IRREGULAR MIGRANT WORKERS IN THE UK: A STORY OF MARGINALIZATION

by

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Abstract

21 Chinese irregular migrant cockle pickers died in February 2004. It soon became clear that these workers had been exploited. They had been paid 11 pence an hour (approximately 30 cents CAD) and had been housed in squalid accommodation. After the tragedy took place I felt compelled to investigate the exploitation of irregular migrant workers in the UK's 'black economy.' Quickly it became clear that this disaster was simply another example of the UK's 'modern day slave-trade,' in which irregular migrant workers fall prey to unscrupulous bosses in a wide range of low skilled industries.

In this thesis I unveil how irregular migrant workers face practices that amount to 'modern slavery' in the UK's low skilled industries. I describe these various forms of exploitation in Chapter 2 and explain how they constitute 'modern slavery.' In documenting these different types of abuse, I have relied on secondary sources and have contacted certain individuals directly. In Chapter 3, I then consider the legal rights irregular migrant workers have against such exploitation under UK law. As I reveal however, legal rights are often ineffective for irregular migrant workers due to their immigration status. In Chapter 4, I show how forthcoming legislation, which was brought in following the cockle pickers' deaths, also fails to provide irregular migrant workers useful rights. Due to the inadequacy of rights protection at the domestic level, in Chapter 5 I assess whether international human rights law offers more effective protection. As I explain however, individuals in the UK are unable to enforce international human rights law. In light of these findings, in Chapter 6, I make recommendations on how to improve the rights of irregular migrant workers in the UK.
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To my family.
Chapter 1

Motivations and Methodology

On February 5th 2004, 21 Chinese irregular migrant cockle pickers drowned after being caught by rising tides in Morecambe Bay, Lancashire. The cockle pickers faced strong currents, deep channels and treacherous quicksand. Despite the well-known dangers of the tides in Morecambe Bay, these workers were not provided with lifejackets and were unable to understand the warning signs, as they could not read English.\footnote{The Telegraph, “Illegal immigrants pay ultimate price” The Telegraph (9 February 2004), online: smh.com <http://www.smh.com.au/articles/2004/02/08/1076175034058.html?from=storyrhs&oneclick=true>.
3 Ian Johnston “Worked to death” Scotland on Sunday (8 February 2004).

Local people had warned the government about the dangers of cockle picking in Morecambe Bay, yet nothing was done to protect this group or reduce the dangers they faced.\footnote{U.K., House of Commons Hansard Debates, Operation Gangmaster (London: 9 February 2004 at Column 1127).} As the story unfolded it became clear that basic safety and employment rights simply did not exist for the cockle pickers. For their labours, this group had worked for 11 pence an hour (approximately 30 cents CAD) and had been housed in squalid accommodation.\footnote{Ian Johnston “Worked to death” Scotland on Sunday (8 February 2004).}

After the tragedy took place I felt compelled to investigate the exploitation of irregular migrant workers in the UK’s ‘black economy’. I soon learned that the Morecambe Bay tragedy was not an isolated incident. Quickly it became clear that the disaster was simply another example of the UK’s “modern day slave-trade”, in which irregular migrant workers fall prey to unscrupulous bosses in a wide range of low skilled industries.\footnote{David Blunkett, “Home Office UK, Press Release: New Measures to Tackle Illegal Working” (16 March 2004).}
The accounts that I read horrified me on many different levels. First, why had these matters not come to my attention before? Why was the media so quiet on these issues that simply stank of human rights violations? Second, I was appalled that the law could be so unresponsive to the plight of these workers. What could be done to help this group? I have tried to respond constructively to my shock and horror. This thesis represents my personal contribution towards aiding and empowering irregular migrant workers in the UK.

1.1 Thesis Objectives

This thesis has three primary objectives. First, I attempt to raise awareness about the exploitation of irregular migrant workers in the UK’s low skilled industries. Very little research has been conducted into this issue and I hope to contribute contemporary knowledge to this emerging field. Increasing awareness about the exploitation of these workers is vital as often this group is portrayed unsympathetically. Irregular migrant workers tend to lack the emotive appeal of other immigrant groups such as refugees and the family class. Based predominantly in low skilled industries, these workers also lack the prestige of highly skilled migrants. Such factors may explain the less sympathetic discourse that surrounds them.

By telling the stories of irregular migrant workers’ experiences of exploitation at work, I hope to generate a more sympathetic and accurate discourse. Such a discourse will hopefully promote a more critical reading of the media when it discusses the ‘problem’ of irregular migrant working, or ‘illegal working’ as it is often described. Ultimately, I hope to give a voice to irregular migrant workers who perform necessary jobs in our economy yet lack the legal status to speak for themselves.
Knowledge that irregular migrant workers face exploitation without legal recourse may also act as a useful counterweight to talk of a ‘rights culture’ in the UK. In a liberal democracy such as the UK it is all too easy to presume that all persons can access basic rights protection. Talk of a ‘rights culture’ has also been especially prevalent since the *Human Rights Act 1998* brought certain rights under the *European Convention of Human Rights* into domestic law.

Second, I aim to challenge the law’s humanity and protective capability. The law leaves some of the UK’s most vulnerable inhabitants - irregular migrants generally, and irregular migrant women in particular – without legal recourse, effectively ignoring their exploitation. In my analysis, I hope to offer a critical perspective of the law’s “bright lines and clear taxonomies” that leave irregular migrant workers unprotected.\(^7\)

Third and finally, through my various criticisms of the law I hope to encourage creative thinking to find pragmatic ways to end the abuse of this group. I aim to challenge the position of irregular migrant workers as complete ‘outsiders’ on account of their immigration status. Through arguing that this group also deserves the benefit of human rights protection, I aim to promote a debate on whether legal rights can provide a solution to these problems.

### 1.2 Terminology

Much of the relevant terminology is explained at the appropriate point in the thesis. However, two general terms are worth explaining from the outset.

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First, I use the term ‘irregular migrant worker’ to describe those who work in contravention of UK immigration law. I have adopted the term ‘irregular’ as opposed to the terms ‘illegal’ and ‘undocumented’ for the following reasons. The term ‘irregular’ is preferable to the term ‘illegal’ because ‘illegal’ connotes a complete lack of recognised existence, as well as a status of criminality. As Patrick Taran notes, the term ‘illegal’ renders this group of workers “outside the applicability and protection of law, contrary to the inalienability of human rights protection”.


In contrast, the term ‘irregular’ is relatively neutral and thus makes it easier to advocate on behalf of this group. The term ‘irregular’ is also more appropriate than the term ‘undocumented’ because ‘undocumented’ does not capture the full range of ways in which a person may come to work without authorization. For example, a worker may enter a country legally, and hence be documented, but then violate the terms of his or her stay. Migrant workers may also appear documented because they carry false papers. As the International Symposium on Migration in Bangkok in 1999 recognised, the term ‘irregular’ incorporates the full range of circumstances that may contribute to a person working without authorization and thus offers a more complete description.

The second term worth explaining from the start is ‘low skilled industries’. I am using this term to mean industries that do not require a high level of expertise, where irregular migrant workers are commonly found. In particular I am looking at exploitation in agriculture, food processing, cleaning, the residential care sector, and construction,
though mention is made of other sectors when useful to my exposition. In using the term ‘low skilled’ I do not intend to suggest any lack of respect for these industries.

1.3 Research Methods

Irregular migrant workers suffer many different types of exploitation in the UK. In this thesis I am focussing on practices that amount to ‘modern slavery’. ‘Modern slavery’ describes practices that exist in today’s low skilled industries that can be interpreted as indicators of ‘slavery’. According to Anti-Slavery International, ‘slavery’ is defined as when a person is forced to work through mental or physical threat, owned or controlled by an ‘employer’, usually through actual or threatened abuse, dehumanised and treated as a commodity, and physically constrained or has restrictions placed on his or her freedom of movement.10

Placing this definition in the context of irregular migrant workers in the UK’s low skilled industries, many indicators of ‘modern slavery’ become apparent. First, the issue of death in the course of employment due to a lack of attention being paid to safety requirements can be seen as an example of how irregular migrants are treated as commodities, disposable and unimportant. Second, irregular migrants often face actual and threatened abuse in the form of violence or threats of violence at work. Third, this group often receives illegally low wages and endures excessively long working hours. Such poor working conditions stand in defiance of basic employment law protection and can be seen as dehumanising. Finally, irregular migrants are physically constrained through being provided accommodation by their employer, which acts to control their movement. Such

accommodation is also often substandard and this in itself reinforces the dehumanisation of this group.

Although these indicators of slavery could also include legal workers who endure similar substandard employment conditions, what distinguishes irregular migrant workers is their practical inability to change their circumstances on account of their immigration status. Without the right to work in the UK, irregular migrant workers may have no choice but to work for unscrupulous employers and face awful conditions. Unrestricted by immigration status, legal workers do not face this added burden.

In documenting these different types of exploitation that irregular migrant workers suffer, I have used Internet search engines to find relevant cases and legal articles. I have also relied on secondary sources from academics, journalists and public interest organisations. To find certain pieces of information, I have contacted certain individuals directly. In particular, the following persons have provided me with much useful assistance: Don Pollard, a gangmaster researcher for the Transport and General Workers Union; Don Flynn, Policy Officer for the Joint Council for the Welfare of Immigrants; Felicity Lawrence, journalist for The Guardian and author on food industry issues; Andrew Seagar, spokesperson for the Citizens' Advice Bureau; Daniel Wilsher, academic at the City University in London and member of the Law Society's Immigration Panel; Jabez Lam of the Chinese rights group Min Quan; Fiona Beach, an immigration lawyer; and, Morven Cameron who works in the Policy Section of the Criminal Injury and Compensation Authority.

The shortage of research on irregular migrant workers - possibly because many are too afraid to speak out for fear of being removed from the UK or being punished by their
employer has meant that I have had to rely on research on regular migrant workers at times, to gauge a fuller picture of irregular working. Such comparison between these two groups of workers is possible however, as both suffer many of the same problems. For example, many Portuguese workers are unaware that they have the right to work in the UK and fall prey to 'modern slavery' in the same way as irregular migrant workers.

1.4 Thesis Structure

The substantive sections of this thesis begin in Chapter 2, where I provide a contextual overview of irregular migrant working in the UK. First I explain why and how a person may become an irregular migrant worker. Then I illustrate the potential scale of irregular migrant working, to give an idea of the possible extent of exploitation. Next I give an overview of the gangmaster phenomenon, whereby 'gangmaster' employers commonly employ and exploit irregular migrant workers. Finally, I describe with examples how irregular migrant workers are subject to 'modern slavery' based on the indicators outlined above. In my exposition I also reveal how irregular migrant workers are marginalized as a group, and that irregular migrant women are doubly marginalized.

In Chapters 3, 4 and 5, I consider whether irregular migrant workers might have any viable legal claims against such abuse. In Chapter 3, I examine the situation under current domestic law and reveal that both legislation and case law reflect a lack of domestic remedies for these workers. I also show how current policy echoes the law's denial of rights and places the end of irregular migrant working high on the government's agenda.

12 HC, Friday 27 February 2004, Second Reading Gangmaster (Licensing) Bill, at col. 549.
In Chapter 4, I then question whether the new *Gangmaster (Licensing) Act 2004*,\(^{13}\) which will come into effect as and when the Secretary of State decides,\(^{14}\) will improve the situation for irregular migrant workers. After considering possible rights protections at the domestic level, in Chapter 5, I look at potential rights claims under international law.

Finally, in Chapter 6 I conclude the thesis and also discuss whether giving legal rights to irregular migrant workers offers a useful remedy against exploitation. I also make recommendations on how the plight of irregular migrant workers in the UK might be improved. Having explained the background to this thesis, I now turn to Chapter 2, *A Story of Marginalization*.

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\(^{13}\) *Gangmaster (Licensing) Act 2004* (U.K.), c. 11.

\(^{14}\) See section 29. The Act’s entry into force is explained further in Chapter 4, section 4.3.7.
Chapter 2

A Story of Marginalization

In this chapter I provide the necessary contextual information to ground the rest of the thesis. Providing this background information will offer a fuller understanding of the issues that affect irregular migrant workers. First I offer some reasons to help explain why a person might leave their country of origin and come to the UK to work in a low skilled industry. Second, I describe how a person might become an irregular migrant worker. Third, I assess the scale of irregular migrant working in the UK. Fourth, I explain what a ‘gangmaster’ is and how such persons operate to control irregular migrant workers. Fifth, I describe the conditions that amount to ‘modern slavery’ that affect many irregular migrants. Finally, I describe the law that governs the employment of irregular migrants and show how this is rarely enforced against ‘gangmaster’ employers.

2.1 Why migrate to the UK to Work in a Low Skilled Industry?

There are many factors that might cause a person to come to the UK and work in a low skilled industry. Each person will have a different story. However, common factors that help explain why people leave their countries of origin (the ‘push’ factors) and come to the UK (the ‘pull’ factors) include the following:

* Push Factors *

- Inadequate employment opportunities

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• Poor living conditions including a lack of essential services such as education and healthcare
• Political breakdown or economic crisis that may leave individuals in a financially precarious position
• Environmental disaster that may leave a person homeless
• Discrimination on the basis of gender, ethnicity or caste
• Family breakdown (especially the death of one's parents), which may compel family members to send children away to work or seek opportunities
• Escape from war or similar violence

_Pull Factors_

• International travel can be fast and cheap
• The standard of living may be better abroad, and offer good essential services
• Greater job opportunities abroad or much better rates of pay
• Recruitment agencies or brokers willing to facilitate travel for migrants
• High expectations of opportunities in foreign countries due to global media and the Internet
• Demand for workers in low skilled industries in foreign countries

These factors help to explain why persons might migrate to the UK to work in a low skilled industry. If such a migrant is unable to work in the UK legally, they may become an 'irregular migrant worker' as I explain below.
2.2 How does someone become an Irregular Migrant Worker?

2.2.1 A Lack of Legal Entry Routes

An irregular migrant worker is essentially any person who works in the UK in contravention of immigration law. To work in the UK legally, a migrant from outside the European Economic Area (EEA) who is not ‘settled’ in the UK (as under the Immigration Act 1971) must have permission to enter and work.

For entry into the UK’s low skilled industries the two main entry routes are the Sectors Based Scheme (SBS) and the Seasonal Agricultural Workers Scheme (SAWS). In brief, the SBS allows workers aged 18-30 from outside the EEA to take short-term or casual low skilled jobs for up to 12 months at a time. Work under this scheme is either in the hospitality industry, which includes hotel and catering work, or in food production, which includes meat, fish and mushroom production work. 20,000 places were available on the SBS scheme in 2003-4. Under the SAWS, students over the age of 18 from outside the EEA come and do low-skilled agricultural work for farmers and growers for between 5 weeks and 6 months. In 2003-2004, 25,000 places were available on the SAWS scheme.

The SBS and the SAWS reflect the Labour government’s commitment to ‘managed migration’. In its White Paper Secure Borders, Safe Haven, Integration and Diversity in Modern Britain published in 2002, the government recognised the need for low skilled workers to fill job vacancies. However, the SBS and SAWS do not provide satisfactory

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4 The Sectors Based Scheme, supra note 2.
5 The Seasonal Agricultural Workers’ Scheme, supra note 3.
6 Secretary of State for the Home Department, Secure Borders, Safe Haven, Integration and Diversity in Modern Britain (London: The Stationary Office, 2002).
solutions to filling these vacancies as not enough jobs are created under these schemes. For example, it is clear that the SBS did not allow for enough jobs in Indian restaurants. Curry houses used up their quota for workers “within weeks” and were left with a staffing crisis leaving restaurateurs having to resort to irregular migrants to fill the vacancies. Equally, there is evidence that SAWS workers are illegally hired on to other employers at the end of their working period, which suggests that job shortages remain in agriculture. In fact, statistics reveal that the SBS and the SAWS do not create even a tenth of the legal entry routes needed to saturate the UK job market. In comparison to the 45,000 jobs created for low skilled workers under these schemes between 2003-4, approximately 550,000 jobs are left unfulfilled each year.

These schemes thus represent a limited attempt to allow persons to work legally in the UK. To speculate, it is possible that the government has created such a limited number of legal entry routes, as it is afraid of becoming unpopular among the electorate should it open up the schemes to more migrants. The two major political parties, the Conservatives and Labour, both speak of migration in fearful terms. Indeed, their language has attracted criticism from the Commission of Racial Equality, a publicly funded non-governmental organisation that tackles race discrimination and promotes racial equality. Both parties have also pledged greater investment in border policing and port security.

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8 Bridget Anderson & Ben Rogaly, “Forced Labour and Migration to the UK” (Study prepared by COMPAS in collaboration with the Trades Union Congress, February 2005), online: <http://www.tuc.org.uk/international/tuc-9317-0.pdf> at 27.
9 Start-Ups, “Government launches illegal working crackdown” Start-Ups (18 March 2004), online: <http://www.startups.co.uk/Forums/ArticlePost.aspx?PostID=114688&p=22f1318d&h=57a0d78d>.
11 BBC News, ibid.
Whatever the government’s true motivations, its policies leave many persons unable to work legally in the UK’s low skilled industries. For example, the SBS and SAWS schemes are inaccessible to a wide range of age groups. Migrants over 30 years old who are not students are ineligible for both these schemes. The lack of legal entry routes may explain why persons overstay their working visas, or work in contravention of their visa, such as on a tourist visa. Other people may resort to smugglers to enter the UK, or fall victim to human trafficking.

2.2.2 Smuggling and Trafficking of Workers to the UK

The *Protocol against the Smuggling of Migrants by Land, Sea and Air*,\(^\text{12}\) defines smuggling as “…the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”\(^\text{13}\) The UK has signed this protocol.\(^\text{14}\) According to this definition, the smuggler and the smuggled migrant are in a business relationship and the role of the smuggler is simply to facilitate border crossing. Smugglers can charge US $200-300 (approximately 240-365 CAD) to get migrants across a land border, or about US $30,000 (approximately 36,500 CAD) to transport them from East Asia to North America or Europe.\(^\text{15}\) As smuggled migrants are assumed to be acting voluntarily, their protection is not placed as a paramount consideration under this protocol.


\(^\text{13}\) See Article 3(a) of the protocol.


By contrast, trafficking is for the purpose of exploitation and requires the continued exercise of control over migrants once they have moved. Trafficked persons are thus seen as in greater need of protection. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children\(^\text{16}\) thus creates a number of victim protection measures. The UK has also signed the trafficking protocol.\(^\text{17}\) Under the protocol, trafficking is defined as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal or organs.\(^\text{18}\)

Although smuggling and trafficking contain different elements, in practice it may be hard to distinguish between these forms of entry. As Anne Gallagher observes, “someone can be a smuggled migrant one day and a trafficked person the next.”\(^\text{19}\) Equally, the lines between trafficking and smuggling may blur as both a voluntary commercial relationship as well as coercion and force may exist during a transaction. The difficulties in separating the trafficking and smuggling, and the lack of guidance as to how to do this in the protocols also create the risk that states may be more inclined to identify a form of illegal entry as smuggling rather than trafficking, to avoid the greater protections that


\(^{17}\) Global Policy Forum, supra note 14.

\(^{18}\) See Article 3(a) of the protocol.

\(^{19}\) Anne Gallagher, “Trafficking, smuggling and human rights: tricks and treaties” 12 Forced Migration Review 25 at 27.
victims of trafficking should receive. According to Gallagher, "there is already plenty of anecdotal evidence" indicating that the practice of trafficked individuals being wrongly identified as having been smuggled is already occurring. It is unfortunate that states are avoiding fulfilling their human rights commitments under the trafficking protocol in this manner and that the definition of smuggling does not recognise that smuggled persons may also be victims in need of assistance.

Smuggling and trafficking thus reflect the willingness of international criminals to move people across borders. However, these practices also underscore that there is a huge demand for informal workers in the UK, which is far larger than the legal entry routes into low-skilled industries suggest.

2.3 What is the scale of Irregular Migrant Working?

According to the International Labour Conference (ILO): "The extent of the flows of irregular workers is a strong indication that the demand for regular migrant workers is not being matched by the supply, with [irregular] migrants serving as the buffers between the political demands and economic realities." Indeed, at their 2004 conference the ILO estimated that 10-15% of all migrants are irregular.

Current estimates that approximately 550,000 jobs are left unfulfilled each year may thus indicate the actual numbers of irregular migrant workers in the UK. This potentially high number is also supported by estimates of irregular migrant workers in various industries. For example:

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20 Ibid.
21 International Labour Conference, supra note 15.
22 Ibid. at 11.
23 Start-Ups, supra note 9.
• 75,000 irregular workers work in rural areas alone.\textsuperscript{24}

• one in four workers in London’s hotel and catering trade is an irregular migrant worker.\textsuperscript{25}

• Baz Morris of the textile workers union KFAT believes that the informal sector is “probably as big” as the above board sector.\textsuperscript{26}

• George Brumwell of the construction industry union UCATT places the number of irregular migrant workers at approximately 40,000 of the 200,000 building workers in London.\textsuperscript{27}

• In an interview with the BBC’s Panorama, Don Pollard, gangmaster researcher for the TGWU, stated in 2000 that, “early estimates of the number of illegal workers in this country is something like 20\% of the total workforce.”\textsuperscript{28}

• A Home Office advisor told The Times if irregular migrant workers “disappeared overnight, London and the south-east would break down before breakfast”.\textsuperscript{29}

These estimates of the numbers of irregular migrant workers in various industries illustrate how the UK economy is heavily reliant on their labour. The scale of irregular migrant working is frightening. Not because these workers are ‘foreigners invading our land’ but because they often face terrible conditions in the course of their employment and in their private lives at the hands of exploitative employers, known as ‘gangmasters’. Next

\textsuperscript{24} Ian Johnston “Worked to death” Scotland on Sunday (8 February 2004).
\textsuperscript{25} Brian Wheeler, “How illegal workers are propping up our lifestyle” BBC Online Magazine (10 February 2004).
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid.
\textsuperscript{28} BBC Panorama documentary, “Gangmasters” (19\textsuperscript{th} June 2000), online: <http://news.bbc.co.uk/1/hi/programmes/panorama/archive/794072.stm> at 16.
\textsuperscript{29} Tom Baldwin, “State turns blind eye to workers in the shadows” The Times Online (January 31 2003), online: <http://www.timesonline.co.uk/article/0,,2-560764,00.html>.
I explain how the gangmaster phenomenon came about and how gangmasters operate to exploit their workers.

2.4 The ‘Gangmaster’ Phenomenon: Agriculture and Food Production

Large-scale employers, known as ‘gangmasters’, have been around since the early nineteenth century. Since the industrial revolution British agricultural and horticultural industries depended on a self-appointed manager – the gangmaster - to find additional, casual workers to do low skilled work at peak times of the year. The Agricultural Gangs Act 1867, defines a gangmaster as a person “who hires Children, Young Persons, or Women with a view to their being employed in Agricultural Labour on Lands not in his own Occupation.” This definition reflects the vulnerability of the gangmaster workforce at this time. However, according to Don Pollard, “there have always been abuses of workers rights” in the gangmaster system. Although the nature of the workforce has changed since the 1867 definition, the vulnerability of workers and their exploitation continue to exist within the gangmaster system today.

The composition of the gangmaster workforce has altered for various reasons since 1867. First, the nature of food production itself has transformed dramatically. The growing season of fresh produce is now year-round due to scientific advances in agricultural science. Also, packhouses - where food is packed before it is sent to the supermarkets - operate 24 hours per day to keep up with supermarkets’ longer opening

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32 Agricultural Gangs Act 1867.
hours and increased consumer demand for pre-packed fresh produce. For example, during
hot weather a supermarket may require extra washed lettuce and contact a supplier to
provide more lettuce for later that day. A packhouse would then ask a gangmaster to
provide perhaps 30-40 additional workers immediately. Computerized ordering practices
based on hourly supermarket sales also allow orders to change at very short notice. These
innovations have meant that gangmasters need a flexible workforce, which can be brought
in or sent home depending on supermarket demands. These changes have made this type
of work less desirable for women who want a job that can be fitted around domestic
responsibilities and students who want to fit part time work around studying. 34

As well, supermarket demands for ever cheaper food are responsible for such work
being very low paid. While supermarkets claim that they are simply giving their customers
what they want, namely cheaper prices, such low prices exist at a human cost that is borne
by the workers. 35 As Pollard states: "[The supermarkets] buy I think 80% of the fresh
produce in this country, and they’re putting tremendous pressure both on the pack-house
people and on farmers to reduce costs, and they in turn are putting pressure on the weakest
link in the production structure, namely wages and conditions." 36 Poor conditions, such as
work in refrigerated plants, or dirty and boring work in the fields, also combine to make
food production work low status and unattractive. 37 Unsurprisingly, as local people in rural
areas have benefited from increased car use in recent years, they have taken more attractive

34 See EFRA, supra note 31 at paras. 3-7; Felicity Lawrence, Not on the label (London: Penguin Books,
jobs elsewhere that tend to offer stable employment and guaranteed pay. Ironically, many of these jobs are in the supermarkets themselves.\textsuperscript{38}

These various dynamics mean that the British population no longer meets current labour demands in food production. To find extra workers many gangmasters have become dependent on migrant labour. Many gangmasters recruit migrants who have the right to work in the UK, through the SAWS scheme, or the SBS and stay within the law. Indeed, some gangmasters, such as Zad Padda who is often cited as a model gangmaster, work with the government to try to ensure that workers are treated fairly.\textsuperscript{39} Other gangmasters however, employ irregular migrant workers and take advantage of their lack of legal status. Instead of women, young persons and children, irregular migrant workers now form the new vulnerable workforce in the agricultural gangmaster system.

Gangmasters take advantage of irregular migrants by paying these workers far less than the minimum wage. This allows gangmasters to charge the factories less, who in turn can supply the supermarkets for less. Although the supermarkets do not endorse the employment of irregular migrants, it is their activities at the top of the ‘food chain’ that encourages the employment of irregular migrants.\textsuperscript{40} As Pollard explains:

Intense competitive price pressure comes down from the supermarkets to their suppliers who, in turn, pass it down to their labour providers, the gangmasters, on a ‘take it or leave it’ basis. Where the profit margin between what the farmer/packhouse is willing to pay the gangmasters and what he pays his workers is too low to meet all the legitimate employment costs, then many gangmasters turn to illegal practices on pay, conditions of work, and health and safety and recover money from the workers themselves by illegal an/or excessive deductions from their pay for

\textsuperscript{38} EFRA, supra note 31 at para. 5.
\textsuperscript{39} See for example, Zad Padda’s participation in the Ethical Trading Initiative’s Seminar on Seasonal and Foreign labour in the UK Food Industry, online: <http://www.eti.org.uk/Z/lib/2002/05/ukagric-senm/index.shtml>.
\textsuperscript{40} Don Pollard, “The Gangmaster System in the UK” supra note 30 at 2.
accommodation, transport, interests on loans, clothing and equipment for work and the mysterious charge for “administration”.

While some gangmasters have resorted to exploiting irregular migrants to survive, others have turned to subcontracting their workers. Subcontracting removes the supplying gangmaster from direct responsibility for any legal violations that are committed towards the subcontracted workers. This situation makes the commission of such legal violations particularly likely, as Bridget Anderson and Ben Rogaly explain: “As the chain lengthens, so the possibilities for informality (and exploitation) increase.”

