

WORKERS IN THE SHADOWS: AN INTERNATIONAL COMPARISON ON THE LAW OF DISMISSAL OF ILLEGAL MIGRANT WORKERS (2010) 31 ILJ 1521

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INTRODUCTION: THE SOCIAL AND ECONOMIC CONTEXT GIVING RISE TO ILLEGAL MIGRANT LABOUR

Research by the International Labour Organization (ILO) on migration shows that there are approximately 191 million migrants around the world, made up of workers, their dependants, refugees and asylum seekers. ¹ About 60% of migration occurs from developing to developed nations. ² The United Nations (UN) estimates that between the years 1980 and 2000 the number of migrants in developed countries grew from 48 million to 110 million. The number in developing countries grew from 52 to 65 million. ³

In 2000 the migrant worker population was estimated to be 86 million and distributed as follows: ⁴ In Europe (including Russia) - 28.5 million; in Asia (including the Middle East) - 25 million; in North America - 20.5 million; in Africa - 7.1 million; in Oceania - 2.9 million; and in Latin America and the Caribbean - 2.5

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million. ⁵ The exact number of illegal migrant workers internationally is difficult to determine because of the clandestine nature of their movements but there is general international consensus that the largest unauthorized worker flow is from Mexico to the United States (USA). ⁶ The undocumented immigrant population in the USA is about 9 million and the number of unauthorized workers is estimated to be about 5.3 million. The USA is the reluctant host to almost double the number of illegal migrants living and working in Europe. Tighter patrols along the US-Mexican border have not halted this flow, causing one commentator to say that enhanced controls 'have less to do with actual deterrence and more to do with managing the image of the border'. ⁷ South Africa too has and is experiencing unprecedented flows of illegal migrants, mainly from Zimbabwe on a scale never previously experienced. Unofficial figures (there are no official ones) indicate a presence of between 1 and 3 million illegal Zimbabweans in the country. ⁸

The ILO estimates that approximately 10%-15% of international migration occurs irregularly/illegally. ⁹ In some receiving countries the percentages are much higher. For example more than half of the 3-4 million migrant workers (from Central Asia including Kyrgyzstan, Tajikistan and the Ukraine) in the Russian Federation are illegal workers. ¹⁰

Push factors

The main reason migrants leave their own countries is high unemployment, poverty and the hope of a better life in a different country. The ILO estimates that about 550 million workers are living on less than one US dollar a day, whilst half the world's 2.8 billion earn less than two US dollars a day. ¹¹

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About half of the workforce in developing countries is employed in the agriculture sector (1.3 billion people). The sector faces numerous challenges such as competition from subsidized farming in the industrialized world, climate change and environmental degradation. These circumstances drive workers to consider selling their labour power in the developed world where wages and conditions of work are more favourable.

The remittances which migrants send home are significant. The GCIM estimates that migrants moving from low to high income countries earn 20 to 30 times more than they would in their countries of origin. ¹² In October 2007, a UN study estimated that migrants working in industrialized countries send more than 300 billion US dollars to

their families, more than the 104 billion US dollars provided by donor nations in foreign aid to developing countries. ¹³ The highest remittance flows are to India, China and Mexico (27 billion US dollars, 26.7 billion US dollars and 26 billion US dollars respectively).

Remittance flows have the advantage of providing financial support directly to the families of migrants (it reaches the people). The GCIM noted that 'remittances help to lift recipients out of poverty, increase and diversify household incomes ... enable families to benefit from education and training and provide a source of capital for the establishment of small businesses'. ¹⁴

Pull factors

Migrants in host countries work in industries (such as construction and agriculture) which are not appealing to their own nationals. Irregular migrant workers are generally over represented in the '3-D' jobs - those which are dirty, degrading and dangerous. Interestingly, about half of migrants are women and meet a demand for labour in work traditionally associated with women, such as domestic work, nursing, care for children and old people, cleaning and the sex industry. ¹⁵

It is not just the case that illegal workers are filling jobs that nationals do not want; a further explanation for their presence in the economy is that there may not be sufficient nationals to fill those positions. Many industrialized countries have falling birth figures which means that national labour is not replaced at the levels needed for the economy and employers then look elsewhere for labour. ¹⁶

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According to the UN Population Division, fertility rates in Europe for 2000 were 1.4 children per adult woman, while the replacement rate for a population is 2.12 children per woman. The GCIM notes that for some industrialized countries the population is getting smaller and older, 'a situation which threatens their ability to sustain current levels of economic growth and to maintain their existing pensions and social security systems'. ¹⁷

Employers are incentivized to employ unauthorized workers because they are often prepared to work for lower salaries than their national counterparts. Employers are also attracted to the flexibility of such labour which may be employed in times of need and simply dispensed with in times of low demand. They are thus a source of labour vulnerable to exploitation and abuse.

Marginalization and xenophobia

Many illegal migrant workers find themselves on the fringes of the host nation's economy. Their marginalized work experience is exacerbated not only by language difficulties but also by an unfamiliar system of administration, governance and legal practices in the host country. Regrettably, conflict between immigrants and nationals does sometimes occur as has been witnessed recently in South Africa when nationals from poor communities attacked foreigners, mainly Zimbabweans and Mozambicans, in May 2008 leaving 62 migrants dead, 67 wounded and between 30,000 and 100,000 displaced. ¹⁸ Prince Mashele from the Institute for Security Studies was quoted in the ILO's International Migration Project's report explaining the context giving rise to this xenophobia: 'If you listen to the reasons given by the people who have participated in the violence, you will hear about how foreigners have taken their jobs, foreigners have taken their houses, foreigners are committing crimes, so you see there are socio-economic concerns in the communities where the violence is taking place.' ¹⁹

Political pressures

States are under political pressure to restrict and manage immigration in their national interest. Beth Lyon, an academic from the Villanova University School of Law, comments:

'Governments are under increasing pressure from their electorates to demonstrate that they are limiting immigration, in the name of national security, cultural and racial purity, social spending, the environment and domestic worker protection.' ²⁰

Along similar lines the GCIM reports that:

'Irregular migration, which appears to be growing in scale in many parts of the world, is regarded by politicians and the public alike as a threat to the sovereignty and security of the state. In a number of destination countries, host countries have become increasingly fearful about the presence of migrant communities, especially those with unfamiliar cultures and that come from parts of the world associated with extremism and violence.' ²¹

Conflicts of interest

The presence of unauthorized workers in host countries creates uneasy tensions between the principles of fairness and human rights underlying international ILO and UN conventions on the one hand and the principles of sovereignty informing national immigration law on the other; as well as between governments' desire for flexible labour for certain sectors of the economy and the political sensitivities of their citizens. These larger tensions come into play in the workplace in different ways. Trade unions may be reluctant to organize and represent unauthorized workers who are viewed as transient and responsible for 'stealing jobs' from nationals. There may be conflict between foreigners and nationals over wages, with foreigners prepared to accept lower wages than nationals, as recently seen (November 2009) in De Doorn in the Western Cape where South African nationals attacked Somalian workers who worked on grape farms. Tensions are also evident in circumstances in which unauthorized workers are dismissed. Employers are generally quick to argue that unauthorized workers have no entitlement to the protection of labour laws as their presence in the country contravenes immigration laws - 'they shouldn't be here in the first place' argument.

The labour rights of illegal workers in South Africa

In South Africa the emerging position appears to be that unauthorized workers are entitled to labour law protections argued primarily on the basis of the right to fair labour practices in s 23(1) ²² of the Constitution of the Republic of South Africa. ²³ The leading decision in that regard is *Discovery Health v CCMA*²⁴ in which the Labour Court (LC) held that the Commission for Conciliation, Mediation & Arbitration (CCMA) has jurisdiction to consider an unfair dismissal claim brought by a foreigner who worked in contravention of the Immigration Act 2002. ²⁵ The decision overturns previous decisions made by the CCMA to the effect that such employment relationships

are void ab initio and any application by an employee to the CCMA for relief following an unfair dismissal was dismissed on the basis that the CCMA lacked jurisdiction to hear such a complaint.

Noting that South Africa is not in a unique position with respect to the flow of illegal workers into the country, and the controversial nature of the LC's decision, this article considers the jurisprudence in other jurisdictions, in particular the US, the United Kingdom (UK) and Australia, confronted with the same issue - whether illegal workers may be protected against unfair dismissals. The article also considers international law instruments developed by the ILO ²⁶ and the UN ²⁷ concerned with the protection of migrant workers, including illegal migrant workers. International comparative research is encouraged by our Constitution in circumstances in which the interpretation of a right (such as a right to fair labour practices) in the Bill of Rights is subject to contestation. The Constitution entreats a court or tribunal when interpreting a right in the Bill of Rights to 'promote the values underlying an open and democratic society based on human dignity, equality and freedom' and to consider international law and foreign law. ²⁸ Furthermore, when interpreting legislation (such as the Immigration Act) courts are encouraged to prefer a reasonable interpretation of legislation consistent with international law over an alternative interpretation inconsistent with international law. ²⁹

The issue of according labour law rights to illegal workers is a contentious one on numerous fronts: moral, political and legal. This article confines itself to the latter front - and the question for consideration is whether or not the LC's decision in *Discovery Health* is legally defensible and accords with foreign and international law. Expressed a

little differently, the question is whether the interpretation of the constitutional right to fair labour practices as extending to illegal workers in circumstances of dismissal accords with foreign and international law.

At the outset it is important to state that the article has limitations: it does not report on and compare the jurisprudence in many other major receiving countries, such as Russia or Germany. Furthermore, the article is restricted to the topic of unfair dismissals and does not deal with other types of disputes involving illegal migrant workers, such as those falling under the rubric of unfair labour practices, health and safety or discrimination.

