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EXTENSION OF THE ACCESSION STATES WORKER REGISTRATION SCHEME

Submission by the Association of Labour Providers to reverse the decision to extend the scheme

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Introduction

On 8 April 2009 the British government announced that it has decided to extend the Accession States Worker Registration Scheme (WRS) for a further two years from 1 May. The Association of Labour Providers (ALP) represents employment businesses which supply the food and agriculture industries in the UK and which rely heavily on A8 workers. The Association believes that the decision cannot be justified either in its own right or under European Union law and it seeks support from MPs, the European Commission and others for the decision to be changed. The Association's view is shared by other key stakeholders including the Trades Union Congress, the National Farmers' Union, the Recruitment and Employment Confederation and groups representing workers from the Accession States.

The Worker Registration Scheme

Under the Accession Treaty for the A8 countries, nationals of these States have the same free movement rights as nationals of the existing Member States. The Accession Treaty provides, however, that existing Member States could, as a derogation from the usual position under European Community law, regulate access to their labour markets by nationals of the Accession States (other than nationals of the Republic of Cyprus and the Republic of Malta). This derogation could be applied for a transitional period of five years from accession (with provision for a further two years in the case of serious disturbances of the labour market).

The UK Government has used this derogation to operate the WRS. The key points of the scheme are –

- It applies to eight of the ten Accession States; workers from Malta and Cyprus are exempted.
- Employees, but not the self-employed, are required to register within one month of beginning work in the UK. The obligation to register is with the worker but employers must show that they have done all they can to encourage workers to register.
- A fee has to be paid on first registration. Initially this was £50; it has subsequently been increased to £70 and then to £90, that is an 80% increase within three years.
- When a worker changes job he must re-register within a month but does not have to pay a fee.

Purpose of the WRS

The purpose of the WRS is stated on the Home Office website –

> "It allows us to monitor where citizens of those countries (except Malta and Cyprus) are coming into our labour market, the type of work they are doing, and the impact this has on our economy."

However, the real reason for the scheme has been more to do with denying A8 workers access to benefits. This was clear from a Cabinet Office paper, dated 21 September 2005, on the extension for the scheme beyond the initial two years. This paper was obtained after a freedom of information request which the Cabinet Office resisted to the extent of appealing to the Information Tribunal, and clearly was not intended to be published. The paper (accessible at on the ALP website or at http://www.labourproviders.org.uk/files/Ministerial%20working%20group%20paper%20on%20WRS%20Sept%202005.pdf) was duly provided at the last possible moment, the end of February 2009.

The paper set out six reasons for retaining the WRS –

- Closing the WRS would create a "pull factor" attracting more migrants some of whom might arrive without a job or with limited resources. It quoted a DWP estimate that "current arrangements may have saved around £5 million a year in payment of income-related benefits".
- Closing the WRS "would almost certainly mean more people from the new Member States would be eligible to claim income-related benefits, child benefit and child tax credit".
- Closing the WRS could mean an increase in the number of people eligible for local authority housing.
- "The change in policy is likely to be perceived domestically as a loosening of the Government's grip on migration and benefit shopping".
- There is no evidence that other Members States intend to change their policy.
- There is an argument for fairness and consistency – those that have registered would be in no better position than those that have not.

The paper made virtually no mention of labour market effects.

The decision to extend the scheme

Until very recently it was clear to key clear stakeholders that the WRS would not be extended beyond April 2009. This was apparent from various "messages" coming from government. The government changed its mind in February 2009, probably prompted by the Lindsey oil refinery dispute. The decision of the government to retain the scheme was "announced" by the Home Secretary in a television interview (which was largely concerned with her expenses claims) on 22 February 2009. The exact wording was –

> "Although of course what's interesting, Andrew [Marr], is that what we know is that those people travelling within the EU as well, there are fewer of those coming to the UK. Now of course we know that because we have a Workers Registration Scheme - incidentally something that the Tories' immigration spokesman has said he'd like to do away with.
> ANDREW MARR:
> You...
> JACQUI SMITH:

I think it's important we know actually what's happening within Europe and that's why I'm intending to keep it. "

That this was a change of mind was confirmed in the evidence the Business Secretary, Lord Mandleson, gave to the House of Commons European Scrutiny Committee on 9 March -

"The Worker Registration Scheme which was introduced in 2004 has helped us to monitor access to our labour market by migrants from the eight non-Bulgarian and non-Romanian accession countries. We are currently considering exercising our option to maintain this scheme rather than to scrap it in April of this year which was the original thought.