Subcontracting also encourages the cost of labour to be driven down, sometimes so that workers do not get paid at all. The following advertisement for gangmaster services illustrates this fact: ‘As a gesture of our good will we may allow at no cost to yourselves free labour and transport consisting of 5 workers for 5 days. This is how confident we are of supplying you with fast reliable and efficient staff.’

The exploitation of irregular migrant workers currently exists on a very large scale with some agricultural gangmasters forming mafia-like networks. In their report Anderson and Rogaly recount an example of how dangerous gangmaster operations can be. In the words of one of their interviewees, “when I was in East Anglia I heard reports from gangmasters who had been phoned up and asked if they would take thirty labourers, and on querying it were told: no, you don’t understand, you will take them.”

41 Ibid.
42 Ibid. at 5.
43 Ibid.
44 Bridget Anderson & Ben Rogaly, “Forced Labour and Migration to the UK” supra note 8 at 30.
45 Ibid.
46 Ibid. at 32.
Criminal gangmasters tend to start by setting themselves up as ‘employment agencies’ in the form of limited companies. These companies then recruit workers from abroad and can even become directly or indirectly involved in smuggling them into the UK. Often the workers pay gangmasters exorbitant sums for their travel to the UK. Further fees are then often charged for travel documents and job placements. Thus, many workers arrive in the UK indebted to gangmasters or criminal mafias in their home country who lend them money to travel. The workers are then provided with housing and transport by the gangmasters, for which they are charged extortionate rates. Providing housing encourages the workers to remain dependent on their gangmaster, which in turn reduces the likelihood of workers reporting abuse.

Gangmasters then put their recruits to work, charging the packhouses, factories and farmers where the irregular migrants work the going rate of £6-7 per hour (approximately 14-16 CAD), plus Value Added Tax. Gangmasters also deduct tax and insurance from the workers’ pay packets, even when these deductions have nowhere legitimate to go, as they are not provided to the government. This process keeps the books of the companies that the gangmasters supply clean and allows gangmasters to cream off this money, on top of the profit they make on paying the workers less than they charge for their work. Gangmasters may also appear to be acting legitimately through double or off the book recording. This allows a gangmaster to act lawfully with a legitimate workforce, while

47 For a brief description of smuggling and an estimation of how much smuggled migrants pay, see the discussion above in section 2.2.2.
48 It is illegal for an employment agency to charge fees for finding someone a job. See the Employment Agencies Act 1973, section 6(1).
49 According to the National Criminal Intelligence Service, the worst gangmasters are involved in human trafficking and also drug smuggling. See: HC, Friday 27 February 2004, Second Reading Gangmaster (Licensing) Bill, at col. 518.
50 See generally Not on the label, supra note 34 at 38-39.
51 Value Added Tax (VAT) is a tax placed on supplies of taxable goods and services. The rate for work (and most goods) stands at 17.5%. 

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making a dishonest income from other workers who do not feature on the company books.\textsuperscript{52}

In order to completely avoid lawful obligations, before paying VAT, tax or insurance, which are collected retrospectively, gangmasters usually go bankrupt, sometimes owing between £1 million and £3 million to the government (approximately 2.3-7 million CAD). Indeed, between 1989 and 1994, the agricultural compliance unit recovered £537 million in unpaid taxes from gangmasters (approximately 1.25 billion CAD).\textsuperscript{53} Government research from 2001 also indicates that there were 400 known gangmasters in the UK who were evading up to £5 million each year in taxes and other dues (approximately 11.65 million CAD).\textsuperscript{54} Recent statistics provide an even more troublesome picture and suggest there are currently 3000 gangmasters in the UK.\textsuperscript{55} Such findings imply that potentially billions of pounds are lost through tax evasion by gangmasters each year. This money is often held in offshore accounts and is thus inaccessible to the UK authorities.

After going into liquidation, gangmasters frequently reappear as phoenix companies, whereby the owners buy the assets of the liquidated company and immediately re-start trading in the same line of business. Thus the same gangmaster(s) may re-emerge as an employment agency with a new name but supplying the same workers to the same sites. Gangmasters may also create clone companies to supply subcontracted labour.

\textsuperscript{52} Don Pollard, "The Gangmaster System in the UK" supra note 30 at 5.
\textsuperscript{53} Second Reading Gangmaster (Licensing) Bill, supra note 49 at col. 518.
These clone companies help to disguise fraud and get around the restrictions on bankrupts being the directors of other companies.

2.4.1 Construction, Contract Cleaning and Residential Care

Although gangmasters have been studied mostly in relation to the food industry, a very similar phenomenon exists in many other sectors of the British economy. It is thus appropriate to extend the term ‘gangmaster’ to large-scale employers who follow similar practices throughout the economy. Two recent reports have shed light on gangmaster activity in other industries. First, the Citizens Advice Bureau (CAB)\textsuperscript{56} has revealed how gangmasters operate in other sectors and often transfer workers between low-skilled jobs.\textsuperscript{57} Second, Anderson and Rogaly expose how the construction industry, contract cleaning and the residential care sectors share common characteristics with agriculture and food production that enable gangmasters to exploit irregular migrants.

Like agriculture and food processing, work in construction, cleaning and residential care can be physically hard, low paid, tends to be low status and can be insecure. Work in construction and cleaning is also location specific and thus requires a flexible labour force. These reasons indicate why such work is unpopular with the local population and irregular migrant workers are often hired to fill job vacancies.\textsuperscript{58}

Not unlike some agricultural gangmasters, certain businesses in these industries may also hire irregular migrants and pay them less as a way to survive. For example, William Laing notes that the full cost of operating a good quality residential care home in

\textsuperscript{56} Citizens Advice Bureau, \textit{Nowhere to turn – CAB evidence on the exploitation of migrant workers} (27 February 2004) [the CAB report].
\textsuperscript{57} \textit{Ibid.} at 6.
\textsuperscript{58} Bridget Anderson & Ben Rogaly, “Forced Labour and Migration to the UK” \textit{supra} note 8 at 26-29.
2001 was between £75 and £85 per week higher than the average fees paid to it by the local authority. Economics are also a huge driving force behind the recruitment of irregular migrant workers in construction. In a recent Radio 4 interview a London construction worker explained: "It's money. It always comes down to money. It's cheap labour. I mean, you can cheat [irregular migrant workers] because clearly they have no real way of getting back at you, and the option to them is you take the job or you don't." Lacking the power to 'get back' at their gangmaster employers means that irregular migrants get paid less, and sometimes not at all. Employing irregular migrant workers may thus be a priority for gangmasters in construction – and other industries – who have a tight bottom line or simply wish to make as much profit as possible on a contract.

Overall, modern gangmasters are often sophisticated criminals who operate in the same way as employment agencies, supplying workers to a wide range of industries for profit. In the next section I explain further how gangmasters exploit their workers. In particular I focus on the forms of abuse that are indicators of 'modern slavery'.

2.5 Exploitation of Irregular Migrant Workers by Gangmasters in the UK

As I explained in Chapter 1, many different exploitative practices can be seen as indicators of 'modern slavery'. Of these multiple indicators I have limited my research to looking at the following: deaths of irregular migrants in the course of their employment; violence or the threat of violence against this group; long hours and low wages; and tied

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61 See section 1.3.
accommodation. These examples combine to tell a story in which irregular migrant workers are frequently marginalized in many spheres of their lives.

2.5.1 Deaths in the course of Employment

Irregular migrant workers often perform very dangerous jobs without health and safety training. The Morecambe disaster, in which 21 cockle pickers were swept out to sea, provides a tragic example of how irregular migrant workers are often not given basic safety equipment or language instruction to enable them to read the warning signs. Not affording these workers basic safety protection suggests that some employers view irregular migrants as commodities, who are not worth the effort required to make them safe.62

The careless treatment of irregular migrants in dangerous jobs is also apparent from other tragic incidents. For example, a lack of safety training led to the deaths of two Polish workers who became entangled with a rope-reeling machine on a Twyford fruit farm, in Berkshire. The inquest held on July 30th 2003 declared that these deaths were "accidental". However, the facts suggest that these men were not properly instructed as to what to do, as farm manager Jeffry Dever admitted that one of the deceased had asked another man to translate his instructions.63 Poor safety considerations have also led to vehicle deaths. Irregular migrant workers are often asked to drive vehicles without proper qualifications, which are frequently overloaded and in bad condition.64 Circumstances such as these led to the deaths of three irregular migrants (and the injury of five others) when

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their minivan collided with a high-speed train on an unmanned level crossing in Worcestershire.65

Jobs that do not initially appear dangerous have also resulted in irregular migrant worker fatalities due to extremely harsh working conditions. For example, on January 13th 2004, The Guardian reported that an irregular Chinese worker dropped dead after stamping the Samsung name on microwave ovens for 24 hours on end.66

These accounts reflect how irregular migrant workers can be marginalized to such an extent that their basic safety is not taken into account. Such inattention to protecting the lives of irregular migrant workers also suggests that these workers are viewed as disposable commodities. Moreover, without strong protection for irregular migrant workers' lives and safety all of their other human rights are placed in jeopardy.

2.5.2 Violence and the Threat of Violence

There is evidence that irregular migrant workers suffer physical abuse and threats of violence in the course of their employment. Intelligence briefings for the UK government on gangmasters have revealed details of two particularly shocking forms of physical abuse: the 'Azerbaijani signature', a slash of a knife that stretches from the back of the shoulder to across the chest and the use of heavy rifles on farms to keep workers in order. Further, in interviews with investigative journalist Felicity Lawrence, migrant workers have spoken of

65 Not on the label, supra note 34 at 52 and 46.
66 Hsiao-Hung Pai & David Leigh, "Tragic death that uncovered the shadowy world of Britain's hidden Chinese workers", The Guardian (13 January 2004), online: <http://www.guardian.co.uk/print/0,3858,4834802-103601,00.html>.
being threatened with beatings for complaining about their conditions, such as when a group of workers complained that the factory they were working in was too cold.\textsuperscript{67}

Irregular migrant workers also face violence through being accommodated by their gangmaster employer in houses with 'enforcers' who use force to ensure that the 'regime' is followed.\textsuperscript{68} Enforcing the regime includes forcibly evicting tenant workers with baseball bats or using violence to exhort money from workers, sometimes leaving those who refuse to pay up in hospital for their injuries.\textsuperscript{69}

These examples reveal how irregular migrant workers are vulnerable to violence or the threat of violence as a group. Irregular workers tend to be too afraid to speak out against such abuse, which leaves them completely marginalized. The fearsome power gangmasters hold over their workers as well as systemic factors such as the operation of immigration law and the removal procedure may mean that irregular migrants feel that they are trapped in a world of exploitation.

While irregular migrants may experience such vulnerability as a group, irregular migrant women are sometimes marginalized further through sexual exploitation. As the ILO states: "women in an irregular status are doubly vulnerable owing to the high risk of sexual exploitation to which they are frequently exposed."\textsuperscript{70} For example Anderson and Rogaly came across a young female irregular migrant worker from the Ukraine who endured a sexual attack while lying ill and continues to suffer sexual harassment in the course of her employment.\textsuperscript{71} As well, in Norfolk, Chinese irregular migrant women are

\textsuperscript{67} Not on the label supra note 34 at 48.
\textsuperscript{68} Ibid. at 39, 47 and 48
\textsuperscript{69} Becky Taylor and Ben Rogaly, Report on Migrant Working in West Norfolk, October 2003, at 8-9 and 21.
\textsuperscript{70} International Labour Conference, supra note 15 at 59 [the 'Norfolk Report'].
\textsuperscript{71} Bridget Anderson & Ben Rogaly, "Forced Labour and Migration to the UK" supra note 8 at 51.
used as sex workers within the male migrant population. In an interview with Lawrence, a Portuguese migrant worker described another situation in the agricultural industry as follows:

One of the gangmasters would boast that he could take any woman to bed. He'd say the women had no choice because they were illegal. There was an attempted rape in one house – there's lots of sexual harassment, but this was serious assault. One of the women in the house who was legal rang the police. So he told her she was sacked over the phone and came round to evict her.

This account illustrates the added vulnerability that irregular migrant women face through sexual exploitation. The passage also serves to expose the lack of power that irregular migrants have to complain about their conditions, as it was the woman “who was legal” that felt able to call the police.

Highlighting the added vulnerability of irregular migrant women is one step towards acknowledging how broad group-based categorisation ‘irregular migrant workers’ clearly masks multiple experiences. In considering ways to combat the marginalization of irregular migrants, the added vulnerabilities that different group members face should also be recognised.

2.5.3 Long Hours and Low Wages

Irregular migrant workers commonly work well beyond the UK’s legal limit of 48 hours per week imposed by the Working Time Regulations 1998. Although there is a

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72 Norfolk Report, supra note 69, at 20.
73 Not on the label supra note 34 at 47.
provision for workers to opt-out of the 48-hour limit, it is apparent that many irregular migrant workers do not get this choice. Reporting on the food industry, Lawrence compares the supply of migrant workers to a tap, which can be turned on whenever the food suppliers need people to work.⁷⁶

Long hours are also symptomatic of other industries that employ migrant workers. In its report, the Citizens Advice Bureaux reveals that illegally long hours are a reality for migrant workers in the care home sector, cleaning, agriculture and the hospitality sector.⁷⁷ For example, the CAB report revealed that a young Indian woman worked up to 66 hours a week in a care home for no extra pay and two Filipino women were required to work 80 hours a week.⁷⁸ According to Anderson and Rogaly, such long working requirements are sometimes enforced through the employer making threats of reporting the worker to the immigration authorities. For example, an irregular Sri Lankan domestic often had to work two 12 hour shifts back to back and was threatened with being reported to immigration if she attempted to refuse.⁷⁹ It is quite possible that such treatment could also exist at the hands of gangmasters.

Although Anderson and Rogaly emphasise that some workers choose to work such long hours, in my view such ‘choice’ reflects sheer desperation and cannot be seen as real choice.⁸⁰ As a Nigerian contract cleaner states:

If you leave [the job], what are you going to live on? [The workers] have no choice but to stay with it, you see some of them early morning cleaning, they do afternoon cleaning and some do nights, some work

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⁷⁶ Not on the label supra note 34 at 42.
⁷⁷ CAB supra note 56.
⁷⁸ Ibid. at 8-9.
⁷⁹ Bridget Anderson & Ben Rogaly, “Forced Labour and Migration to the UK” supra note 8 at 41.
⁸⁰ Ibid.
through the night. Then you see them drop dead at the bus stop because they are trying to make ends meet.\textsuperscript{81}

On top of long hours, these workers also often receive illegally low pay. The legal minimum rates of pay are set out by the \textit{National Minimum Wage Act 1998}.\textsuperscript{82} The national minimum wage is £4.85 (approximately 11.30 CAD) per hour for persons over the age of 22, £4.10 (approximately 10 CAD) per hour for workers aged 18-21 and £3.00 (approximately 7 CAD) per hour for 16 and 17 year olds.\textsuperscript{83} Equally, the \textit{Agricultural Wages Order} requires that persons working in agriculture receive certain rates of pay.\textsuperscript{84} However, irregular migrant workers rarely receive the legal amount of pay.

Many gangmasters pay agricultural workers on a ‘piece rate’ basis, which often results in wages that are far below the minimum wage.\textsuperscript{85} Other workers sometime opt for remuneration in the form of a ‘package deal’, through receiving £150 (approximately 350 CAD) per week for example. Such remuneration provides a stable income though it usually translates into very low hourly rates.\textsuperscript{86} Worse still, migrant workers such as the Indian woman described above sometimes find themselves working without being paid at all. The CAB report also revealed how foreign students are often never paid for their work

\textsuperscript{81} Ibid.
\textsuperscript{82} \textit{National Minimum Wage Act} 1998, c. 39.
\textsuperscript{83} These figures reflect the recent rise in the National Minimum Wage as of October 1\textsuperscript{st} 2004. \textit{National Minimum Wage Regulations 1999} (Amendments) (No.2) Regulations 2004, SI 2004/1930.
\textsuperscript{84} Harvest Workers are paid the National Minimum Wage; Standard Workers are paid at a higher rate and skilled and supervisory workers are paid at an even higher rate. The Agricultural Wages Order also established the daily and weekly working limits, after which time overtime must be paid. Rates and conditions under the Agricultural Wages Order result from annual negotiations between the Transport and General Workers’ Union, the National Farmers’ Union and independent members of the Agricultural Wages Board. See Don Pollard, “The Gangmaster System in the UK” \textit{supra} note 30 at 3.
\textsuperscript{85} Ibid. at 3.
\textsuperscript{86} Bridget Anderson & Ben Rogaly, “Forced Labour and Migration to the UK” \textit{supra} note 8 at 42.
in the cleaning sector, as employers take advantage of the lack of clarity over their right to work in the UK.\textsuperscript{87}

These accounts suggest that employers exploit the vulnerability of irregular migrant workers through demanding long working hours for little pay. Low wages serve to marginalize irregular migrants who become unable to lead decent lives on account of their poverty. Situations of enforced poverty where workers are left with barely any money to live on are dehumanising and can they make these workers desperate for jobs, no matter how bad the conditions. Long working hours also mean that many irregular migrant workers are marginalized through lacking much time they can call their own and thus being unable to participate fully in society.

\subsection*{2.5.4 Squalid and Excessively Priced Housing}

The last form of abuse against irregular migrant workers that I am evaluating is squalid and excessively priced housing. Migrant workers commonly suffer appalling housing conditions for which they are charged extortionate rates. First, accommodation is often overcrowded and inhabitants are forced to ‘hot-bed’. ‘Hot-bedding’ is a process whereby one person gets up and goes to work and another goes to bed in their place.\textsuperscript{88} As Mr Simmonds, MP for Boston and Skegness, explained to the House of Commons, in his constituency 60 workers live in a three-bedroomed house, with 30 workers sleeping in the house at any one time.\textsuperscript{89} In some cases migrant workers have resorted to sleeping in

\textsuperscript{87} The Home Office Immigration and Nationality Directorate has confirmed to CAB that foreign students on courses lasting more than six months are legally able to work for up to 20 hours a week during term time, even though the Immigration Service stamp in their passport may state that they are prohibited from working. In this way, cleaning firms sometimes treat regular migrants as irregular migrants and thereby take advantage of the lack of clarity over their right to work. CAB report, \textit{supra} note 56 at 10-11.

\textsuperscript{88} Norfolk Report, \textit{supra} note 69, at 8.

\textsuperscript{89} HC, Friday 27 February 2004, Second Reading \textit{Gangmaster (Licensing) Bill}, \textit{supra} note 49 at col. 527.
garages due to the lack of space in the house itself. For example, in King's Lynn, Norfolk, 15 people were known to be sleeping in the garage and 20 in the house.\textsuperscript{90}

Such overcrowding has proved dangerous. On the Fairstead estate in Kings' Lynn a two-bedroomed flat that was home to 22 Chinese migrant workers caught on fire, presumably from the over-loading of electricity circuits.\textsuperscript{91} Overcrowding is also likely to cause unsanitary conditions, as washing and cooking facilities are shared between many people. For example, a CAB in the Midlands told of how a woman from the Ukraine was provided accommodation in a portacabin with one kitchen and one toilet between 18 people.\textsuperscript{92} Further, in Cambridgeshire, a CAB described workers being housed in partitioned containers with no water supply.\textsuperscript{93}

In Norfolk these squalid conditions have made it even harder for migrant workers to escape such bad quality accommodation as the local population perceives these workers to be a health risk on account of their terrible housing.\textsuperscript{94} Racism in the current housing market also makes it difficult for migrant workers to find other accommodation. Finding alternative accommodation is also difficult because gangmasters sometimes penalize those who move out of accommodation with a reduction in work. One worker said that when she left the accommodation her gangmaster had provided her hours were gradually reduced and then stopped entirely.\textsuperscript{95}

As well as providing overcrowded housing, gangmasters often make significant deductions from migrant workers' wages for accommodation and transport, which
sometimes leaves migrant workers in abject poverty. The CAB reports being approached by a Portuguese man and his pregnant wife. In their case, £90 (approximately 205 CAD) was deducted for a week's accommodation (a double bed in a house with 17 other Portuguese workers) and £11 (approximately 25 CAD) was deducted for weekly transport. This left the couple with just £6 (approximately 14 CAD) a week on which to live. The CAB described the couple as "penniless, short of food, and living on charitable handouts." In another case, a South African migrant worker on a two-year working visa was left with just 78p for a week's work.

The law protects against certain deductions being made yet is often flouted. There is a legal limit of up to £26.25 (approximately 60 CAD) per week that can be deducted for accommodation, or £3.75 (approximately 9 CAD) per night where the worker does not stay a full week. Unfortunately, there is no legal limit on the amount that can be deducted for transport. Examples of illegal deductions for housing include: a Spanish worker who lived on a rat-infested caravan site with two toilets and two showers for over 50 men was charged £75 a week (approximately 175 CAD) rent for a caravan shared with two other men; and rent for a two-bedroomed house shared between eight men in Norfolk was reported to be £600 a month (approximately 1400 CAD). Usually these extortionate rents are deducted from pay cheques, often leaving migrant workers in abject poverty. In

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96 CAB report, supra note 56 at 14.
98 For the law on legal deductions, see the Employment Rights Act 1996 ss13-26. For the exact amounts that can be deducted, see the TUC guide, "Working in the UK: Your Rights", online: <http://www.tuc.org.uk/tuc/workingintheuk.pdf> at 6.
99 Ibid.
100 Norfolk report supra note 69 at 10.
101 Ibid. at 9.
some cases, a gang worker may actually owe money to their gangmaster at the end of the week if there has been little work and the deductions continue.\(^{102}\)

As well as keeping irregular migrant workers in a state of poverty, gangmasters also use housing to assert as much control as possible over their workers. As Anderson and Rogaly note, tied housing arrangements create a situation of physical and psychological dependency on the gangmaster.\(^{103}\) Tied accommodation also reduces the chances of workers associating with other people and speaking out against their abuse.\(^{104}\) An interviewee on Radio 4’s *File on 4* explained the situation that exists in the King’s Lynn area as follows:

> Essentially the [irregular workers] would be kept in houses, normally tenements, normally in run down areas. They would be very much discouraged from associating with anyone outside of that one building, and quite frankly that’s quite easy to do, because how are they going to associate? They can’t speak English, they’re in awe of the society around them, they’ve probably never seen anything like a major western city, and also they’re terrified of falling into the hands of the authorities. They don’t want to be seen.\(^{105}\)

This passage illustrates well the physical and psychological constraints that gangmasters are able place on irregular workers through their lack of English and unfamiliarity with western society.

Gangmasters’ power over both housing and employment also leaves workers at risk of becoming homeless if they are unable to work as required. For example, one Portuguese worker developed serious back pain while working as a cleaner in a hotel. After being advised to rest by his doctor, his employer said that if he could not work he had to leave the


\(^{103}\) Bridget Anderson & Ben Rogaly, “Forced Labour and Migration to the UK” *supra* note 8 at 43.

\(^{104}\) *Not on the label supra* note 34 at 38.

\(^{105}\) “Transcript of File on 4” *supra* note 60 at 14.
Further, a Portuguese migrant worker who tried to organize workers into a union to fight for their rights was evicted without notice from her accommodation.\footnote{\textit{CAB report, supra note 56 at 10.}}

These examples illustrate how gangmaster employers heavily control irregular migrant workers in their private lives. The unfortunate result is that irregular migrant workers have few choices as to where they live and the rules they live by. Squalid housing effectively marginalizes irregular migrant workers, making it harder for this group to associate with persons outside, not to mention the language and cultural barriers that make meeting local people very difficult.

Having revealed how many irregular migrant workers face conditions that amount to ‘modern slavery’ it is important that the law intervenes to stop criminal gangmasters exploiting these workers. However, as I show in the next section, the law governing the employment of irregular migrants is enforced against rogue gangmasters to stop the exploitation of irregular migrant workers.

2.6 Irregular Migrant Working: Some Legal Background

2.6.1 The Gangmaster’s Defence

It is illegal for someone who is ‘subject to immigration control’ to work in the UK. This offence was created for the first time by section 8 of the \textit{Asylum and Immigration Act 1996}.\footnote{\textit{Not on the label supra note 34 at 47.}} ‘Subject to immigration control’ has been defined to include persons who require...
leave to enter or remain in the UK under the *Immigration Act 1971*.

On this basis, section 8 makes it illegal for an employer to hire an irregular migrant worker.

Despite this prohibition, the law accords gangmaster employers a broad statutory defence under section 8(2). To benefit from this defence, an employer need simply show that he or she did not know that the employment was in breach of immigration law, and that he or she saw and retained a copy of 'a document which appeared ... to relate' to a worker before the employment began. Under section 8(2)(b) employers must copy authorizing documents using Write Once Read Many (WORM) technology.

Since May 1st 2004, the documents that an employer may rely upon require more rigorous checks than before. Gangmaster employers are now required to check that the worker can show either a document from the 'secure' list, such as a passport, or two documents from the 'less secure' list, such as a work permit. In practice however, such changes make little difference, as there is no obligation on an employer to investigate the authenticity of such a document. Without such an obligation, the modus operandi of many criminal gangmasters - to supply workers with fraudulently produced documents themselves - is not addressed.

To take advantage of this defence a gangmaster must simply show a certified copy of an official document that he or she believed related to the worker. Most gangmasters are

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109 *Ibid.* at sections 8(1) and 13(2).
110 Under section 8(3) the defence is unavailable if the employer knew that the employment was in breach of immigration law.
114 One of the gangmasters that was recorded on *Panorama, supra* note 28, did this. See page 2 of the transcript.
able to succeed with this defence, which a gangmaster can establish on a 'balance of probabilities'. By contrast, it is harder for the prosecution to prove its case as they must show the employer’s subjective knowledge based on the criminal standard 'beyond a reasonable doubt'.

Gangmasters may also escape being found guilty of a section 8 offence by claiming that they did not employ irregular migrant workers. To establish a section 8 offence, there must first be a contract of employment. Finding a contract of employment between an irregular migrant worker and his or her gangmaster employer may be a difficult task. As Katie Ghose and Declan O’Dempsey point out: “the less regulated the contract is, the more difficult it will be for the prosecution to establish that there was a contract of employment.” A gangmaster may attempt to show that there was no contract of employment by claiming that any irregular migrant workers were not his/her employees but rather self-employed, doing freelance work, or from an employment agency (in which case they remain employees of the agency). Arguments such as these are likely to be accepted in cases of criminal offences where contracts of employment are construed narrowly.

Looking at the statistics on section 8 it is probable that the defence in section 8(2) has operated successfully for many gangmasters. Since the introduction of section 8 in 1997, there have been only 22 prosecutions and 8 convictions of gangmasters. Further, the

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115 To establish whether there is a contract of employment is usually a mixed question of fact and law. Although there is no clear legal test on finding a contract of employment, generally factors such as whether there is control over the worker, whether there is mutuality of obligation, whether the worker assumes a financial risk, all play a part. See further Katie Ghose & Declan O’Dempsey, supra note 113 at 29.