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[1](#) L Berg 'At the Border and between the Cracks: The Precarious Position of Irregular Migrant Workers under International Human Rights Law' (2007) *Melbourne Journal of International Law* 4.

[2](#) Global Commission on International Migration (GCIM) 'Migration in an Interconnected World: New Directions for Action' (2005) at 6. See www.gcim.org.

[3](#) GCIM at 12.

[4](#) ILO *Facts on Labour Migration* at 1. See www.ilo.org/communication.

[5](#) The GCIM notes that the form of migration varies from one part of the world to another. 'In Asia for example, many migrants move on the basis of temporary labour contracts, whilst in parts of the Americas and Africa, irregular migration is far more prevalent. Traditional countries of immigration such as Australia, Canada, New Zealand and the USA continue to accept migrants for permanent settlement and citizenship (for skilled workers and professionals), while the countries of the Middle East usually admit international migrants for fixed periods and without any expectation of integration. In Europe the major preoccupation of recent years has been the arrival of asylum seekers from other parts of the world, the majority of whom do not qualify for refugee status.' GCIM at 7.

[6](#) B Lyon 'New International Human Rights Standards on Unauthorised Immigrant Workers' Rights: Seizing an Opportunity to Pull Governments out of the Shadow' (2006 Villanova University School of Law Paper 45) at 561.

[7](#) Lyon at 567.

[8](#) D Vigneswaran *Special Report: Fact or fiction? Examining Cross-Border Migration in South Africa* (2007 Forced Migration Studies Programme and Musina Legal Advice Office) at 4.

[9](#) ILO Bureau for Workers' Activities (ACTRAW) *In Search of Decent Work - Migrant Workers Rights: A Manual for Trade Unionists* (2008) at 45.

[10](#) ILO at 53.

[11](#) GCIM at 11.

[12](#) GCIM at 12.

[13](#) ILO at 55.

[14](#) GCIM at 26.

[15](#) ILO at 39.

[16](#) The ILO points out that the European Union may face a decrease of 20 million people over the next 40 years. On present trends the population of Italy could drop by 28% and Spain by 24%. ILO at 52.

[17](#) GCIM at 13.

[18](#) *Mail & Guardian online* 31 May 2008, quoting Ms Sally De Beer, the spokesperson for the SA Police Service (SAPS).

[19](#) I Award 'The Global Economic Crisis and Migrant Workers: Impact and Response' (2009) 38. See www.ilo.org/pub.

[20](#) Lyon at 567.

[21](#) GCIM at 8 and 9.

[22](#) 'Everyone has the right to fair labour practices.'

[23](#) Act 108 of 1996.

[24](#) (2008) 29 ILJ 1480 (LC).

[25](#) Act 13 of 2002.

[26](#) The 1949 Convention Concerning Migration for Employment and the 1975 Convention on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.

[27](#) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

[28](#) s 39(1).

[29](#) s 39.

INTERNATIONAL INSTRUMENTS AND THE ROLE OF THE ILO AND THE UN

The ILO Constitution and ILO Conventions 66 of 1939 and 97 of 1949

The ILO is the international organization most concerned with migrant workers (including irregular migrant workers). The preamble in the ILO Constitution drafted in 1919 refers to the duty to protect 'the interests of workers when employed in countries other than their own'. In 1939 the ILO introduced the earliest binding standard called the Convention concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment (No 66). This convention was revised in 1949 by the Convention Concerning Migration for Employment (No 97). The ILO 1949 convention dealt with issues such as the health of migrant workers,³⁰ the transfer of earnings and savings,³¹ the content to be covered in a contract of employment,³² and the recruitment of workers.³³ The ILO 1949 convention does not deal directly with illegal workers but does implicitly recognize that constituency of workers. It espouses the principle that legal migrant workers are entitled to treatment 'no less favourable' than that applying to workers in the host nation.³⁴ By implication, it is arguable that illegal migrant workers could not, according to this early convention, expect parity of treatment, with nationals or legal migrant workers.

ILO Convention 143 of 1975

The plight of illegal migrants and the need for their protection was expressly recognized in 1975 with the adoption of the Convention on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No 143). This convention sought to 'suppress clandestine movements of migrants for employment and illegal employment of migrants'.³⁵ The 1975 ILO convention enjoined members to treat illegal workers on a par with nationals with respect to *past* employment in relation to remuneration, social security and benefits.³⁶ Article 9.1 reads:

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'Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of *rights arising out of past employment as regards remuneration, social security and other benefits.*' (Emphasis added.)

It would seem that this article supports claims for remuneration for work already performed (retrospective rights) but does not extend to continued employment in which the irregular/illegal situation continues. Lawful foreign employees are privileged vis-È-vis their illegal counterparts as member states are encouraged to-

'promote and to guarantee, by methods appropriate to the national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families *are lawfully* within its territory'³⁷ (emphasis added).

Cases before the ILO's Committee on Freedom of Association

The ILO has interpreted other ILO conventions in favour of recognizing the rights of unauthorized workers. In March 2002 the General Union of Workers of Spain approached the ILO³⁸ about a new Spanish law restricting collective bargaining rights to workers legally present in the country (ie excluding foreigners working in Spain illegally). The union argued that the Spanish government's intentions contravened two ILO conventions signed by Spain - the Freedom of Association and Protection of the Right to Organize Convention³⁹ and the Right to Organize and Collective Bargaining Convention.⁴⁰ The ILO's Committee on Freedom of Association found that article 2 of ILO Convention 87 which states, that 'workers ... without distinction have the right to establish and join organizations of their own choosing' applied to unauthorized workers. The ILO encouraged the Spanish government to take into account this interpretation. Spain's Constitutional Court ultimately declared the restrictive provisions to be unconstitutional.

A year later in 2003 the ILO committee heard a complaint from the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM) against a decision by the Supreme Court of the United States (*Hoffman Plastic Compounds v National Labor Relations Board*)⁴¹

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disallowing backpay to an illegal Mexican worker who was dismissed for participating in union activities. The ILO committee found that the court had sanctioned 'anti-union discrimination' and called on the US to review its labour legislation to rectify the discrimination against unauthorized workers. ⁴² The US ignored this recommendation.

The UN's International Convention on Migrant Workers

In July 2003 the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN convention) ⁴³ came into force. ⁴⁴ The UN convention drew on the principles and standards enunciated in the 1949 and 1975 ILO conventions discussed above. The UN convention consists of nine parts ⁴⁵ and deals comprehensively with the rights of migrants in both regular and irregular circumstances. ⁴⁶ (Interestingly the descriptors of workers have changed from 'illegal' and 'illicit' in the 1975 convention to 'irregular' and 'undocumented' in the 1990 convention.) Part III and part IV indicate a distinction between migrant workers in regular and irregular working situations. Part III is entitled 'Human Rights of All Migrant Workers and Members of their Families'; whilst part IV is entitled 'Other Rights of Migrant Workers and Members of their Families *Who Are Documented or in a Regular Situation*' (emphasis added).

The UN convention seeks to extend the rights of migrant workers in irregular working circumstances, whilst according additional rights to migrant workers in regular circumstances. The preamble to the convention motivates this position as follows:

'Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental rights.

Considering that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other

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workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition;

Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned.'

All migrants regardless of their status have the rights expressed in part III - to basic human rights, such as freedom of religion and freedom of expression, and, with respect to employment, to treatment no less favourable than that applying to nationals regarding remuneration, overtime, hours of work, health and safety, minimum age of employment and termination of the employment relationship. ⁴⁷ If a migrant is expelled from the state of employment the migrant is still entitled to receive the wages acquired during the period of employment. ⁴⁸

By way of contrast, migrants in a regular situation (ie legal/documented) enjoy equality of treatment with nationals with respect to access to vocational training, housing and social services. With regard to employment they enjoy equality of treatment with nationals with respect to the protection against dismissals, access to unemployment benefits, and access to public work schemes. It is worth noting that the right to protection against unfair dismissals applies to regular migrants and not to irregular migrants. ⁴⁹

This convention took 13 years to come into effect - it was adopted by the UN General Assembly in 1990 and came into operation in 2003. Concerned with the low ratification rate the UN launched the GCIM in December 2003 ⁵⁰ to examine why the convention 'suffers from a lack of interest: few states have ratified it and no major immigration country has done so'. ⁵¹

The authors of research conducted under the auspices of the GCIM, Pecoud and De Guchteneire, explain that when the idea of the convention took root (late 1970s and 1980s) western countries needed foreign labour. By the time that the convention was

adopted, however, those countries were concerned with unemployment of nationals, political changes such as the end of the Cold War, the growth of asylum seekers as a result of the conflicts in the Balkans,

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and the integration of the descendants of migrant workers. They state that 'the presence of large numbers of culturally distinct people in urban areas contributed to a feeling of unease towards non citizens'. ⁵²

The ratification rate of this convention continues to remain low. By November 2009 there were 57 countries which had either signed and/or ratified it. The list of participating countries comprises by and large sending countries and not receiving countries. For example, sending countries, such as Albania, Algeria, Belize, Cape Verde and Lesotho, have signed the convention. Major receiving countries, such as Canada, the US, the UK, South Africa and Australia, have not.

