secretary of State Department & Anor[13], the National Health Service (NHS) hospitals have recruited junior doctors who are not nationals of the UK, as there was a shortage of this particular category of doctors in the country. However, after several years the country had his own nationals graduating in medicine. The Immigration Rules accordingly modified so as to restrict the number of foreign junior doctors entering the country, and thus recruit nationals doctors. In addition, the Department of Health issued a guidance on the NHS employers website to clarify matters. According to the guidance issued, foreign junior doctors whose Permit Free Training will in some limited time expire, will only be offered a post if no suitable candidate is found on the local market. Lord Bingham of Cornhill held that the resident market labour test has since long been a requirement for obtaining a work permit, and any junior doctor who wishes to seek employment in the NHS shall satisfy this criteria.

Sub - section 2 : Recruitment agencies

Employers in Mauritius usually take the help of recruitment agencies to do the searching for them. Recruitment agencies shall under the Recruitment of Workers Act 1993 hold a licence issued by the Prime Minister`s Office, which

shall be valid for a period of two years, after which the license may be subject to renewal. The recruitment agency acts as a link between the worker and the employer, but it is not a party to the contract of employment. In the case of Innovative Technology Center V Bundesagentur Fùr Arbeît (The Federal Employment Agency of Germany[14]), the applicant is a private sector recruitment agency which has found an employment for the respondent in Germany. The respondent is a Federal Employment Agency (FEA) in Germany which issues recruitment vouchers to persons in search of employment. The latter then has to submit the voucher to any recruitment agency of its choice, who will find a job for him. On presentation of the voucher to the FEA the recruitment agency will receive his due fees. However, in the present case the FEA refused to make the necessary payment to the recruitment agency since the employment received by the person was not according to its specification. The ECJ held that the recruitment agency represents the worker. The court also said that the FEA is surely linked to the worker seeking employment, but the latter still has an obligation to pay the recruitment agency in case the FEA does not make the full payment. Mauritius recruit foreign workers mainly from Bangladesh, Sri Lanka, and China. For the recruitment of foreign workers in group the employer has to satisfy the ratio of three locals to one expatriate. The employer contacts the recruitment agencies and make the necessary arrangements for the workers to be legally sent to Mauritius. The recruitment agencies usually charge the migrant workers exorbitant fees so as to provide them with a job in Mauritius. Most of them take up loans to be able to pay the necessary fees. The migrant workers are also faced with illegal recruiters

who make exaggerated promises about the remuneration to be earned in the host country. Recruitment agencies play a vital role in the recruitment of foreign workers, but there should be a continuous monitoring process of their activities. According to the Minister of Labour, as at 30 November 2011, there were around fifty illegal recruiters of foreign workers operating in Mauritius. The Minister of Labour has proposed a deposit fee of 500, 000 rupees to the Department of Labour in order to obtain the recruitment permit.

Section 3 : Work permit, Residence permit, and medical clearance

After the required quality and quantity of foreign workers have been found by the recruitment agency, the employer has to make the necessary arrangements for the workers to obtain a work permit and residence permit.

Sub - section 1 : Non compliance with the law

Under section 9 of the Immigration Act 1973, a non-citizen in Mauritius without a valid residence permit shall be deemed to be a prohibited immigrant, and consequently under section 4 of the Deportation Act 1968 by deported. Under section 3 of the Non-Citizens (Employment Restriction) Act 1973, a non-citizen shall also not be engaged in any occupation in Mauritius if it does not have a valid work permit. Non compliance with such laws will eventually result in the commission of an offence. The employer shall under section 3 of the Non-Citizens(Employment Restriction) Act 1973, be liable to a fine not exceeding 50, 000 rupees and a penal servitude of not more than 2 years, if found guilty of employing a foreign worker without a valid work permit. In the year 2001, the United States company , the Tyson Foods

Incorporation was charged a criminal case for having recruited foreign workers illegally and provided them with unlawful working papers. The managers consequently faced penal servitude together with fines for having violated immigration laws and for document falsification.