116 Ibid at 29.

117 Ibid.

prosecutions have generally attracted small fines in the region of £100.\textsuperscript{119} Thus, the recent conviction of Victor Solomka in February 2005, a Ukrainian gangmaster who was sentenced to seven years’ imprisonment for breaching immigration laws and money laundering, stands as the exception rather than the rule in these cases.\textsuperscript{120}

The lack of prosecutions of gangmasters under section 8 may also reflect that the law in this area is simply not enforced. Jabez Lam of the Chinese rights group \textit{Min Quan} controversially believes that the government turns a blind eye to the exploitation of persons without rights to be in the UK, as they provide a source of cheap labour.\textsuperscript{121} If this is true, it may explain how gangmaster employers are able to continue their criminal and abusive operations despite the clear prohibition on irregular migrant working.

\textbf{2.6.2 Irregular Migrant Workers: the Real Target of the Prohibition?}

A closer inspection of section 8 also suggests that irregular migrant workers are targeted more heavily by this provision than their employers. This is because potential employer sanctions for hiring an irregular migrant worker are less onerous than the sanctions available to such a worker for working in contravention of immigration law.\textsuperscript{122} For example, the maximum penalty for an employer who hires an irregular migrant is a standard 5 level fine, which is currently £5000.\textsuperscript{123} This is a relatively small fine for gangmasters, many of whom see such a fine as a basic business risk. As the mother of gangmaster Mark Stratton stated somewhat proudly on the BBC documentary programme

\textsuperscript{119} HC, Friday 27 February 2004, Second Reading \textit{Gangmaster (Licensing) Bill}, supra note 49 at col. 539.
\textsuperscript{121} Ian Johnston, “Worked to death” \textit{supra} note 24.
\textsuperscript{123} 1996 Act \textit{supra} note 108 at section 8(4).
Panorama, “for each illegal person we employ Mark gets a fine in court of £5000, but we still do it because we take the risk.” In contrast, an irregular migrant worker is subject to the same level fine and also liable to six months’ imprisonment, plus possible deportation and removal from the UK.

It seems unfortunate that the law penalizes irregular migrant workers more harshly than gangmaster employers. As I have shown, irregular migrant workers are extremely vulnerable and marginalized as a group, with irregular migrant women facing even greater risks of exploitation. The huge power differential between irregular migrant workers and their gangmaster employers thus makes it particularly unfair that irregular migrant workers face greater sanctions.

Overall, the wide statutory defence and relatively low penalties combine to make the law on irregular working more of a ‘business risk’ for criminal gangmasters. The low rate of convictions and prosecutions also hint that the police and immigration enforcement agencies turn a blind eye to such working practices. The heavier legal sanctions for irregular migrant workers also suggest that irregular migrant workers are targeted more heavily than their employers.

2.7 Conclusion

In this chapter I have explained why and how a person might become an irregular migrant worker. I have also described the potential scale of such working in the UK. Following this section, I defined what a ‘gangmaster’ is and exposed how these large-scale employers operate as part of criminal networks in many industries. Then, I depicted some

124 See Panorama, supra note 28 at page 1 of the transcript.
125 See sections 3(5) and 24(1) of the Immigration Act 1971 and Schedule 2, para. 9 of the 1971 Act.
of the conditions that irregular migrant workers face at the hands of criminal gangmasters that stand as indicators of 'modern slavery'. Finally, I reviewed the law on illegal working and revealed how gangmaster employers often have little to fear about law enforcement.

In light of these findings I am concerned that irregular migrant workers cannot exercise their agency and pursue legal rights to protection in the UK. The next chapter, *Legal Rights under Domestic Law: More than a Pipedream?* considers whether viable legal claims for rights protection exist for irregular migrant workers under current UK law.
In Chapter 2, I provided background information on irregular migrant working in the UK. I explained how someone becomes an irregular migrant worker, the scale of irregular working, what a ‘gangmaster’ is and how these employers operate and marginalize their workers. Lastly, I revealed how deficient law enforcement allows many gangmasters to continue their exploitative operations. Owing to such lax law enforcement I expressed concern that irregular migrant workers should be able to seek legal redress themselves against these forms of abuse.

In this chapter I assess whether irregular migrant workers have the necessary legal rights under current domestic law to seek such redress. I have focussed my inquiry on the legal rights that are relevant to all irregular migrant workers, rather than specific groups of irregular migrants such as victims of trafficking for example.

First I assess whether irregular migrant workers can claim against ‘modern slavery’ when all the various indicators of this phenomenon are considered as a whole. Then I consider each substantive indicator of ‘modern slavery’, as set out in Chapter 2. Thus I assess whether irregular migrant workers have legal rights to claim protection against: violence or the threat of violence; illegally long hours and illegally low pay; and squalid and excessively priced housing conditions. Finally I consider whether the family of an irregular migrant worker who dies in the course of his or her employment are can claim relief. My analysis of whether irregular migrants have legal rights in the UK concludes
with a brief assessment of the viability of these workers actually relying on such rights to seek legal redress.

After assessing whether irregular migrants can seek legal redress I examine recent UK policy initiatives. Awareness of deficiencies in the current law and knowledge of recent policy will allow for a more insightful and critical analysis of the new *Gangmaster (Licensing) Act 2004*. Chapter 3 thus forms a useful backdrop to Chapter 4, in which I critically examine the new legislation.

### 3.1 'Modern Slavery'

In this section I assess whether irregular migrant workers have a legal right against the indicators of 'modern slavery' when considered together. To claim against 'modern slavery' an irregular migrant worker could rely on Article 4 *European Convention on Human Rights*\(^2\) (ECHR), which has been brought into force by Article 1 of the *Human Rights Act 1998*\(^3\) (HRA). Article 4 ECHR states:

(1) No one shall be held in slavery or servitude.
(2) No one shall be required to perform forced or compulsory labour.

Considering first Article 4(1), none of the major international human rights instruments define the terms 'slavery' and 'servitude'. According to Claire Ovey and Robin White the distinction between these terms is one of degree. In their view, 'slavery' occurs when an individual is wholly in the legal ownership of another person, while 'servitude' occurs when conditions of work or service are outside the control of the

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individual.\textsuperscript{4} According to the European Commission, ‘servitude’ includes “the obligation on the part of the ‘serf’ to live on another’s property and the impossibility of changing his condition.”\textsuperscript{5} It has also been established that consent is no defence to a claim of slavery or servitude.\textsuperscript{6}

Under these interpretations irregular migrant workers would not have a claim for ‘slavery’ as they are not legally owned by their gangmasters. By contrast a possible claim could exist for ‘servitude’. As I have depicted, irregular workers are often placed in tied accommodation and their unlawful immigration status, poverty, and racism in the housing market make it almost impossible for these workers to find accommodation independent of a gangmaster.\textsuperscript{7}

Considering the term ‘slavery’ in light of modern conditions however, it is possible that this term could be interpreted more broadly. A broader definition could act to promote wider recognition of heinous practices. For example, Anti-Slavery International, the UK charity that works towards eliminating slavery and slavery-related abuses, interprets practices such as early and forced marriage, forced labour, trafficking and child labour as modern forms of slavery.\textsuperscript{8} Many irregular migrant workers are trafficked and work in oppressive conditions, unable to change their situation on account of their immigration status. A broader interpretation of ‘slavery’ could recognise these practices as also falling within the ambit of the term. Such a finding would be in line with the Human Rights Committee (HRC), a body of 18 independent experts established to monitor the

\textsuperscript{5} Van Droogenbroeck, Report of July 1980, Series B, No. 44.
\textsuperscript{6} \textit{W, X, Y and Z v United Kingdom}, (1968) 11 Yearbook at 562.
\textsuperscript{7} See section 2.5.4.
implementation of the *International Covenant on Civil and Political Rights* (ICCPR),\(^9\) which has recognised that private economic interests generate most forms of slavery abuse under ICCPR Article 8 today.\(^{10}\)

Turning next to Article 4(2), ‘forced labour’ has been interpreted by the European Court of Human Rights to mean “work or service performed by the worker against his will and, secondly, that the requirement that the work or service be performed is unjust or oppressive or the work or service itself involves avoidable hardship.”\(^{11}\) Irregular migrant workers may work against their will as their employer may threaten to report them to the immigration authorities should they not agree to do whatever is asked of them. The threat of being reported may make it impossible for irregular migrant workers to leave their employer.

### 3.1.1 Making a Claim under the HRA

Three requirements must be satisfied to claim rights protection under the HRA. There must be a ‘victim’, a ‘public authority’ at fault and the claim must be brought within the appropriate time limit. The ‘victim’ requirement is contained in section 7 of the HRA. Section 7(7) states: ‘a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.’ ECHR case law, decided the European Court of Human Rights in Strasbourg, is thus relevant in determining who counts as a ‘victim’ under the HRA. Indeed, case law from the European Court of Human Rights is relevant to

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\(^{11}\) *Iverson v Norway* (1963) 6 Yearbook 278 at 328.
the decision-making process under the HRA generally, as section 2(1)(a) of that Act requires 'a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights.' Under the Strasbourg jurisprudence 'victims' include natural or legal persons, non-governmental organisations or groups of individuals who are directly or potentially affected by the unlawful act, including family members of a person directly affected who is unable to make a claim.\(^{12}\)

A 'public authority' is defined in section 6(3) HRA as a court or tribunal or any person whose functions are of a public nature, excluding either House of Parliament when exercising their Parliamentary functions. The need for a responsible 'public authority' at first appears to be a stumbling block for irregular migrant workers as gangmasters are private persons and do not exercise public functions. Nonetheless, in some cases the HRA can cover private relationships in the sense that the State has 'positive obligations' to ensure that the rights of individuals are respected. Thus, although an irregular migrant worker would be unable to claim against a gangmaster as a private entity, he or she could claim against a public authority, such as a local authority for example, for failing to exercise its powers to protect irregular migrant workers' rights at the hands of rogue gangmasters.

However, there are limits on the extent to which positive obligations are imposed on public authorities. In *McGinley and Egan v United Kingdom*, the European Court of Human Rights stated that it had to "have regard to the fair balance that has to be struck between the general interest of the community and the competing public interests of the

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individual, or individuals concerned” when deciding whether a positive obligation exists in a particular Convention provision. As Claire de Than observes further, “the positive obligations should not impose an excessive burden upon the State enforcing them, they will be given a narrow definition where possible and will concern or enable fundamental Convention values. But where the harm caused or threatened to the victim is extreme, it is more likely that an obligation will be imposed.” Positive obligations are thus likely to accepted by a court for cases of serious rights violations only.

The third requirement that must be fulfilled to make a claim is that the action must be brought within the appropriate time limit. Under section 7(5) HRA, proceedings must be brought before the end of the period of ‘one year beginning with the date on which the act complained of took place’ or ‘such longer period as the court or tribunal considers equitable having regard to all the circumstances.’

Once these requirements have been satisfied, a successful claim may result in any relief or remedy that the court considers appropriate under section 8(1) HRA. Possible remedies include the usual public authority remedies: declarations, injunctions and damages. According to Natalie Burn, “[d]eclaratory relief has become a favoured remedy in public law. It is usually effective because generally public bodies can be relied on to act in accordance with what the courts have stated to be the law.”

Alternatively, the courts may grant an injunction where there is a belief that the authority would persist in its unlawful behaviour despite a court ruling. Lastly, the court may award damages. However, under section 8(3) HRA, the grant of damages is restricted

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to situations where the court is ‘satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.’ This means that if there is another remedy, generally that remedy should be granted first, and damages should only follow where necessary to afford ‘just satisfaction.’\(^\text{17}\) It is thus possible that no damages may be awarded. Indeed, the mere declaration that there has been a breach of an ECHR right may suffice.\(^\text{18}\) By contrast, just satisfaction may result in substantial\(^\text{19}\) or nominal\(^\text{20}\) damages.

In determining whether to award damages and the amount of damages to give, section 8(4) HRA requires the court to take into account the principles applied by the European Court of Human Rights in relation to damages, as set out under Article 41. As Ovey and White explain, “in determining the amount of compensation, the Court seeks to act equitably, having regard to the severity of the breach and the ready quantifiability of any loss.”\(^\text{21}\) Such discretion regarding the award of damages contrasts with the English tradition of granting damages for all successful claims for civil wrongs.\(^\text{22}\)

Such remedies may be of little practical use to irregular migrant workers. If a declaration is made, although public authorities have a strong record of complying with the law, it may take the authority a while to find the offending gangmaster and stop the abuse. Further, the uncertain nature of a damages award could leave irregular migrant worker claimants no better off financially. This could mean that irregular migrant workers would have to continue working for rogue gangmasters, where they may continue to face rights violations, in order to survive.

\(^\text{17}\) Ibid.
\(^\text{18}\) Golder v United Kingdom (1979-80) 1 E.H.R.R. 524.
\(^\text{21}\) Clare Ovey & Robin C. White, supra note 4 at 417.
\(^\text{22}\) Natalie Burn, supra note 16.
3.1.2 Making a Claim under Article 4 HRA

In light of these requirements, irregular migrant workers who suffer treatment that meets Article 4 ECHR would be ‘victims’ for the purposes of the HRA. Although gangmasters are private individuals, UK courts have accepted that Article 4 creates a positive obligation on the State in certain circumstances. In recent years, a string of successful Article 4 claims have been brought before the Immigration Appeal Tribunal and immigration adjudicators involving women who have been held at the hands of private persons in forced domestic labour. In *Miss T v SSHD* the adjudicator noted that the appellant had been “kept in conditions of virtual slavery” as she was forced to work very long hours, paid no wages and beaten by her employer. The adjudicator found these circumstances were in breach of her rights under Article 4. Adjudicators also granted the women in *Miss AB v SSHD* and *Ms Tarn Thi Dao v SSHD* Article 4 protection. Both these cases involved women who were trafficked to the UK for prostitution.

Despite using Internet search engines and contacting research librarians, I have been unable to find copies of these decisions to review the legal reasoning. Nonetheless it is clear from reports by Anderson and Rogaly and Anti-Slavery International, in which these cases are mentioned, that the British courts are prepared to place a positive obligation on State authorities to prevent Article 4 violations. A possible explanation for finding a positive obligation in these cases may be that these women suffered harm that was considered to be extreme, requiring a public authority to exercise its powers to protect them.

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Moreover, the vulnerability of these women as victims of trafficking may have influenced the court to find a positive obligation. Jurisprudence in the context of Article 3 ECHR reveals that the State must take special care to that ensure that vulnerable persons are protected. This view has been expressed clearly in *Z and others v United Kingdom* in which four children were subjected to severe parental abuse that the authorities had known about since 1987. However, the children were not taken into care until 1992. In that case the extent of the positive obligation was emphasised as being necessary to:

> provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge [my emphasis].

This approach could have led to the domestic courts finding a positive obligation to protect irregular migrant women against Article 4 violations.

However, following *Z*, where the authorities knew who the particular victims were, and the emphasis on giving positive obligations a narrow interpretation that I have discussed above, a court may require that State authorities knew about abuse towards specific persons before imposing a positive obligation. It may be difficult for irregular migrant workers to show that the UK authorities knew of their particular exploitation since these workers often undertake jobs in the ‘black economy’, as I explained in Chapter 2.

Nonetheless, these cases illustrate that irregular migrant workers can make successful claims against practices that amount to ‘modern slavery’ under the HRA. The terms of the HRA are all inclusive and thus an irregular immigration status does not prevent legal rights from being pursued. However, as I explain below, irregular migrant workers face difficulties in launching a legal claim.

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24 *Z and others v United Kingdom*, supra note 19, at para. 73.
3.1.3 Difficulties in Making a Legal Claim

Many irregular migrant workers may feel unable to exercise their legal rights, for various reasons. In the recent trial of gangmaster Victor Solomka, one of his former workers stated: "Illegals are afraid of the Home Office, police, they are afraid and they never protest." Irregular migrant workers may be unwilling to exercise their rights out of a fear of:

- Being caught and removed by UK immigration authorities if they speak publicly about their treatment. Once a person is traced, which would be far easier if an irregular migrant worker launched a legal claim or complained about their ill treatment to the authorities, he or she is subject to removal. A removal order allows an offender to leave the UK voluntarily by buying his or her own ticket. Otherwise, directions for removal are given to the captain of an aircraft, ship or train to remove that person. Often the person will also be detained pending their removal.

- Speaking-out to UK organisations or officials, which could be necessary in order to seek help, due to their experiences of corrupt organisations and abusive officials in the countries they migrated from.

- The local population, who they may have to approach to find out how to make a claim, because of racist attacks they have suffered. In Norfolk for example, Chinese workers have been spat on and abused by locals when using the buses.

- Reprisal from gangmaster employers. For example, many gangmasters employ 'enforcers' and violence is sometimes used to enforce the regime. Irregular

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26 The removal process is explained further in Duran Seddon ed., Immigration, nationality and refugee law handbook (London: Joint Council for the Welfare of Immigrants, 2002) at 527-553.
migrant workers may fear that these gangmasters would come after them should they take legal action.

- Reprisal against their families. For example, traffickers often hold the threat of killing family members over irregular migrants who are trafficked to the UK as a means to control them.\(^{29}\)

Irregular migrant workers also face practical problems, such as a lack of legal aid.\(^{30}\) Irregular migrants who earn illegally low wages will simply not have money to spend on pursuing their rights. This group may also lack of knowledge of their rights.\(^{31}\) For example, gangmasters often lie to their legal Portuguese workers and tell them that they do not have rights when in fact they do as EU citizens.\(^{32}\) Alternatively irregular migrants may simply assume that they could not have rights when they get treated so badly. Gaining knowledge of possible legal rights is made all the harder for irregular migrant workers as they often lack English language skills to effectively pursue a legal claim. For example, the cockle pickers could not even read the warning signs due to their lack of English.

These factors may combine to make legal rights potentially ineffective in practice. A recent case illustrates many of these issues well and makes clear that marginalized people will not always pursue legal rights, even if they exist. Jabez Lam of the Chinese rights group *Min Quan* informed me of a case he acted in which a Chinese man with a valid

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\(^{30}\) Bridget Anderson, & Ben Rogaly, “Forced Labour and Migration to the UK” (Study prepared by OMPAS in collaboration with the Trades Union Congress, February 2005), online: <http://www.tuc.org.uk/international/tuc-9317-f0.pdf> at 57.


\(^{32}\) U.K., H.C., Hansard Debates, col. 549 (27 February 2004) (Mr Frank Dobson) (Holburn and St Pancras) (Lab)).
UK work permit was working in a restaurant where he was racially abused, paid below the minimum wage and made to work 62 hours a week. Despite his lawful immigration status this man was afraid that he would lose his work permit and be removed from the UK if he complained. This man clearly was both afraid of the immigration authorities and had a lack of knowledge as to his legal rights. Fortunately Lam convinced the man to pursue his case, and he was awarded maximum damages. Legal rights are thus not the entire answer to ending the exploitation of irregular migrant workers.

3.2 Violence or the Threat of Violence

This section assesses whether irregular migrant workers can make a claim against violence or the threat of violence. To do this irregular migrant workers can either use the HRA or report the abuse by going to the police. Using the HRA, Article 3 ECHR, as brought into British law by Article 1(1) HRA, states: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ This provision applies if conduct reaches a ‘minimum level of severity,’ which is assessed in light of modern-day conditions. Conduct that meets this minimum level has been assessed by the European Court of Human Rights as either ‘torture’, ‘inhuman’, or ‘degrading’ treatment.

I suggest that acts of actual and threatened violence and sexual harrassment meet the necessary minimum level of severity under Article 3. Under the current definitions, such acts could amount to either ‘inhuman treatment’, which has been held to constitute treatment that is premeditated, performed for hours at a stretch and causes either actual

33 Jabez Lam emailed this information to me on November 11th 2004.
35 The ECHR is a ‘living instrument’. This was established in Selmouni v France (2000) 29 E.H.R.R. 403 at para. 101.
bodily injury or intense physical and mental suffering,\textsuperscript{36} or 'degrading treatment', which involves gross humiliation or debasement.\textsuperscript{37}

To pursue a HRA claim under Article 3, an irregular migrant worker would need to meet the same requirements as I discussed above in the context of Article 4.\textsuperscript{38} As well as fulfilling the 'victim' and time limit requirements, an irregular migrant worker would need to find a positive obligation on the State to make a 'public authority' responsible. In the context of Article 3 conduct at the hands of private parties, the leading cases are \textit{Costello-Roberts v United Kingdom}\textsuperscript{39} and \textit{A v United Kingdom}.\textsuperscript{40} \textit{Costello-Roberts} concerned the use of corporal punishment in a private school, and \textit{A} involved the beating of a child by his stepfather. In both cases the European Court of Human Rights decided that there was a positive obligation on the UK to ensure that all persons within their jurisdiction were not subject to treatment prohibited by Article 3, even when this treatment took place at the hands of private parties. The Court also took the view that the State should take special care to ensure that these violations do not occur where children and other vulnerable persons are involved.\textsuperscript{41}

These obligations to protect vulnerable people suggest that irregular migrant workers, and irregular migrant women in particular, deserve the utmost protection under Article 3. It is also apparent that the government has been made aware of the exploitation of irregular migrant workers through intelligence briefings on gangmasters.\textsuperscript{42} There may thus be a positive obligation on the UK to protect irregular migrant workers against

\textsuperscript{37} \textit{Ibid.}
\textsuperscript{38} See section 3.1.1.
\textsuperscript{39} \textit{Costello-Roberts v United Kingdom} (1994) 19 E.H.R.R. 112.
\textsuperscript{40} \textit{A v United Kingdom} (1999) 27 E.H.R.R. 611.
\textsuperscript{41} As I have discussed above, this view was also taken in the later case \textit{Z and others v United Kingdom, supra} note 19. See section 3.1.2.
\textsuperscript{42} \textit{Not on the label, supra} note 28.
violence or the threat of violence. Although I have suggested that potential remedies under the HRA may be of little use to irregular migrant workers, substantial damages have been awarded for Article 3 claims in the past. For example, in *Z and others v United Kingdom*, substantial damages were awarded, including non-pecuniary loss of £32,000 per applicant (approximately 72,400 CAD) and varying amounts per child for future medical expenses and loss of employment opportunities.

However, as I have explained, in practice irregular migrant workers may be unable or unwilling to launch a claim. For these reasons, irregular migrant workers may also choose not to seek protection against violence or the threat of violence under the criminal law, through seeking the help of the police.

### 3.3 Long Hours and Low Pay: The Problem of ‘Illegality’

As I described in Chapter 2, irregular migrant workers often suffer exploitation owing to unfavourable employment terms and conditions. These workers commonly face illegally low wages and illegally long working hours. This section assesses whether domestic employment law protects against such forms of abuse.

The first case to consider whether a person without a clear legal right to work in the UK could claim employment protection was *Sharma v Hindu Temple & Others*. In that case, Mr Sharma, a Hindu Priest, came to the UK on a one-year visa to work for the Hindu Temple Trust in Southall, subject to the condition that he was not to change his employment without the prior consent of the Home Office. Nevertheless, after two

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43 *Z and others v United Kingdom*, supra note 19.
45 See section 3.1.3.
46 *Sharma v Hindu Temple & Others* (1990) EAT/253/90.
months, Mr Sharma decided to work for the Hindu Society of Slough instead and the Home Office was informed of this change. Later however, when Mr Sharma called the Home Office to have his one-year visa extended, the Home Office refused because the Slough body had indicated their withdrawal of the sponsorship of Mr Sharma. Mr Sharma appealed against the Home Office’s decision but then found himself dismissed from the Slough body. Mr Sharma then claimed unfair dismissal from the Hindu Society of Slough.

The Employment Appeal Tribunal (EAT) were asked to determine how Mr Sharma’s immigration status affected his employment law claim. By the time Mr Sharma’s appeal was heard before the EAT however, all of the conditions of his stay had been removed and he had settled in the UK. Nonetheless, the EAT’s judgment remains important as a guide to how the law treats migrant workers whose immigration is in doubt.

The EAT allowed Mr Sharma’s appeal and ordered a de novo re-hearing. In reaching this conclusion, the EAT stated that there are two relevant approaches to considering the legality of a contract and its enforceability. These approaches have been set out by Devlin J in *St John Shipping Corporation v Joseph Rank Ltd.* The first principle states that a contract entered into with the intention of committing an illegal act is unenforceable. Mr Sharma’s contract of employment would thus be illegal in its formation had he been knowingly in breach of his leave. Applying the first principle to irregular migrant workers, these workers surely intend to break the law. Irregular migrant workers would thus be unable to claim relief on the basis of the first principle.

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48 *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 267.
Concerning the second principle, Devlin J stated that a contract that is expressly or implicitly prohibited by statute is also unenforceable.\(^5\) In their judgment, the EAT stated that the emphasis of the second principle now depends on the approach of public policy. In determining what public policy might mean, the EAT quoted Nicholls LJ in *Saunders v Edwards*, who emphasised that "the refusal of the court to enforce an agreement entered into in a particular form for an unlawful purpose is based on public policy, and public policy is not a blunt, inflexible instrument."\(^5\) The EAT also referred to Bingham LJ in the same case, who said:

On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the law should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff… But I think that on the whole the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn.\(^5\)

Lastly, the EAT cited the reasoning of Kerr LJ, who, in a full review of all the authorities, stated in *Euro-Diam v Bathurst* that the doctrine of illegality, rests on a principle of public policy which applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts.\(^5\)

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51 *Saunders v Edwards* (1987) 1 W.L.R. 1116 at 1132C.
52 *Ibid.* at 1134B.
53 *Euro-Diam v Bathurst* [1988] 2 W.L.R. 517 at 526
On this basis, the EAT said that “it will be open for an industrial tribunal to consider whether in all the circumstances that the contract is tainted with illegality as being contrary to public policy.”

### 3.3.1 Public Policy and Irregular Migrant Workers

As a flexible tool that does not require the law to ‘draw up its skirts’ at the first sign of illegality, public policy could be a useful aid to claims brought by irregular migrant workers. In appealing to public policy, irregular migrant workers could also rely on other authorities that the EAT cited, but did not quote from, in *Sharma*, such as *Hewcastle Catering v Ahmed and Elkamah*. In that case, Beldham LJ held that the doctrine of illegality should not bar an applicant’s claim where “the defendant’s conduct in participating in an illegal contract on which the plaintiff sues is so reprehensible in comparison with that of the plaintiff, that it would be wrong to allow the defendant to rely [on the applicant’s illegality as a defence to the original claim]”. Irregular migrant workers could apply this reasoning and argue that criminal gangmasters’ exploitative behaviour is more reprehensible than irregular migrant workers’ lack of appropriate immigration status to work in the UK. As a result, public policy requires these contracts to be enforced, in order to prevent gangmasters getting away with their more offensive conduct.

Applying public policy in this way would both enable irregular migrant workers to successfully make legal claims and also recognise the valuable economic contribution that

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54 *Sharma supra* note 46.
these workers make to the UK economy.\textsuperscript{57} Dr Juss warns that the UK will need an ever-increasing number of migrant workers, making it not in the public interest for irregular migrant workers’ rights to be dismissed by mere mention of illegality, which would allow these workers be “hired and fired at will by unscrupulous employers.”\textsuperscript{58}

However, it is unlikely that a court would apply the doctrine of public policy to aid irregular migrant workers in this way. To allow irregular migrant workers to make a claim would fall foul of the reasoning of Bingham LJ and Kerr LJ respectively. In \textit{Saunders v Edwards}, Bingham LJ stated that public policy should not allow behaviour that the law prohibits.\textsuperscript{59} As I have explained, irregular migrant working is in clear breach of a statute, namely section 8 of the \textit{Asylum and Immigration Act 1996}.\textsuperscript{60} Equally, in \textit{Euro-Diam v Bathurst}, Kerr LJ argued that the court should not “assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts.”\textsuperscript{61} On this basis, public policy would not aid irregular migrant workers who make contractual claims.