The Home Secretary has already indicated that she is attracted to keeping the Worker Registration Scheme in place and I have no view in my mind at present that might lead me to oppose that."

It should be noted that stakeholders were not informed of the Home Secretary's announcement; this, and the statement by Lord Mandleson, have only come to light in the last week in the research for this paper.

The Migration Advisory Committee (MAC) was asked by the Government on 23 February to *"consider what the likely impact on the labour market would be of relaxing transitional measures [in respect of nationals from the A8 countries], and whether it would be sensible to do so".* The Government requested that the Committee provide its advice by 16 March. In turn the MAC asked a small number of stakeholders for their views by 5 March.

The date on which the scheme was due to end has been known since 2004; however the Home Office asked the MAC to produce a report in just three weeks and a select group of stakeholders was given just 10 days to produce evidence. The MAC did not seek to meet with the key stakeholders.

Only after changing its mind did the government ask the MAC for its report, the conclusions of which could have been predicted given that they are very similar to the conclusions in its report on A2 workers. It seems that the Government has used the MAC as a fig leaf for its own political decision, and the MAC duly delivered what the government wanted.

The MAC recommended retention of the WRS. It rationale for this is reproduced below –

"6.5 The WRS was designed on the basis of a Treaty of Accession power to control (or monitor) access to EU labour markets. It does not, in practice, provide any substantial barriers to employment for A8 immigrants. We would therefore expect any impact of abolishing or retaining it on the number of A8 immigrants employed to be small. The evidence reviewed does not indicate that any substantial negative labour market impacts are likely to result from removing the WRS. Nevertheless, negative impacts of a lower order are plausible, even though evidence is limited and this is only a possibility.

6.6 We emphasise that any impacts resulting from removal of the WRS would be small in comparison to the overall negative labour market consequences of the economic downturn. **Nonetheless, we believe that it would be**

> **sensible to retain the WRS for two more years due to the possibility of small but adverse labour market impacts from abolishing it."**

This conclusion can usefully be compared with the conclusion of the MAC on the A2 workers in its report in December 2008 –

> "Removing the restrictions would probably have a small labour market and economic impact, whether positive or negative. However, uncertainties around potential flows and the current economic situation are likely to be asymmetric in their impact, with the possibility of significantly negative outcomes outweighing that of significantly positive ones. At this moment, greater risks would be posed by removing the restrictions than by retaining them. **We do not recommend fully removing UK labour market restrictions on employment of A2 nationals."**

The approach that the MAC takes is clear – removing restrictions will have a small effect, there are uncertainties, so to be on the safe side keep whatever restrictions are available.

While the MAC is well qualified to comment on labour market issues it has no role in balancing the various interests. The ALP's main interest has always been the wholly unreasonably burden that the scheme puts on low paid workers who have to pay £90 as soon as they arrive in the UK, and surrender their passports at the time when they most need them. Its secondary interest has been the burden on employers who take on average around 30 minutes to help each worker complete the form and who themselves have to retain photocopies of applications forms (and initially of all the guidance notes as well) and subsequent certificates. The MAC took no account at all of these factors as it admits in para 6.8 of its report –

> "6.8 Other factors are also worth mentioning, although our recommendation is not determined by these. First, it is clear that the WRS creates burdens for employers and immigrants. While we do not wish to trivialise these, they need to be assessed against the benefits of the scheme."

It was the task of ministers to weight these factors. They did not do so but simply used the MAC report as justification for the political decision that they had already taken. (This was very clear when the decision was announced not through a press release but rather through giving the news to the *Daily Mail*, which exemplifies the people at whom the decision was targeted.)