Sub - section 2 : Work Permit

An application for a work permit has to be made to the Employment Division of the MLIRE. On the application the employer has to pay work permit fee. Foreign skilled workers are granted a work permit for a maximum period of four years, while unskilled workers are granted a maximum of two years, which can be renewed at the discretion of the MLIRE. The Work Permit Unit has in the year 2009, 2010, and 2011 issued a total of 31, 247, 30, 212, and 28, 964 valid work permits respectively[15]. This unit of the Employment Division has officers who carry out inspections in companies to ensure whether employers have conformed to rules pertaining to work permit and as well to identify foreign workers operating without a valid work permit. In the case of Hussein V The Labour Court & Anor[16], the notice party was a Pakistani employed by the applicant in a restaurant in Ireland. The worker first sued his employer for exploitation under the Terms of Employment Act 1994, The Organisation Of Working Time Act 1997, and The National Minimum Wage Act 2000. The Labour Court awarded damages to the worker. The employer than applied leave from the Labour Court for a judicial review, and claimed that the respondent cannot ask for protection by the employment legislation due to an absence of employment permit. The High Court of Ireland held that Under section 2 of the Employment Permits Ac 2003, a non-national without a valid employment permit shall be deemed to

be an illegal worker, and the court cannot entertain an application of an illegal employment contract.

Sub - section 3 : Residence Permit

Once a work permit has been granted, the migrant worker in Mauritius has to apply for a residence permit. In the case of Sevince V Staatsecretaris Van Justitie[17], the European Court held that a worker having a work permit subject to renewal also has the right to obtain a concurrent residence permit if such is required by the country of employment. In Mauritius, the residence permit is issued by the Passport Immigration Office for the corresponding period of the work permit. Under section 10 of the Immigration Act 1973, an applicant for a residence permit shall make a deposit of 20, 000 rupees to the Mauritian Government which shall be returned to the worker on its departure. In the case of Saleem V MJELR[18], the applicant was a native of Pakistan working in Ireland, and asking for a long term residency in the country. The High Court of Ireland refused to allow the application since at the time the request was made the worker`s work permit and residence permit had already expired. Some countries in the European Union do not require a residence permit for short stay in the country. In the case of Oulane V Minister Voor Vreemdelingenzaken, the European Court held that a migrant worker shall be issued a residence permit as proof of residency right if stay on the territory exceeds three months. Otherwise, only the identity card or passport shall suffice as proof of legal stay[19].

Sub - section 4 : Medical Certificate

Migrant workers coming to Mauritius shall prior to their arrival submit a medical clearance certificate to the Migrant Section of the Occupational Health Unit of the MLIRE. Besides, on their arrival, they are once again subject to a medical check-up by a national medical institution. According to section 8 of the Immigration Act 1973, persons suffering from contagious diseases, including HIV AIDS, will not be allowed access to the island. Such provisions in the law is mainly to protect the Mauritian citizens from any contagious disease.

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CHAPTER TWO : A DISCRIMINATORY ATTITUDE TOWARDS MIGRANT WORKERS

According to Lord Steyn in Johnstone V Pedlar[20]: « Discrimination cases are generally fact-sensitive and their proper determination is always vital in our pluralistic society.» Migrant workers are very often treated in a hostile manner in host countries. They are subject to discrimination both at work and in the society, even if there are legislations which try to protect them. There are international organisations like the International Labour Organisation (ILO), which cater more specifically for the human rights of migrant workers, but there are also Non-governmental organisations in different countries, such as the SOS-Racisme 1984 in France, United Against Racism in Greece, and the Anti-Nazi League 1970 in UK, which fight against discriminatory behaviour in their specific country. In this chapter, the role of the ILO in protecting migrant workers will be discussed (Section 1), then the discrimination faced by migrant workers shall be analysed (section 2), and

finally, the freedom of conscience, thought and religion of migrant workers in host country shall be considered (section 3).

Section 1 : The Role of the International Labour Organisation

The ILO has since its foundation in 1919[21]been concerned with the protection of migrant workers, through the identification of problems arising from international migration, and seeks to remedy the problems either through international conventions[22]or recommendations[23]. It is the only intergovernmental agency known to have survived the World War II.