This result was confirmed in the case of \textit{Bamgbose v Royal Star Garter Home}.\textsuperscript{62} In that case a Nigerian national who had been working in a UK nursing home in breach of immigration law claimed unfair dismissal. Counsel for the appellant relied on Devlin J’s second principle and argued that public policy did not require the court to declare the appellant’s contract of employment unenforceable simply because the appellant was in technical breach of immigration law. However, the EAT refused to accept that submission. Instead, they relied on Devlin J’s first principle and decided, “the appellant cannot enforce

\begin{footnotes}
\item[57] Dr Satvinder S. Juss, \textit{supra} note 47 at 303-304. Dr Juss also makes the argument that public policy should be interpreted differently for migrant workers than for tax and financial fraud cases, which the doctrine of illegality was developed to deal with.
\item[58] \textit{Ibid.}
\item[59] \textit{Supra} note 52.
\item[60] \textit{Asylum and Immigration Act 1996} (U.K.), 1996, c. 49. See section 2.6.
\item[61] \textit{Supra} note 53.
\item[62] \textit{Bamgbose v Royal Star Garter Home} EAT/841/95.
\end{footnotes}
a contract which he entered into with the deliberate intention of breaking the law." As I have stated above, irregular migrant workers surely intend to break the law when they work in the UK. They would thus be caught by Devlin J’s first principle and would be unable to claim relief based on public policy.

3.3.2 Implications of the Doctrine of Illegality: A Lack of Legal Rights

Denying irregular migrant workers legal rights to assert contractual claims on account of their immigration status is problematic for three main reasons. First, denying irregular migrant workers rights under a contract makes these people legally invisible. However, such legal invisibility is pure fiction. As I have explained, irregular migrant workers fill essential roles in the UK economy and the scale of irregular migrant working suggests that these workers are anything but invisible. The operation of the doctrine of illegality to deny irregular migrant workers recognition at law thus creates a fiction in which irregular migrants appear differently from other workers. In a similar way, Patricia Williams is also aware of the “deadening power” of contract law, which may not reflect the reality of the parties’ involvement. The law thus resists facing up to the exploitation of irregular migrant workers by denying them legal rights under their employment contracts.

Second, in barring irregular migrant workers from succeeding in a claim against exploitative working conditions the operation of the doctrine of illegality allows gangmasters to exploit their workers with impunity. In effect the law protects rogue

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63 Ibid.
64 See section 2.3.
gangmasters who have little to fear from their workers pursuing an action against them. The law thus fails to promote full accountability on the part of criminal gangmasters for their offences. Indeed, this outcome effectively protects criminal gangmasters from their irregular migrant workers launching legal claims against them. This result is similar to the phenomenon that Williams perceives in the context of racism in the US, in which “the law becomes a shield behind which to avoid responsibility for the human repercussions of either governmental or publicly harmful private activity” (my emphasis). As I have described, the police or other enforcement agencies rarely prosecute gangmasters, leaving an action by their victims as a valuable way to bring these criminals to justice. Criminal gangmasters may also be aware of their irregular workers’ powerlessness and exploit them further as a result.

Third, the courts have applied the doctrine of illegality very harshly to persons working in contravention of immigration law who assert non-contractual legal rights. It does not seem fair that the doctrine of illegality denies irregular migrant workers such a wide range of rights. In the recent Court of Appeal case Vakante v Addey & Stanhope School, a Croatian asylum seeker was working without authorization in a school where he suffered race-related abuse. Mr Vakante sued the school under the Race Relations Act for discrimination. The issue in this case was whether an irregular migrant worker could succeed on a statutory tort claim – rather than a contractual claim - when the contract of employment was illegal.

66 As I have described, on top of the limited nature of rights for irregular migrant worker under the doctrine of illegality, there are also other difficulties that irregular migrants face in launching a legal claim. See section 3.1.3.
67 Patricia J. Williams, supra note 65 at 140.
68 See section 2.6.
70 Race Relations Act 1974 c. 74.
In *Vakante* the court followed an earlier case, *Hall v Woolston Leisure Ltd*, in which an employee’s claim for sex discrimination was not barred by the fact that there was illegality surrounding her employment contract. In *Hall* the claimant knew that her employer did not deduct income tax and National Insurance contributions from her wages. In that case however the Court of Appeal held that the statutory tort of sex discrimination was not based on the contract of employment and that a remedy under the *Sex Discrimination Act* was still available. Peter Gibson LJ laid down the approach for Employment Tribunals to follow in sex discrimination cases. In his view, a tribunal must 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 receive compensation without appearing to condone that conduct.\(^{72}\)

This test was followed in *Vakante* with a less fortunate outcome for the applicant. The Court of Appeal concluded that *Vakante* was different from *Hall* because “Mr Vakante was solely responsible for his illegal conduct in working for the respondent and creating an unlawful situation, on which he had to rely in order to establish that there was a duty not to discriminate against him.”\(^{73}\) It is thus apparent that the courts are unsympathetic to irregular migrant workers, and deny such applicants relief even when the claim is not based upon an illegal contract but a statutory tort.

Comparing *Vakante* to *Hall* also suggests that the courts see unlawful working as a ‘worse’ form of illegality than tax fraud, which occurred in *Hall*. It seems as though the court viewed the irregular immigration status of Mr Vakante as making him less worthy of

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\(^{71}\) *Hall v Woolston Leisure Ltd* [2000] IRLR 579, CA, hereinafter *Hall*.

\(^{72}\) *Ibid.* at para 42.

\(^{73}\) *Vakante*, supra note 69 at para 35.
legal rights protection. However, in my view, Mr Vakante was a far more deserving candidate for legal protection than someone who did not have such desperate circumstances and turned a blind eye to fraud as Miss Hall did. However, the court was unprepared to see the complete picture of Mr Vakante’s vulnerability and desperation and refused him any legal relief. The outcome in this case reflects Williams’ belief that, “resistance to [the law] seeing the full reality is played out in the leaving of blame and, most cowardly of all, in disempowering others.”

Disempowering irregular migrant workers who pursue a non-contractual claim leaves this group further marginalized as they are unable to seek any legal redress based on their employment.

Given these harsh effects of the doctrine of illegality to contractual and statutory tort claims, it is possible that irregular migrant workers may only have viable claims under the HRA. The language of the HRA expressly includes everyone and does not entertain an irregular immigration status. However, irregular migrant workers have brought few legal cases and it remains to be seen whether the doctrine of illegality will also defeat claims brought by these workers under the HRA.

I suggest that the operation of the doctrine of illegality allows irregular migrant workers to be doubly violated. First, irregular migrant workers may be exploited by their gangmaster employer. Second, the law marginalizes and disempowers this group through denying them a legal remedy. This approach leaves irregular migrant workers without basic rights protection and fails to bring criminal gangmasters to justice. However, as I have explained, even if the doctrine of illegality offered a favourable outcome for irregular

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74 Patricia J. Williams, supra note 65 at 167.
migrant workers, they would have to overcome many fears and hurdles to make a legal claim.\textsuperscript{75}

### 3.4 Squalid and Excessively Priced Housing

As I described in Chapter 2, irregular migrants are often housed in overcrowded dwellings, which are hazardous and potentially unsanitary. These workers are also charged illegally high rates for such accommodation. In this section I assess whether irregular migrant workers have a legal remedy against gangmasters who provide squalid housing at excessive prices.

I have already set out the law governing legal rent charges.\textsuperscript{76} The law regulating overcrowding is Part 10 of the \textit{Housing Act 1985}.\textsuperscript{77} Under section 331, a landlord commits a violation if he or she causes or permits a house to be overcrowded.\textsuperscript{78} Section 324 defines overcrowding as when either the 'room standards' or the 'space standards' are contravened. Under section 325, the 'room standards' state that there is overcrowding if two or more people of the opposite sex have to sleep in the same room, unless they are a married or cohabiting couple, or they are children under 10 years of age.\textsuperscript{79} The amount of space each person should have has also been provided for under section 326. Space per person is determined according to the number of rooms in a house and the amount of floor space.\textsuperscript{80}

If a house consists of one room, two persons may live there; where there are 2 rooms, 3 persons; for 3 rooms, 5 persons; for 4 rooms, 7.5 persons (a child under ten counts

\textsuperscript{75} See section 3.1.3.  
\textsuperscript{76} See section 2.5.4.  
\textsuperscript{77} \textit{Housing Act 1985} c. 52.  
\textsuperscript{78} A landlord may get a licence to permit overcrowding if the Council sees fit, e.g. for a seasonal increase in population. \textit{Ibid.} at section 330.  
\textsuperscript{79} \textit{Ibid.} at section 325.  
\textsuperscript{80} \textit{Ibid.} at section 326.
as half a unit); for 5 rooms or more, 2 persons for each room. In terms of floor space per
room, if there is more than 110 square feet, 2 or more persons may live there; for 90-110
square feet, one and a half persons may live there; and for 70-90 spare feet one person may
live there.81 (These provisions allow for an exception for children attaining the age of 10
and visiting relatives).82

However, it is questionable whether certain irregular migrant workers would succeed in a civil claim against overcrowded housing and illegally high rents. Irregular migrant workers who have the right to be in the UK but are simply working in contravention of immigration law, such as by violating the terms of their entry, would be able to make such a housing claim as they have the right to be in the UK. However, irregular migrant workers who entered illegally are not allowed to be in the UK by virtue of section 24 Immigration Act 1971. As their housing contracts result from their presence in the UK, a court could view their housing contract as unenforceable under the doctrine of illegality.

As I have described, Devlin J set out two principles governing the enforceability of illegal contracts.83 Devlin J’s first principle, that the contract should not be entered into with the intention of committing an illegal act, may not defeat a claim since it is unlikely that irregular migrant workers would enter a housing contract with the intention of breaking the law. After all, these workers would already have broken the law through entering the UK in defiance of immigration law. Concerning the second principle, that the contract is not expressly or implicitly prohibited by statute, although there is no express prohibition of housing contracts under section 24, there is an implicit ban on being housed in the UK by

81 Ibid. at section 326.
82 Ibid. at sections 328 and 329 respectively.
83 See section 3.3.
virtue of the law against illegal entry. As I have explained, the approach of the second principle depends on public policy. Thus, it would be up to the courts to decide whether the gangmaster's behaviour in providing squalid housing is more reprehensible than the irregular migrant worker's behaviour in living illegally in the UK.\textsuperscript{84}

Even if a claim did succeed however, current penalties are unsatisfactory. The maximum penalty for overcrowded housing is a fine not exceeding level 2 on the standard scale, which currently stands at £500 (approximately 1,136 CAD),\textsuperscript{85} with a further fine of up to 10% of the main fine for each day that the violations continue.\textsuperscript{86} Such penalties would not affect many gangmasters who charge extortionate rents and make vast profits from their workers. Equally, a successful claim for excessive housing costs may not result in more than the difference between what the worker ought to have paid – up to £26.25 a week - and what was actually paid. Such sums may not be enough to allow these workers to move into better accommodation, and they may thus remain dependent on exploitative gangmasters for their lodging.

3.5 Death in the course of Employment

In Chapter 2, I also explained how irregular migrant workers sometimes die tragically owing to unsafe working conditions. In this section I consider how the family of a deceased irregular migrant worker might claim compensation for contractual rights, damages, or they may claim that the right to life of the irregular migrant was not respected.

To claim compensation, section 1(1) of the\textit{Law Reform (Miscellaneous Provisions) Act 1934}. Section 1(1) states: "Subject to the provisions of this section, on the death of any

\textsuperscript{84}See section 3.3 and 3.3.1.
\textsuperscript{85}Section 37(2) of the\textit{Criminal Justice Act 1982}, states how much fines are on the standard scale.
\textsuperscript{86}\textit{Criminal Justice Act 1982, ibid. at section 331(3).}
person ... all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate..." However, as I have discussed, based on the doctrine of illegality considered above, contractual claims for employment rights would be tainted with illegality. Such causes of action would thus not be open to an irregular migrant worker’s family to make on behalf of the deceased. However, the deceased’s family may be able to make housing claims if the irregular migrant worker had entered the UK legally, or if the court was prepared to enforce the housing contract had the worker entered illegally. The deceased’s family may also be able to launch claims under the HRA as I describe below.

If the death had been caused by a wrongful act or by negligence, the deceased’s family could also claim damages as ‘dependents’ under the Fatal Accidents Act 1976. Section 1(1) states:

If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

Again however, it is doubtful that an irregular migrant worker’s dependents could recover damages for an employment claim under this provision. Although I have not come across any cases that deal with this exact scenario, it is clear from Burns v Edman that this Act

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87 Law Reform (Miscellaneous Provisions) Act 1934, section 1(1).
88 A ‘dependent’ is defined in section 1(3). This section states that ‘dependent’ means the wife or husband or the former wife or husband of the deceased; or any person who was living with the deceased in the same household immediately before the death; any person who had been living with the deceased in the same household for at least two years before that date and was living with the deceased as husband or wife, parent or other ascendant; a person who was treated by the deceased as his parent; a person who was a child or other descendant of the deceased; or, a person who was treated as a child; or, a brother, sister uncle or aunt of the deceased.
89 Fatal Accidents Act 1976.
90 Burns v Edman [1967] 2 Q.B. 541.
does not allow for the recovery of damages when the deceased’s earnings were the result of
criminal acts. As I have shown, section 8 of the Asylum and Immigration Act 1996 makes
it a criminal offence for an irregular migrant worker to take up employment in the UK.\(^91\)
Thus, the earnings of irregular migrant workers would be considered to be the result of
criminal acts and the Act could not be used to deliver compensation to the victim’s family.
The refusal of compensation resulting from criminal acts was recently confirmed in Hunter v Butler,\(^92\) in which Waite LJ explained:

[Allowing a claim] offends public policy ...When Lord Wright in Davies v Powell Duffryn Associated Collieries Limited [1942] AC 601 spoke (at page 617) of the “damages proportioned to the injury” for which provision is made by what is now s3(1) of the Fatal Accidents Act as being “a hard matter of pounds, shillings and pence, subject to the element of reasonable further possibilities” the pounds of which he spoke were those derived from wages honestly earned or income honestly received.\(^93\)

Applying Waite LJ’s reasoning, irregular migrant workers’ incomes are not “wages honestly earned or income honestly received”, but rather wages stemming from illegal behaviour. On this basis, the dependents of an irregular migrant worker would be unable to recover damages.

Alternatively however, an irregular migrant worker’s family might make a claim for legal future earnings. As the fundamental principle behind an award of damages is that the claimant should be restored to the position that he would have been in, had the tort not been committed, insofar as this can be done by the payment of money,\(^94\) it seems logical that the dependants of an irregular migrant worker should receive compensation for honestly earned future wages. Nonetheless, it may be impossible to show that future earnings would be

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\(^91\) See section 2.6.

\(^92\) Hunter v Butler Court of Appeal (Civil Division) [1996] RTR 396.

\(^93\) Ibid. at 403E-H.

\(^94\) Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, at 39.
legally earned. The deceased’s irregular immigration status may make legal work highly unlikely in the UK. An award for legal earnings outside the UK, where it would be legal for the deceased to work, may also be too speculative.

The irregular immigration status of a deceased worker also makes an action for compensation from the Criminal Injuries Compensation Authority (CICA) unlikely to succeed. A claim to CICA becomes possible if a criminal prosecution is successfully brought against someone who negligently caused the death of a worker for a "crime of violence." However, even if such a prosecution was successfully brought, CICA may withhold or reduce compensation because of the deceased’s ‘illegal’ status. For example, the families of the 58 Chinese people who suffocated to death in a lorry in Dover in June 2000 were denied compensation from the Criminal Injuries Compensation Appeals Panel because the victims who were being smuggled into the UK were “voluntarily engaged in an unlawful act.” Indeed, CICA intends to supplement their guide on claiming compensation with a paragraph on illegal immigrants to emphasise that awards for irregular migrants may be reduced or withheld on account of their immigration status.

Refusing compensation for dependents of irregular migrant workers is another example of irregular migrants being doubly violated. First, irregular migrant workers are violated through their death in a non-protective work environment. Second, irregular migrant workers are violated if the law and the CICA deny their dependents recovery.

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95 There is no legal definition of this term though typically, ‘a crime of violence’ means an attack on a person such as a wounding or sexual attack. In deciding whether an application fits within the scheme, each case is judged on its merits. See further, CICA online: <https://www.cica.gov.uk>.

96 Under paragraphs 13(d) and 15 of the scheme the CICA must take into account person’s character. Through email contact with Morven Cameron of Policy Section of CICA, it was confirmed to me that if a person was in the country illegally this would influence and reduce the amount of compensation that is awarded.


98 John Dixon who works for CICA informed me that in the next guide, a paragraph will be added to make clear that irregular migrant workers may receive reduced funding, or none at all.
Denying compensation suggests that even in death these workers' lives were not as valuable as persons with lawful immigration status.

Beyond bringing claims for compensation, a deceased's family may wish to pursue a claim under the HRA. Section 2 ECHR, as brought into UK law by Article 1(1) HRA states: 'Everyone's right to life shall be protected by law'. This provision also places a duty on the State to take steps to prevent the avoidable loss of life in certain circumstances. In such cases there is a positive obligation on the State and thus no need to find a culpable 'public authority'.

Article 2 may offer meaningful protection to irregular migrant workers' families if they can show that the death was avoidable under the prescribed circumstances. These circumstances require that the applicant is a member of a finite group, and, where the State is being held liable for the acts of private parties such as gangmasters, the State must have known or ought to have known of a real and immediate threat to the life of this limited group, yet failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk.

Applying these requirements, irregular migrant workers who die in work-related accidents form finite groups. It is also clear that the State might sometimes know of irregular migrants whose lives are at risk. For example, in the case of the cockle pickers, Geraldine Smith MP for Morcambe and Lumsdale warned the government that cockle picking in the area was a "tragedy waiting to happen" and had called for tougher

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99 See section 3.1.1 for the procedure of making a claim under the HRA.
101 This condition was recognised for the first time in LCB v United Kingdom (1998) 27 E.H.R.R. 212.
regulations before the disaster took place.\textsuperscript{103} In my view, the government could have taken measures to avoid this risk of death, such as by tightening up safety in Morecambe Bay.

However, in \textit{Osman v United Kingdom} the European Court of Human Rights emphasised that this positive obligation to prevent foreseeable deaths was to be "interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."\textsuperscript{104} State authorities thus have a positive obligation to take reasonable measures to prevent an Article 2 violation, given the state of their knowledge. The families of the cockle pickers could thus bring a legal claim under that HRA if they showed that the UK had not taken reasonable measures in response to their knowledge surrounding the cockle pickers in Morecambe Bay.

Having shown the limited nature of potential legal claims under current domestic law as well as the difficulties that irregular migrant workers face in pursuing any such actions, next I assess the state of UK policy to see whether this offers more useful solutions.

\textbf{3.6 UK Policy}

In this section I assess UK government policy as well as recent non-governmental and industry-led initiatives to deal with gangmasters and irregular migrant workers. There are many different strands of UK government policy that deal with gangmasters and illegal working. I have decided to analyse major recent initiatives that provide the political background to the \textit{Gangmaster (Licensing) Act 2004}. I am concerned that government policy should be sympathetic to irregular migrant workers and that such concern might be

\textsuperscript{103} Mail on Sunday, "Labour’s refusal to tackle illegal immigration is hurting everyone" \textit{The Mail on Sunday} (15 February 2004).
\textsuperscript{104} \textit{Osman, supra} note 102 at para. 116.
reflected in the new Act. However, recent government policy initiatives seem to have achieved little to help irregular migrant workers. Some initiatives seem to have removed protection from irregular migrant workers and targeted this group. Others are often too complex to achieve any useful results. Non-governmental and industry policies also seem to be ineffective.

3.6.1 Removing protection

As I explained in Chapter 2, gangmasters in agriculture and the food industry have been exploiting their vulnerable workforce for years. As the years have passed however it seems that worker protection has decreased. Since the early 19th century licensing schemes regulated gangmasters in agriculture and the food industry. The last such licensing scheme was introduced in 1973. This scheme required all gangmasters to carry a licence and to comply with the Employment Agencies and Employment Business Regulations.\textsuperscript{105} Although this scheme proved ineffective, as there were few powers of monitoring registered gangmasters and almost no enforcement powers existed to deal with unregistered gangmasters, it nonetheless laid down legal standards that gangmasters should follow. However, in 1994, this scheme was abolished as the Labour government thought it was too much of a burden on business.\textsuperscript{106}

Had the government replaced the licensing scheme with another initiative, abolishing the 1973 scheme could have been a step forward in terms of worker protection. Instead however, the government failed to demonstrate a commitment to worker protection, as it did not provide workers with any other safeguards. This is particularly disappointing.

\textsuperscript{105} U.K., H.C., Hansard Debates, col. 537-8 (27 February 2004) (Mr Nicholas Brown) (Newcastle upon Tyne, East and Wallsend) (Lab).
\textsuperscript{106} Ibid.
as, according to Don Pollard, an expert on gangmaster issues, “everybody involved in the food industry” knew about gangmasters exploiting their workers and that this problem was getting worse.\textsuperscript{107} Although Pollard’s statement may seem extreme, it nonetheless reflects a strong level of awareness about gangmaster exploitation. The government thus seemed keen to help gangmaster businesses, even at the expense of vulnerable workers.

A more recent example of the government’s lack of commitment to worker protection is the Morecambe Bay disaster itself. This tragedy was the worst workplace disaster in the UK since the Piper Alpha disaster in 1988.\textsuperscript{108} However, it took three weeks for the Minister for Nature Conservation and Fisheries, Ben Bradshaw, to visit the Morecambe area.\textsuperscript{109} This was a shockingly slow response, especially when compared to rail disasters, after which Ministers usually visit the scene within hours.\textsuperscript{110} This slow response may also reflect a current lack of concern to protect irregular migrant workers from abuse. A possible reason for this could be that these workers are seen as undeserving of the same level of protection afforded to UK legal residents.

3.6.2 Targeting Irregular Migrant Workers

After the 1973 licensing scheme was abolished, the first initiative aimed at combating criminal gangmasters was an inter-departmental taskforce known as Operation

\textsuperscript{107} Ibid.
\textsuperscript{108} The Piper Alpha disaster involved an ill-maintained oil-rig in the North Sea – ‘the Piper Alpha’ – which was destroyed by fire and killed 167 of the 226 men on board. See further: BBC News Online, “Piper Alpha Remembered”, (6 July 1998), online: <http://news.bbc.co.uk/1/hi/uk/127335.stm>.
\textsuperscript{109} Environment, Food and Rural Affairs Eighth Report HC 455 (22 March 2004), online: <http://www.publications.parliament.uk/pa/cm200304/cnselect/cmenvfru/455/45502.htm> at para. 28 [hereinafter ‘EFRA 2004’]
\textsuperscript{110} Ibid.
Gangmaster. Operation Gangmaster evolved from an Interdepartmental Working Party on agricultural gangmasters that criticized the failure of government departments to work co-operatively to combat rogue gangmasters. Operation Gangmaster was created as a collaborative enforcement initiative to control the activities of criminal gangmasters in the summer of 1998.

At first, Operation Gangmaster was launched as a pilot initiative in Lincolnshire (a county in central England) and parts of East Anglia (a county in the south-east) only, though now the project has been extended to the rest of the UK where agricultural gangmasters are active. Operation Gangmaster appears to be a good example of co-operative government as it brings together the Home Office, the Department for Work and Pensions, Customs and Excise, the Inland Revenue and the Department for the Environment, Food and Rural Affairs.

However, despite this inter-departmental collaboration, Operation Gangmaster has accomplished very little. Inter-departmental co-operation has been limited due to constraints on information sharing under the Data Protection Act 1998, differing departmental cultures and priorities, and different government agencies having dissimilar perceptions of the project. In its 2003 report, the Environment, Food and Rural Affairs

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112 For example, one department sought to collect taxes, another was in charge of health and safety, another was responsible for wages, and yet another concerned with illegal immigration. Ibid. at para. 35.

113 Ibid. at paras 34 and 35.


115 Data Protection Act 1998, c. 29.

Committee (EFRA) criticized the government for failing to give a clear idea of what
*Operation Gangmaster* had achieved since it began in 1998.\(^{117}\) EFRA stated that it was:

> appalled by the lack of priority given to, and political accountability for, what is supposed to be the Government's co-ordinated response to illegal activity by gangmasters. Operation gangmaster appears to be little more than an umbrella term for a few local enforcement operations in which the various agencies have exchanged information. Five years after it was established, Operation Gangmaster has had no significant resources allocated to it, has no targets and no Minister to take overall responsibility for its activities. Nobody could give us a comprehensive picture of what Operation Gangmaster does, how much it has spent and what it has achieved. ...we conclude that Operation Gangmaster remains woefully inadequate response to the complex enforcement issues arising from the illegal activities of gangmasters.\(^{118}\)

To sum up, EFRA stated that *Operation Gangmaster* "serves as a convenient reference point for Ministers to give the impression that the Government is doing far more about dealing with the problems associated with gangmasters than is the case."\(^{119}\) For example, the title 'Operation Gangmaster' sounds as though it targets all gangmasters industry-wide. In reality however, *Operation Gangmaster* is limited to the agricultural sector. As well, despite talk of *Operation Gangmaster* among government, the research group *Produce Studies Limited* found that in *Operation Gangmaster*’s target area, only about 25% of farmers and packers using gangmaster-supplied labour recognised the name ‘*Operation Gangmaster*’. Even fewer workers had heard of the initiative.\(^{120}\)

It is possible that the lack of activity carried out by *Operation Gangmaster* was a small blessing in disguise for irregular migrant workers however. This is because it seems that when enforcement was carried out irregular migrant workers were targeted more than

\(^{117}\) EFRA, *supra* note 111 at para. 42.
\(^{118}\) *Ibid.* at para. 45.
\(^{119}\) *Ibid.* at para. 47.
\(^{120}\) *Produce Studies, supra* note 116 at iii.
gangmasters. As the Transport and General Workers Union stated: "‘Swoops’ on fields of hapless workers, often unaware of their rights, netted only the victims of the abuses. Those profiting from the system were rarely tracked down, and despite a few prosecutions, had little to fear." 121 Making exploited workers the focus of Operation Gangmaster’s enforcement operations reflects how the law operates to place more severe sanctions on irregular migrant workers for working than their rogue employers.

Another policy that targets irregular migrant workers more than their exploitative employers is the Illegal Working Steering Group (IWSG). Created in November 2002, the IWSG comprises representatives from industries in which irregular migrants primarily work. 122 In the minutes of the first meeting, held on 21st November 2001, the group’s main aims were set out. These were: first, to gain commitment from business and industry to tackle illegal working; second, to improve compliance from and practically support employers; third, to develop workable Codes of Practice in this area; fourth, to find “innovative solutions to the problems identified”; and, fifth, to “send out a strong message about the determination to tackle the problems associated with illegal working.”