The MAC simply ignored the effect of the scheme on workers, and on employers. It actually said, in para 5.32 that "although abolition of the WRS would reduce the administrative burden of the WRS on employers, little research has been performed to examine the scale of such a burden". To the extent that this statement is true is because neither the MAC nor the Home Office has ever wanted to know about the burden on employers and has chosen to ignore all evidence that has been presented on this subject.

In a paper submitted to the Home Office in November 2005 (and included in the ALP's evidence to the MAC) the ALP said –

> "Labour providers estimate that it takes between 30 and 45 minutes to help each worker complete the application form. Taking the lower figure of 30 minutes, this represents 110,000 hours at, say, £20 an hour, and therefore a total cost up to the end of June 2005 of £2.2 million.

> Employers also have to maintain records, generally including copies of the WRS applications. Until the form was revised in the summer of 2004 employers were advised to copy all 12 pages of the form including the eight pages that constituted guidance. Now the form is a more manageable, but still excessive, four pages."

965,000 applications have now been made under the scheme, putting the total cost to employers at nearly £10 million.

The Recruitment and Employment Confederation, in a letter to the Home Secretary on 9 April, included the following brief analysis of costs for just one business –

> "To give you an idea of how this affects our members, one larger member in the food processing sector received 5000 registrations for work in December. 2500 received work, of which around half were A8 nationals. If they are already registered then the agency scans copies of their registration so that they can assure clients that the workers are within the scheme. If they have to register for the first time then the agency provides the worker with the form and usually provides advice on filling it in.
>
> This whole process is estimated to involve 80 hours for the volumes discussed, simply in explaining the form, i.e. 2 people's jobs and a further 60 hours of work in checking that workers have sent their applicant off and that clients have seen proof that the workers are registered.
>
> This then drains resources away from the central functions of an agency, that of registering workers to find work for and speaking to clients to find positions."

Had the MAC asked for more detailed analyses these would have been provided very promptly. It is unacceptable for policy decisions to be made by ignoring evidence that is available and not seeking evidence that is clearly relevant.

Flawed analysis by the MAC

The MAC analysis is flawed in one serious respect. It argues that the WRS has an effect in deterring workers from coming to Britain. It produces no evidence to support this, for the good reason that there is no evidence. In essence the scheme is voluntary. Workers do not commit an offence if they do not register and while employers may technically commit an offence if they employ an unregistered worker none have been prosecuted. What the scheme does is to deter people from registering, and perhaps as a consequence to opt to work in the informal economy.

That many workers do not register is well known. In its December 2008 report on the A2 workers the MAC itself commented: "some immigrants may fail to register, for example, because they are unaware of the requirements to do so or do not wish to pay the fee (currently £90)." Para 5.11 of the report then noted: "WRS estimates exclude some categories of immigrants such as the self-employed and immigrants working for less than one month, as well as those that fail to register. From migrant surveys, Pollard et al. (2008) estimate that a third of A8 immigrant workers in the UK are not registered on the WRS and are therefore not in compliance with regulations." This survey and others are briefly noted in para 2.7 of the new MAC report.

It is simply implausible to argue that the scheme acts as a deterrent to workers coming to Britain when no evidence is offered to support the view and there is an abundance of evidence to the effect that registration is effect voluntary and that many workers who should have registered have chosen not to do so.

The legality of the WRS and of the decision to extend it

The WRS has always been of questionable legality. While ostensibly a monitoring scheme it has clearly been used as a means of controlling access to benefits. This was confirmed in the Cabinet Office paper referred to previously, where the possibility of infraction proceeding by the European Commission was also noted:

> "Nationals from the new Member States do not have a right to reside in the UK as work seekers. This means that while they are seeking work they only have a right to reside as an economically inactive person, and this right is conditional on them having sufficient resources to avoid becoming a burden on the UK social assistance system. Amendments to income-related benefits, child benefit, child tax credit and housing regulations effectively restricted access to these forms of support by economically inactive EEA nationals, by requiring claimants to demonstrate that they had a right to reside in the UK. Without the WRS and the associated regulations, access to income-related benefits by unregistered workers and work-seekers from the new Member States could not also be controlled in the same way. [Further detail is provided at Annex A of the paper]. The European Commission have shown concern that these arrangements may be in contravention of EU legislation on equal treatment of workers. Although the risk of infraction has decreased, it still remains a possibility."