Sub - section 1 : Conventions

Some of its main conventions relating to migrant workers include inter alia, the Convention on the Protection of All Migrants and Members of their Families, International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country In Which They Live. Since it is an agency of the United Nations, most of the United Nations members are also part of the ILO, including Mauritius. Members of the UN can become members of the ILO only by notifying the Director General that it accepts the ILO constitution. Originally, the policy of the organisation was to allow countries having a surplus of manpower to move to countries with a shortage of labour. It now also aim at bringing a uniformity in the international labour legislations and thereby levelling the treatment of workers on an international basis. The ILO consists of a tripartite policy making, that is, it consists of government representatives, as well as workers` and employers` representatives.

Sub - section 2 : Adopting a convention and evaluating its application

States have a time limit of one year after the ILC has adopted a convention to bring that convention before the national legislative body[24]. Any convention is adopted after two readings at the ILC. Once a convention has been ratified, the state shall every year at the request of the ILC present a report on the convention. This is done so as to monitor the application of the conventions in the particular State and to find out any improvement or discrepancy in their application.

The ILO has a Committee of Experts on the Application of Conventions and Recommendations which consists of twenty experts, who assess the application of conventions and recommendations. In case a State has not been complying with a ratified convention the Committee will publish the findings in the Committee of Experts Annual Report of Observations and will request the State to take necessary actions. The Committee does not condemn States for non compliance to human rights, but instead only draws the attention of the State to the discrepancy and requests for any remedial action[25].

In cases of more serious violations of human rights, the Committee holds a public discussion allowing representatives of the concerned state to participate. The violations are then published in the report to be submitted to the Conference Plenary. For example, in February 2010, the UN published a written statement on racism against black African migrants in Libya. Such an action can affect the reputation of Libya in the world labour market.

Sub - section 3 : Complaint Procedure

The ILO also allows a State to make a complaint against another State for non compliance to ratified convention. For instance, in 1985 the Tunisian government made a complaint against the Libyan government for having wrongfully expelled 10, 000 Tunisian migrant workers from the Libyan territory. The complaint included non-payment of wages and wrongful termination of employment. The ILO met the representatives of both States and the dispute was settled when the Libyan government agreed to compensate the Tunisian government. Similarly, in 1981 The Dominican Republic and Haiti were found to be in violation of ILO conventions relating to the protection of workers for having mistreated Haitian migrant workers in the Dominican Republic.

Section 2 : Discrimination faced by migrant workers in the host country

The ILO has in most of its conventions[26]a non discrimination section preventing any discrimination of any kind relating to " race[27], sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In the case of Gueye et al. V France[28], the Human Rights Committee established that discrimination on the basis of nationality falls under the term 'other status'.

Sub - section 1 : Equality at work

The ILO Convention 143 on migrant workers provides for the basic human rights of the latter. Article 10 of the same convention provides for an equal treatment of migrant workers and nationals. Article 2 of the Universal Declaration of Human Rights (UDHR) provides that:" All human beings are

born free and equal in dignity and rights". As such, no human being shall be treated as inferior, and basic human rights shall be given to all. Section 16 of the Mauritian constitution 1968 provides for protection against discrimination, while section 4(1)(a) of the ERA provides for non discriminatory behaviour at work. Section 20[29]of the ERA 2008 provides for an equal payment to all workers for work of equal value. Every employer shall ensure that the remuneration of any worker shall not be less favourable than that of another worker performing the same type of work. Nationals and foreign workers should be remunerated the same amount for similar tasks. According to the 2011 National Remuneration Board (NRB), unskilled workers in the Export Oriented Enterprises (EOE) shall be remunerated a minimum of Rs607 ($21) per week, while an unskilled worker outside the EOE shall be paid at least a weekly pay of Rs749 ($27). The National Economic and Social Council (NESC) points out the unequal pay provided to Chinese migrant workers. Chinese workers in the Export Processing Zone (EPZ) sector earn a low rate of 120-150 dollars per month. . Workers at Trend Clothing limited earn an hourly rate of Rs 16. 57[30]. On the 10 October 2007[31], 448 Bangladeshi workers from the Compagnie Mauricienne de Textile Ltée factory (CMT) had a strike to demand a rise in their pay from Rs5700 to Rs 10, 000, for the same hours of work. According to the Sunday Times in 2007, migrant workers receive only up to 22 pence to 40 pence per hour, which is about 40% less than what is obtained by local workers. In the case of Bialczyk & Anor V Mc Grady & Byrne Provincial Care Service Agency[32], the applicants are foreign workers of Polish nationals working in the Northern Ireland, The workers claim that they were being treated less favourably than