These aims suggest that irregular migrant workers are seen as the ‘problem’ in this area. The first and second aims, to gain a commitment from and support business and industry, fail to suggest that business and industry are involved in deliberately contravening the law and exploiting irregular migrant workers. Indeed, these aims frame the situation in such a way that removes any responsibility for the ‘problem’ of illegal working from

121 T & G, “Fight to register gangmasters continues” Transport and General Workers Union (1 December 2003).
122 The industries that have representatives are The British Chambers of Commerce; The British Hospitality Association; the Commission for Racial Equality; the Confederation of British Industries; the Construction Skills Certification Scheme; the Health and Safety Executive; J Sainsburys; the National Farmers’ Union; the NHS; the Recruitment and Employment Confederation; and, the Trades Union Congress. See the Home Office, “Stakeholder group to tackle illegal working”, online: <http://www.ind.homeoffice.gov.uk/ind/en/home/0/preventing_illegal/steering_group_to.textonly.html>.
business and industry. It is also apparent from the minutes of their meetings that the IWSG does not view the protection of irregular migrant workers as a priority.

In a similar way, the strategy of targeting irregular migrant workers to combat criminal gangmasters has received express backing from the government. In a House of Commons debate on February 11th 2004, just days after the cockle-picker tragedy, Mr Michael Jack, MP, asked the Prime Minister whether he knew of the “illegal immigrants in this country who fall easy prey to the despicable activities of illegal gangmasters?” Mr Jack continued, “In the light of [the cockle-picker] tragedy, what action will the Prime Minister take to remove those people from this country?” The Prime Minister answered, “It is precisely for that reason that we do remove illegal immigrants from this country – actually, thousands and thousands a year.”

The notion that targeting the victims of exploitation will stop the exploitation itself has also been supported with increased financial backing. Former Home Secretary David Blunkett stated that the “government is taking action” against criminal gangmasters who “exploit vulnerable people” by “increasing the number of enforcement operations, enhancing the power of immigration officers to raid business premises and investing in the multi-agency taskforce Reflex [which tackles organized immigration crime] to disrupt the people-smuggling gangs behind this trade.” In line with these promises the government has increased the number of staff engaged in immigration enforcement work by nearly 50% in the last two years. The Home Office has also opened a new Immigration Office in Norfolk to tackle illegal working in the King’s Lynn area and northern East Anglia. As well, the Immigration and Nationality Directorate reports that it is removing record

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123 U.K., H.C., Hansard Debates, col. 1412 (11 February 2004) (Mr Michael Jack (Fylde) (Con).
124 Ibid, (The Prime Minister).
numbers of immigration offenders from the UK. The number of people removed from the UK as a result of enforcement action (not including asylum related cases) has increased from 5,830 cases in 1992 to 8,090 in 2002.\textsuperscript{126}

However, targeting irregular migrants rather than their rogue employers reflects a false sense of logic and is problematic for three main reasons. First, targeting irregular migrants to end their exploitation fails to make gangmasters responsible for their criminal acts. Indeed, targeting the workers effectively places the blame on this group for being vulnerable to abuse. Such a response does not recognise the power differential between gangmasters and their workers.

Second, this approach is short-sighted as it fails to recognise that after removal, many irregular migrants quickly return to the UK on different documents, under a different name. As one irregular migrant who had been previously removed from the UK stated in an interview for a BBC documentary on gangmasters: “Don’t tell them your name. Make it up. Make up a date of birth. Make up everything. No problem. No problem.”\textsuperscript{127} It seems that a gangmaster can be confident of using either the same workers once they return or finding new irregular migrant workers and exploiting them in turn. This approach also fails to note the correlation between increased enforcement measures and border controls against irregular migrants, and the resulting increase in the numbers of such persons who arrive in contravention of immigration law. As the United Nations Secretary General has explained:

Few if any States have actually succeeded in cutting migrant numbers by imposing such controls. The laws of supply and demand are too strong for that. Instead, immigrants are driven to enter the country clandestinely, to

\textsuperscript{127} See transcript of “Gangmasters” (BBC \textit{Panorama} documentary, 19th June 2000), online: <http://news.bbc.co.uk/1/hi/programmes/panorama/archive/794072.stm>.
overstay their visa, or to resort to the one legal route still open to them, namely the asylum system.\textsuperscript{128}

Third, targeting irregular migrants rather than the gangmaster does not improve working conditions for legal workers who also suffer substandard terms of employment. For these reasons the government's current approach of targeting irregular migrant workers is ineffective at stopping criminal gangmasters from exploiting irregular migrants.

\textbf{3.6.3 Overly Complex Structures}

Another deficiency of current UK policy towards irregular migrant workers is that it is built upon overly complex structures. Such complexity makes it very difficult to act in this area to help irregular migrant workers. This complexity exists due to the sheer number of initiatives on illegal working and the complicated structures within these initiatives. The initiatives listed below give some idea of the high number of operations in this area:\textsuperscript{129}

- The \textit{Informal Economy Steering Group} (IESG). The IESG was established in March 2000 to implement recommendations from the \textit{Grabiner Report} on the informal economy. The IESG receives reports from \textit{Operation Gangmaster}.

- The \textit{Informal Economy Working Group} (IEWG). The IEWG supports and reports to the IESG.

- The \textit{Gangmaster Co-Ordination Group} (GCG). The GCG was set up at the request of the IESG in July 2003 as a forum to debate policy and enforcement relating to agricultural gangmasters.


\textsuperscript{129} EFRA 2004 \textit{supra} note 109 at para.31.
• **Regional Gangmaster Meetings.** Under *Operation Gangmaster*, regional gangmaster meetings share intelligence and make multi-agency enforcement actions.

• **The Fraud Steering Group (FSG).** The FSG works on *Operation Gangmaster* among other matters.

• **Reflex,** a multi-agency taskforce Reflex which tackles organized immigration crime

Taking the GCG as an example to highlight the complexity within each of these bodies, the GCG is chaired by an official from the Department of Work and Pensions, reports to the Minister for Food and Farming, and its meetings are attended by the Department of Work and Pensions, the Home Office, the Inland Revenue, the Department of Trade and Industry, HM Customs and Excise, the Cabinet Office and the Health and Safety Executive. This structure is complicated further by the fact that individual government departments and agencies also carry out policy development and enforcement. Persons from all such offices must thus be taken into consideration before action can be taken.

In their 2004 report EFRA criticized the complexity within these groups. EFRA explained that inconsistent membership in the various groups and the existence of chairmanships split between government departments and agencies left it often unclear which department is in charge.\(^{130}\) Overall, EFRA stated:

> We are convinced that the overly complicated structure of bodies put in place to deal with this cross-departmental issue hinders rather than helps a coherent response to the problems of illegal working and of gangmasters. We recommend that the Government rationalize and streamline the steering groups, working groups and other bodies that operate in this policy area. Currently co-ordination of activities appears only to take place

\(^{130}\) *EFRA 2004 supra note 109 at para. 33.*
on the ground: we recommend that a single co-ordinating body for illegal working and the informal economy be established. We again recommend that a single Minister be made clearly responsible for the issue.\textsuperscript{131}

I agree with EFRA's recommendations. However, to create an effective body the government must also have a useful strategy. Beyond creating a streamlined organisation the government must also be made aware of the ineffectiveness of targeting irregular migrant workers to end their exploitation and should focus on rogue gangmasters as the root of these problems.

To make such a strategy effective, the government would have to commission research into irregular migrant working to discover the extent of this problem. So far however the government has made no effort to carry out such research. As EFRA stated in its 2004 report, "the Government is no nearer to obtaining a comprehensive picture of the scale and nature of the problem of illegal gangmaster activity than it was when we published our original report eight months ago."\textsuperscript{132}

Overall it is clear that UK government policy is unsympathetic to the plight of irregular migrant workers and can be said to target rather than protect this group. The number of initiatives may make the government appear committed to tackling these problems, yet in reality these structures are very complex, achieve little, and there is no sign that the government will commission necessary research to improve the situation.

Government policy may reflect a lack of sympathy for irregular migrant workers out of concern to maintain electoral votes.\textsuperscript{133} Ironically however, the government may actually create and fuel migration fears among the electorate. For example, in the context of economic migration, the Prime Minister has said, "The public are worried about this, and

\textsuperscript{131} Ibid. at para. 34.
\textsuperscript{132} Ibid. at para. 11.
\textsuperscript{133} See section 2.2.2. for a further discussion of this, in the context of the numbers of legal entry routes.
they are worried rightly, because there are abuses of the immigration and asylum system. They are worried rightly, because there are abuses of the immigration and asylum system. The government may thus encourage the electorate to fear irregular economic migration and has to follow through on this approach in its various policies on irregular migrant workers in order to maintain electoral support.

It is also possible that government policy is unsympathetic to irregular migrants as these workers reflect that the government's efforts at 'managed migration', manifested in its White Paper, Secure Borders, Safe Haven, Integration and Diversity in Modern Britain, have not succeeded. In the White Paper the government stated that it "is determined to prevent [the immigration] system from being undermined by people coming illegally to the UK or working in breach of the law." Expressing sympathy for irregular migrant workers would thus indicate both a lack of consistency in government policy as well as an admission that the government had failed to meet its own economic migration objectives.

3.6.4 Non-Governmental and Industry-Led Initiatives

Non-governmental and industry initiatives have also been unsuccessful at tackling criminal gangmasters. In 1997 the Transport and General Workers' Union issued a report that described gangmaster abuses in the UK and explained the problems with the current law. The report recommended reintroducing a statutory registration scheme for

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135 Secure Borders, Safe Haven, supra note 29 at 75.
136 This report resulted from a European Conference of the European Federation of Agricultural Workers in September 1995 at which similar problems of gangmaster abuse were discovered to exist across Europe. After the conference, the Office for European Social Research was commissioned to organize a survey to be carried out in the UK, France, the Netherlands, Germany, Italy and Spain. The Transport and General Workers' Union undertook to do research in the UK and listed the main abuses and the problems of enforcing the current law with suggestions for further action. Their report emphasised the need to a statutory registration scheme. See: Don Pollard, "The Gangmaster System in the UK" (Report for the Transport and General Workers' Union) August 2004 at 6.
gangmasters but was not followed up on. This is unsurprising given government policy towards irregular migrant workers.

The most recent attempt to regulate gangmasters has come out of the Ethical Trading Initiative (ETI). The ETI is an alliance of companies, non-governmental organisations and trade union organisations. It formed the Temporary Labour Working Group (TLWG) to look at gangmaster issues in the agricultural and food industries in 2002. The TLWG convened two meetings that year to discuss problems in temporary labour in the UK food and agriculture industry. These meetings found that “abuses, evasions and fraudulent activities were getting more frequent and that this trend would continue without new controls on labour providers.”

Then in early 2004 the TLWG carried out audits of gangmasters with the help of government departments and businesses. The audits took place in workplaces in south Lincolnshire (central England), where fruit, vegetables and meals are prepared and packed for supermarkets. Although large food companies nominated the gangmasters that participated in the audit, widespread abuse and illegal practices were found to exist amongst many of the gangmasters surveyed. The ETI identified 107 “points of improvement”. As ETI director Dan Rees commented:

I think the industry was surprised, not by the horror stories, but by the extent to which it goes on. We have established that poor practice is commonplace. We asked for volunteers. You would expect to get better ones as volunteers. When you find serious problems here, you think, God, what’s down the line.

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137 Temporary Labour Working Group, A licence to operate; New measures to tackle exploitation of temporary workers in the UK agricultural industry (November 2004) at 7.
139 Ibid.
140 Ibid.
Following these initiatives, the TLWG introduced a voluntary Code of Practice (‘the Code’) in November 2004. The aim of the Code is to “set out clearly a standard of good practice for businesses providing labour to other businesses within the agriculture and fresh produce industry.”¹⁴¹ The Code thus clarifies what gangmasters must do to meet legal and industry standards of best practice.

The Code appears to be a thorough commitment to tackling criminal gangmasters. However, the Code is purely voluntary because the TWLG felt “sceptical about the political will” to support legislation requiring a licensing scheme for gangmasters.¹⁴² As a voluntary initiative, there is only so much that the Code can do. The failure of voluntary codes to regulate gangmasters has been made apparent from a succession of ineffective agriculture and food industry codes. For example, the National Farmers’ Union (NFU), the Fresh Produce Consortium, some supermarkets,¹⁴³ and even gangmasters themselves have all introduced codes of practice.¹⁴⁴ The NFU code has been described as “toothless”¹⁴⁵ and the other codes have clearly made little positive impact in light of the TWLG’s findings. As I discuss in the next chapter, the Code may provide useful groundwork for the Gangmaster (Licensing) Act 2004 when it comes into force. At this stage however, the Code lacks teeth to have any real effect in this area.

¹⁴² A licence to operate, supra note 137 at 9
¹⁴³ Sainsbury’s was the first supermarket to publicly express their concern about gangmaster abuse and introduced a company code of practice to increasing understanding about gangmaster issues in 2001. See: Don Pollard, supra note 136 at 7.
¹⁴⁴ The Association of Labour Providers has introduced codes of practice on behalf of gangmasters. Ibid.
¹⁴⁵ The Operation Gangmaster 1999 Analysis described the NFU Code as “toothless”. Ibid.
3.7 Conclusion

In this chapter I have illustrated how irregular migrant workers have a limited number of viable legal claims under domestic law. I have also shown how further barriers exist that make it difficult for an irregular migrant worker to take legal action. This makes full rights protection for irregular migrant workers in the UK no more than just a pipedream. I also revealed how UK governmental policy towards irregular migrants is unhelpful, as it targets these workers and is too complex and mismanaged to achieve anything useful. Non-governmental and industry initiatives have also been unsuccessful due to a lack of political backing.

In light of these findings the path for the Gangmaster (Licensing) Act 2004 is somewhat uncertain. Will the new Act secure rights to all persons regardless of their immigration status? Or will the new Act deny legal rights to these workers on account of their immigration status? And, how will current policy inform the new Act? With these concerns in mind, in Chapter 4, The Gangmaster (Licensing) Act 2004: A Fitting Memorial? I assess what the new Act might hold in store.
Chapter 4

The Gangmaster (Licensing) Act 2004: A Fitting Memorial?

In the last chapter I identified how irregular migrant workers suffer rights deficiencies in current domestic law. I also explained how UK policy fails to protect these workers against exploitative gangmasters. This chapter considers whether the Gangmaster (Licensing) Act 2004 might fill such gaps in protection for irregular migrant workers at the domestic level.

First I describe how the Act came into being as a Private Members Bill. Then, I describe the new Act and consider the implications of some of these provisions for irregular migrant workers. In particular, I assess how provisions on the recruitment of workers and information sharing under the new Act could lead to this legislation being a source of immigration enforcement rather than protection. Ultimately, I assess whether the new Act offers a 'fitting memorial' to those who died in the cockle-picker disaster, as Jim Sheridan MP who introduced the Bill hoped it would.2

4.1 Getting the Bill Passed: The Private Members' Bill Procedure

In contrast to most Bills which are introduced by the government, Private Members' Bills (PMBs) are introduced by backbench or opposition MPs in the House of Commons or by peers in the House of Lords. The PMB procedure makes it very difficult, and indeed rare, for such legislative attempts to succeed. For example, in the

1 Gangmaster (Licensing) Act 2004 (U.K.), 2004, c. 11.
2001-02 session of Parliament only 8 of 47 successful Bills were PMBs.\(^3\) There are many reasons why PMBs tend to be unsuccessful.

First, very little Parliamentary time is devoted to these Bills. Of the approximately 700 hours spent debating Bills, only approximately 50 of these are for PMBs.\(^4\) Second, there may not be the necessary quorum of 40 MPs sitting in Parliament on a Friday afternoon when PMBs get debated. Overall, although PMBs go through the same stages as a Government Bill, they face added obstacles as they move through Parliament.\(^5\)

These obstacles are apparent from the start of a PMB’s passage through Parliament. To become legislation, a Bill must get a First Reading. For Government Bills this is a mere formality: the title of the Bill is read to the House, the Bill is ordered to be printed and a date is fixed for the Second Reading. For PMBs by contrast, getting a First Reading can be a difficult process. Three different possibilities are open to PMBs for obtaining a First Reading. A PMB may be introduced at any time after due notice is given.\(^6\) Alternatively, a PMB may be introduced under the ‘Ten Minute Rule’, which gives the MP introducing the Bill ten minutes to explain the Bill and his or her opponents have ten minutes to oppose the Bill. Then, a vote decides whether to give the Bill a First Reading.\(^7\) The most popular route however is for a PMB to get a First Reading through the ballot process. A ballot is held at the beginning of each Parliamentary session and

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\(^5\) It is possible that PMBs face such difficulties getting through Parliament to avoid inconsistency and conflict with Government policy. Ibid.
\(^6\) This is recognised by S.O. 58, ibid.
\(^7\) This is recognised by S.O. 19, ibid.
over four hundred MPs enter. The first twenty MPs to get drawn out of the ballot receive a First Reading on the fifth Wednesday of the session, and the first ten can also claim some expenses towards drafting their Bill.

The next obstacle that can stall a PMB is the Second Reading stage. During a Second Reading, the Bill is debated as a whole. Such debate is only possible for the Bills of MPs whose names were drawn within the first six in the ballot, as only these Bills are guaranteed sufficient Parliamentary time for debate. For the remaining fourteen PMBs, the Clerk reads out the titles of these Bills at the end of the Friday session and only if no-one objects does the Bill pass to the Second Reading stage. However, if a single MP shouts “object” when the title of the PMB is read the Bill fails, even if all other MPs were in support of the Bill. A PMB may also fail at this stage if it gets ‘talked out’ by its opponents. Getting ‘talked out’ means that the debate is not concluded by the end of the Friday session and is then adjourned to another Friday at which time the Bill has no priority. To avoid a PMB getting ‘talked out’, the sponsoring MP can bring a closure motion. However, a closure motion requires the presence of 100 MPs, which can be hard to muster on a Friday.

For PMBs that gain a successful Second Reading, they are referred to a Standing Committee. The Standing Committee debates and amends PMBs in the order that they pass their Second Reading. In practice this means that there is only time to debate a few

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8 The ballot process is recognised by S.O. 13(5), ibid.
9 This is recognised by S.O. 13(10), ibid.
10 The first ten MPs to be drawn out of the ballot may claim up to £200 expenses in drafting their bills. This figure was fixed in 1971 and has never been revised. See: House of Commons Information Office, supra note 3.
11 This is recognised by S.O. 13(4), Leeds University Law School, supra note 4.
12 PMBs tend to go to Standing Committee C. See House of Commons Information Office, supra note 3 at 6.
of these Bills at the top of the list. As a result, only uncontroversial PMBs can succeed through the Committee Stage, if there is no opposition and they are passed ‘on the nod’.¹³

The fourth stage of a Bill is its Third Reading. At this point the Bill gets debated briefly and drafting amendments may be made. PMBs are dealt with during the four Fridays set aside for this purpose.¹⁴ Finally the Bill goes through a similar process in the House of Lords and is then sent to the Queen for her approval.

4.2 From Bill to Act: A Tragic Twist of Fate

This account illustrates how difficult it is for PMBs to succeed in becoming legislation. These difficulties make it all the more remarkable that the Gangmaster (Licensing) Bill was a PMB that succeeded in becoming law. Jim Sheridan gained a First Reading after being drawn third out of the ballot, and he introduced the Gangmaster (Licensing) Bill in the House of Commons on January 7th 2004.¹⁵ Jim Sheridan’s original Bill was short and simple. The Bill proclaimed itself as “A Bill to: [m]ake provision for the licensing of Gangmasters; to make further provision concerning the enforcement of legislation relating to Gangmasters; and for connected purposes.”¹⁶ The Bill required gangmasters who engaged in agricultural work or the packaging or processing of consumable produce to have a licence. Licences were to be issued from ‘the Authority’, a body that would be nominated or established by the Secretary of State as responsible

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¹³ Leeds University Law School, supra note 4.
¹⁴ House of Commons Information Office, supra note 3.
for licensing gangmasters. Further, the Bill made it an offence to engage in the services of an unlicensed gangmaster who did work that required a licence.

4.2.1 The Second Reading Stage

As a result of being drawn third in the ballot, Jim Sheridan was assured a Second Reading. The Bill's Second Reading took place on February 27th 2004 when it was the first item on the agenda, ensuring plenty of time for debate. Prior to the Second Reading this Bill also benefited from a tragic twist of fate. The Morecambe Bay tragedy, which resulted in the deaths of 21 irregular migrant cockle-pickers who were working for exploitative gangmasters, took place on February 5th 2004, just a few weeks before the Second Reading. As Jim Sheridan stated at the outset of the debate:

The recent tragic deaths of 20 cockle pickers in Morecambe bay have brought gangmasters into the headlines. It is the duty of us all to ensure that those who lost their lives have a fitting memorial, and first and foremost, that must mean legislation to tackle the worst excesses of illegal gangmasters. It is time for such legislation to stop the exploitation.

Heightened awareness about criminal gangmasters at this time may explain why this Bill received strong cross-party support from the start. The Bill was supported by MPs from all political parties, major supermarkets, immigrants rights groups and government departments. According to Jim Sheridan, the Bill was “backed by MPs from every party, indeed every nation.” Far more than the necessary quorum of 40 MPs

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17 Ibid. at clauses 1 and 2.
18 Ibid. at clause 4.
20 Jim Sheridan, supra note 2.
21 Ibid.
22 Jim Sheridan, supra note 19.
attended the debate. Indeed, there were over 100 MPs, which enabled Jim Sheridan to successfully bring a closure motion.

The tenor of the debate at the Second Reading was generally very supportive of the Bill. However, different MPs had very dissimilar conceptions of whether and how the Bill should deal with irregular migrant working. During the Second Reading stage Mr Sheridan did not focus his arguments on irregular migrant workers but rather stressed how the legislation could combat a wide range of societal ills. Referring to "rogue gangmasters", Mr Sheridan stated: "They are bad for workers, bad for business, bad for taxpayers and, more importantly, bad for our society."\(^{23}\) Other MPs stressed the need for effective enforcement;\(^{24}\) that businesses should not be burdened with red tape;\(^{25}\) and that the costs of the licence could be prohibitive for smaller gangmasters.\(^{26}\) For many MPs a licensing scheme could regulate gangmasters without upsetting immigration law and the rules on illegal working.

By contrast, MPs such as Mr Nick Brown challenged the law on illegal working. Mr Brown asked: "[W]hy should it be illegal nowadays to work?" He continued: "My view is that work should not be illegal, at least from the point of view of the worker."\(^{27}\) Mr Brown advocated full employment protections for irregular migrant workers and challenged the belief that "if we make this country an unattractive place for immigrants...they will not come here." As he stated, "All the current evidence is that


\(^{24}\) U.K., H.C., Hansard Debates, col. 523 (27 February 2004) (Mr Mark Simmonds) (Boston and Skegness) (Con).

\(^{25}\) U.K., H.C., Hansard Debates, col. 524 (27 February 2004) (Mr Alun Michael) (Minister for Rural Affairs and Local Environmental Quality) (Lab).

\(^{26}\) U.K., H.C., Hansard Debates, col. 527 (27 February 2004) (Mr Mark Simmonds) (Boston and Skegness) (Con).

\(^{27}\) U.K., H.C., Hansard Debates, col. 540 (27 February 2004) (Mr Nicholas Brown) (Newcastle upon Tyne, East and Wallsend) (Lab).
this is a hopeless argument. I urge the government to think again." Overall, Mr Brown suggested that immigration enforcement should be dealt with separately to employment protection. Mr Frank Dobson also expressed a sympathetic view, that "people who do casual work [should be] offered proper and full protection." He went on to say: "We must not fear being accused of introducing the nanny state, red tape and snooping if they offer decent protection." Overall, the comments and statements made during the Second Reading stage reflect a wide range of different political priorities regarding the new Bill.

4.2.2 The Standing Committee Stage

After its successful Second Reading, the Bill moved to Standing Committee C on April 28th 2004 where it was extensively debated. Issues such as enforcement, the cost of a licence and the scope of the legislation were discussed. Substantial amendments were made to the Bill at this stage. For example, the scope of the Bill was widened to include gangmasters in the whole of the UK as well as those based offshore. A broader definition of the work to which the Bill applies was also added, to prevent gangmasters evading the Bill by redefining their line of work. The Bill was amended to cover all forms of subcontracting as well as employment agencies and employment businesses that do work within scope of the Act. New clauses were also added to explain how enforcement would be carried out.

28 Ibid.
29 U.K., H.C., Hansard Debates, col. 546 (27 February 2004) (Mr Frank Dobson) (Holburn and St Pancras) (Lab).
30 Ibid.
31 U.K., Standing Committee C., Hansard Debates, col. 3 (28 April 2004).
In Committee there was also a mixed and somewhat confused understanding of whether and how the new legislation would protect irregular migrant workers. Mr Sheridan stated that the legislation should protect all workers regardless of their immigration status:

A worker is a worker is a worker, and no worker, indigenous or migrant, should be exploited. The clause [the clause in debate defined a ‘worker’ to include irregular migrant workers] will also extend the protection from exploitation to people who may be working illegally. The provision will be the key to ensuring that workers feel able to alert the authorities to any malpractice or breaches of the law on the part of their employers. That is crucial.\(^{32}\)

Mr Alun Michael MP, Minister for Rural Affairs and Local Environmental Quality, agreed: “all workers, whoever they are, are entitled to protection from the exploitative activities of gangmasters.”\(^{33}\)

Later on in the debate however, in a discussion on when a licence should be revoked, Mr Michael stated: “If one of the villains is not only not paying tax, but employing illegal workers, or exploiting people by not paying them the minimum wage or so on, revoking the licence gives us a powerful opportunity to get a grip on the situation and close down their operation [my emphasis].”\(^{34}\) This comment suggests that employing irregular migrant workers would be a serious offence under the licensing provisions. Taking this logic one step further, this approach could leave irregular migrant workers vastly unprotected. Due to the new law, gangmasters may no longer be prepared to take the risk of hiring irregular migrant workers. This could mean that these workers

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33 U.K., H.C., Hansard Debates, col. 12 (28 April 2004) (Mr Alun Michael) (Minister for Rural Affairs and Local Environmental Quality) (Lab).
34 U.K., H.C., Hansard Debates, col. 15 (28 April 2004) (Mr Alun Michael) (Minister for Rural Affairs and Local Environmental Quality) (Lab).
are unable to benefit from any protections under the new Act. Further, irregular migrant workers could be left to find employment in unregulated industries that fall outside the purview of the Act. Talk of irregular migrant worker protection thus falls flat if it is a serious offence to employ this group and if this law will actually be enforced.35

4.2.3 The Third Reading and the House of Lords

The amended Bill was then sent back to the House of Commons for its Third Reading on May 21st 2004.36 After this the Bill went to the House of Lords where Lord Carter sponsored it.37 In the House of Lords the Bill passed swiftly through its Second Reading, the Committee Stage and the Third Reading and no amendments to the Bill were made. Then, on July 8th 2004 the Bill received Royal Assent.