The ILO Multilateral Framework on Labour Migration

At the end of 2005 the ILO adopted the Multilateral Framework on Labour Migration (the framework). The framework arose from the work of the World Commission on the Social Dimension of Globalization which noted the absence of a multilateral framework to govern cross-border movements. The framework attempts to address problems such as the exploitation of migrant workers, the growth in irregular migration, the rise in the trafficking of people and the brain drain of professionals from developing countries. It is not binding on members but offers practical guidelines on managing migration to maximize the benefits of migration for countries of origin and destination. It has an annexure with examples of 'best practice' from different regions which protect workers' rights. For example, France targets overseas development aid to Francophone countries in Africa to 'reduce emigration pressures'. Argentina and Brazil suspended the eviction of illegal workers who came from countries bordering their own, in order to establish a common market permitting the free movement of goods and services between MERCOSUR states (Argentina, Brazil, Uruguay and Paraguay). The Philippines government identifies labour market niches abroad and arranges an orderly supply of workers by way of bilateral agreements supported by accredited recruitment agencies. ⁵³

The international standards provide for a minimum bed of entitlements for illegal workers. Their basic human rights must be protected at all times, regardless of their status and in relation to employment they are entitled to the same benefits accorded nationals (and regular migrants) with respect to remuneration, hours of work and overtime. In general then, illegal workers enjoy the same rights for work already performed.

The ILO and the UN draw a distinction between migrant workers who are employed in a regulated situation (in compliance with the

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immigration laws of host countries) and those who do not, and neither international body encourages host nations to continue an employment relationship which contravenes immigration laws. It arguably flows then that the right to protection against unfair dismissals, bearing in mind that the primary remedy for a finding of unfairness is reinstatement, applies only to migrants in a regular situation. This conclusion is buttressed by the location of the protection against dismissal in the UN convention which falls within rights accorded particularly to the category of regular migrants.

³⁰ Phrased in the language of the day as (art 5(b)) 'ensuring that migrants for employment ... enjoy ... good hygienic conditions at the time of departure, during the journey and on arrival in the territory of destination'.

³¹ art 9.

³² annexure 1 art 5.

³³ annexure II.

³⁴ Article 6 reads: 'Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex to *immigrants lawfully within its territory*, treatment no less favourable than that which it applies to its own nationals in respect of the following matters: remuneration, hours of work, overtime, holidays with pay ... membership of trade unions and

enjoyment of the benefits of collective bargaining; accommodation ... social security... .' (Emphasis added.)

[35](#) art 3. See also art 6.

[36](#) art 9.

[37](#) art 10.

[38](#) Case 2121 at www.ilo.org/ilolex.

[39](#) ILO Convention 87.

[40](#) ILO Convention 98.

[41](#) 535 US 137 (2002).

[42](#) Case 2227 at www.ilo.org/ilolex.

[43](#) Resolution 45/158 of 18 December 1990.

[44](#) The convention was adopted by the General Assembly in 1990 and needed 20 ratifications to come into effect. It took 13 years to achieve this, pointing to the reluctance of nations to grant rights to migrant workers, especially those irregularly present.

[45](#) Scope and definition, non-discrimination with respect to rights, human rights of all migrants, other rights of migrants who are documented or in a regular situation, provisions applicable to particular categories of migrants, the promotion of sound, equitable, humane and lawful conditions in connection with international migration, application of the convention, general provisions and final provisions.

[46](#) Migrant workers in this convention are considered as documented or in a regular situation (part I art 5) 'if they are authorized to enter, to stay and to engage in remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party'. Migrant workers are considered to be non-documented or in an irregular situation if they do not comply with these conditions.

[47](#) part III art 25.

[48](#) part III art 22, 9.

[49](#) part IV art 54 1(a).

[50](#) The mandate of the GCIM commission is to place the issue of international migration on the global policy agenda, to analyse gaps in current approaches to migration ... and to present appropriate recommendations to the secretary-general and other stakeholders.

[51](#) A Pecoud & P de Guchteneire *Migration, Human Rights and the United Nations: An Investigation into the Low Ratification Record of the UN Migrant Workers Convention* (2004 Global Migration Perspectives). See www.gcim.org.

[52](#) A Pecoud & P de Guchteneire at 10.

[53](#) ILO Multilateral Framework on Labour Migration at 36 onwards. See www.ilo.org/publns.

ILLEGAL MIGRANT WORKERS IN THE UNITED STATES OF AMERICA

The USA has the highest number of illegal workers in the world - close to 10 million workers, the majority of whom come from Mexico. ⁵⁴ They work mainly in the agriculture, hospitality, construction, meat packing and poultry industries. Typically these workers are vulnerable to abuse (such as wages paid below the minimum rate, unhealthy working conditions and long working hours).

Legislation: Immigration Reform and Control Act 1986

Immigration into the USA is governed primarily by the Immigration Reform and Control Act 1986 (IRCA). The purpose of the Act is to reduce incentives for hiring illegal workers by imposing penalties on employers who do. The Act prohibits employers from hiring unauthorized aliens. ⁵⁵ It is also an offence to continue employing an unauthorized alien, knowing that the employee is not permitted to be employed. ⁵⁶ The Act establishes a complex verification system to compel employers to check the immigration status (by checking documents) of foreigners prior to employment and during the course of their employment. ⁵⁷ A violation of IRCA is a criminal offence attracting fines (up to 3000 US dollars for each unauthorized worker) and imprisonment up to six months. ⁵⁸

Case law: Hoffman Plastic Compounds v National Labor Relations Board

Mr Jose Castro was a Mexican worker who entered the US illegally and found employment in 1988 with Hoffman Plastic Compounds Inc. He was dismissed in 1989 because he became involved in a trade union (the United Rubber, Cork, Linoleum and Plastic Workers of

America) organizing at the workplace. The National Labor Relations Board (NLRB) which oversees the National Labor Relations Act 1947 (NLRA) found the employer's termination to be unfair and unlawful ⁵⁹ and awarded the worker reinstatement and backpay. ⁶⁰ The NLRB was unaware at the time it made its ruling that he was working illegally.

Under the NLRA, backpay is paid to an ex-employee for an illegal anti-union termination to compensate him/her for wages he/she would have earned but for the termination. The employer appealed and the case (*Hoffman Plastic Compounds v National Labor Relations Board*) ⁶¹ proceeded ultimately to the Supreme Court of the United States where the NLRB's decision was overturned largely on the basis that Mr Castro's employment had violated the US's immigration laws, in particular IRCA. The Supreme Court drew attention to IRCA which prohibits the employment of 'illegal aliens'. ⁶² The court commented:

'Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations. *The Board asks that we overlook this fact and allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.*' ⁶³ (Emphasis added.)

The Supreme Court found that awarding backpay would trivialize the US's immigration laws and encourage future violations and on that basis set aside the board's decision. Ultimately the Supreme Court had pronounced that illegal workers would not be protected from unfair dismissals because they had violated US immigration laws.

International litigation in the Inter-American Court of Human Rights

The Supreme Court's decision has had a chilling effect on the labour rights of undocumented workers. Undocumented workers are now more vulnerable than before, as the US courts will not come to their assistance following an unfair dismissal. This means that employers can hire and fire undocumented workers at will - with little risk of attracting any financial penalties. Mexico, concerned with the outcome of this decision and the impact it would have on its nationals

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working illegally in the US, approached the Inter-American Court of Human Rights for relief. Mexico asked the court to interpret key norms (equality and non-discrimination) in the Universal Declaration of Human Rights (1948), the Organization of American States Charter (1948), the American Declaration on the Rights and Duties of Man (1948), the International Covenant on Civil and Political Rights (1966) and the American Convention on Human Rights (1969). The court received representations from the Inter-American Commission on Human Rights, Nicaragua, El Salvador, Honduras and Canada. The US declined to make representations, but amicus curiae were received from a number of law schools in the US. ⁶⁴

The court discussed the principles of equality and non-discrimination and made the point that it was important to differentiate between 'distinctions' between persons which were reasonable and objective and furthered a legitimate purpose, and 'discrimination' which indicated a restriction or exclusion which adversely affected human rights. ⁶⁵

The court argued that the principles of equality and non-discrimination were jus cogens principles - in other words, peremptory norms of general international law and that 'the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws'. ⁶⁶

The court drew attention to the acute vulnerability of undocumented migrants, but noted that states were entitled to draw a distinction between the treatment of documented vis-à-vis undocumented migrants, for example with respect to political rights, or their entry and departure. However, undocumented migrants were at all times to be treated in a manner in which their fundamental human rights were respected.

Importantly the court argued that once an undocumented migrant enters into an employment relationship, he or she becomes entitled to the rights applicable to his/her

status as a worker. ⁶⁷ By implication then his/her status as a worker overrides his/her migratory status. The court concluded:

'[T]he State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationship.'

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Complaint to the ILO

The CTM ⁶⁸ and the AFL-CIO ⁶⁹ also instituted a complaint to the ILO's Committee on Freedom of Association about the Supreme Court's decision. John Sweeney, the president of the AFL-CIO, in his representations on the case to the ILO said:

'By eliminating the backpay remedy for undocumented workers, the *Hoffman* decision annuls protection of their right to organize. The decision grants license to employers to violate workers' freedom of association with impunity.'

He proceeded later to say:

'Before the *Hoffman* decision, union representatives assisting workers could say, "we will defend your rights before the National Labor Relations Board and pursue backpay for lost wages if you are illegally dismissed. Now they must add: except for undocumented workers - you have no protection".'⁷⁰

The US government responded to the ILO and presented the following arguments. Firstly, it said that it had not ratified the Freedom of Association and Protection of the Right to Organize Convention (No 87), or the Right to Organize and Collective Bargaining Convention (No 98) and was therefore not bound by their provisions. Secondly, the US government reassured the ILO that the *Hoffman* decision would be narrowly applied (ie would not adversely affect any other rights or the interpretation of any other labour legislation), and thirdly, that it was reasonable in that Castro was not denied payment for work performed, he was denied payment for time spent in the country (from the date of dismissal until the date of the hearing), in circumstances in which he was not entitled to be there.