their Irish colleagues, on the basis of their race and national origin. They received a remuneration inferior to that of their Northern Irish colleagues. The Northern Ireland Industrial Tribunal held that under Article 3(1), 6(2)(a), and 52(A) of the Race Relations Order 1997 , the respondent has committed an act of discrimination by providing a different remuneration to workers of different origin. In the case of Pilar Allué and Carmen Coonan V Università degli Studi di Venezia[33], one of the applicant was of Spanish nationality, employed as a foreign language lecturer in Venice. However, the university refused to extend his employment contract under the Presidential Decree 1980 which allows the contract of employment of a foreign language lecturer to be valid only for a year, subject to renewal. The European Court held that the Article 48(2) of the EEC Treaty not only prohibits discrimination based on nationality but all other forms of discrimination which leads to the same result, and which causes prejudice to non-nationals. The ICESR provides for basic human rights to all human beings irrespective of nationality. Therefore, countries having ratified this convention should ensure foreign workers are employed under fair and just conditions. Article 23 of the UDHR provide for a right work under just and favourable conditions. However, such a declaration was not binding on the states. To bring an obligation towards the states the ILO drafted the ICCPR which established right to freedom and self determination.

Sub - section 2 : Indirect Discrimination

Article 26 of the ICCPR provides that every person shall be equal before the law, that is, the law applicable in the host country shall not be discriminatory as regards to foreign workers on its territory. The latter shall benefit from an

equal protection of the law. The European Court held in the case of Pinna V Caisse d`Allocations Familiales de la Savoie[34], that a national law which applies to both national workers and migrant workers, but which causes detriment essentially to the latter must be regarded as indirectly discriminatory. In the present case the applicant is of Italian origin and lives in France together with his family. Likewise, in the case of O`Flynn V Adjudication Officer[35], the applicant, a UK resident of Irish origin and a former migrant worker, was asking for a funeral payment for the cremation of his son in Ireland. Under UK legislation, the Social Fund (Maternity and Funeral Expenses) Regulations 1987, a funeral payment shall be provided to both national workers and migrant workers only if the funeral takes place in the UK. If the cremation takes place outside the UK no such allowance shall be provided to both the national worker and the migrant worker. Such a law is likely to affect mostly migrant workers in the UK who wishes to cremate their family members in countries other than the UK. The law therefore constitutes indirect discrimination.

Sub - section 3 : Racial Discrimination

International declarations such as the Vienna Declaration and Programme of Action 1993, Commission on Human Rights Resolution 1997/74 of 1997, and the Durban Declaration 2001 address issues of racial discrimination and xenophobia against migrants. The UK has the Britain`s Race Relations Act 1965, 1968 and 1976 which are designed to counter racism in all spheres including employment. These Acts make racial discrimination a criminal offence. The employer should not discriminate employees on the basis of race, and should also protect the employees from racial discrimination at

work. In Chin V The Post Office and others[36], the employer was held guilty for failing to protect the employees against racial harassment at work. In Gaygusuz V Austria[37], the ECHR found that a Turkish national in Austria was being discriminated with other Austrian nationals as he was denied unemployment benefit on the basis that he was not of Austrian nationality. In the case of Weller V Hungary[38], the ECHR held that every difference in treatment will not amount to discrimination. The applicant has to prove that other people in the same situation enjoy a different treatment. In the case of Cass. 28 Avril 2006[39], the French Court held that there will be no breach of the principle of equal remuneration for work of equal value, if the employer justifies this difference with valid reasons.

In the case of Woods V Pasab Ltd[40], the claimant is a religious Irish woman employed at the respondent`s pharmacy in Birmingham. The claimant is making an appeal against the decision of the Employment Appeal Tribunal. The main issue is the use of the word " a little Sikh club" used by the claimant to qualify the respondent during a discussion at work regarding prayer breaks. The latter sued the employee as he considered the use of those words to be a racist remark. However, the Tribunal found that it was only a remark made out of frustration and was not due to racism. Yet, the employee was dismissed by her employer for bad punctuality. She is now suing his employer for discrimination. The court held that there was no discrimination in the dismissal as it was only due to the employee`s performance at work.