At this final stage the debate also revealed a lack of clarity regarding protection for irregular migrant workers under the proposed legislation. Lord Chan stated that he strongly supported the Bill for a variety of reasons, including that unregulated gangmasters “deny British workers legitimate employment.”38 This statement suggests that irregular migrant workers take “British” jobs away from the indigenous population. By implication, this suggests that irregular migrant workers do not deserve full employment protection. However, the large number of job shortages in agriculture suggests that this is a rather uninformed perspective. Lord Carter offered an alternate view of the Bill and described it as extending “the full protection of the law to any

35 As I have shown, it is illegal to hire an irregular migrant worker under the present law but this is rarely enforced against employers. See section 2.6.
individual worker undertaking work to which the provision apply.” Such a description implies that irregular migrant workers will receive protection under the proposed legislation regardless of their immigration status.

In light of these different perceptions regarding the protection of irregular migrant workers under the new Act, next I turn to the new legislation itself. In the next section I describe and interpret the new Act in an effort to understand how the legislation could affect irregular migrant workers.

4.3 The Gangmaster (Licensing) Act 2004: A Descriptive Analysis

4.3.1 Introduction to the Act

The *Gangmaster (Licensing) Act* describes itself as:

An Act to make provision for the licensing of activities involving the supply or use of workers in connection with agricultural work, the gathering of wild creatures and wild plants, the harvesting of fish from fish farms, and certain processing and packaging; and for connected purposes.\(^{40}\)

This introduction also makes no mention that the Act aims to protect irregular migrant workers. Instead, it appears that the Act’s primary purpose is to licence gangmasters in the main agricultural and food industries. The Act is divided into six parts, each of which deals with a different theme of the legislation.

4.3.2 Part 1: The Gangmasters Licensing Authority

The first part of the Act deals with the ‘Gangmasters Licensing Authority’. Section 1(1) states: ‘There shall be a body known as the Gangmasters Licensing


\(^{40}\) Introduction to the Act, *supra* note 1.
Authority (in this Act referred to as “the Authority”).’ Section 1(2) lists the Authority’s various statutory functions. These functions include: carrying out licensing; doing inspections of licensed gangmasters to ensure they are complying with their licences; reviewing gangmaster activities; supplying information held by the Authority to other parties as specified in the Act; reviewing the Act; and, performing any other functions as prescribed in regulations by the Secretary of State.

It is common practice for Acts to set up licensing authorities that have the statutory function of authorizing a person to carry on an activity regulated by the Act, in this case operating as a gangmaster.\(^{41}\) Section 1(3) gives this Authority a wide mandate. The Authority ‘may do anything that it considers is calculated to facilitate, or is incidental or conducive to, the carrying out of its functions.’

It is also common for Acts to appoint a Minister of the Crown as responsible for delegated legislation.\(^{42}\) The Act gives the Secretary of State responsibility to create regulations as to the Authority’s ‘other functions’. Section 1(5) enables the Secretary of State to make regulations as to: the status and constitution of the Authority; the appointment of its members; the payment or remuneration and allowances to its members; and such other matters in connection with its establishment and operation as he thinks fit. As the Secretary of State can choose the members of the Authority, it is possible that the Authority’s composition will reflect current political attitudes about irregular migrant working. As I showed in the last chapter, recent initiatives generally do not sympathise with the plight of these workers.


\(^{42}\) Ibid. at section 55.
Finally, section 2 requires the Secretary of State to give directions to the Authority in writing; to consult the Authority before giving such directions; and for the Authority to give the Secretary of State any requested information.

4.3.3 Part 2: Scope of the Act

The second part of the Act sets out the Act’s scope. Section 3 lists the work to which the Act applies. This includes: agricultural work; gathering shellfish; and, the processing or packaging of any produce derived from agricultural work, or shellfish, fish, or products derived from shellfish or fish. Section 3 also elaborates on the definitions of ‘agricultural work’, ‘shellfish’, and ‘consumable produce’, giving each term a broad meaning. These provisions reinforce the limited effect of this Act, as it does not apply to industries other than those mentioned above. If the Act aims to improve conditions for workers, its limited scope means this goal can only be achieved in a limited range of industries, leaving irregular migrant workers prone to exploitation in other sectors.

Section 3 also offers flexibility in terms of the industries that fall under the scope of the Act. Section 3(5) empowers the Secretary of State by regulations to exclude work that falls under the Act from its scope and to include the gathering or processing of wild creatures or wild plants and the harvesting of fish from a fish farm. Interestingly, section 3(5) thus gives the Secretary of State the power to exclude a wider range of industries than it can include. This greater willingness to stop regulating industries could reflect an attempt to be sensitive to business needs and to not burden these industries with red tape.

43 Supra note 1 at sections 3(3)-3(4).
This position stands in contrast to Mr Frank Dobson who stated that the government should not fear being accused of introducing red tape if it offers decent protection.\textsuperscript{44}

Section 4 defines when a person is 'acting as a gangmaster'. Section 4 is drafted widely and covers all forms of labour providing, including sub-contracting. Section 1(2) states: 'A person ("A") acts as a gangmaster if he supplies a worker to do work to which this Act applies for another person ("B").' Section 1(3) explains how the Act covers subcontracting: 'for the purposes of subsection 2 it does not matter:

- whether the worker works under a contract with A or is supplied to him by another person;
- whether the worker is supplied directly under arrangements between A and B or indirectly under arrangements involving one or more intermediaries;
- whether A supplies the worker himself or procures that the worker is supplied; and, whether the work is done under the control of A, B or an intermediary;
- whether the work done for B is for the purposes of a business carried on by him or in connection with services provided by him to another person.'

Section 4 goes on to elaborate further how all types of subcontracting and labour arrangements fall within the scope of the Act. As I have described, abuses are more likely to occur the longer the subcontracting chain and previous law left it unclear who was responsible for workers at each point.\textsuperscript{45} The thoroughness of section 4 suggests a strong willingness to catch gangmasters at every possible point.

Section 5 sets out the territorial scope of the Act. The Act applies to work done throughout the UK, on the shore, the seabed, and in coastal waters, as well as to

\textsuperscript{44} Mr Frank Dobson, supra note 29.
\textsuperscript{45} See section 2.4.
gangmasters overseas who supply or use workers that work in the UK. The “UK” means Great Britain and Northern Ireland.46

4.3.4 Part 3: Licensing

The third part of the Act is concerned with licensing. Section 6 prohibits unlicensed activities. Under section 6(1): ‘A person shall not act as a gangmaster except under the authority of a licence’. Section 6(2) states further: ‘Regulations made by the Secretary of State may specify circumstances in which a licence is not required’. Section 6(2) thus allows the Secretary of State to exclude family businesses from the licensing scheme for example. The idea behind drafting the prohibition widely and then specifying exemptions is that this makes the Act both simple to understand and fair.47

Section 7(1) gives the Authority discretion to grant licences ‘if it thinks fit’ and for a period that it ‘thinks fit’ (7(2)). Section 7(3) states that the ‘licence authorises activities by the holder of the licence and by persons employed or engaged by the holder of the licence who are named or otherwise specified in the licence.’ Section 7(4) clarifies that a licence may be held by a ‘body corporate’ or an ‘unincorporated association’ or a ‘partnership.’ Lastly, section 7(5) provides that ‘a licence shall be granted subject to conditions as the Authority considers appropriate.’

Such licence conditions are subject to rules ‘in connection with the licensing of persons acting as gangmasters.’ Section 8(1) gives the Authority the power to make these rules and section 8(2) clarifies what the rules involve. The rules may, in particular:

46 Bennion, supra note 41 at section 126.
47 U.K., H.C., Hansard Debates, col. 24 (28 April 2004) (Mr Alun Michael) (Minister for Rural Affairs and Local Environmental Quality) (Lab).
• prescribe the form and contents of applications for licences and other documents to be filed in connection with applications;
• regulate the procedure to be followed in connection with applications and authorize the rectification of procedural irregularities;
• prescribe the time limits for doing anything required to be done in connection with an application and provide for the extension of any period so prescribed;
• prescribe the requirements that must be met before a licence is granted;
• provide for the manner in which the meeting of those requirements is to be verified;
• allow for the grant of licence on a provisional basis; prescribe the form of licences and the information to be contained in them;
• require the payment of fees in accordance with the rules; and,
• provide that licences are to be granted subject to conditions requiring the licence holder to produce evidence of his licence or comply with requirements relating to the recruitment, use and supply of workers.

In light of the last possible rule, the Authority has the power to define the terms of the licence and the types of workers that gangmasters are allowed to recruit. Section 8(3) makes clear that the Authority must consult the Secretary of State before making any rules about fees. The Authority also has the power to modify, revoke or transfer a licence by virtue of section 9. Section 10 requires the Secretary of State to establish an appeals procedure by means of regulations and section 11 requires the Authority to establish and maintain a register of licensed gangmasters that is available for public inspection.
4.3.5 Part 4: Offences

The fourth part of the Act deals with offences that the Act creates. Section 12 creates the offence 'acting as a gangmaster, being in possession of false documents etc.' Section 12(1) makes operating as an unlicensed gangmaster an offence: 'A Person commits an offence if he acts as a gangmaster in contravention of section 6'. Section 12(2) adds: A person commits an offence if he has in his possession or under his control a relevant document that he knows or believes to be false; a relevant document that was improperly obtained and that he knows of believed to have been improperly obtained; or a relevant document that relates to someone else. Section 12(6) explains that the term 'relevant document' means a licence or any document issued by the Authority in connection with a licence.

An offence under section 12 may be punished either as a summary offence or by way of indictment. Under section 12(3) summary conviction involves imprisonment not exceeding 12 months, or a fine not exceeding the statutory maximum or both. Section 12(4) states that on indictment a person is liable to imprisonment for a term not exceeding 10 years or a fine or both. These potentially heavy penalties create a strong incentive for gangmasters to stay within the law.

Section 13 creates the offence of 'entering into arrangements with unlicensed gangmasters.' Under section 13(1) a person commits an offence if he enters into arrangements under which an unlicensed gangmaster who supplies him with workers or services. A defence is available under section 13(2) if the person took all reasonable steps to satisfy himself that the gangmaster had a valid licence or had no reasonable
grounds to suspect the gangmaster did not have a valid licence. It is up to the Secretary of State to specify what such ‘reasonable steps’ involve.

Section 13(4) states that an offence under section 13 involves summary conviction with imprisonment for a term not exceeding 51 weeks in England and Wales or 6 months in Scotland and Northern Ireland or to a fine not exceeding the statutory maximum or to both. This offence also carries a strong deterrent message to gangmasters.

Section 14 details supplementary provisions, such as giving ‘enforcement officers’ (defined in section 15, below) powers of arrest for an offence under section 12(1) or 12(2) or conspiring, attempting, inciting, aiding, abetting, counselling or procuring the commission of these offences. Section 14(2) clarifies that an enforcement officer who has ‘reasonable grounds for suspecting that such an offence has been committed’ may arrest ‘anyone whom he has reasonable grounds for suspecting to be guilty of the offence’ without a warrant.

### 4.3.6 Part 5: Enforcement

Enforcement is dealt with by the fifth part of the Act. Section 15 creates the positions of enforcement and compliance officers and defines what these titles involve. Section 15(1) states that the Secretary of State may appoint ‘enforcement officers’ to enforce section 6 and take action in circumstances where it appears that a section 13 offence has been committed. Section 15(2) also gives the Secretary of State power to make arrangements with the officers of other authorities to act as enforcement officers. Section 15(3) sets out the authorities whose officers might effect this purpose: the
Authority; any Minister of the Crown or government department; the National Assembly of Wales; the Scottish Ministers; any body performing functions on behalf of the Crown. The immigration service is a government department and could thus work alongside gangmaster enforcement officers. Presumably this work would involve tackling irregular migrant working. ‘Compliance officers’ are dealt with by section 15(4). This provision states that the Authority may appoint ‘compliance officers’ to verify compliance by gangmasters. Sections 15(5)-(6) also require enforcement and compliance officers to identify their position to any gangmaster they visit.

Section 16 details further the power of enforcement or compliance officers and gives them various powers to obtain information, such as to inspect and examine gangmasters’ records. Section 17 also makes provision for enforcement officers to obtain a warrant from a justice of the peace to enter premises. Section 18 creates a further offence of obstructing an enforcement or compliance officer. Under section 18 a person can be convicted on summary conviction, which carries penalties of imprisonment for up to 51 weeks or a fine not exceeding the statutory maximum, or both. These penalties suggest that catching rogue gangmasters is a real priority under this legislation and strong enforcement is provided to effect this purpose.

Section 19 also requires any persons exercising functions related to the Act to share information. For example, section 19(1)(b)(iii) states that information ‘may be supplied to any person having functions relating to offences committed by workers in connection with or by reason of their doing work to which this Act applied.’ This provision suggests that workers can commit an offence by the mere fact of working. There are few groups that commit an offence by doing otherwise legal work. This
provision could thus be aimed at benefit fraudsters or irregular migrant workers. Section 19 could thus be used to share information on irregular migrant workers. However, the purpose of such information sharing is not specified in the Act.

4.3.7 Part 6: Supplementary Provisions

The final part of the Act contains supplementary provisions. Sections 20, 21 and 22 clarify that the Act applies to bodies corporate, unincorporated associations and partnerships. Section 23 requires the Secretary of State to provide an annual report to each House of Parliament. Section 24 sets out the financial provision for the Act and authorises the Secretary of State to make any necessary payments to the Authority. Section 25 clarifies the power of the Secretary of State to prescribe regulations, rules and orders to flesh out parts of the Act.

Perhaps the most important provision of the Act regarding irregular migrant workers is section 26, which defines the term ‘worker’. Section 26(1) states: ‘In this Act “worker” means an individual who does work to which this Act applies.’ Section 26(2) clarifies that this term includes irregular migrant workers: ‘A person is not prevented from being a worker for the purposes of this Act by reason of the fact that he has no right to be, or to work, in the United Kingdom.’

Section 27 clarifies that there is no overlap between this Act and the Employment Agencies Act 1973. Section 28 states that the Act also applies to Northern Ireland, and section 29 gives the Secretary of State the power to decide when the Act comes into force. Section 29(1) states that the Act may come into force on the day the Secretary of State appoints. Section 29(2) and 29(3) also allow the Secretary of State to appoint
different days for the entry into force of different parts of the Act and to use transitional provisions if they are considered appropriate. Thus it is left unclear as to when the Act, or parts of the Act, will enter into force. Finally, section 30 gives the long and short titles of the Act.

Having described the main provisions of the Act, next I consider whether it offers a satisfactory response to the irregular migrant workers who died in Morecambe Bay. Jim Sheridan’s aim was for “those who lost their lives [to] have a fitting memorial” and “for legislation to stop the exploitation.” In this section I use contemporary methods of statutory interpretation to consider whether the new Act might succeed in giving the cockle-pickers who died at Morecambe Bay a ‘fitting memorial’

4.4 The Gangmaster (Licensing) Act 2004: An Analysis of its Potential Effects

Instead of protecting irregular migrants, the Act’s focus is on regulating gangmasters by creating a statutory licensing scheme with clear penalties. Beyond including irregular migrants in the definition of a ‘worker’ under section 26, and thus requiring all licence conditions to also apply to this group, the Act is silent on irregular migrant worker issues.

If the Act is to provide a ‘fitting memorial’ to the irregular migrants who died, the legislation should offer full employment protections to these workers. Irregular migrant workers would need effective and accessible rights that they could rely upon without facing fearsome barriers to taking legal action, as I discussed in Chapter 3. Such rights

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48 Jim Sheridan, supra note 2.
49 See section 3.1.3.
might include reinforced protection against long working hours, low pay and health and safety issues for example. It would also be useful to have a body that irregular migrants could complain to in confidence, should they not want to approach the official authorities.

Unfortunately however, such protections do not exist. Indeed, the Act could be used to supplement immigration enforcement against irregular migrant workers. To illustrate how the new Act could be used to aid immigration enforcement, next I review the possible contents of a gangmaster licence and the provision on information sharing.

4.4.1 The Licence: the recruitment of workers

Since the Act was passed in July 2004, the Department for Environment, Food and Rural Affairs has consulted many stakeholders about the Gangmasters (Licensing) Authority Regulations.\textsuperscript{50} These Regulations have been put into a draft statutory instrument.\textsuperscript{51} The regulations make clear that the licence should protect workers. Regulation 12(2)(a) states that the licence should promote the ‘avoidance of any exploitation of workers as respects their recruitment, use or supply.’

These protective aims may not apply to irregular migrant workers however. The Authority’s licensing conditions do not come into force until September 2005 and it is unclear what they will say.\textsuperscript{52} Nonetheless, it is likely that the licensing conditions will follow the current law on illegal working. This is because the Authority’s power to grant

\textsuperscript{50} Gangmasters (Licensing) Authority Regulations 2005. These regulations come into force on April 1\textsuperscript{st} 2005.

\textsuperscript{51} Draft Gangmasters (Licensing) Authority Regulations 2005 can be viewed online: <http://www.hmso.gov.uk/si/si2005/draft/20051762.htm>.

a licence as it 'considers appropriate' under section 7(5) must be exercised in accordance with 'implied ancillary rules,'\textsuperscript{53} which range from legal policy to technical legal rules. As I have explained, the current law bans irregular migrant working.\textsuperscript{54} Thus it is likely that the licence would also prohibit irregular migrant working in the industries regulated by the Act. To speculate further, the harshness of such a provision could depend on how sympathetic the appointees to the Authority are towards irregular migrant workers.

Section 8(1) also empowers the Authority to make rules by way of statutory instrument (section 24(4)) in connection with gangmaster licensing. Section 8 lists possible rules, one of which, section 8(2)(i)(ii), deals with the recruitment of workers. The Authority thus has the power to make delegated legislation on the types of workers that may be recruited.

The fundamental principle behind delegated legislation is that the legislature cannot directly exert its will in every detail.\textsuperscript{55} Thus the Act forms the outline that the Authority and the Secretary of State are to fill in. Under section 25(6), rules made by the Authority under section 8 are subject to annulment in pursuance of a resolution by either House of Parliament, allowing either House to defeat the instrument. This process enables Parliament to retain some control over the exercise of delegated legislation.\textsuperscript{56}

In considering what kind of a rule on the recruitment of workers both Houses of Parliament would accept, the express words of section 8(2)(i)(ii) do not reveal legislative intent as to whether or not irregular migrants should be allowed to work under this Act. However, any rule brought in under section 8(2)(i)(ii) would have to deny gangmasters

\textsuperscript{53} Bennion, \textit{supra} note 41 at section 329.
\textsuperscript{54} See section 2.6.
\textsuperscript{55} Bennion, \textit{supra} note 41 at section 215.
\textsuperscript{56} \textit{Ibid}. at section 202.
the right to recruit irregular migrant workers. This is because delegated legislation must not conflict with current law and cannot override any other Act unless the enabling Act so provides.\textsuperscript{57} As the \textit{Gangmaster (Licensing) Act} says nothing about allowing irregular migrants to work, any rule on the recruitment of workers would have to forbid irregular migrants from working to keep in compliance with the current law. From the perspective of irregular migrant workers, it is unfortunate that delegated legislation is restricted in this manner. Through being unable to work in the industries regulated by the Act, irregular migrant workers may be pushed into unregulated industries.

Denying irregular migrant workers the right to work in industries regulated by the Act challenges the Act’s hype of being a ‘fitting memorial’ to the cockle pickers who died at Morecambe and of thereby offering social change for irregular migrant workers. As Joel Bakan states in the context of social rights however, “the effect may be to create an illusion of social change when nothing has actually happened.”\textsuperscript{58} Despite my expectation that the Act would offer greater protections to irregular migrant workers, I suggest that it has failed to create positive change for these workers. Although the Act will provide protection to irregular migrants who manage to work fraudulently in the regulated industries, (through being included in the definition of a worker under section 26), the lack of a right to work makes such a job precarious at best. Moreover, as I explain below, information sharing on irregular migrant working could lead to the employment of these workers not lasting very long at all.

\textsuperscript{57} As I have stated, section 8 of the \textit{Asylum and Immigration Act 1996} prohibits irregular migrants from working. See section 2.6.

\textsuperscript{58} Joel Bakan, \textit{Just Words: Constitutional Rights and Social Wrongs} (Toronto: University of Toronto Press, 1997) at 140.
4.4.2 Information Sharing on Irregular Migrant Workers

Section 19(1)(b)(iii) states that information 'may be supplied to any person having functions relating to offences committed by workers in connection with or by reason of their doing work to which this Act applied.' Irregular migrants are a group who commit an offence by doing otherwise honest work and may thus fall subject to this provision.

To find the legislative intention behind section 19(1)(b)(iii), it is first necessary to look at the literal enactment. In full, section 19(1)(b)(iii) states: 'Information held by any person for the purposes of, or for any purpose connected with, the exercise of functions under this Act may be supplied to any person having functions in relation to offences committed by workers in connection with or by reason of their doing work to which this Act applies, for use for the purposes of, or for any purpose connected with, those functions.' Persons who have functions in relation to irregular migrant working offences are the immigration service and the police. These services enforce immigration law against irregular migrants. If this provision was used to share information with these services it is likely that irregular migrants would face greater penalties and removal. As a result of information sharing, irregular workers might have to look for work in unregulated industries where they could face exploitation. The literal meaning of this provision thus leaves it open for information sharing to target irregular migrant workers. It is especially likely that the Act will result in increased immigration enforcement if the Authority follows the TLWG Code, which sees itself as "a forerunner to the compliance arranges that will be introduced when licensing of labour providers comes into effect".59

The Code includes many protective conditions for workers yet also emphasises the importance of checking immigration documents, to ensure that all workers have the right to work in the UK. In order to gain an informed insight as to the legislative intention however, it is necessary to also consider the context of this provision.

Considering the enacting history, (the public knowledge that existed when Parliament passed the Bill), clear and relevant statements made by the promoter of the Bill may be used to gain an informed interpretation of legislative intent.\textsuperscript{60} For a Private Member's Bill the promoter of the Bill is the person who introduced the Bill, in this case Jim Sheridan. The statements of other ministers and sponsors cannot be considered authoritative as they may conflict with each other as to the meaning and effect of the Bill.\textsuperscript{61} Mr Sheridan’s statements reflect a clear intention to protect all workers against abuse. For example, Mr Sheridan states: “It is the duty of us all to ensure that those who lost their lives have a fitting memorial, and first and foremost, that must mean legislation to tackle the worst excesses of illegal gangmasters.”\textsuperscript{62} By implication, the new Act should protect irregular migrant workers rather than promote immigration enforcement. Mr Sheridan states later: “A worker is a worker is a worker, and no worker, indigenous or migrant, should be exploited. The clause [clause 26] will also extend the protection from exploitation to people who may be working illegally.”\textsuperscript{63}

These statements reflect a different emphasis to the literal meaning under section 19. Mr Sheridan’s statements are very protective of irregular migrants whereas a literal interpretation of section 19(1)(b)(iii) leaves the door open for greater enforcement against

\textsuperscript{60} Bennion, supra note 41 at section 217.
\textsuperscript{61} Ibid.
\textsuperscript{62} Mr Jim Sheridan, supra note 2.
\textsuperscript{63} Mr Jim Sheridan, supra note 32.
illegal working. These different emphases of the literal meaning and Mr Sheridan’s comments may be reconciled however. Mr Sheridan may think that effective immigration enforcement that removes irregular migrants from the industries dealt with by the Act could stop irregular migrants from being exploited. Although I do not agree with the effectiveness of such an approach, such an interpretation fits with both the literal meaning – to allow potential immigration enforcement – and Mr Sheridan’s aims – to protect irregular migrants from exploitation.

4.4.3 Is the Act a ‘Fitting Memorial’?

4.4.3.1 A Lack of Protection

The new Act fails to be a ‘fitting memorial’ to the irregular migrant workers who died because it does not give irregular migrant workers specific protections. Indeed, the new Act allows the Authority to make a rule against the recruitment of irregular migrant workers and may lead to immigration enforcement through information sharing.

If the Authority cracked down on irregular migrant working, these workers could get pushed into unregulated industries. Ironically, the Act could worsen the conditions for these workers, as there could be more competition for jobs among irregular migrant workers that could drive standards down even further.

As the scope of the Act is limited to the agriculture and food industries it also fails to offer a *symbolic* memorial to the workers who died. The workers who died were irregular migrant workers as well as cockle-pickers. Although the Act regulates cockle-picking, it would have been a more ‘fitting memorial’ to regulate gangmasters in all industries that are known to exploit irregular migrant workers rather than just a few.
Such wide-ranging regulation would have reflected the fact that the cockle-pickers who died were irregular migrant workers who could easily have suffered a tragedy in another dangerous industry due to their vulnerability.

### 4.4.3.2 Possible Explanations

The lack of employment rights for irregular migrant workers in the Act may reflect the current political climate. Mr Sheridan's Bill would probably not have succeeded in becoming law had he advocated full worker protection for irregular migrants. Recent policies considered in Chapter 3 illustrate how the current political climate is hostile to 'illegal working.' Legislation that regulates gangmaster employers could thus be the only way to attempt to reduce the exploitation of irregular migrant workers.

It is also possible that this Act would not be the best place to locate rights for irregular migrant workers. The *Gangmaster (Licensing) Act* is primarily about gangmasters rather than irregular migrant workers. A better place to locate employment protection for irregular migrants may thus be a fundamental employment rights statute, such as the *Employment Rights Act 1996*.\(^6^4\) Placing rights in this statute would give irregular migrant workers widely recognised rights.

The limited coverage of the Act to just a few industries is also understandable as part of the strategy to get the Bill successfully passed. Fears were expressed during the debates about the bureaucratic burdens the licensing scheme would create for businesses. To suggest a licensing scheme for a wide range of industries may thus have lost political

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backing. The limited scope of the Act may thus be explained as part of Mr Sheridan's attempt to regulate some industries by way of legislation.

Overall, the lack of political backing for irregular migrant workers could mean that it is impossible to create legislation that offers a truly 'fitting memorial' to the cockle-pickers who died. Although compromised, as it fails to accord irregular migrant workers employment rights, the new Act could be the best memorial that was possible at the time the Act was debated and passed. If nothing else, the passage of this Act has raised awareness on gangmaster issues and it will hopefully create a heightened public consciousness regarding irregular labour exploitation. Although far from perfect, the Act may thus pave the way for stronger legislation for irregular migrant workers in the future.

4.5 Conclusion

In this chapter I have described how the new Gangmaster (Licensing) Act 2004 was passed. I have also illustrated the main provisions of the Act and have considered how this legislation could affect irregular migrant workers. Although much of the detail of the Act is to be decided by way of delegated legislation, I have speculated that the provisions on licensing and information sharing could lead to irregular migrant workers being pushed out of the industries regulated by the Act and facing further exploitation in unregulated industries. Ultimately the new Act represents politically compromised legislation, yet it may pave the way for increased rights protection for irregular migrant workers in the future.

Having shown the failings of current law and policy in Chapter 3 and the deficiencies of the Gangmaster (Licensing) Act, in the next Chapter, International
Human Rights: Do They Fill the Rights Deficit? I consider whether international human rights laws offer irregular migrants stronger employment protections.
In Chapters 3 and 4, I explained how domestic UK law gives irregular migrant workers inadequate rights protection against exploitation. In Chapter 3, I showed how the courts may deny these workers legal rights on account of their irregular immigration status unless the claim is based on the *Human Rights Act 1998*.¹ In Chapter 4, I revealed further how the *Gangmaster (Licensing) Act 2004*² is a politically compromised piece of legislation that fails to protect these workers.