The ILO committee considering the case commented that 'the Committee's concern is uniquely to examine whether the remedies that remain available under the NLRA (a cease and desist notice and a posting of the notice at the workplace) are sufficient for effectively ensuring the basic trade union rights it purports to guarantee to all workers, including undocumented workers'. It concluded that they were 'inadequate' and recommended to the US government that it 'explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association principles in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the *Hoffman* decision'. ⁷¹

In sum, the US Supreme Court found that reinstatement or backpay would undermine the immigration laws of the country and

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encourage future violations. The Inter-American Court found that the US's action contravened international human rights law. The ILO found that the US was guilty of anti-union discrimination. Both the court and the ILO recommended to the US government that it make legislative changes to rectify the unfair treatment of undocumented workers. The US has ignored these recommendations, arguing that it alone may decide on its immigration and labour policies.

⁵⁴ S Cleveland, B Lyon & R Smith 'Inter-American Court of Human Rights Amicus Brief: The United States Violates International Law when Labor Law Remedies are Restricted based on Workers' Migrant Status' (2002-2003) *Seattle Journal for Social Justice* 795.

⁵⁵ s 274A.

⁵⁶ s 274A(2).

⁵⁷ s 101B.

⁵⁸ s 101(8)(1).

⁵⁹ Section 8(a)(3) of the NLRA prohibits discrimination 'in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization'.

- ⁶⁰ Calculated from the date of termination to the date when the company learnt of his unlawful status - some 3.5 years of wages (\$66,951).
- ⁶¹ 535 US 137 (2002).
- ⁶² Term used by the court. Hoffman at 9.
- ⁶³ Hoffman at 10.
- ⁶⁴ Harvard, Texas and Villanova Universities.
- ⁶⁵ Advisory Opinion OC - 18/03 (17 September 2003) para 48.
- ⁶⁶ para 101.
- ⁶⁷ paras 134 and 135.
- ⁶⁸ A union representing 5.5 million Mexican workers.
- ⁶⁹ A federation of 66 national and international unions in the US, representing 13 million workers.
- ⁷⁰ Complaint presented by the American Federation of Labor and Congress of Industrial Organizations to the ILO, 28 November 2002. Reported in (2002 - 2003) *Seattle Journal of Social Justice* 910.
- ⁷¹ Case no 2227 paras 610-614.

ILLEGAL MIGRANT WORKERS IN THE UNITED KINGDOM

The vulnerability of illegal workers in the UK was raised in February 2004 when 21 illegal Chinese immigrants drowned at Morecambe Bay while collecting cockles. A study financed a year later by the Home Office found unauthorised workers working in the agriculture, construction, hotel and catering industries. The Home Office estimated that there were approximately half a million unauthorized workers in Britain. ⁷² Bernard Ryan ⁷³ quotes from that study that 'there were many anecdotal reports of migrant workers receiving lower pay than domestic workers, experiencing long hours, poor conditions and few employee rights'. ⁷⁴ These reports are confirmed by other sources, such as a study by a Trades Union Congress on Ukrainian workers and by evidence produced by investigative journalists. He comments: 'None of these studies on their own gives definitive proof as to the extent of unauthorized work.... What is striking however is the consistency of the picture painted by the various studies. It is the cumulative weight of the studies that supports the conclusion that unauthorized employment often in exploitative conditions, has become more extensive in recent years.' ⁷⁵

He explains that the growth in unauthorized work is attributed to the following factors: a growth in international travel, employer demand for labour (often provided by nationals from central and eastern Europe), weak labour market regulation and by limited trade union reach in the private sector.

Legislation: Immigration, Asylum and Nationality Act 2006

The employment of foreign workers is currently regulated by the Immigration Act 1971 (which creates the offences of illegal entry, overstaying and breach of a condition to leave, enter or remain in the country) and the Immigration, Asylum and Nationality Act 2006. Section 15 of the 2006 Act gives the Home Office, through

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immigration officers, the power to serve 'penalty notices' upon employers of unauthorized workers. Employers are required to check original documentation and make copies of documents which indicate an entitlement to work. The obligation on employers to check documentation arises before employment and every 12 months during the employment of the foreign national (ie it is an ongoing obligation). Penalties include 24 months' imprisonment for knowingly employing a person who is not entitled to work, or a fine of up to £2,000 per worker. Employers have the right to appeal.

Case law: Vakante v Addey and Stanhope School

Most UK cases dealing with the question whether or not an employee may rely on an employment contract tainted by illegality have as their factual basis a 'fraud on the Revenue' (ie non-payment of tax due to the authorities). ⁷⁶ There is one reported case (*Vakante v Addey and Stanhope School*) ⁷⁷ of an employee working in contravention of immigration laws who claimed that he was the subject of an unfair dismissal on the basis of his race.

The facts were as follows. Mr Vakante was a Croatian national who arrived in the UK in early 1992. His permission to stay expired in June 1992 and he applied for asylum status. The Home Office sent him a standard letter which read: 'The applicant may not take employment paid or unpaid.' In August 1999 he applied for a post as a maths teacher at Addey and Stanhope School. He informed the school that he did not need a work permit. He began teaching in November 1999 but was dismissed eight months later in July 2000. He approached the Employment Tribunal with a complaint of race discrimination. ⁷⁸ Mr Vakante framed his unfair dismissal case as a discrimination claim on the basis of nationality. He lost and he then appealed. The Employment Appeal Tribunal (EAT) was not persuaded. It was of the view that only discrimination claims arising from 'gratuitous racial abuse ... committed during the contract of employment, or on the employer's premises' would be entertained. ⁷⁹

The EAT noted that Mr Vakante had contravened s 24 of the Immigration Act 1971 by taking up paid employment despite the clear wording of the Home Office's letter. Furthermore, he continued to receive state benefits, despite working, which he was not entitled to

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receive. The tribunal found that Mr Vakante had 'knowingly entered into a contract to work while claiming benefits as unemployed and restricted from working by the terms of his leave to enter. He falsified a number of forms to achieve this end and put the respondent in a position where it too was unwittingly committing a criminal offence....' ⁸⁰ The tribunal concluded that the contract of employment was void ab initio - the school would never have entered into the contract of employment but for Mr Vakante's fraudulent representations.

The England and Wales Court of Appeal

Mr Vakante was not deterred and appealed to the England and Wales Court of Appeal (Court of Appeal) basing his argument on the proposition that 'illegality could never defeat a discrimination claim'. This proposition was supported by a (*n*) recent decision in *Hall v Woolston Hall Leisure Ltd*⁸¹ which his legal representatives argued was analogous to his case. (*Hall's* case dealt with sex discrimination and an illegal contract of employment.) Very briefly Mrs Hall was dismissed after her employer became aware that she was pregnant. The issue in *Hall* was whether her claim for unfair dismissal on grounds of pregnancy and sex could be defeated because she was aware that her employer acted illegally by not deducting income tax and national insurance contributions from her wages. The Court of Appeal rejected the argument that the illegal conduct precluded her claim of discrimination. It found that Hall's contract of employment from inception was lawful. She did not participate in the illegality as the obligation to pay PAYE rested with the employer. Whilst she acquiesced in her employer's conduct 'that acquiescence (*s*) in no way causally linked with her sex discrimination claim'. ⁸² She was therefore entitled to compensation for the discrimination she had experienced.

Peter Gibson LJ set out an appropriate approach to the issue of discrimination claims in the context of illegal contracts. He said: 'The proper approach should be to consider whether the applicant's claim arises out of or is so clearly connected or inextricably bound up or linked with the illegal conduct of the applicant that the court could not permit the applicant to recover compensation without appearing to condone that conduct.' ⁸³

Lord Justice Mummery commented in *Vakante* that:

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'The strength of the *Hall* approach is that it is flexible. It enables the tribunal to avoid arbitrary and disproportionate outcomes and to reach sensible and just decisions in most cases... Although *Hall* uses some of the familiar language of legal and factual causation ('connected', 'link') the test does not restrict the tribunal to a causation question. Matters of fact and degree have to be considered: the circumstances surrounding the applicant's claim and the illegal conduct, the nature and seriousness of the illegal conduct, the extent of the applicant's involvement in it and the character of the applicant's claim are all matters relevant to determining whether the claim is so 'inextricably bound up with' the

applicant's illegal conduct that, by permitting the applicant to recover compensation, the tribunal might appear to condone the illegality.'⁸⁴

He said further:

'As for the illegal conduct here (a) it was that of the applicant; (b) it was criminal; (c) it went far beyond the manner in which one party performed what was otherwise a lawful employment contract; (d) it went to the basic content of an employment situation - work; (e) the duty not to discriminate arises from an employment situation which, without a permit, was unlawful from top to bottom and from beginning to end.'⁸⁵

Mummery LJ found that Mr Vakante's conduct was unacceptable, he had obtained work by making a false statement and he was responsible for the illegal contract and for those reasons he concluded that 'condonation of the alleged unlawful conduct by the respondent is out of the picture and out of the question'.

Ryan comments: 'Pursuant to the flexible approach outlined, Mummery, L.J. went on to highlight the factors that distinguished Vakante's circumstances from those in *Hall*. The main differences were that in *Vakante* the illegal conduct was that of the employee rather than the employer, it arose from the formation of the relationship rather than its performance, and went to the heart of the employment relationship.'⁸⁶

From the above, the position of the enforceability of an employment contract tainted with illegality in English law seems to be the following: If there is a causal connection or a close nexus between the illegal conduct and allegations of discrimination then the courts will not enforce the contract and the affected employee will not therefore have the usual range of remedies available to him/her (ie as in the *Vakante* case). Conversely, however, if there is no connection, or a remote one then the courts will enforce the contract and the employee will have the usual remedies available to him/her (ie as in the *Hall* case).