On 30 June 2012 in Northern Ireland, a migrant was beaten by two men while returning home from work. As well, numerous racist attacks against Pakistani migrants in Greece[41].

Sub - section 4: Gender Equality

Workers should also not be discriminated according to their gender. The Equal Opportunities Bill 2005 prohibits discrimination, but section 4 provides certain circumstances in which the Act shall not apply. The Act also provides for a reasonable test to determine whether a practice is unlawfully discriminatory or not. Both men and women are to be treated equally, both at work and in the society. Men driven society has been since long prevailed in various countries. Employers very often provide different facilities at work to migrant workers based on their gender. Legislation is continuously improved so as to eliminate such unfairness. In the case of Garland V British

Rail Engineering Ltd[42], the applicant is suing her employer on the basis of sexual discrimination. The company`s policy is to provide free travel facilities to its workers during their employment and even after their retirement. However, such facilities extend on to the male workers` family members, but not to the female worker`s husband and children. The House of Lords ruled that where the employer provides such facilities only to male employees, it constitutes a discrimination under Article 119[43]of the EEC treaty, against the female employees. In the case of Defrenne V. Sabena Airlines[44], the European court of Human Rights held that gender discrimination forms part of the basic human rights of individuals. Employers shall not treat men and women workers differently. Article 119 of the European Economic Community (EEC) treaty regulates pay discrimination between men and women. In the Mauritian case law Guyot and Anor V Governemnt of Mauritius[45], the applicant challenged the Non-Citizens (Employment Restriction) Exemption Regulations 1970, which allows only the foreign wife of a Mauritian, and not the foreign husband of a Mauritian female citizen, to work in Mauritius without having to apply for a work permit. According to the plaintiff is against contrary to Chapters 1 and 2 of the 1968 Constitution which prohibits sexual discrimination. The Supreme Court held that there is no discrimination as the law applies to all foreign husbands equally, and this law is to enable the country to prevent illegal migration. On the other hand, the case of Abdulaziz, Cabales and Balkandali v. United Kingdom[46], the European court held the immigration law that assists women to join their husband settled in UK but made it more difficult for men to join their wives in the country, to be sexually discriminatory.

Section 3 : Freedom of conscience and religion

Section 11 of the Mauritian Constitution 1968 provides for the protection of freedom of conscience to individuals in Mauritius. Migrant workers coming to the country therefore has a freedom of religion which allows them to exercise their religious beliefs freely. Moreover, Article 18 of the UDHR 1948 provides for a freedom of conscience, thought and religion to individuals. However, religious practices of migrant workers are sometimes against national legislations of the host country. In the case of Ghai V Newcastle City Council[47], the claimant, a man of Hindu origin, has been working in the Newcastle since 1958, and is now asking to have the right to exercise his freedom of religion by having his body cremated on open air pyre after his death. The High Court of England and Wales held that the claimant has a freedom of religion and belief under Article 9[48]of the European Convention on Human Rights, but such a practice is only a matter of tradition and not belief. And in addition, according to the Cremation Act 1902, the burning of human dead bodies shall take place only in a crematorium. According to the UN Human Rights Watch, Indonesian migrant workers in Malaysia are not allowed to pray five times per day and are also prohibited from fasting during the month of Ramadan. Some also complained that recruitment agents took their religious book, the Koran, before they arrive in Malaysia to work. The Christian migrant workers claim that their employers did not allow them to go to Church. Under section 11 and 12 of the UK Employment Act 1989, Sikhs working on construction sites are exempted from the requirement of wearing a safety helmet, as this would affect their religious belief of wearing a turban. However, in cases where such specific provisions

do not exist, Sikhs are subject to indirect discrimination as they are unable to grow beard and wear a turban at work. In the case of Singh V Rowntree[49], the applicant, a Sikh, was not recruited by the respondent due to the fact that the applicant refused to shave his beard. The latter refused to do so as it was part of his religious beliefs. He then sued the respondent for racial discrimination under the Race Relations Act 1976. The respondent succeeded in proving that he required his employees to shave their beard for hygienic purpose. Therefore, the Employment Appeal Tribunal held that there was no discrimination. In the case of Shebert V Verner[50], a member of the Seventh Day Adventist Church was dismissed when she refused to work on Saturday due to her religious beliefs. She was also refused unemployment compensation as her employer found that the reason of her refusal to work on Saturday was not compelling. The United States Supreme Court held that there was an infringement of the applicant`s freedom of religion. She should not have to choose between unemployment benefits and her religion.

