

Position paper: tackling illegal workers

25 March 2004

Introduction

On 16 March 2004 the Home Office announced new arrangements for combating illegal working. The ALP believes that the new arrangements, like the existing arrangements, will be both ineffective and inefficient and suggests a more sensible way to achieve the government's objectives.

The ALP has a particular interest in this subject as the perceived "gangmaster" problem is linked to the problem of illegal working. The Association was established in February by a group of labour providers (or gangmasters as the government persists in calling them) who wish to improve standards and to provide labour providers with a voice in the public policy debates relevant to their business. The Association has been established with the full support of Defra and is working with Defra and other interested parties on the Gangmasters Licensing Bill. Full details of the Association's membership and activities are on its website. It currently has 26 members.

Executive summary

- The government wish to prevent people working in Britain illegally.
- Over 60 documents give evidence of the right to work in Britain.
- 7 million people take on new jobs each year; about 10% of these do not have a British passport.
- The obvious solution to the problem is for the government to issue a single "right to work" document to those without British passports.
- The current solution of relying on 1.3 million employers to check documents that they are not familiar with and for which they cannot be expect to detect forgeries is inefficient and ineffective.
- The policy making process has been unsatisfactory. The consultation exercise had such a poor response that it can be regarded as almost useless. The Home Office needs to review its consultation process.
- There appears to have been no consultation or RIA on the new requirements to register workers from eight of the accession states.
- The communication programme is unsatisfactory. Most employers will not have access to the full guidance until after the new arrangements come into effect.

The problem

The perceived problem is that people are working in the UK who are not entitled to. (Precisely why this is a problem is another matter that is beyond the scope of this paper.) This in turn leads to exploitation of workers not entitled to work in the UK. They can in effect be slave labour, under the control of their employer (a "gangmaster"), and cannot leave because they will not be able to obtain another job. The Morecambe Bay tragedy exemplifies this problem.

The objective

The government's objective is to prevent illegal working. The focus should therefore be on how this objective can be most effectively and efficiently pursued.

The task

The task is to ensure that only those people who are entitled to work in the UK do so. However, many people are entitled to work in the UK including:

- Nationals of 30 European countries (after the enlargement of the EU on 1 May).
- Those with passports or travel documents endorsed to indicate that the holder has the right to work in the UK.
- Asylum seekers who are entitled to work.

There is a huge range of documents that individually or in combination can be used to demonstrate the right to work in the UK - over 60 documents in total.

In very round terms 7 million people start a new job in the UK every year. There needs to be a check every time an employee is taken on to ensure that they have the right to work in the UK. For over 90% of workers a British passport is the relevant document. This is familiar to employers. The issue is identifying the right to the remaining workers – up to about 3 million people. However, it is likely that those without a British passport account for a higher proportion of new jobs than they do of the labour force. A reasonable estimate is that 700,000 people without a British passport take on new jobs each year.

The ideal solution

Given the number of documents that give evidence of right to work, the very small number of occasions on which employers will see many of the documents (how many employers ever see a Lithuanian or Maltese passport?), the huge scope for forging documents and the massive rewards to be gained from forgeries the obvious solution is a centralized system. Those seeking to work in the UK would therefore have to produce in person the appropriate documents to offices staffed by specialists who would have access to information from the authorities in other countries, which would, for example, assist in identifying forgeries. The workers would then be given a single "entitlement to work" document - probably a plastic card - and a central record would be kept which could be checked against income tax and other records. In an ideal world a national insurance number could be issued at the same time. Employers would therefore have to be familiar with just two documents - a British passport and the standard entitlement to work document. Given the scale involved, unit costs would be low and could be recovered by a charge being made.

In the consultation exercise on the new arrangements respondents were asked the question "What further assistance would you like to see the Government provide in order to assist compliance with these new requirements?" Seven of the 28 respondents who answered this question mentioned or requested a helpline to confirm the right to work of individuals be set up in within IND. The Home Office response to this is indicative of its reluctance to take any responsibility:

"There are three major considerations in this: first, the Data Protection Act precludes IND from disclosing the immigration status of an individual to a third party (including an employer) unless they have given their express permission. Secondly, even if the employees gave their permission, this would be extremely resource intensive while there is no central database containing the entitlement to work of all individuals in the UK. Finally, it is the responsibility of the employer to ensure that his or her workforce is entitled to work in the UK."

All three points are flawed. The “Soham defence” (cite Data Protection Act as an excuse for not doing something) is probably arguable but it seems absurd to make it a criminal offence to employ someone not entitled to work in Britain while at the same time the Government department responsible for determining eligibility to work refuses to provide information specifically obtained to identify immigration status. The second point rather ignores that it is even more resource intensive not to have a central database. Also, the issue is not have a central database for everyone entitled to work in Britain but rather building up a database of those entitled to work in Britain who do not have a British passport. The final point is simply a cop out. Government simply cannot require organisations to do its policing work but then deny them the means to do so.

The government solution

The solution adopted by the government is far removed from the ideal solution and imposes significant costs on those employers who try to comply, while being ineffective. A suitable analogy is trying to peel an orange with one's feet rather than one's hands.