⁷²The *Sunday Times* of 17 April 2005 quotes the Home Office figures which estimate the number of illegal workers to be between 310,000 and 570,000.

⁷³B Ryan 'The Evolving Legal Regime on Unauthorized Work by Migrants in Britain' (2006) 27 *Comparative Labor Law & Policy Journal* at 29.

⁷⁴Ryan at 11.

⁷⁵ibid.

⁷⁶See for example *Newland v Simons & Willer (Hairdressers) Ltd* [1981] ICR 521 and *Hewcastle Catering Ltd v Ahmed* [1992] ICR 626.

⁷⁷[2004] EWCA Civ 1065.

⁷⁸He complained that he did not receive the same support and training as a British colleague, that he was dismissed on grounds of his race, and that his terms of engagement were less favourable than those of his colleagues.

⁷⁹*Vakante v Governing Body of Addey and Stanhope School* [2004] ICR 279 at 76.

⁸⁰*Vakante* at 24.

⁸¹[2001] ICR 99.

⁸²*Hall* at 47.

⁸³*Vakante* at 7.

⁸⁴*Vakante* at 9.

⁸⁵*Vakante* at 34.

⁸⁶Ryan at 77.

ILLEGAL MIGRANT WORKERS IN AUSTRALIA

Most illegal workers in Australia are found in the construction, taxi, hospitality, cleaning and sex industries. Compared with the other

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countries in the article the number of illegal workers in Australia is relatively small at around 46,400 people.⁸⁷ Illegality most often arises in circumstances in which a person overstays his/her visa conditions or works in contravention of the visa conditions. Many people visit Australia on a working holiday visa (permission to stay for 12 months and permission to work, but not for longer than three months with the same employer), or a

tourist visa (six months, no permission to work). Australia keeps the numbers of illegal workers in check by deporting about 25,000 illegal workers each year. ⁸⁸

The Australian government has in recent years become increasingly concerned with the scale of illegal work and has amended the Migration Act 1958 to impose penalties on employers who employ workers contrary to the immigration laws of Australia and to require employers to verify the status of foreign workers prior to employment.

Legislation: Migration Amendment (Employer Sanctions) Act 2007

The Explanatory Memorandum to the Migration Amendment Bill 2006 sets out the background to the topic of illegal workers in Australia and motivates for stricter enforcement of immigration laws. The bill opens as follows:

'The incidence of illegal work in Australia is a significant problem that denies Australians the opportunity to gain employment and can result in the exploitation of non-citizens. It is also a concern to the Government because of its close association with cash economy industries, which are characterized by abuses of Australia's tax, employment and welfare laws.' ⁸⁹

The memorandum states quite unapologetically that:

'Unrestricted access to the labour market is a privilege limited to citizens and permanent residents of a country. In Australia, permanent residents, Australian citizens and New Zealand citizens who enter Australia on a valid New Zealand passport, have an unrestricted right to work. Other people wishing to enter the country face the precondition that they have either no access or restricted access to the labour market.' ⁹⁰

The memorandum notes that failure to take action against illegal work will undermine the integrity of a managed immigration programme, encourage people smuggling, increase the likelihood of tax and social security fraud, 'present a health problem to the Australian

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community, ⁹¹ present safety risks to the Australian community ⁹² and increase exploitation of workers, particularly of women in the sex industry'. ⁹³

The bill was passed by the Australian government and was titled the Migration Amendment (Employer Sanctions) Act 2007. The Act came into effect on 19 August 2007. The Act's long title reads as follows: 'An Act to impose sanctions on persons who are connected with work by unlawful non-citizens or work in breach of visa conditions, and for related purposes.' The Act imposes heavy penalties on employers who employ illegal workers - imprisonment for two years for an ordinary violation and five years in the case of an 'aggravated offence'. ⁹⁴ An aggravated offence is one in which 'the worker is being exploited and the person knows of, or is reckless as to that circumstance'. ⁹⁵ 'Exploited' is defined as a person working 'in a condition of forced labour, sexual servitude or slavery in Australia'. ⁹⁶

Case law: Wei Xin Chen v Allied Packaging Co Pty Ltd and Emurugat v Utilities Management Pty Ltd

There are two cases in Australian jurisprudence dealing with the dismissal of a worker on account of his or her immigration status. The first was *Wei Xin Chen v Allied Packaging Co Pty Ltd*⁹⁷ heard in 1997 and the second, *Antony Emurugat v Utilities Management (Pty) Ltd*⁹⁸ heard a little over a decade later. The principle enunciated in both cases is that a dismissal for the reason that the employee worked in contravention of the immigration laws of the country is lawful and reasonable.

The facts and reasoning in the first case were briefly as follows. Mr Chen worked as a guillotine operator for Allied Packaging. During the course of his work in 1996 he injured his back. He took time off work to attend to his injuries. When he returned to work his employer (Mr Doherty) told him that the Department of Immigration & Ethnic Affairs had written to inform him that Mr Chen was a 'non-citizen who is not entitled to work while he is in Australia. He should not be re-employed by you unless he is able to provide evidence of his right

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to work in Australia' and consequently the employment relationship was to be terminated.⁹⁹

Mr Chen challenged his dismissal in the Industrial Relations Court in Australia. Chief Justice Wilcox found that Mr Chen was an 'unlawful non-citizen' whose employment breached the Migration Act 1958.¹⁰⁰ He said:

'[O]nce Mr Doherty became aware of Mr Chen's status, any action by him that facilitated Mr Chen's illegal employment would itself be unlawful; Mr Doherty would be an accomplice and would himself be exposed to prosecution. Whatever Mr Doherty's motive in contacting the Department, and however harsh the result may be as far as Mr Chen is concerned, there was a valid reason for his termination.'¹⁰¹

The facts in Mr Emurugat's case differed but the legal reasoning remained the same. Mr Emurugat was a power line worker recruited in 2005 from Kenya by an Australian company (Utilities Management (Pty) Ltd) to work on power lines in Australia. The company found, however, that he lacked the necessary skills. His visa conditions specified the job he was permitted to perform. The company attempted to train him for that position but that effort bore little fruit (he could not meet the required standard). The company accommodated him at a lower position (as a 'general skilled worker'). The Business Monitoring Unit of the Department of Immigration & Citizenship monitored the work he was doing and concluded that he had been working in breach of his visa conditions. The department advised the company to provide 'gap' training necessary to reach the required standard, but the company argued that his knowledge base was so low that gap training would be inadequate and that apprenticeship training was necessary. They were not prepared to train him to such an extent and dismissed him to avoid a contravention of immigration laws.

He referred an unfair dismissal claim to the Australian Industrial Relations Commission (AIRC) in terms of the Workplace Relations Act 1996. He argued that the company should train him to the required standard and their failure to do so amounted to an invalid reason for termination. The AIRC found the dismissal to be unfortunate but fair, as continued employment contrary to the visa conditions would contravene the Migration Amendment Act 2001. The AIRC, having considered the decision in *Chen*, found that 'there was a valid reason for the termination of Mr Emurugat's employment ... [as] his continued employment was illegal under the provisions of the

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Migration Act 1958'. The AIRC found that this reason was 'sound, defensible or well-founded'.

Thus, the Australian position with respect to an employee who works in contravention of the migrant laws of the country is that the contract of employment is void ab initio and a dismissal for that sole reason is regarded as lawful and sound.

⁸⁷ R Guthrie & R Taseff 'Dismissal and Discrimination: Illegal Workers in England and Australia' (spring 2008) *The International Journal of Comparative Labour Law and International Relations* 46.

⁸⁸ Guthrie & Taseff at 47.

⁸⁹ Explanatory Memorandum at 3.

⁹⁰ *ibid* at 4.

⁹¹ 'Due to people bypassing the health checks normally undertaken by lawful longer-term residents.'

⁹² 'Due to people bypassing the rigorous character checks normally undertaken in relation to lawful long-term residents.'

⁹³ Explanatory Memorandum at 11.

⁹⁴ s 245AB.

⁹⁵ s 245AB subsection 2.

⁹⁶ s 245AH.

⁹⁷ Industrial Relations Court of Australia [1997] IRCA 120.

⁹⁸ Australian Industrial Relations Commission, 11 July 2008 (case no U2008/2326).

⁹⁹ Mr Doherty contacted the compliance section of the Department of Immigration & Ethnic Affairs seeking information about Mr Chen's entitlement to work. The department wrote to him stating: 'I hereby confirm that the following employee has been identified as a non-citizen who is not currently entitled to work while he is in Australia. He should not be re-employed by you unless he is able to provide evidence of his right to work in Australia.'

¹⁰⁰ Section 235(3) of that Act reads: 'An unlawful non-citizen who performs work in Australia whether for reward or otherwise commits an offence....'

¹⁰¹ *Wei Xin Chen* at 3.