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CHAPTER THREE : WORKING CONDIITIONS

The working conditions are usually specified in the foreign worker`s contract of employment. Mauritian labour legislations such as the ERA 2008, National Pensions Act 1976, OSHA 2005, and the Workmen Compensation Act 1931 apply equally to nationals and migrant workers. Migrant workers should not be subject to less favourable working conditions than nationals, and should not be exploited by their employers. In this chapter, the contract of employment shall be analysed (section 1), then the delayed payment and

unlawful deductions from wages of workers shall be considered (section 2), and finally, the working conditions of migrant workers will be discussed (section 3).

Section 1 : Contract of employment

The MLIRE issues work permit guidelines which provide for the core provisions to be included in migrant workers contract of employment. Some of the provisions which should inter alia be included in the contract of employment are, working hours, remuneration conditions, accommodation to be provided, provision for return air ticket, and circumstances for termination of contract of employment. The contractual relationship between an employer and a worker is normally regulated by a contract of employment, defined by the ERA 2008 as an oral, written, implied or express agreement. The contract of employment should be duly signed by both the employer and migrant worker before the latter starts work.

Sub - section 1 : Access to contract of employment

All contracts of employment for migrant workers earning below Rs360, 000 shall be verified by the MLIRE. The contract of employment should most preferably be sent to the worker in its country of origin[51]in a language the latter understands, therefore, having adequate time to read and understand the conditions of employment. According to the Mauritian apparel manufacturer, the CMT, the foreign workers have access to the contract only when they have arrived in the country. In addition, most of them are illiterate and besides, the contract of employment is not in a language which they understand. Such a situation results in the signature of a document of which

the workers have no understanding. Furthermore, some of the contracts often fail to mention the conditions of employment[52], therefore leading to disagreements between the employer and employee after work has started. To prevent such a situation, the contract of employment should be set in a language which the migrant worker understands, or a translator could be made available by the employer, to explain the contents of the contract of employment to the worker.

Sub- section 2 : Working Hours

Section 14[53]of the ERA 2008 provides for the normal working hours of a worker. A normal day`s work shall consist of 8 hours, but such number of hours shall not exceed 90 in a fortnight without additional pay. Section 14(7) of the Act provides that a worker shall be asked to recommence work only after a lapse of 11 hours since he ceased work. The Act also provide for 20 working days annual leave for every workers who has been in continuous employment for a period of 12 consecutive months[54]. However, migrant workers very often work much more than the lawfully permitted number of hours, especially those in the EPZ sector, where most of the migrant workers are employed (18, 200 of foreign workers in the year 2011[55]). According to the employers, the workers request for additional working hours to earn more, and therefore they are able to send more money to their family. Yet, such a practice is unlawful. In the case of Martin V Galbraith[56], the applicant was claiming payment for hours worked in excess of the lawfully permitted number of hours. The Supreme Court held that the parties cannot sue upon a contract which produces illegality.

Sub - section 3 : Overtime

The ERA 2008 also specifies the way overtime shall be remunerated. A worker shall be notified 24 hours in advance of the work to be performed. In addition, no worker shall be forced to carry out overtime. Any worker who does not wish to carry out overtime shall notify its employer at least 24 hours in advance. According to the Mauritius Labour Congress, 10 hours of overtime[57]a week is compulsory in certain textile factories. Any overtime shall be remunerated at one and a half times the notional rate per hour for every hour of work performed. Some workers reported unpaid overtime and less favourable payment than nationals. The latter often take part in strikes to show dissatisfaction. Illegal manifestations cause the deportation of the workers, due to which most of the migrants withdraw from any complaints. However, the American case law Tripp V. May et al[58], the US court of appeal held that the employer shall not be held guilty for any unpaid overtime provided it is proven that the act was in good faith and that he had reasonable grounds for believing that this act or omission was not an infringement to the Fair Labour Standards Act 1938.