The Government is expecting every employer (about 1.3 million) every time they employ any person to check and copy the original documents. To be effective this requires employers to be familiar with sixty or so documents and to be able to identify forgeries. This is impossible. The diligent employer is put to substantial cost. The less diligent can simply argue that they had no reason to believe that a document was not genuine. The system actually facilitates exploitation of illegal workers. The "gangmaster" obtains forged documents which the employer accepts, either in good faith, carelessly or knowingly. The workers know they are illegal and cannot escape from their gangmaster.

The Regulatory Impact Assessment (RIA) acknowledges this problem. This notes that the number of prosecutions of employers of illegal workers is at a low level (20 in the last five years for which figures are available, of which just 7 were successful) “mainly because of the widespread use of forged documents by illegal workers to obtain employment”. The RIA then goes on to identify a possible solution: “The government’s decision to begin the process of introducing a national identity cards scheme will eventually help us to tackle illegal working more effectively. The scheme would enable employers to comply in a simplified manner with the law by checking for a universal identifier.”

The RIA acknowledges how easy it is to forge documents and therefore how ineffective employer checks are: “The ease with which some of the documents acceptable as proof of entitlement to work can be forged means that compliant employers may be unwittingly employing illegal workers, despite carrying out checks.” The RIA then goes on to admit that without greater enforcement the new arrangements may be ineffective: “Forgers and others seeking wilfully to break the law may be able to negate the increased security provided by the two-list system of identification. Without an increase in enforcement activity, little real change may be embedded.” The problem was also recognised in the consultation exercise. Of the 35 responses on the specific question over half (18) expressed concern that documents would continue to be forged and “A number felt that this might undermine the secondary legislation’s effectiveness, especially if the support for employers is not adequate in terms of identifying forgeries.”

To some extent the Home Office is living in a make-believe world. The fact is that many employers do not carry out the checks required by law. This was rather confirmed in the consultation document. A question asked “how many and what type of documents are currently checked and recorded by UK employers as best practice in terms of Section 8 compliance?” Just one employer listed their document requirements although four mentioned the national insurance number or P45. The latter are needed in order to pay employees and are not acceptable as proof of identity. Only 16 of the 50 respondents answered the question about how well present arrangements are understood. Of those, seven said that they were well understood and seven that they were not.

The response to the consultation turns the position on its head: “This does not mean that document checks are not taking place, as a number of respondents indicated that the proposed requirements would have little impact on recruitment procedures, and this suggests that they already carry out checks of some kind.” There is no way that this conclusion could have been drawn from the response. A better conclusion would have been: “The response suggests that many employers do not carry out the required checks at present and will not change their practice in future.” The response to the consultation exercise acknowledges that “very few respondents gave any information on current recruitment procedures carried out by employers or on the likely costs of the proposed requirements for a typical UK business.” The proper government reaction should have been to commission a mystery shopping exercise or even a telephone survey of employers to test the current level of compliance. This should still be undertaken; there is no doubt that it would demonstrate a very low level of compliance.

To compound the problem the government is introducing a last minute registration scheme for nationals of eight of the accession states. With the ideal situation described above the data would be recorded automatically. Instead the "peeling oranges with feet" principle has been adopted. Employers are required to advise employees that they should register with the Home Office. If they fail to register within a month (even if this is the fault of the Home Office or the Post Office) then the employer will have to sack them otherwise they "may be" committing a criminal offence and will be liable to a £5,000 fine.

The process

The process used to settle the new policy is far from satisfactory. There seems to have been no consultation and no regulatory impact assessment on the arrangements for the eight accession states even though the accession date has been known for years.

The consultation exercise generally was not successful. Just 50 responses were received of which 14 were from trade associations, three from employment agencies and three from trades unions. Most of the responses also failed to answer most of the questions. Interest groups must take part of the blame for this but perhaps the Home Office could have reviewed its approach to consultation so as to secure a better response.

The consultation exercise and the RIA were also very narrowly based. The consultation exercise simply asked for comments on what the Home Office proposed to do rather than setting out options. The RIA considered just four options:

- No change.
- Introduce the revised secondary legislation across all sectors.
- Codes of practice leading to self-regulation in sectors where illegal working is prevalent.
- Introducing the proposed new secondary legislation only in specified sectors in which illegal activity is prevalent; maintaining the status quo for the remaining sectors within the UK economy.

A second's thought would indicate that the third and fourth options are unworkable – perhaps why they were included in the analysis. The option of the government accepting any responsibility was not considered.

Communication

The new arrangements were announced on 16 March and come into operation on 1 May. The guidance to employers is currently in the form of a draft leaflet on the Home Office website. It is intended to send a hard copy of the leaflet (it is not clear whether this will be the draft or a final

version) to employers in April. This hardly gives employers much notice. The leaflet is not user friendly and will probably frighten many of the employers who read it. For example, although it sets out the position after 1 May it does not list the accession states as being within the EEA. It also sets out the requirement for nationals of eight of the accession states to register but does not explain how the registration process will work; for example where can forms be obtained, to whom should they be sent, how long will the Home Office take to respond? It seems that those employers who do not look for the information on the Home Office website (probably the vast majority) will not have access to any information on the arrangements until after they come into effect. Indeed this applies to the detailed guidance on the whole of the new arrangements. Hard copies can be ordered only from 30 April. This is not acceptable for arrangements that come into effect on the 1st of May.