ILLEGAL MIGRANT WORKERS IN SOUTH AFRICA

Since the advent of democracy in South Africa the country has attracted large numbers of immigrants seeking work and a better life. The foreigners come mainly from Africa, and in particular from neighbouring Zimbabwe. In November 2009 the Forced Migration Studies Programme (FMSP) at the University of the Witwatersrand reported that 'the economic and political collapse of Zimbabwe has generated unprecedented outward migration to Southern African countries. Even as stability gradually returns in Zimbabwe, the humanitarian crisis facing its diaspora and the potential for further waves of migration remain high'. ¹⁰²

The exact number of foreigners entering the country both legally and illegally is uncertain as no official figures are published by the Department of Home Affairs, whose legislative mandate covers the Refugees Act 1998 ¹⁰³ and the Immigration Act 2002. ¹⁰⁴ Noting that the number of illegal foreigners can only be a guesstimate, newspaper reports indicate that there are between 1.2 million and 3.5 million Zimbabweans illegally in the country. ¹⁰⁵

Zimbabweans work mainly in agriculture, construction, domestic work and the service industry. ¹⁰⁶ Zimbabweans and other migrants, especially those whose presence is illegal, are vulnerable to a growing culture of xenophobia and to exploitation in the workplace. ¹⁰⁷

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Legislation: Immigration Act 2002

The employment of foreigners is regulated by the Immigration Act 2002. The preamble suggests that the Act seeks to encourage the immigration of foreigners who have the skills required by our economy. For example, para (d) reads:

'[T]he Immigration Act aims at setting in place a new system of immigration control which ensures that - economic growth is promoted through the employment of *needed foreign labour*, foreign investment is facilitated, the entry of *exceptionally skilled or qualified people is enabled*, *skilled* human resources are increased.' (Emphasis added.)

Paragraph (h) reads:

'[T]he South African economy may have access at all times to the full measure of *needed contributions* by foreigners.' (Emphasis added.)

Whilst the preamble promotes the 'highest applicable standards of human rights' and the prevention of xenophobia, the reasonable inference to be drawn from the preamble is that not all foreign workers are welcome, only those needed by the economy are.

Section 10A sets out the obligation on a foreigner to hold a valid visa, which may be a work permit. ¹⁰⁸ A person in contravention of this section is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 12 months, and that person may be arrested and removed from the country. ¹⁰⁹

The holder of a visitor's permit may not work, unless authorized by the Director-General of the Department of Home Affairs. ¹¹⁰ Work permits are regulated by s 19 of the Immigration Act. There are four different types of work permits: quota permits, ¹¹¹ general work permits, ¹¹² exceptional skills permits ¹¹³ and intra-company transfer permits. ¹¹⁴

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The nature and type of work permits reinforce the intention of the Act already intimated in the preamble which is to encourage foreigners with skills and qualifications generally lacking in the country to seek employment in the country. The converse may reasonably be inferred - work permits will not be issued by the director-general to foreigners whose skills and qualifications are not needed in the economy, as there are South Africans in the labour pool to do the work.

Section 38 deals with employment and subsection (1) states:

'No person shall employ-

- (a) an illegal foreigner;
- (b) a foreigner whose status does not authorize him or her to be employed by such person; or
- (c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.'

Employers are obliged to check the status of employees and not to employ illegal foreigners. ¹¹⁵ The Act prohibits any person from assisting an illegal foreigner (apart from humanitarian assistance) by, for example, 'entering into an agreement with him or her for the conduct of any business or the carrying on of any profession or occupation'. ¹¹⁶ For employers it is an offence to employ an illegal foreigner or a foreigner in violation of the Act and the employer may be liable on conviction to a fine or imprisonment not exceeding one year (for a first conviction). ¹¹⁷

In terms of s 43(a) foreigners are obliged to abide by the terms and conditions of their status. A foreigner who works without a permit contravenes s 43, which, in terms of s 49 (6), carries a penalty upon conviction of a fine or imprisonment not exceeding 18 months.

There are three deductions which can be made from the provisions in the Immigration Act set out above. Firstly, based on the preamble and the type of work permits available, the legislature encourages 'needed' foreign skills, and not skills already abundant in the country. Secondly, based on the prohibition of employing illegal foreigners, coupled with the attendant risk of a fine or one year's imprisonment, the legislature intended criminalizing employers who contravened the relevant provisions. Thirdly, based on the obligation of a foreigner to abide by the terms of his or her status coupled with the attendant risk of a fine or imprisonment and/or deportation for failing to do so, the legislature intended criminalizing foreign workers who worked without one of the requisite work permits.

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Early case law in the CCMA (2001-2004)

In 2001 the CCMA heard *Moses v Safika Holdings*¹¹⁸ in which a citizen of the USA accepted an offer of employment as an adviser in South Africa contingent upon his obtaining a work permit. He did not do so. For reasons unmentioned in the award, the contract of employment was terminated and Mr Moses referred an unfair dismissal dispute to the CCMA. Commissioner Moletsane dismissed the application explaining that the applicant was not an 'employee' in terms of the Labour Relations [Act 66 of 1995](#) because the contract was void ab initio due to the applicant's illegal status which directly contravened the Aliens Control Act 1991. ¹¹⁹

In 2003 the CCMA heard the matter *Vundla v Millies Fashions*¹²⁰ in which a Zimbabwean national found employment as a sales assistant in a dress shop in Johannesburg. Millies Fashions received numerous complaints about employing a foreigner and whilst happy with Ms Vundla's performance, her employer requested that she produce documents to show that she could be legally employed. When she failed to do so, her employment was terminated. She referred an unfair dismissal dispute to the CCMA. Commissioner Tsatsimpe held that there had been no dismissal and dismissed the referral.

In 2004 the CCMA heard the matter *Georgieva-Deyanova v Craighall Spar*¹²¹ in which Craighall Spar dismissed a foreigner (nationality unstated) because she did not have a work permit. The CCMA upheld a point in limine that it had no jurisdiction to hear the matter as the contract of employment was void ab initio as the employment violated the Immigration Act 2002.

The general thrust of the legal reasoning applied in these cases is crisply as follows. As the worker has no work permit, any employment contract is void ab initio as the contract directly contravenes the Aliens Control Act/Immigration Act and thus the worker does not fall within the definition of 'employee' in the LRA and consequently does not enjoy the labour protections therein.

Opening the debate in 2006: Extending legal protection to illegal immigrants

In 2006 Craig Bosch published 'Can Unauthorized Workers be regarded as Employees for Purposes of the Labour Relations Act?' ¹²² The title suggests that the correctness of the orthodox view, described above, was open to doubt. Having analysed the Immigration Act,

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considered the constitutional right to fair labour practices ¹²³ and drawn attention to the acute vulnerability of illegal workers, Bosch concluded that those workers should be regarded as 'employees' and entitled to a qualified right not to be unfairly dismissed. (Qualified to apply to illegal workers deserving of protection.) ¹²⁴

He argued that there is no express restriction in the Constitution limiting the right to fair labour practices to workers legally employed; ¹²⁵ an employment contract is not required by workers to access the protection of the constitutional right to fair labour practices as a relationship akin to an employment relationship suffices, ¹²⁶ and that the right to fair labour practices is closely linked to the constitutional right to dignity which should not be impaired (unless reasonably justified under the limitation clause in s 36 of the Constitution). ¹²⁷

Case law: Discovery v CCMA & others in 2008

The submissions made by Bosch were considered in 2008 by the LC in the case *Discovery Health Ltd v CCMA & others*. ¹²⁸ The facts very briefly were that Discovery Health terminated the employment relationship with Mr Lanzetta, an Argentinian national, who worked in their call centre as he did not have the requisite work permit in terms of s 19 of the Immigration Act. The CCMA, presumably persuaded by Bosch, found for Mr Lanzetta on the basis of a valid employment relationship despite an invalid employment contract. Discovery took the matter on review to the LC. The court came to the same conclusion (and found against Discovery) but for different reasons.

The court considered two legal questions. Firstly, it considered whether or not the contract of employment was invalid by virtue of the contravention of the Immigration Act, and secondly, whether or not the statutory definition of 'employee' in the LRA was predicated on a valid contract of employment. ¹²⁹ It found, contrary to Bosch's analysis, that a contract entered into in contravention of the Immigration Act was valid and that Mr Lanzetta was an 'employee' as defined in s 213 of the LRA. ¹³⁰ The court's reasons may be summarized as follows. The Immigration Act does not state that an employment contract concluded without the required permit is void; ¹³¹ a statute should be interpreted if its language reasonably permits in a manner which does not limit rights, especially the constitutional right to fair

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labour practices; ¹³² the express prohibition against employing illegal foreigners in s 38 (1) of the Immigration Act 2002 should be interpreted in a manner which does not limit the right to fair labour practices as exploitative practices may otherwise result; and the legislature was content with penalizing the one party (the employer) without rendering the employment contract void. ¹³³

The LC's analysis may well have stopped there, but it went on to examine whether the statutory definition of 'employee' presupposes a valid contract of employment. It found that it did not. The court found that the right to fair labour practices applies more extensively than to parties governed by an employment contract and potentially 'extends ... to other contracts, relationships and arrangements in terms of which a person performs work or provides personal services to another'. ¹³⁴ The court found support in the application and interpretation of relevant ILO conventions whether an illegal worker could find protection in the LRA against an unfair dismissal. It drew attention to s 233 of the Constitution which states that 'when interpreting any legislation, every Court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. The Constitutional Court in *NUMSA v Bader Bop*¹³⁵ has found that

the conventions and recommendations of the ILO are an important source of international law. ¹³⁶

The court in *Discovery* found that ILO conventions 1949 and 1975 'set out the general obligation of member states to respect the basic human rights of all migrant workers'. It found further 'that the protection of the fundamental rights of migrants, even those who are employed illegally, is a primary purpose of the International Convention and Convention 143, and the LRA should be interpreted in a manner that recognizes that purpose'. ¹³⁷

The court concluded as follows:

- (a) The contract of employment concluded by Discovery Health and Lanzetta was not invalid, despite the fact that Lanzetta did not have a valid work permit to work for Discovery Health. For this reason, Lanzetta was an 'employee' as defined in s 213 of the LRA and entitled to refer the dispute concerning his unfair dismissal to the CCMA.
- (b) Even if the contract concluded between Discovery Health and Lanzetta was invalid only because Discovery Health was not permitted to employ him under s 38(1) of the Immigration Act, Lanzetta was nonetheless an

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'employee' as defined in s 213 of the LRA because the definition is not dependent on a valid and enforceable contract of employment.'