Section 2 : Remuneration

Migrant workers are often faced with delayed payment from the employers or unauthorised deductions from their remuneration. Some workers prefer to remain silent due to the fear of being deported, whiles others choose to show their dissatisfaction. On the 06 March 2008[59], 172 Bangladeshi workers of the Chentex factory reported not having received their pay for December 2007, and having received only half of the pay for January in February.

Sub - section 1 : Unlawful deductions from wages

An employer should not make any such deductions from the employee`s wages about which the latter has not been notified and has not consented[60]. The EAT held in the case of Potter V Hunt Contractors Ltd[61], that any deduction of wages shall be authorised in writing. Employers often exploit migrant workers by not providing a remuneration for work done, and then try to escape their liability by arguing that the migrant worker is an illegal immigrant. The employer who knew the migrant worker`s migration status before employing the latter should not be allowed to evade their duty of remuneration[62]. Many migrant workers are victim of the ruse of their employers, who find ways not to remunerate them for the work done. In the case of Okuoimose V City Facilities Management Ltd[63], the claimant is of Nigerian nationality works for the respondent in the UK. She is suing her employer for unlawful deductions from her salary. The respondent claimed that the applicant was not entitled to receive a remuneration for that period as she did not had a valid work permit and residence permit. However, the Employment Appeal Tribunal found that the latter had already made an application to renew her residence card and therefore the residence card should be retrospectively recognised. As a result, the applicant has a right to live, reside and work in the country. The court consequently held that the respondent has erred under section 13[64]of the Employment Rights Act 1996, by not remunerating his worker. Similarly, in the case of Nizmuddowlah v. Bengal Cabaret. Inc.[65], the applicant was refused remuneration by his employer on the basis that he was an undocumented migrant worker in US. The New York court held that employing an illegal

migrant worker and at the same time not remunerating the latter is both an offence. Besides, the law provides penalties for illegally obtaining employment in the country, but deprivation of remuneration is also not permitted by the law.

Sub - section 2 : Minimum wage

In Mauritius, the National Remuneration Board, under the National Remuneration Order, provides for a minimum wage for all workers. The minimum wage shall be a gross amount which shall exclude the annual leave, sick pay, public holidays, tax deductions, and social contributions. Each country has its own method of calculating minimum wage for its workers. For example, India has more than 1200 minimum wage rates under the Minimum Wages Act 1948. In the case of Cordant Group Plc, R V Secretary of State for Business, Innovation and Skills & Anor[66], the applicant was a public limited company employing about 30, 000 employees. The applicant is challenging the amendment to the calculation of minimum wage of workers. The amendment proposes that travelling expenses paid to workers shall not be included in the calculation of minimum wage. The court dismissed the appeal and concluded that such an amendment will benefit low paid workers, which include a high percentage if migrant workers.

Section 3: Working environment

Workers in Mauritius have the right to be protected from any reasonable harm at work. The OSHA 2005 applies to each and every worker in Mauritius, be it in the private or public sector, nationals or migrant worker, or self employed. It includes new hazards which have cropped up with the advent of

new technology. In Mauritius, a high percentage of migrant workers are employed in Export Oriented Enterprises (18, 200 foreign workers in the year 2011)[67]and the mining industry (19, 154 foreign workers in the year 2011) [68], where a great number of work related accidents are recorded each year. In the year 2011, a total of 17 work accidents relating only to migrant workers has been recorded[69]. The number of accidents reported is most of the time inaccurate due to underreporting of work related injuries by migrant workers. Work related accidents are often the result of inadequate or no training to the migrant workers, language barriers, which make it difficult for the latter to understand the way particular machines should be handled and making it difficult for local colleagues to warn them about particular risks at work, lack of protective equipment and under staffing. The employer should carry out regular checks on the workplace or employ a supervisor to do the supervision for him.