Such deficiencies in rights protection at the domestic level have led me to consider whether irregular migrant workers have rights protection under international human rights law. First I explain how international human rights law offers a wide range of rights. Then I show how these rights are often inaccessible to individuals in the UK. Finally, I examine the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*³ and consider whether the UK should ratify it.

5.1 International Human Rights Law: A Wide Range of Rights

5.1.1 'Modern Slavery'

Slavery was the first human rights issue to evoke international concern and recognition. The UK has committed itself to ending slavery at international law through Article 8 *International Covenant on Civil and Political Rights* (ICCPR), Article 4 *Universal Declaration of Human Rights* (UDHR), Article 2 *ILO Convention No.29 on Forced Labour* (the 'ILO Forced Labour Convention'), and Article 4 *European Convention on Human Rights* (ECHR).

Article 8 ICCPR states: 'No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited' and 'No one shall be held in servitude.' Under Article 8 'slavery' has been interpreted as when one person effectively 'owns' another, so that the 'owner' can exploit that person with impunity. 'Servitude' has been interpreted more broadly and refers to economic exploitation, dominance or slavery-like practices. The Human Rights Committee (HRC), which monitors the implementation of the ICCPR, has confirmed that Article 8 covers private individuals and that there is a positive element to Article 8 protection. According to the HRC, "...A State Party must protect all persons within the jurisdiction from article 8 abuse by private bodies, as well as refraining from

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engaging in such abuse itself." The HRC has also recognised that the treatment of "illegal aliens" by employers in numerous State Parties is a matter of particular concern. Article 8 ICCPR would thus protect irregular migrant workers who have experienced exploitation at the hands of their gangmaster as I have described in Chapter 2.

The prohibition of slavery at international law is also found in Article 4 UDHR, which states: 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.' This broad prohibition applies to everyone and thus offers protection to irregular migrant workers in the UK.

Under the ILO Forced Labour Convention, Article 2 defines 'forced labour' as: 'all work or service which is enacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.' Forced labour 'for the benefit of private individuals, companies or associations' is also included in the prohibition by virtue of Article 2(c). The term 'penalty' includes many different types of treatment that irregular migrant workers commonly face. The ILO supervisory bodies have identified forms of treatment that can indicate a situation of forced labour, some of which are listed below. As I showed in Chapter 2, irregular migrant workers may fall victim to such forced labour practices:

- Threats or actual physical harm to the worker (irregular migrant workers often experience violence or the threat of violence)
- Restriction of movement and confinement to a limited area (through tied accommodation)

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10 Sarah Joseph, et al, supra note 8 at 201.
11 Ibid.
• Excessive wage reductions (irregular migrant workers often do not receive the agreed pay)

• Threat of denunciation to the authorities (irregular migrant workers sometimes work under this threat)

Article 2(c) of the ILO Forced Labour Convention thus offers potentially useful protection to irregular migrant workers who suffer treatment that has been recognised as ‘forced labour’ by the ILO supervisory bodies.

As I discussed in Chapter 3, Article 4 ECHR also offers potentially useful protection to irregular migrant workers at the domestic level by virtue of the Human Rights Act 1998 (HRA).\textsuperscript{13} It is also possible for a victim to make an ECHR claim at the international level by going to the European Court in Strasbourg as I discuss below.\textsuperscript{14}

\textbf{5.1.2 Violence or the Threat of Violence}

Violence and the threat of violence are prohibited under international human rights law by Article 7 ICCPR, Article 5 UDHR and Article 3 ECHR. Article 7 ICCPR states: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. ...No one shall be arbitrarily deprived of his life.’ The HRC has stated that Article 7 aims to protect both the dignity and physical and mental integrity of everyone, through legislative or other acts, be they committed by State or private individuals.\textsuperscript{15} Irregular migrant workers who suffer violent or sexual attacks to their physical or mental integrity may thus be protected by this provision. The UDHR also provides wide-ranging protection against violence or the threat of violence in Article 5, which states: ‘No one shall

\textsuperscript{13} See section 3.1.1.
\textsuperscript{14} See section 5.2.5 below on how to proceed before the European Court of Human Rights.
\textsuperscript{15} Sarah Joseph, et al, \textit{supra} note 8 at 148, citing the HRC General Comment 20.
be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' The forms of violent treatment that irregular migrant workers suffer at the hands of gangmasters could fall within this broad prohibition. Again, if an irregular migrant worker satisfies the requirements of Article 3 ECHR, as I have discussed, he or she may also make this claim before the European Court of Human Rights.

5.1.3 Long Hours and Low Pay and Excessive Deductions

Article 7 ICESCR and Articles 23(3) and 24 UDHR protect irregular migrant workers against abusive employment practices. Article 7 ICESCR provides that all workers should get ‘fair wages’ and should have ‘safe and healthy working conditions’ with ‘rest, leisure and reasonable limitation of working hours and periodic holidays with pay’. According to M. Craven ‘fair wages’ are based on a number of objective criteria, such as the level of skill required, the amount of responsibility, the value of the output to the local economy, health and safety risks of the job, and whether and how the job disrupts family life. As I have described, irregular migrant workers often do jobs that are essential for the UK economy and can be dirty, degrading and dangerous. Irregular migrant workers should thus be paid ‘fair wages’ yet many do not even receive the national minimum wage.

Articles 23(3) and 24 UDHR could also help irregular migrant workers seek redress against abusive working conditions. Article 23(3) grants ‘everyone’ the right to ‘just and favourable conditions of work and to protection against unemployment’

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16 See section 3.2.
17 See section 5.2.5 below on how to proceed before the European Court of Human Rights.
including 'just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity.' Workers are also protected against long hours under Article 24, which states that ‘everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.’ Such protection could be useful to irregular migrant workers who work excessive hours, sometimes for no extra pay.

5.1.4 Squalid Housing

Universal housing rights have been recognised as necessary in and of themselves and also as ways to access other rights, such as a private life and personal security.\(^{19}\) International human rights law protects all persons against bad housing in ICESCR Article 11 and UDHR Article 25(1). ICESCR Article 11(1) states that everyone has the right to ‘an adequate standard of living for himself and his family’ and housing is expressly included as necessary to fulfil this right. Article 11(1) has been interpreted by the UN Committee on Economic, Social and Cultural Rights, which oversees the implementation of the ICESCR, to mean accommodation that goes beyond “the shelter provided by merely having a roof over one’s head.”\(^{20}\) The Committee has explained further that adequate housing includes the right to live in security, peace and dignity. All persons should also have a degree of security of tenure and protection against forced eviction. As well, the Committee made clear that all persons should have access to natural and common resources, including clean drinking water and sanitation and

\(^{19}\) The Human Right to Adequate Housing, Factsheet No. 21 (United Nations).

\(^{20}\) HRC General Comment No. 4 “The Right to Adequate Housing”, cited in Richard Burchill et al., eds., Economic, Social and Cultural Rights: Their Implementation in United Kingdom Law (Nottingham: University of Nottingham Human Rights Law Centre, 1999) at 59.
washing facilities. The Committee emphasised further that housing should be affordable.  

However, as I have shown the accommodation that irregular migrant workers often receive does not meet these standards. Eviction is often without notice and sometimes involves violence. Living arrangements are often potentially unhygienic. Rents for such accommodation can also be extortionate and local authorities are reluctant to act to help migrant workers because their housing stocks are already overstretched. A local authority consultant in Cambridge remarked, "Gangmasters know and exploit this."

Article 25(1) UDHR also offers protection against squalid housing. This provision states that everyone 'has the right to a standard of living adequate for the health and well-being of himself and of his family, including ... housing.' Irregular migrant workers' housing often falls short of a standard that is 'adequate for health and well-being.' Article 25(1) UDHR could thus be of use to irregular migrant workers.

5.1.5 Deaths of Irregular migrant workers due to Employment-Related Events

The right to life is protected by Article 6(1) ICCPR, Article 3 UDHR and Article 2 ECHR. Article 6 states: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' The HRC has

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23 See section 2.5.4.
stated that Article 6(1) includes a positive obligation on the State to adopt measures conducive to living. This positive obligation includes a duty on States to prevent and punish killings by private actors such as gangmasters. Under Article 6(1), states are also required to prevent and punish deaths in the private sector caused by negligence or recklessness. Article 6(1) thus covers irregular migrant workers who die due to the deliberate, reckless or negligent acts of private actors. Article 3 UDHR also states the right to life in broad terms: ‘Everyone has the right to life, liberty and security of person.’ In addition to defending the right to life, this provision could be invoked to protect irregular migrant workers who lack security of person due to dangerous working conditions. The family of an irregular migrant worker may also rely on Article 2 ECHR if their case falls within this provision. A family of a victim may also take their case to the European Court of Human Rights.

This account illustrates that a wide range of rights exist under international human rights law to protect against the forms of exploitation that irregular migrant workers suffer at the hands of gangmasters in the UK. However, accessing these protections can be very difficult in practice. Next, I discuss some of the problems that arise when relying on international human rights.

26 Ibid. at 129.
27 Ibid.
28 See section 3.5.
29 See section 5.2.5 below on how to proceed before the European Court of Human Rights.
5.2 Practical Problems

5.2.1 Rights under the ICCPR

The ICCPR is a legally binding treaty and thus binds the UK as a state. However, the UK's 'dualist' position means that treaties have no effect in domestic law unless they are incorporated via an Act of Parliament. The 'dualist' position stems from the separation of powers doctrine. Under this doctrine, the executive government, pursuant to its prerogative to conduct foreign affairs, enters into international treaties yet lacks the constitutional authority to alter the domestic law of the country. Courts must therefore not treat an international treaty as a legal source of obligation until Parliament has incorporated it into domestic law by statute. The ICCPR provisions considered above have not been incorporated into domestic law. This leaves such rights at the international level for persons in the UK.

At the international level individuals are unable to rely on ICCPR rights directly. The UK has not ratified the First Optional Protocol, which creates a right of individual petition to the HRC for ICCPR violations. Ratification of the Protocol would enable irregular migrant workers to complain about ICCPR violations to the HRC directly, as petitioners must only have been subject to the jurisdiction of the state party to the Protocol at the time of the complaint.


However, even if individuals in the UK could enforce the ICCPR, irregular migrant workers would still face difficulties in making a complaint due to their immigration status. I have described some of these general barriers to an irregular migrant worker making a legal claim in the domestic context.\(^{33}\) Complaining under the Optional Protocol would create further difficulties for an irregular migrant worker as communications cannot be anonymous. This may leave irregular migrant workers afraid to make a complaint through fear of immigration enforcement. Also, it may take 12-18 months to declare a case admissible and two more years to examine the merits of the case. In especially serious cases where these delays would be too damaging to the parties involved the HRC has addressed urgent requests to the States involved to refrain or carry out a particular action.\(^{34}\) However, in most cases, an applicant would have to endure these long delays during which violations of their rights could continue.

Without a right of individual petition under the ICCPR for individuals in the UK however, irregular migrant workers are dependent on weak international enforcement measures. Enforcement of the ICCPR involves either States submitting reports on their human rights progress to the HRC under Article 40 or inter-state claims under Article 41. Although these processes theoretically allow the State to be held responsible for any rights violations, in practice such an outcome is unlikely. State reports under Article 40 are voluntary and often inaccurate (despite the efforts of NGOs to provide a more truthful account).\(^{35}\) These factors may lead the HRC to give states inaccurate advice in response to their reports. Such advice may also be out-of-date by the time the relevant State

\(^{33}\) See section 3.1.3.


receives it due to the HRC’s huge backlog of work.\textsuperscript{36} The HRC also lacks the power to ensure that its report recommendations are followed by the state concerned.\textsuperscript{37}

Despite these limitations, State reporting may add value to debates on how effectively the UK protects human rights. Such debates may pressure the government to make appropriate changes.\textsuperscript{38} Through informing public policy in this manner, the reporting process may have an indirect positive impact on government policy regarding irregular migrant workers. However, given the nature of UK policy that I have outlined,\textsuperscript{39} such an outcome is unlikely.

Inter-state claims under Article 41 represent another unlikely attempt to enforce international human rights law. To date, no inter-state complaints have been made under the ICCPR or any of the other United Nations human rights treaty bodies.\textsuperscript{40} States may choose not to complain about international human rights violations of other States in order to maintain good inter-state relations, especially with relatively powerful states such as the UK.\textsuperscript{41}

Although this account paints a rather dismal picture of international human rights enforcement, at times the UK will look to its international obligations in interpreting domestic legislation. Irregular migrant workers may thus be able to take advantage of international human rights protections at the domestic level. However, there is a limited

\textsuperscript{36} Laura Theytaz-Bergman, “State Reporting and the Role of Non-Governmental Organizations” in Anne Bayesfsky, ed., \textit{ibid.} at 55.
\textsuperscript{38} Jonathan Cooper, “International Human Rights Treaties in UK Domestic Law: Inspirational, Enforceable, or Irrelevant?” presented 26\textsuperscript{th} November 2003, online: <http://www.doughtystreet.co.uk/data/h_rights/data/cooper.pdf>.
\textsuperscript{39} See section 3.6.
\textsuperscript{40} Carla Edelenbos, Secretary on the Committee of Migrant Workers informed me of this in her email of 29\textsuperscript{th} March 2005.
range of situations in which a UK court will look to its international obligations. These include:

- Where a UK statute is capable of two interpretations, the one consistent with the UK’s international treaty obligations will be followed as the courts will presume that Parliament intended to legislate in accordance with international law;
- Where the common law is uncertain, unclear or incomplete the courts should rule in accordance with the UK’s treaty obligations;
- Where the courts are called upon to construe a domestic statute to satisfy an international human rights treaty obligation;
- Where the courts have discretion to act one way or another they must not violate a treaty obligation; and,
- Where the courts are asked to decide what public policy demands, the courts may have regard to international obligations.\textsuperscript{42}

Another example of how international human rights may influence domestic law is through the Joint Committee of Human Rights (JCHR). The JCHR is a UK body that scrutinises proposed legislation and conducts inquiries regarding the compatibility of prospective law with international human rights instruments that the UK has ratified. The JCHR often refers to international human rights standards to change proposed legislation.\textsuperscript{43} These indirect means through which international human rights standards may take effect in the UK may thus offer irregular migrant workers some hope that their ICCPR rights will be protected.

\textsuperscript{42}Jonathan Cooper, supra note 38.
\textsuperscript{43}Ibid.
5.2.2 Rights under the ICESCR

Irregular migrant workers face similar problems in enforcing rights under the ICESCR to those identified in relation to the ICCPR. ICESCR rights remain at the international level and there is no domestic legislation that brings the entire ICESCR into force. Equally, there is no right of individual petition and the reporting system is also inefficient. The chances of an inter-state claim are also highly unlikely given the non-use of this measure in the past.

Indeed, it is possible that the Committee on Economic, Social and Cultural Rights faces an even greater challenge keeping up with its workload than the HRC. The ICESCR could face added difficulties because it receives $US 702,400 for 149 state parties as opposed to the HRC which is given US$1,301,100 for 152 state parties. Moreover, the ‘progressive implementation’ language contained in Article 2 ICESCR may give States a long time to make appropriate changes. By not requiring prompt changes, rights violations could continue for some time.

As I have explained however, it is theoretically possible for reports to lead to policy changes through raising public awareness. Moreover, although the ICESCR is not self-enforcing, in certain circumstances ICESCR rights may influence domestic law. Indeed, the JCHR used rights in the ICESCR when examining the Nationality, Immigration and Asylum Bill regarding the withdrawal of asylum benefits and the education of children in detention centres.

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44 However, as I discussed in the context of the ICCPR Optional Protocol, even if the right of individual petition existed, irregular migrant workers face many barriers to taking legal action as I described in section 3.1.3.
46 Jonathan Cooper, supra note 38.
5.2.3 Rights under the UDHR

The UDHR is often said to represent customary international law. According to Benedetto Conforti, customary international human rights law is composed of “general principles of law recognised by civilised nations...confined to the protection of a fundamental and unrenounceable nucleus of human rights.” There is an ongoing debate as to whether the UDHR represents customary international law. This debate is important because UK courts take a ‘monistic’ approach to customary international law. This means that UK courts treat customary international norms as part of the common law without the need for incorporating legislation. The application of UDHR rights thus depends on whether a court takes such rights into account as part of customary international law.

UK courts have applied provisions of the UDHR to support other human rights provisions in the past. For example, in Regina (Amin) v. Secretary of State for the Home Department the right to life under Article 2(1) ECHR was supported by reference to Article 3 UDHR. Equally, in Reyes v. R. Privy Council Articles 3 and 5 UDHR were raised to show the development of international rights protections. These examples illustrate that the UDHR does not offer actionable rights to irregular migrant workers but may provide useful support to claims that are founded on other human rights instruments.

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49 For a preliminary discussion on whether the UDHR has become part of customary international law, see Thomas Buergenthal, in Henry J Steiner and Philip Alston eds., International Human Rights in Context: Law, Politics and Morals (Oxford: Oxford University Press, 1996) at 143.
50 See further Anthony I. Aust, supra note 30 at 151 and Murray Hunt, supra note 30 at 11-13.
5.2.4 ILO Forced Labour Convention

The ILO Forced Labour Convention affords irregular migrant workers little extra protection to that which already exists under UK law. Article 25 of the Convention requires the UK to make forced labour a punishable offence with adequate and strictly enforced penalties. As I showed in Chapter 3, the UK has prohibited forced labour very clearly through the HRA, which brings Article 3 ECHR into force. Article 3 ECHR suggests that the UK has met its obligation under Article 25 of the ILO Forced Labour Convention.

If an irregular migrant worker suffered forced labour and felt that the UK had not met its obligations however, he or she could make a complaint via either of the two contentious procedures under this Convention. The first contentious procedure involves a representation being made to the International Labour Office by an employers' or a workers' organisation. If irregular migrant workers had a workers' organisation they could ask to lobby on their behalf, this group could inform the International Labour Office that the State concerned had failed to implement its obligations. This representation would then be communicated to the government of the State concerned for reply as well as to a tripartite committee within the ILO Governing Body,\(^{53}\) (the executive body of the ILO that meets three times a year).\(^{54}\) If no reply is received from the government within a reasonable time or the reply is unsatisfactory, the ILO

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\(^{53}\) The committee is ‘tripartite’ in the sense that it is composed of government representatives as well as employers' and workers' representatives who participate on an equal basis.

Governing Body may decide to publish the representation and the substandard government statement.\textsuperscript{55}

The second contentious mechanism is the complaint procedure. One State party may lodge a complaint against another State, or the ILO Governing Body may initiate the complaint procedure of its own motion. Alternatively, a delegate to the International Labour Conference may make a complaint, which is then forwarded to the ILO Governing Body.\textsuperscript{56} An irregular migrant worker would thus have to contact a workers' delegate who would make the complaint known at the next International Labour Conference. After receiving a complaint, the ILO Governing Body may invite the State concerned to make a statement in its defence. Unless the ILO is satisfied by the State's response, it may launch a Commission of Inquiry. Such an inquiry is composed of three independent and highly qualified persons appointed by the Governing Body.\textsuperscript{57} Its work may involve gathering documents, hearing from the parties concerned and witnesses, and visiting relevant sites.\textsuperscript{58} The inquiry may result in a report giving recommendations to the State concerned on how to comply with the Convention.\textsuperscript{59} This report is then communicated to the governments concerned and published.\textsuperscript{60}

After receiving a report, the relevant governments have three months to inform the ILO of whether they will accept the recommendations stemming from the report. If the State refuses to comply the case can be referred to the International Court of Justice ('ICJ') under Article 29 of the ILO Constitution whose decision is final. The ICJ may

\textsuperscript{57} Cholewinski, \textit{supra} note 55 at 64.
\textsuperscript{58} A. Subbian, \textit{supra} note 56 at 64.
\textsuperscript{59} Cholewinski, \textit{supra} note 55 at 88.
\textsuperscript{60} A. Subbian, \textit{supra} note 56.
come to a different conclusion than the report. It is unlikely that a case will be referred to
the ICJ however as this has only happened once.\(^61\) To promote State compliance further,
the ILO Governing Body may recommend that the International Labour Conference take
appropriate action if the government fails to follow the report’s recommendations. Such
action may include the International Labour Conference expelling a State from the ILO.

These contentious procedures may be of use to irregular migrant workers. According to V.A. Leary, International Labour Conference delegates have filed a number of complaints in recent years.\(^62\) Indeed, at least one of these complaints has involved the protection of migrant workers. In 1981 workers’ delegates from Burkina Faso, The Central African Republic, Rwanda and Surinam made complaints against the governments of Haiti and the Dominican Republic at the 67\(^{th}\) International Labour Conference. The complaint concerned the abuse of Haitian migrants who were working on sugar plantations in the Dominican Republic. A Commission of Inquiry was established to investigate the case and found that the Dominican Republic and Haiti were both in violation of various ILO Conventions relevant to the protection of migrant workers.\(^63\) The Dominican Republic and Haiti responded as follows:

Since the Commission of Inquiry report the Dominican Republic has invited the ILO for a number of ‘direct contacts’ to assess the situation. It would appear that recent efforts undertaken by the Government to regularize the status of irregular Haitian migrants have resulted in an improvement in their situation.\(^64\)

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\(^{63}\) Cholewinski, *supra* note 55 at 89.

\(^{64}\) *Ibid.*
These responses indicate that the Commission of Inquiry report had a real effect on the laws and policy in the Dominican Republic regarding the treatment of irregular migrant workers. If irregular migrant workers knew a delegate to the International Labour Conference, it is thus possible that this may offer a viable route to rights protection.

However, irregular migrant workers may not know a workers’ representative due to their lack of contact with wider society and their general shortage of language skills. Alternatively, irregular migrant workers may be unwilling to contact a workers’ representative due to the other barriers that these workers face in taking legal action.65

On top of this, irregular migrant workers may feel that their agency is denied by not being able to complain directly to the ILO.

5.2.5 Rights under the ECHR

Taking proceedings before the European Court of Human Rights (‘the Court’) requires an individual to first introduce an application. This involves the applicant writing to the Court’s registry.66 The registry comprises a body of lawyers and administrators whose tasks include corresponding with applicants and governments, preparing cases for examinations, advising the Court on issues of national law and ECHR law, and assisting in the drafting of judgments and decisions.67

After the application is introduced, the question of whether the complaint is admissible arises. This issue of admissibility is heard initially by an individual judge

65 See section 3.1.3.
67 Ibid. at 399.
who acts as a rapporteur. If the rapporteur finds the application inadmissible, he or she will prepare a report that is sent to a committee of three judges who confirm whether or not they also think the application is inadmissible unanimously. The chance of an application being found inadmissible is high however, and there is no possibility of appeal. Of the 7460 final decisions and judgments adopted by the Court in 2000, 84% were found inadmissible.\(^6\) Such a high level of inadmissibility may reflect the Court’s need for economic efficiency, requiring it to consider only the most meritorious cases. The Court’s need for efficient procedures has become particularly pronounced in recent years as the Court’s caseload is constantly increasing, with a 35% increase in applications between 2000 and 2001.\(^6\)

To be admissible, the applicant must have standing as a ‘victim’ under Article 34 ECHR, the criteria for which I discussed in Chapter 3.\(^7\) The application must also be brought before an ECHR State party and the matter must fall within the scope of the ECHR. Further, Article 35(1) ECHR requires an applicant to have exhausted all domestic remedies. Thus, if an irregular migrant worker failed to pursue all domestic avenues he or she would be barred from taking action at the international level.\(^8\) The application must also be introduced within time limit of six months, which begins the day after the applicant became aware of the act or decision of which he or she complains.\(^9\) The application must also not have been brought before, and must not be manifestly ill founded.\(^\) If an application is declared admissible, the parties will be informed and the

\(^6\) Ibid, at 403.
\(^7\) Ibid, at 396.
\(^8\) See section 3.1.1.
\(^9\) See section 3.1.3, as to why an irregular migrant worker may fail to pursue all domestic avenues for legal redress.
\(^\) Ovey and White, supra note 66 at 403.
\(^\) Ibid, at 412-413.
Court will try to help them reach a friendly settlement under Article 38(1)(b) and 38(2) ECHR. However, if no settlement is reached, the Court will examine the case and undertake an investigation where necessary to establish the facts, as required by Article 38(1)(a) ECHR. There are no fees for applying to the Court and the Council of Europe meets its expenses under Article 50 ECHR. Free legal aid may be also awarded to an applicant after their claim is found to be admissible. Such economic support may make it easier for irregular migrant workers to make a claim. Nonetheless, the difficulties that irregular migrant workers face in taking legal action may make it very hard to these workers to exhaust domestic remedies.

Having shown some of the various difficulties that individuals face in relying upon international human rights provisions, next I consider whether the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Migrant Workers Convention) offers stronger protection to irregular migrant workers. I describe the Migrant Workers Convention and discuss the provisions that are problematic in terms of protecting irregular migrant workers. Ultimately I assess whether the UK should ratify this Convention as a way to better protect these workers.

5.3 The Migrant Workers Convention: A Descriptive Analysis

5.3.1 Introduction to the Migrant Workers Convention

The Migrant Workers Convention is the first universal codification of migrant workers' rights. In this section I discuss and criticize the treaty. Ultimately I consider

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74 Ibid. at 413-414.
75 Ovey and White, supra note 66 at 401.
whether the UK, which is not a party to the treaty, should ratify the Migrant Workers Convention.

Linda Bosniak describes the Migrant Workers Convention as the “most ambitious document to date” for irregular migrant workers. The Convention expressly includes irregular migrant workers in the definition of a migrant worker under Article 5. Article 5(b) defines an irregular migrant worker as a person who is not ‘authorized to enter, to stay and to engage in a 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.’ Despite expressly including an irregular migrant worker in Article 5 however, the Migrant Workers Convention compromises the rights of irregular migrant workers by seeking to fulfil two conflicting aims.

First, the Convention seeks first to protect irregular migrant workers. By contrast, the Convention also seeks to stop irregular migration. Thus, on the one hand the Preamble recognises that “the rights of migrant workers and members of their families have not been sufficiently recognized elsewhere and therefore require appropriate international protection.” On the other however, the Preamble goes on to note that “the human problems involved in migration are even more serious in the case of irregular migration” and remarks that “appropriate action should be encouraged in order to prevent and eliminate the clandestine movements.” Preventing irregular migration as a way to tackle the problems that irregular migrant workers face allows States to increase their immigration enforcement efforts towards these workers in response to their vulnerability.

As I explain below, this strategy effectively undermines the very rights that this Convention gives irregular migrant workers.

5.3.2 Substantive Rights for Irregular Migrant Workers under the Convention

The rights accorded to irregular migrant workers are found in Part III of the Migrant Workers Convention. Under Part III, irregular migrants receive human rights protections such as the right to life, freedom from torture, cruel or degrading treatment, and freedom from slavery or servitude. However, most of these rights are not new for these workers, as they exist in other international treaties. For example, Article 25(1), contained in Part III of the Convention, provides that all migrant workers should receive the same employment conditions as nationals regarding pay and working hours. As I have shown, this right also exists under Article 7 ICESCR and Articles 23(3) and 24 UDHR. According to Leonard Hammer, "the general language of the ICESCR seems to obviate the needs for a UN Migrant Workers Convention." Apart from creating three new rights (which I discuss below), Part III offers no new international human rights protections to irregular migrant workers.