A critique of the Labour Court's decision in Discovery Health

Arguably, the court may have erred in this decision for the following reasons. It is a well established principle in law that a contract in contravention of a statute is null and void. ¹³⁸ The more reasonable textual analysis of the Immigration Act points to an employment contract, in contravention of that Act, as being one which is null and void, rather than one which is valid. Four reasons are proffered. Firstly, the Act imposes a criminal penalty on both the employer and employee for violating its provisions. Secondly, the very purpose of the Act is to permit employment of foreign workers who have permits, chosen on the basis of the skill needs in the South African economy (the purpose is to privilege South African nationals over foreigners in the workplace unless South Africans lack the skills required for the functioning of the economy). Thirdly, allowing an employee to work in contravention of the Immigration Act permits the very scenario which parliament expressly sought to prohibit. Finally, it seems that the court's interpretation of the Immigration Act, buttressed by the right to fair labour practices in the Constitution which is given legislative effect in the LRA, and the imperative of interpreting legislation in a manner that does not limit rights, may have exceeded the limits which the language of that Act could reasonably bear. Kentridge AJ in *S v Zuma & others*¹³⁹ warns:

'Whilst we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument ... it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.... If the language used by the lawmaker is ignored in favour of a general resort to 'values' the result is not interpretation but divination.... I would say that a constitution embodying fundamental rights should *as far as its language permits* be given a broad construction.' (Emphasis added.)

It is important to point out that the LC was seised with a preliminary issue - whether the CCMA had jurisdiction to consider Mr Lanzetta's unfair dismissal claim in the light of his illegal work status. The court found that it did, as Mr Lanzetta ultimately fell within the definition of 'employee'. The fairness of his dismissal is still to be determined, and if there is a finding in his favour, the quagmire of the appropriate remedy. It is arguable that compensation would be the more likely remedy, rather than reinstatement as reinstatement would give rise to a continued violation of the Immigration Act 2002 (assuming

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of course that Mr Lanzetta does not regularize his situation in the meantime). ¹⁴⁰

The position in South Africa may be summarized as follows. A migrant worker who takes up employment in contravention of the Immigration Act has locus standi to approach the CCMA in circumstances of an alleged unfair dismissal and to pursue the processes and

remedies envisaged in the LRA - the employee falls within the definition of 'employee' in the LRA. For clarity purposes the contract of employment is not by virtue of a contravention of the Immigration Act void ab initio. For the reasons set out in the critique above, this decision is controversial, but nonetheless, it is the law as it currently stands.

[102](#) *Zimbabwean Migration into Southern Africa: New Trends and Responses* at 5. See www.migration.org.za.

[103](#) Act 130 of 1998.

[104](#) Act 13 of 2002.

[105](#) Refer to Jayendra Naidoo's article 'SA Picking up a Crippling Tab for Zimbabwean Crisis' *Sunday Times* 11 May 2008.

[106](#) FMSP at 8.

[107](#) The Department of Labour in February 2008, for example, reported that '[d]ozens of illegal workers had been arrested on farms in Musina where they worked 7 days a week, 9 hours a day for wages ranging from R107 to R1 200 a month'. In May that year South Africa experienced a wave of xenophobic attacks on foreigners. Examples of newspaper headlines at that time read, 'Alex door to door purges. Cops step in to protect refugees and lawlessness' (*The Star* 13 May 2008) and 'Terror on the home front: How residents unleashed a week of murderous mayhem on their foreign neighbours' (*Sunday Times* 18 May 2008). In November 2009 newspapers reported that South African nationals in De Doorns in the Western Cape attacked Somalians and Zimbabweans and prevented them from climbing on to the trucks of local farmers to get to work. About 1800 foreigners fled and were escorted by police to a sports field where they slept in tents. News 24 reported: 'The local residents claim the Zimbabweans are willing to work for less than the minimum wages, and steal the local community's job opportunities.'

[108](#) Section 10A(1) reads: 'Any foreigner who enters the Republic shall subject to subsections (2) and (4) on demand produce a valid visa ... to an immigration officer.' Section 10A(2) reads: 'Any person who holds a valid permit issued in terms of sections 13 to 22 ... shall upon his or her entry into the Republic and having been issued with that permit, be deemed to be in possession of a valid visa for the purposes of this section.'

[109](#) s 10A(5).

[110](#) s 11(2).

[111](#) s 19(1). Quota permits may be granted to foreigners who fall within specific professional categories or within specific occupational classes. The Minister of Home Affairs consults the Minister of Labour and the Minister of Trade & Industry and announces the categories by notice in the *Government Gazette*.

[112](#) s 19(2). General work permits may be granted to foreigners if the prospective employer can show that despite a diligent search, the employer is unable to find a South African with similar qualifications or skills.

[113](#) s 19(4). Exceptional skills permits may be granted to foreigners possessed with exceptional skills or qualifications. The application must be motivated on the basis of scarce skills in South Africa.

[114](#) s 19(5). Intra-company transfer permits may be granted to foreigners, employed outside the country by a business with operations in South Africa, seeking to work in a branch or affiliate here.

[115](#) s 38(2).

[116](#) s 42(1)(a)(iii).

[117](#) s 49(3).

[118\(2001\) 22 ILJ 1261 \(CCMA\)](#).

[119](#) Act 96 of 1991 (repealed by s 54 of the Immigration Act 2002).

[120\(2003\) 24 ILJ 462 \(CCMA\)](#).

[121](#) [2004] 9 BALR 1143 (CCMA).

[122\(2006\) 27 ILJ 1342](#).

[123](#) s 23(1) and (2) of the Constitution.

[124](#) ie not to those illegal foreigners who wilfully flout the provisions of the Immigration Act.

[125](#) Bosch at 1351.

[126](#) *ibid*.

[127](#) at 1352.

[128\(2008\) 29 ILJ 1480 \(LC\)](#).

[129](#) para 19.

[130](#) para 33.

[131](#) para 24.

[132](#) para 29.

[133](#) para 30.

[134](#) para 42.

[135](#) 2003 (3) SA 513 (CC); [\(2003\) 24 ILJ 305 \(CC\)](#).

[136](#) *Discovery* paras 42-44.

[137](#) para 49.

¹³⁸ See *Sutter v Scheepers* 1932 AD 165; *Standard Bank Ltd v Van Rhyn* 1925 AD 266; *Schierhout v Minister of Justice* 1926 AD 99; *Pottie v Kotze* 1954 (3) SA 719 (A); *Pratt v First Rand Bank Ltd & another* [2004] 4 All SA 306 (T).

¹³⁹ 1995 (2) SA 642 (CC) at 652I and quoted with approval in *Standard Bank Investment Corporation v Competition Commission & others* 2000 (2) SA 797 (SCA); [2000] 2 All SA 245 (SCA).

¹⁴⁰ It is worth noting that the recent Labour Appeal Court decision in *Kylie v CCMA & others* (2010) 31 ILJ 1600 (LAC) concludes at para 52 that reinstatement as a remedy for sex workers, unfairly dismissed, would be 'against public policy' presumably because reinstatement would give rise to a continued violation of the Sexual Offences Act 1957.

DISCUSSION AND ANALYSIS

As has been previously mentioned, the number of illegal migrants working around the world is significant. The constituency is a vulnerable one, subject to exploitation and abuse. Despite the numbers and the treatment of such workers, it is a striking fact that there are very few reported cases of workers challenging their situation. The reason is obvious - workers do not want to expose themselves to the authorities for fear of deportation.

Two observations arising from the reported cases are worth noting. Firstly, apart from Mr Castro (who mixed chemicals) and Mr Chen (who operated a guillotine), the cases do not involve unskilled workers, as would be expected from the international profile of migrant workers reported in the research literature. Mr Lanzetta worked as a call centre agent, Mr Emurugat worked as a power line assistant and Mr Vakante worked as a maths teacher. When challenges are instituted it appears that they come from workers who have some training and skills (and are possibly less economically vulnerable) and who arguably have a greater sense of entitlement to fair dealing in the workplace.

Secondly, the single consistent reason given by all the employers for the termination of employment of the employees was ultimately that the employees had violated the immigration laws of the host country, which thereby disentitled them to employment in the host country and the protections envisaged in their respective labour laws. Reading between the lines, there may well have been more genuine reasons underlying the dismissals, such as Mr Chen's illness and absence from work, Mr Castro's union activities and Mr Emurugat's poor work performance, but the employers ultimately and successfully

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based their cases on the illegal status of the employees, and not traditional complaints rooted in capacity or conduct.

COMPARING THE JURISPRUDENCE OF THE US, AUSTRALIA AND THE UK WITH SOUTH AFRICA

The argument of the illegal immigration status of the employee disentitling the employee to the protections of the host nation's labour laws was successfully argued in the US, the UK and Australia but not in South Africa. Interestingly, although the arguments in each court (apart from South Africa) ultimately reached the same conclusion, the route and reasoning to that conclusion differed.