The ALP has always understood that any extension of the WRS after April 2009 could only be on the grounds that migration of A8 workers could cause "serious disturbance" to the UK labour market. However, the government is now arguing that it can extend the scheme if there is serious disturbance to the UK labour market which has nothing to do with A8 immigration. The logic of such an approach is untenable and the legality is highly questionable.

The MAC report quotes the relevant EU document –

> "however, measures can be maintained for the final two years "if there are serious disturbances (or a threat thereof) to the labour market".

In fact the EU document quoted has slightly different wording:

> "however, if there are serious disturbances (or a threat thereof) of the labour markets, they may prolong national measures for a further two years after notifying the Commission"

Whether the substitution by the MAC by "of" for "to" is significant is debatable. However, it seems clear that the whole context is referring to disturbances caused by migrant flows not an economic downturn generally.

The following quote from the report is also relevant –

> "If an old Member State stops using national law measures and moves to free movement of workers under Community law, there is a possibility to re-impose restrictions if there are serious disturbances on the labour market, or the threat thereof. These "safeguard" clauses have always featured in accession Treaties, but have never been invoked. Therefore the Commission has no practical experience in their operation. However, it is clear that the Commission would expect a Member State to put forward convincing proof of a high level of disturbance on the labour market, in order to justify seeking to re-impose a restriction on free movement of workers, one of the four

fundamental freedoms under the EC Treaty."

It has always been the Association's understanding that the UK government would similarly have to make a case to the European Commission for seeking to extend the scheme on the grounds that it was necessary to prevent serious disturbances in the labour market. An EU press release on 8 February 2006 confirms this position –

> "If a State wishes to maintain restrictions on access to its labour market, this will apply for the period from May 2006 to 30 April 2009. Thereafter, they could be renewed for a further, final period of two years, but only if there is evidence that labour flows had disrupted (or were threatening to disrupt) a country's labour market."

Similar wording is used in the Report of a High Level Group on Free Movement of Workers (16 September 2005).

Similarly the Government minister Baroness Scotland of Asthal, said in the House of Lords on 23 February 2004 –

> "Those [restrictions] could be extended for another three years to make it five years and/or could be extended further – if there were specific specialised causes of concern – into the seven-year period".

The then Minister of state for immigration, Liam Byrne MP said in a debate on 13 May 2008 -

> "The restrictions need to be reviewed—indeed, there are rules on when they should be lifted. Under the accession treaty, the second phase of transitional controls, which is what we have in place, must end five years from the date of accession. The Government are allowed to continue to use those controls, but any case that we make to the European Commission for retaining them must be based on guarding against any serious disturbance to our labour market or threat thereof. We have not yet begun to study that. If we could prove that there is a risk, we would be allowed to keep restrictions for another two years—in other words, until 30 April 2011. We need to get stuck into that work in the latter half of this year."

The MAC confirms the ALP's understanding of the position in para 2.6 of its report -

> "2.6 On 1 May it will be five years since the Treaty of accession came into effect. Member states can therefore only maintain transitional measures beyond that date if they can demonstrate that abolition would threaten to generate or somehow exacerbate a serious disturbance to the domestic labour market."

Having made this statement the MAC then gives no such demonstration and contradicts itself by arguing that it merely has to show that there is a serious disturbance of the labour market, even if this has nothing to do with the scheme.

In contrast to the line taken by the MAC, the Home Secretary, in her announcement on 22 February 2009 said that she intended to keep the scheme because she wanted to count A8 workers in Britain.