Sub- section 1 : Duty of care of the employer

The Act engages the responsibility of the employer where the security of the workers is concerned. Section 5[70]of the Act provides that it is the responsibility of the employer to ensure the safety, health and welfare of the employees. The employer shall so far as is reasonably practicable, provide an environment which is safe and without risks to the health of its employees. The latter should be provided with adequate training, health and safety information, preferably in a language they understand, and sufficient protective equipment such as helmets, goggles, gloves, safety footwear, and overalls. On proof of the contrary, the employer shall commit an offence and shall be liable to penalties. Employers shall not only ensure safety

environment in home country, but shall also inspect working conditions in countries where the workers are being sent to work. In Cook V Square[71], the plaintiff is an engineer employed by a UK based company, to work in Saudi Arabia. The worker got injured during the course of his employment in Saudi Arabia. The court held that even if the workers had been sent to a foreign site the employer should have made sure that the occupiers are aware of their duty of providing a safe workplace for the people working there. In the case of Toronto Power Co V Paskwan[72], the plaintiff`s husband died on the workplace following a serious injury. A block which was attached to a chain got loose and fell on the worker. The jury held that the accident was due to the failure of the employer to install effective and safety appliances at work. In the year 2010, the Sheriff of Scotland conducted an inquiry on the death of a Polish national working in the construction industry in Scotland. The latter died following a fall on the construction site. The Scottish Sheriff Court, held that the accident was in fact due to the poor safety on the site[73]. In the case of Lubbe & others V Cape Plc[74], the plaintiffs are workers of South African origin and work in a subsidiary company in South African whose parent company is in England. The plaintiffs are suing the respondent for breach of duty of care towards its employees. The latter suffered from injuries caused by the exposure to contaminated product while working in the respondent`s factory. The matter was finally resolved when the parties agreed for an out of court settlement during which the respondent agreed to pay a compensation of $16. 5 million to the plaintiffs. Even when the employees are experienced and skilled, it is still the responsibility of the employer to provide them with safety equipment. The

employer certainly has a greater duty of care towards the inexperienced worker, but a duty of care is owed to the experienced workers as well even if it is to a lesser extent. In the case of General Cleaning Contractors V Christmas[75], the applicant was a window cleaner who was provided with safety belts but there was no hooks on the building to attach them. As a result, the worker fell while cleaning a window and was injured. The employer argued that the worker was experienced and skilled and should therefore be able to find solutions by himself. However, the court held that it was the employer`s duty to warn the worker to check the window before working and to provide for safety equipment to prevent any eventual fall.

Sub- section 2 : Reasonable precaution of the employee

The OSHA 2005 also provides for duties of employees under section 14. The latter are expected to take reasonable care for their own health and safety, and should use protective equipment provided by the employer. However, in the case of Berry V Stone[76], the deafness suffered by the worker at work was held to be due to the negligence of the employer, as the latter has a duty not only to provide protective equipment but to ensure as well that the worker uses the equipment. Migrant workers often undertake high risks jobs which nationals refuse to accept. The migrant workers do not verify the safety equipment as they should but are instead in a hurry to complete a given task an earn their remuneration. Some of them do not report unsafe working conditions as they are undocumented workers or they are simply unaware of their right to be protected under the OSHA 2005. Such conditions are applicable mostly to unskilled migrant workers who are employed in low skilled jobs.

Sub - section 3 Compensation

Under section 25 of the National Pensions Act 1976, a worker who has suffered industrial injury shall be liable to an industrial injury allowance, and under section under section 2 of the Workmen`s Compensation Act 1931 be entitled to compensation for injuries arising out of and in the course of employment. In Mauritius, once the worker has established prima facie that the employer has breach its duty of care, it is for the employer to prove on a balance of probabilities, that he has committed no such breach and that he has taken all reasonable precaution to ensure the health and safety of his employees[77]. Under UK law the employee has to fill a personal injury claim and has to prove the negligence of its employer or fault of a third party, while Korea has an industrial accident compensation insurance policy offered by the Korean Ministry of Labour. The worker who is injured at work is offered a compensation and has its medical fees paid by this policy, regardless of whose fault is the accident. Employers very often try to evade paying injury compensation by simply establishing that the migrant worker`s immigration status is irregular. A migrant worker`s immigration status should not prevent him from obtaining compensation for injuries caused at work by the employer`s breach of duty of care. In the case of Montoya V Gateway Insurance Co[78]., the New Jersey court held that the migrant worker should not be refused medical benefits under the insurance policy, on the basis that the migrant worker is an illegal immigrant.

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