In the US it is important to note that when the NLRB ¹⁴¹ found that the dismissal of Mr Castro for union activities was in contravention of the NLRA ¹⁴² and awarded reinstatement and backpay, the NLRB was unaware that his employment was in contravention of immigration laws. The NLRB was under the impression that his employment was lawful. The NLRB therefore did not consider the standard employer defence which arguably would have been presented such as the employment contract being void and of no effect as from inception. It was only when the board met later to consider the quantum of the compensation that Mr Castro's illegal status became evident. *Hoffman Plastics* presented the standard defence. The Supreme Court found in favour of this argument by five judges to four. Accordingly, the remedy of reinstatement was no longer an option as continued employment meant continued transgression of

immigration laws. The remedy of compensation was also unavailable as that remedy was calculated on the time (3.5 years) between his dismissal and the date when the employer became aware of his illegal status, time when he was not entitled to be present and working in the US. The Supreme Court in *Hoffman* emphasized the continued unlawfulness of the employment relationship despite the fact that a dismissal for union activities breached the US's own NLRA. (Clearly immigration law trumped labour law in this case.) But for his illegal status, Mr Castro would have been entitled to those remedies. In arriving at its decision the US did not consider any international law expressed in UN or ILO conventions.

In Australia, the Industrial Relations Court and the Industrial Relations Commission found (similarly to the *Hoffman* decision in the US) that the dismissals were 'sound, defensible or well-founded' because the continued employment of Mr Chen and Mr Emurugat would amount to a continued violation of the Migration Act.

In the UK the England and Wales Court of Appeal emphasized the

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illegal nature of the employment contract and considered whether the reason for dismissal amounted to impermissible race discrimination. The Court of Appeal endorsed the view of the EAT that the 'contract of employment could never have been entered into at all but for the fraudulent representations of Mr Vakante. It was void ab initio. It was illegal conduct which rendered the contract void'. ¹⁴³ The Court of Appeal briefly considered the discrimination argument made by Mr Vakante's legal representative, that the school's treatment of Mr Vakante violated the European Council's Directive 222/43/EC which posits the principle of equal treatment of persons regardless of race or ethnic origin. The court held that the point 'does not begin to get off the ground' because at the outset the directive did not apply at the time of his dismissal and because of the centrality of his illegal conduct. The court held: '[E]ven if Mr Vakante were able to prove unlawful race discrimination, the reason why he would not be entitled to any compensation or other remedy is that he has, by his own illegal conduct in securing employment without the requisite permit disqualified himself from pursuing his claim.'

¹⁴⁴

In the light of the weight of the arguments presented above, how could the LC have arrived at a decision that granted Mr Lanzetta access to the protections against unfair dismissal envisaged in the LRA despite his breach of South Africa's immigration laws? Could this be a case, against the tide, of labour law trumping immigration law? At the outset, it must be pointed out that the LC was faced with a preliminary issue which was whether or not the CCMA had jurisdiction to hear the unfair dismissal claim. It was not seised with the question whether or not the dismissal was fair, and, if not fair, the quagmire of an appropriate remedy which theoretically could have included reinstatement.

The LC concluded that the employment contract between Mr Lanzetta and Discovery Health was not invalid even though it amounted to, from inception, a contravention of the Immigration Act. (The nature of the contravention was mild, he had permission in his visa to work, but for a different company, not for Discovery Health.) His contravention was of a very different nature to that of Mr Vakante (who presented false documents to the school, and informed the school that he was allowed to take up employment in the UK and received wages whilst drawing social security benefits) and Mr Castro (who entered the US illegally and presented false documents purporting to authorize his permission to work to Hoffman Plastics).

The court goes to some length to explain such an apparently incongruous position. It argues that the constitutional right to fair labour practices is a fundamental right. Legislation, such as the Immigration

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Act, should be interpreted as far as reasonably possibly (to the extent that the language of the relevant provision will permit) in a manner which does not limit this right.

Parliament did not intend to visit invalidity on contracts such as Mr Lanzetta's, content that a penalty imposed upon an employer for a contravention sufficed. The court supported this position by reference to the Constitutional Court decision in *NUMSA v Bader Bop* which 'emphasized that if a statute is capable of interpretation in a manner that does not limit fundamental rights, then that interpretation should be preferred'.¹⁴⁵ Furthermore, the court noted that there was no indication in the Immigration Act that parliament intended to limit that right 'or accomplish more than to penalize persons who employ others on unauthorized terms'.¹⁴⁶ The policy considerations supporting such an interpretation are based in equity - to prevent employers utilizing the labour of illegal workers and then dismissing them for no sound reason, knowing that those workers have no remedy in labour law.¹⁴⁷

The South African position as it currently stands differs fundamentally from the position in the US, the UK and Australia. The LC in South Africa has jettisoned the argument that a contract of employment entered into in violation of migration laws is void ab initio and unenforceable. That in short is the position of the international fora. The LC's reason ultimately lies in the fundamental right to fair labour practices found in the Constitution which fosters an interpretation of the definition of 'employee' in the LRA to include workers employed in contravention of South Africa's immigration laws. The question though whether our courts will find that a dismissal for reason of such a violation is fair or unfair remains to be seen, and if unfair the appropriate remedy. That is a matter for future litigation.

It is arguable that the facts presented by Mr Lanzetta were conducive to such an interpretation. Hypothetically, if the CCMA and the LC were faced with the facts akin to those in the *Vakante* or *Castro* cases - where a foreigner enters the country illegally, presents a fraudulent work permit and accesses UIF when not entitled to do so, and is later dismissed - it is doubtful that they would find that the contract was not void ab initio and that the worker was entitled to the protections against unfair dismissal envisaged in the LRA.

Does the Labour Court's decision in Discovery Health find support in international law?

The answer to the above question appears to be both 'yes' and 'no'. The Inter-American Court on Human Rights found that the US had

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transgressed the jus cogens of equality and non-discrimination. The court encouraged the US to explore legislative and other means to rectify these transgressions. Presumably the LC's decision would find favour with the Inter-American Court, as the LC did not discriminate against Mr Lanzetta on the basis of his immigration status and the court had given him access to the fora established under the LRA.

It is also reasonable to argue that the LC's decision would find favour within some quarters of the ILO and the UN - two international organizations concerned with the protection of illegal workers, noting their particularly vulnerable status in host countries. Granted the ILO conventions and the UN convention support the humane treatment of illegal workers and encourage host nations to treat illegal workers on a par with those legally in the country and on a par with nationals with respect to conditions of employment, such as remuneration, hours of work, overtime and benefits.

However, there are limits to the equality of treatment - the principle subsists for the duration of the employment relationship for work already performed. Neither the ILO nor the UN recommends that host nations disregard their sovereignty and ignore their immigration laws and policies and continue employment relationships which contravene those laws. The conventions do not entreat host nations to reinstate illegal employees, upon a finding of an unfair dismissal, in the face of express prohibitions by the government. Whilst the LC has not decided on the fairness of this type of dismissal nor on the appropriate remedy, it has opened the door to illegal immigrants having their dismissal disputes determined and potentially being reinstated. This reinstatement would arguably be a step 'too far' beyond the recommendations of the ILO and UN.

¹⁴¹ National Labor Relations Board.

[142](#) National Labor Relations Act.

[143](#) *Vakante* at 27.

[144](#) *Vakante* at 37.

[145](#) *Discovery* para 29.

[146](#) para 30.

[147](#) para 31.

CONCLUSION

Research has shown that there are millions of workers employed contrary to the immigration laws of the host nations wherein they work. Despite the scale of this workforce, there are but a handful of cases of workers challenging the lawfulness of their dismissals. In the US, the UK and Australia, dismissals on the basis of a violation of each of those countries' immigration laws legally justified the dismissals, regardless of whether there may have been a more pertinent reason for the dismissal, such as Mr Castro's union involvement in the US, or Mr Emurugat's poor performance or Mr Chen's incapacity (respectively) in Australia.

In South Africa, the LC in *Discovery Health* found (contrary to previous CCMA decisions) that an employee who had worked contrary to the Immigration Act had a valid employment contract and was regarded as an 'employee' for purposes of the LRA. This opens the door for illegal migrant workers to pursue unfair dismissal claims and potentially to the remedies of compensation and reinstatement.

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The South African position stands in sharp contrast to the position in the US, UK and Australia in that the contract of employment in South African law is not deemed to be void ab initio, whereas in those other countries it is. South African case law does not find support in comparable foreign case law in this respect.

Whilst the ILO conventions and the UN convention encourage equality of treatment of illegal migrants vis-à-vis legal migrants and nationals, this equality pertains to work already performed. The protection against dismissals for illegal workers is not a right which may on a reasonable interpretation be sourced from these conventions. The ILO and UN recognize the sovereignty of nations to determine their own immigration laws and policies and do not enjoin nations to continue employment relations which contravene those laws and policies. The primary remedy for a finding of an unfair dismissal is reinstatement and clearly such a remedy in favour of an illegal worker would result in the perpetuation of an illegal employment relationship which host nations have sought to avoid.

The position regarding the rights (rather the lack thereof) of illegal workers with respect to dismissal in the conventions does not accord with the decision of the Inter-American Court of Human Rights (which found that the US had violated illegal employee's rights to the principles of equality and non-discrimination sourced in the jus cogens of international law) and that of the ILO Committee on Freedom of Association. Accordingly, it appears that the international law position with respect to the protection to be afforded illegal workers against unfair dismissals is somewhat inconsistent, open to interpretive contestation and ripe for judicial activism.

In the final analysis, noting the cumulative weight of the domestic law critique in South Africa against the LC's finding, clear and consistent foreign case law which posits ultimately that employment relations in contravention of immigration laws are void ab initio, and the limits to the principle of equality applicable to illegal workers found in the ILO conventions and the UN convention, I conclude that the LC's decision in *Discovery Health* which accords an expansive interpretation to the right to fair labour practices to foreign illegal workers in the circumstances of dismissal is a finding which cannot reasonably be sustained.

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