Consultation and stakeholder views

The WRS has since its inception been strongly opposed by trade bodies representing employers of workers required to register under the scheme, by representative groups of migrant workers, by the trade unions, by organisations concerned with the welfare of immigrants and indeed by almost everyone with the exception of the government. It has even been opposed by the Conservative Opposition. The government has no support for the scheme.

It has never once properly consulted on the scheme and has ignored the code of practice on consultation which the Home Office is committed to. The government's treatment of stakeholders on this matter is usefully summarised in the 2005 Cabinet Office paper:

> "There has been some lobbying amongst employers for closure of the WRS, particularly among the agriculture, food processing and hospitality sectors (where most workers are located). However, the employer lobby has been contained and managed effectively within the Illegal Stakeholder Working Group."

This exemplifies the Home Office attitude to stakeholders on this matter – they are there to be contained and managed, not to be involved.

It has misled stakeholders, including by not announcing the decision taken in November 2005 to extend the scheme from April 2006 until the last minute. It invited stakeholders to produce an alternative means of monitoring the labour markets impacts – but then refused to even discuss the report they produced. The Home Secretary's announcement that she intended to keep the Worker Registration Scheme on 22 February 2009 was not communicated to stakeholders. It invited stakeholders to be told what the government planned to do in April 2009, after it had given the story to the *Daily Mail.*

Human rights issues

It is also worth noting here the statement from the Northern Ireland human rights commission on 11 March 2009 –

> The Northern Ireland Human Rights Commission has submitted evidence to the UK Border Agency calling for the abolition of the Worker Registration Scheme (WRS). Under this scheme migrants from A8 accession states such as Poland and Slovenia who come to live and work in Northern Ireland must complete a continuous period of 12 months registered work. Those who do not meet the strict requirements of the scheme are denied access to essential services such as homelessness support and welfare benefits. The Commission has found that this is leading to severe hardship and suffering.
>
> NIHRC Chief Commissioner Monica McWilliams commented:
>
> "*The Human Rights Commission has serious concerns about this scheme. Through our investigations work we have found that its effects can lead to violations of the right to life and the right to be free from inhuman and degrading treatment. The Worker Registration Scheme is due to end on 31 April 2009 and the Commission urges government not to extend it."*

The Commission has found examples of human rights abuses which are a direct result of the scheme, including victims of domestic violence being prevented from accessing accommodation and benefits. In such cases women are being forced to choose between extreme poverty and remaining in potentially deadly relationships. The Commission has also encountered a number of people forced to sleep rough on the streets of Northern Ireland having being denied access to temporary accommodation.

Monica McWilliams added:

"The Commission is concerned about the denial of services to victims of domestic violence and recommends greater access to protection and support for these victims. It is clear that greater flexibility is needed to ensure that people who are unable to fully comply with the scheme, for example as a result of injury or illness, can access services that are needed in order to avoid destitution."

Summary

- For political reasons the government has decided to extend the WRS for a further two years, imposing a considerable burden on low paid workers and a lesser burden on their employers. The government asked the Migration Advisory Committee (MAC) for a report only after it had decided to extend the scheme. The MAC itself admits that it took no account of the interests of workers or of employers.
- The MAC asserts with no evidence that the £90 fee for registering acts as a deterrent to workers coming to Britain. It does not. It is merely a deterrent to registering and an encouragement to working in the informal economy.
- The MAC report noted that the government could maintain the WRS only if it could "demonstrate that abolition would threaten to generate or somehow exacerbate a serious disturbance to the domestic labour market". It then recommended retention of the scheme while admitting: "We would therefore expect any impact of abolishing or retaining it on the number of A8 immigrants employed to be small." This is a clear contradiction.
- There is no suggestion that workers from the A8 countries are seriously disrupting the labour market.
- The decision was taken without taking due regard to the interests of or proper consultation with the social partners and other stakeholders.
- At various times the government has given different reasons for retaining the scheme – limiting access to social security benefits (Cabinet Office paper, September 2005), counting A8 workers in Britain (Home Secretary, 22 February 2009 and Home Office website) and deterring workers from coming to Britain) (acceptance of the MAC report, April 2009).
- The decision is of questionable legality.