The rights that irregular migrant workers are entitled to under Part III stand in stark contrast to the far greater scheme of rights available to regular migrant workers in Parts IV and V. Placing extra rights in Parts IV and V, which irregular migrant workers are not privy to, effectively denies irregular migrant workers many important rights. In her

analysis of Articles 36-56 and Article 70, all of which fall outside Part III, Bosniak comments:

State parties are entitled to discriminate against undocumented migrants with respect to rights to family unity, liberty of movement, participation in the public affairs of the state of employment, equality of treatment with nationals as regards the receipt of various social services, equality of treatment for family members, freedom from double taxation and further employment protections and trade union rights among others.\(^{79}\)

Denying irregular migrant workers these important rights conveys the message that irregular migrants \textit{deserve} fewer rights. The distinction between rights for regular and irregular migrants could also stigmatize the latter group.

James Nafziger and Barry Bartel warn further that this distinction between rights for regular and irregular migrant workers may threaten pre-existing international human rights that could otherwise protect irregular migrant workers. As Nafziger and Bartel note, "new language for both new and existing rights may obfuscate or obscure the enforcement of both the Convention and corresponding human rights instruments that are designed to protect everyone, including migrant workers."\(^{80}\) Affording irregular migrant workers fewer rights than regular migrants could thus result in a more restrictive interpretation of international human rights law in the context of irregular migrant workers. For example, the right to liberty and freedom of movement exist in Part IV of the Act, is inaccessible to irregular migrant workers. However, irregular migrant workers have this right under international law by virtue of Article 12 ICCPR and Article 13(1) UDHR. But, since irregular migrant workers are not granted this protection under Part III of the Migrant Workers Convention, it is possible that Articles 12 ICCPR and 13(1)

\[^{79}\text{Bosniak, supra note 76 at 741.}\]
\[^{80}\text{Nafziger and Bartel, supra note 77 at 787.}\]
UDHR could be interpreted restrictively as a result. The distinction between rights for regular and irregular migrant workers could thus diminish the protection for irregular migrant workers under other international human rights instruments.

Worse still, Part III rights may be limited in practice due to the Convention’s emphasis on immigration enforcement. Article 68 emphasises that the State may implement measures to prevent and eliminate clandestine and illegal movements. Article 69 reinforces Article 68 and requires States to take measures to ensure that the presence of irregular migrants does not persist. These provisions allow states to enforce immigration law against irregular migrants. This emphasis on immigration enforcement may make irregular migrant workers feel unable to assert their Part III rights for fear of making themselves known to the authorities and facing immigration controls. As Bosniak writes, “[a]t the very least, the continued vulnerability of these migrants to prosecution for immigration violations will limit their ability and willingness to exercise the rights guaranteed to them under Part III.”81 Bosniak describes the resulting situation as the Convention effectively threatening to “take away with one hand what has been offered by the other.”82

The threat of immigration enforcement under the Migrant Workers Convention could mean that the three new rights that exist under Part III and do not exist elsewhere in international law could become meaningless in practice. This would be unfortunate as these rights are potentially useful to irregular migrant workers. First, Article 21 prohibits the unauthorized destruction of documents. Article 21 may thus offer useful protection to

81 Bosniak, supra note 76 at 759.
82 Ibid. at 762.
irregular migrant workers working for gangmasters who may take workers’ identification to assert greater control.

Second, Article 23 gives irregular migrants a right to consular or diplomatic protection, which could be helpful should irregular migrant workers need the help of their embassy. Third, Article 25 offers irregular migrant workers the right to uphold employment contracts, oral or written, even before performance. This provision is important as prior to the Migrant Workers Convention the rights of irregular migrant workers to just and favourable treatment in employment, namely in Article 7 ICESCR, did not extend to employment before its commencement.

Overall, with the exception of Articles 21, 23 and 25, the Migrant Workers Convention accords irregular migrants fewer rights than exist for these workers under international human rights law generally. Asserting Convention rights also carries the risk of immigration enforcement under Articles 68 and 69. Rights under Part III are thus at risk of being practically ineffective.

5.3.3 Enforcement under the Convention

The enforcement regime is set out in Part VII. Article 72 establishes a Committee that receives state reports. Articles 73 and 74 require State parties to report on the steps they have taken to implement the Convention within a year of its entry into force and every five years thereafter. The Committee then gives comments to the State that submitted the report. As I have shown in relation to the ICCPR and ICESCR governing bodies however, State reports can be inaccurate. Delays within the treaty governing body due to backlogs of work can also cause recommendations to be out-of-date.
Inter-state claims under Article 76 offer an alternative means of enforcement. However, these claims are also unlikely to result in strong enforcement, especially against the UK. Current state parties to the Convention tend to be poorer countries that traditionally send migrant workers overseas. A sending state would probably not initiate enforcement measures against a powerful receiving state such as the UK, which could react by reducing its migrant worker quota. A sending state may not be able to afford to take such a risk.

A final enforcement possibility is for individuals to complain directly to the Committee under Article 77. However, this procedure requires declarations by ten state parties to enter into force. At present no state has made such a declaration. Even if this procedure was in force however, it may be of little use to irregular migrant workers as the Committee refuses to consider anonymous communications (Article 77(2)). This leaves irregular migrant workers in the same position as before, susceptible to immigration controls and other barriers should they try to assert Convention rights.

This analysis reveals that the Migrant Workers Convention is a compromised instrument that fails to guarantee effective rights to irregular migrant workers. The Convention is compromised because it seeks to accommodate the principle of human rights while also requiring states to exert complete immigration control. Bosniak describes this conflict as between human rights on the one hand and the “norms of sovereign statehood” on the other. Perhaps as a result of this “failure of sovereignty-in-fact” irregular migrant workers receive few protections in the Convention, which they

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83 For a list of state parties to the Migrant Workers Convention, see December.18.net <http://www.december18.net/web/general/page.php?pageID=79&menuID=36&lang=EN#eleven>.
84 Bosniak, supra note 76 at 737.
85 Ibid. at 746.
cannot assert without risking immigration enforcement. In light of these findings, next I consider whether the UK should ratify this instrument.

5.3.4 Should the UK sign the Migrant Workers Convention?

According to former immigration minister Beverley Hughes, the government has no plans to sign and ratify the Migrant Workers Convention. In her words:

We believe that the United Kingdom has struck the right balance between the need for immigration control and the protection of the interests and rights of migrant workers and their families. The rights of migrant workers and their families are protected in UK legislation, including the Human Rights Act 1998, and the UK's existing commitments under international law.\(^{86}\)

I agree that the UK should not ratify the Migrant Workers Convention yet do not agree with the Hughes' reasons. Having shown how irregular migrant workers face exploitation and receive little practicable protection, I do not agree that the UK has 'struck the right balance' between protecting such persons and asserting immigration control. In my view the UK should not ratify the Migrant Workers Convention because it fails to offer adequate protection to irregular migrant workers. As I have explained above, the lesser number of rights available to irregular migrant workers under Part III of the Convention than under general international human rights law could create the impression that irregular migrant workers deserve fewer rights. As I suggested, this could serve to further stigmatize these workers. Indeed, as I also argued, there is a risk that protection under Part III could undermine pre-existing international law protections.

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UK ratification worries me, as the government could present the Convention as its solution to the exploitation of irregular migrant workers, when in fact it is very difficult for irregular migrant workers to assert their rights under Part III for the reasons I have outlined. The Convention’s appearance of guaranteed rights may thus give way to a less protective reality. As Carol Smart comments, “the acquisition of rights in a given area may create the impression that a power difference has been resolved.” However, by giving irregular migrant workers impracticable rights the power difference will remain and irregular migrant workers will remain vulnerable to exploitation.

Despite these limitations, some commentators see the Migrant Workers Convention as a positive step forward towards governments acting responsibly towards migrant workers. However, I remain concerned that governments may use the Convention to undermine migrant workers’ rights in the manner I have outlined. I am also not convinced by another possible argument in favour of ratification, that the Migrant Workers Convention could raise public awareness and promote the positive inclusion of irregular migrant workers in public discourse. Non-ratification could thus leave the impression that irregular migrant workers do not count. However, owing to its current policies, I fear that the government would raise awareness about its right to enforce immigration policy against these workers under the Convention rather than on the protection and social inclusion of these workers.

Overall, I suggest that the UK should not ratify the Migrant Workers Convention as it is a philosophically diametric treaty that could lead to the pursuit of irregular migrant

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89 See section 3.6.
workers rather than their protection. Moreover, as the NGO Symposium on the Migrant Workers Convention found, “non-ratification of the Migrant Workers Convention does not necessarily imply that a Government does not grant migrants an appropriate legal protection.”\textsuperscript{90} For this reason, instead of ratifying the Convention, I suggest that the UK government should work on raising its standards regarding the protection of migrant workers. Such initiatives could raise public awareness about irregular migrant workers without promoting debate regarding immigration enforcement.

5.4 Conclusion

In this chapter I have shown how international human rights law offers somewhat illusory protection to irregular migrant workers in the UK. International human rights instruments contain wide-ranging protections that apply to ‘everyone’ regardless of their immigration status yet enforcement is difficult to achieve. States often submit inaccurate reports and treaty bodies face immense backlogs of work. Inter-state claims are also ineffective as they pose a huge political challenge. I also showed that like the \textit{Gangmaster (Licensing) Act} considered in Chapter 4, the Migrant Workers Convention is a compromised instrument that fails to protect irregular migrant workers adequately. For the reasons I have outlined I do not think the UK should ratify this Convention.

Having found that irregular migrant workers lack the necessary legal rights to redress the types of abuse that I outlined in Chapter 2 under current domestic law, the forthcoming \textit{Gangmaster (Licensing) Act 2004}, and international human rights law, in the next Chapter, \textit{Conclusion: The Value of Rights for Irregular Migrant Workers}, I discuss

whether providing irregular migrant workers with more legal rights might be an effective solution to ending their exploitation.
Chapter 6

Conclusion: The Value of Rights for Irregular Migrant Workers

In Chapter 1, I listed my aims in writing this thesis. First, I hoped to raise awareness about the exploitation of irregular migrant workers in the UK’s low skilled industries. By telling the stories of irregular migrant workers’ experiences of exploitation I hoped to generate a more sympathetic and accurate discourse. Second, I aimed to criticize the law for leaving some of the UK’s most vulnerable inhabitants without recourse to legal protection. Third, I hoped to encourage creative thinking and find pragmatic ways to end the abuse of this group of people.

So far I have satisfied my first and second objectives. I raised awareness about the exploitation of irregular migrant workers at the hands of gangmaster employers and gave a sympathetic voice to these workers in Chapter 2. Then, in Chapter 3, I criticized current UK law for denying these workers much legal redress on account of their immigration status. I also illustrated how UK policy initiatives fail to help irregular migrant workers combat gangmaster abuse. In Chapter 4, I explained further how the forthcoming Gangmaster (Licensing) Act 2004\(^1\) denies irregular migrant workers the right to work in industries regulated by the Act and could push these workers further into the black economy. Finally, in Chapter 5, I revealed how international human rights law appears to offer irregular migrant workers useful rights, yet in practice these are largely inaccessible.

In this Chapter I aim to do more than critique the lack of rights of irregular migrant workers. As Williams comments, to say that these consequences of having no

\(^1\) Gangmaster (Licensing) Act 2004 (U.K.), 2004, c. 11.
rights are simply ‘unfortunate,’ is “the softened inverse of something akin to moral fascism.”

Thus I aim to offer effective recommendations to irregular migrant workers who face exploitation in the UK. To do this, first I consider why legal rights are important to irregular migrant workers. Then I assess whether giving irregular migrant workers rights is possible under our contemporary understanding of state sovereignty. Next I advance various criticisms of legal rights. Criticizing legal rights will allow me to understand the problems legal rights are subject to. This will enable me to respond to these critiques and make more effective recommendations.

6.1 Why are Legal Rights Important to Irregular Migrant Workers?

Legal rights can give voice to previously voiceless groups. Patricia Williams describes the commonality of marginalized groups as being “invisible nobodies” before the law. Giving irregular migrant workers the right to be in the UK and to receive legal protection in the course of their employment would effectively give these workers voice. An ability to speak out without fear of immigration control would also allow irregular migrant workers to tell their different stories. This could allow these workers to be better understood and accepted by UK society.

Speaking out as individuals could also allow the differences between irregular migrant workers’ experiences to be appreciated. As I explained in Chapter 2, irregular migrant women often suffer sexual exploitation. As Patricia Cain comments, “If we are careful to listen to women when they describe the harms they experience as women, we

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are more likely to get the legal theory right."4 Giving voice to irregular migrant women may thus allow for their differences to be heard and for appropriate legal responses to be formulated.

Legal rights could also reduce the vulnerability of irregular migrant workers. As I showed in Chapter 2, irregular migrant women are particularly vulnerable to sexual violence.5 The threat of reporting these workers to the immigration authorities may be enough to allow their abuse to continue. In this sense, irregular migrant workers are unable to use the law to protect themselves against exploitation. However, legal rights can create necessary boundaries to protect people from others. Such boundaries can be extremely important to vulnerable people, especially women. As Elizabeth Kiss writes, "rights [as boundaries] allow for the slave to exclude the master from her hut, declaring herself not a slave."6 Having rights could thus mean that irregular migrant women can refuse sexual advances by gangmasters, knowing that they have the law's protection.

From this account it is clear that legal rights are important for marginalized persons and serve important functions for irregular migrant workers. Before I recommend the types of legal rights irregular migrant workers should receive however, it is first necessary to ask whether giving irregular migrant workers rights is possible under our contemporary understanding of state sovereignty.

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5 See section 2.5.2.
6.2 Would Awarding Irregular Migrant Workers Rights Undermine State Sovereignty?

State sovereignty traditionally allows a state to decide who may enter and who may work. According to Edward Morgan, determining state membership is essential to state sovereignty.7 Linda Bosniak also recognises that the “norms of sovereign statehood” allow states to determine their membership.8 Indeed, Michael Walzer relies on immigration law to defend the liberty and welfare of the members of a nation-state.9 Immigration law can thus be viewed as necessary to support the nation-state, which, as Catherine Dauvergne notes, celebrates the “US and THEM dichotomy”.10

On this basis, irregular migrant workers who enter the UK in defiance of its immigration laws undermine state sovereignty. However, the view that states are in complete control of their borders and membership does not reflect reality. As Bosniak writes, “hundreds of thousands of people cross national borders without state permission and millions remain without express permission. Most are ultimately employed in the receiving state.”11 Moreover, as I have described, irregular migrant workers are absolutely essential to the UK economy.12 On top of this, state efforts to assert tight border controls often fail. Indeed, it has been suggested that stricter border controls lead to an increase in irregular migration.13 As Anne Gallagher comments, “There is a

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11 Bosniak, supra note 8 at 744.
12 See section 2.3.
13 See section 4.2.1, where this view was also put forward by Mr Nick Brown MP.
growing body of evidence that severely restrictive immigration policies are more likely to fuel organised, irregular migration than to stop it.14

In light of these findings I suggest that a modern understanding of state sovereignty must recognise irregular migration. Such an approach would better reflect the present reality in which irregular migrant workers perform essential jobs in the UK as well as many other economies around the world. Otherwise, as Bosniak points out, “the prevailing legal norm of territorial sovereignty [will remain] increasingly at odds with the current dynamics of transnational migration.”15

Recognising irregular migration as part of a modern approach to state sovereignty may seem challenging at first, especially in light of the definitions of sovereignty set out above. However, support for my argument can be found in the work of Neil MacCormick. MacCormick refers to the European Union, where states have pooled part of their sovereignty, and claims that viewing sovereignty as a changing notion is positive.16 In his words, “[t]o escape from the idea that all law must originate in a single power source like a sovereign, is thus to discover the possibility of taking a broader, more diffuse view of law.”17 Following MacCormick, I suggest that a modern approach to state sovereignty should include irregular migrant workers who have entered the UK in defiance of immigration law. Accepting irregular migrants as falling within a definition of state sovereignty could allow states to organize their laws and policies in a way that takes these workers into account. On this basis irregular migrant workers could be awarded positive rights.

15 Bosniak, supra note 8 at 745.
17 Ibid. at 8.
Even if irregular migration can be placed within a modern understanding of state sovereignty, awarding these workers legal rights after they have defied immigration law may seem radical at first. Popular discourse is generally unsympathetic to irregular migrant workers and regards these workers as a problem.\textsuperscript{18} However, it becomes easier to accept the idea of giving rights to irregular migrant workers when we remember that law is a socially constructed phenomenon. Christopher Stone makes this point very clear:

"We are inclined to suppose the rightlessness of rightless “things” to be a decree of Nature, not a legal convention acting in support of some status quo…. The fact is that each time there is a movement to confer rights onto some new “entity,” the proposal is bound to sound odd or frightening or laughable.\textsuperscript{19}" 

Following Stone, the invisibility, voicelessness and unpopularity of irregular migrant workers may help to explain why giving these workers rights may seem radical to some. However, as a social construction, the law must change to reflect the modern day. As Williams writes, “cultural needs and ideals change with the momentum of time; the need to redefine our laws in keeping with the spirit of cultural flux is what keeps a society alive and humane.”\textsuperscript{20} In my view it is morally imperative to redefine UK law and accord these workers rights to assert themselves against exploitation at the hands of gangmasters.

Moreover, the idea of giving legal rights to irregular migrant workers becomes easier to accept when one remembers that these workers have received rights in the UK.

\textsuperscript{18} As I have noted in section 3.6.3, Prime Minister Tony Blair has said, in the context of economic migration, “The public are worried about this, and they are worried rightly, because there are abuses of the immigration and asylum system.” BBC News, “Immigration: Party Politics” BBC News (15 February 2005), online: <http://news.bbc.co.uk/go/pr/fr/-/hi/uk_politics/4243067.stm>.
\textsuperscript{20} Patricia J. Williams, supra note 2 at 139.
in the past. For example, in 1979 work permits for resident domestic workers were phased out. This meant that domestics entered the UK as ‘persons named to work with a specified employer’ or as ‘visitors’ or without an immigration status at all. Without a right to work independently of their employer, and sometimes without the right to work at all, many of these domestic workers found themselves unable to leave their abusive employer, or working in the black economy where they faced terrible conditions. Then, in June 1998, as a result of these workers campaigning for greater rights, the government announced that domestic workers entering the UK would no longer be tied to their employer and that those who had entered under the former system would be regularised. This regularisation programme had a limited scope as it only applied to domestic workers who met certain criteria. Nonetheless, this past example of regularisation suggests that the UK may be prepared to give other groups of irregular migrant workers who fall outside current immigration laws positive rights in the future.

Having explained why legal rights are important to irregular migrant workers and that awarding rights to these workers fits within a modern understanding of state sovereignty, next I consider various criticisms of legal rights. I consider the indeterminacy of legal rights, the difficulties in assessing legal rights and their limited effect, and I offer a critique of rights as boundaries. As I have stated, these criticisms are important as responding to these critiques will allow me to offer more effective recommendations.

22 See section 6.4.5 below, where I discuss how these grassroots organisations successfully campaigned in more detail.
23 Bridget Anderson, supra note 21 at 5.
24 See section 6.4.2 below.
6.3 Criticisms of Legal Rights

6.3.1 Indeterminacy of Rights

Rights can be indeterminate if they are couched in broad terms and provide few constraints on their interpretation. As Martha Minow remarks:

The content and application of rights remain indeterminate and subject to the shifting views of officials...A rule that enforces contracts...leaves to the judge the question of when the individual's need for freedom to bargain should bind and limit the freedom of another, who seeks to avoid the contract.25

A judge may thus prefer to interpret an irregular migrant worker's rights regressively, to find in favour of a gangmaster for example. Indeed, Minow's comments echo the phenomena that I have described in Chapter 3. As I have shown, courts may use the doctrine of illegality to deny irregular migrant workers a contractual remedy. By raising the doctrine of illegality, gangmasters may thus defeat claims brought by irregular migrant workers. The courts have also been unprepared to find in favour of irregular migrant workers whose non-contractual rights have been violated, even where there was a precedent for finding in favour of the claimant.26 Courts may thus be insufficient guarantors of rights for marginalized groups.

Rights may also be under threat from right wing groups, such as large businesses and branches of government that have conflicting interests.27 For example, UK supermarkets may find that food prices go up as a result of irregular migrant workers having rights and being paid properly. The supermarkets may then lobby the government

26 See Vakante v Addey & Stanhope School [2004] EWCA Civ 1065 and section 3.3 generally.
27 Joel Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997) at 136.
to restrict rights for irregular migrant workers, in an attempt to return to the status quo, whereby irregular migrant workers receive terrible wages and food is the same price, or cheaper, than before. Major supermarket chains have extensive resources, in terms of funds, access to the media, lawyers and experts.\textsuperscript{28} This makes it easier for them to influence public opinion and UK policy generally. For example, according to an article from April 2003, Lord Sainsbury, the former chairman of the supermarket chain “Sainsbury’s”, has donated £8.5 million (approximately 19.5 million CAD) to the Labour party since 1999.\textsuperscript{29} These donations raise serious questions as to whether Lord Sainsbury has effectively ‘bought the political agenda to suit his interests.’\textsuperscript{30} In Chapter 2, I showed further how the supermarkets have already played a large role in driving down wages and working conditions for workers.\textsuperscript{31} Given this precedent, it is possible that supermarkets could whittle down the meaning of employment rights and protections in the future.

### 6.3.2 Difficulties in Exercising Rights and the Limited Effect of Rights

Another problem with legal rights is the difficulties irregular migrants face in exercising them. Unless these rights are exercised, they remain, “fine-sounding words of justice... just words.”\textsuperscript{32} As I explained in Chapter 3, there are many reasons why an irregular migrant worker may feel unable to speak out against exploitation and commence a legal action.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{28} Minow, \textit{supra} note 25 at 137.
\item \textsuperscript{29} BBC News, “Sainsbury donates £2.5 to Labour”, \textit{BBC News} (April 1 2003), online: \textless \url{http://news.bbc.co.uk/1/hi/uk_politics/2904427.stm} \textgreater .
\item \textsuperscript{30} Ibid.
\item \textsuperscript{31} See section 2.4.
\item \textsuperscript{32} Bakan, \textit{supra} note 27 at 3.
\item \textsuperscript{33} See section 3.1.3.
\end{itemize}
Even if irregular migrant workers overcome these difficulties in exercising their rights however, such rights will not affect deep-rooted social inequality. Rights are atomistic and contemplate only dyadic relationships. As such, rights can only deal with discrete symptoms of social problems rather than their causes, which are rooted in the intersecting relations of class, gender and race. Minow comments further, “If an assertion of rights by an individual produces an individualized response, the remedy still leaves in place existing institutions.” These criticisms suggest that no matter how successful irregular migrant workers are in their individual legal claims, irregular migrant workers will continue to suffer abuse as a group.

6.3.3 Critique of Rights as Boundaries

Cultural feminists have also criticized rights for being selfish, impersonal and for advancing an excessively conflictual view of social life. Peter Gabel argues further that rights distance people from each other and thus serve to undermine social change. Gabel suggests that our common humanity should bring us together. In his words we should “come out from behind the fabric of appearances through which we make each other hostage to the illusion that it is distance rather than a good heart turned outward that the law in us requires.” Gabel thus suggests that we should unite with our fellow man rather than create protective boundaries around our individual selves.

34 Bakan, supra note 27 at 51.
35 Ibid.
36 Minow, supra note 25 at 147.
37 Ibid. at 2.
6.3.4 A Response to these Criticisms

These criticisms make clear that rights alone are not a solution to the exploitation of irregular migrant workers. I accept that rights are never absolute, and that their content depends on who is interpreting them. I also concede that rights are vulnerable to attack from other groups that have conflicting political goals, especially if opposing groups have money and power. Moreover, irregular migrant workers may not exercise their rights due to various difficulties and barriers that they face. I also agree that a legal case cannot by itself affect underlying social inequality.

However, I do not agree with the criticisms of rights as boundaries. Instead, I agree with Kiss who articulately dispels these criticisms: "An abstract preference for connection over separation ignores the reality that, for the less powerful members of any society, connection often means invasion and intrusion rather than intimacy." Ignoring the value of individual rights may thus serve to marginalize and further exploit irregular migrant workers.

With these criticisms in mind, it is now possible to take these criticisms into account and consider how legal rights should be formulated. This will allow me to accept the realistic limitations of the rights I propose. I also hope to ameliorate the impact of these criticisms where possible.

6.4 Recommendations: More Rights for Irregular Migrant Workers

I recommend that the government should accept the UK’s need for irregular migrant workers and award these workers a greater range of rights. With more rights, irregular migrant workers can speak out against exploitation and can place protective

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39 Kiss, supra note 6 at 6-7.
boundaries around themselves. To do this, I suggest that the government should create more legal entry routes to low skilled jobs and regularise the status of irregular migrant workers who are already working in the UK. I also argue that there should be greater legal rights for irregular migrant workers already working in the UK who therefore cannot take advantage of legal entry routes or do not get regularised. Further, I propose that there should be an agency to support these workers. Lastly, I advocate the importance of irregular migrant workers becoming politically active. I describe each of these proposals in turn and also explain how I have tried to ameliorate the effects of the criticisms I have discussed above.

6.4.1 More Legal Entry Routes

I propose that the government should create more legal entry routes for migrants to work in the UK’s low-skilled industries. As I showed in Chapter 2, the estimated scale of irregular migrant working in these industries is far larger than the number of places available on the legal entry schemes.\(^{40}\) It is important that legal jobs are available as work that is ‘above board’ is less likely to result in workers facing exploitation.

Creating more legal entry routes should respond to actual job shortages. Again, I have already explained how legal entry schemes in 2003-2004 filled less than a tenth of the job shortages.\(^{41}\) Filling job shortages legally would reduce the incentive for persons to enter the UK irregularly and join the black economy. As I have shown, there is a correlation between job shortages and irregular migration.\(^{42}\)

\(^{40}\) See section 2.2.1, 2.2.2 and 2.3.
\(^{41}\) See section 2.2.1.
\(^{42}\) See section 2.3.
The argument for creating legal entry routes that reduce the incentive for irregular migrant workers coming to the UK and working in the black economy should find favour with the government who sees uncontrolled immigration as a threat. For example, Tony Blair’s spokesman said at an immigration summit last year: “The prime minister is determined not to allow abuses of the system to poison the whole idea of managed migration which brings enormous benefits to the whole country” (my emphasis). As irregular migrants workers represent ‘abuses’ of the immigration system, the government could gain increased control of access to the job market through creating legal entry routes that respond to economic need.

To create the correct number of legal entry routes that counteract job shortages the government would have to carry out regular research into the scale of job shortages. However, only last year, in 2004, the Environment, Food and Rural Affairs Committee expressed its disappointment that the government did not seem interested in conducting such research. It is essential that the government conduct research into the numbers of actual job shortages to determine how many persons should be given legal entry to the UK. Inaccuracy in the numbers of jobs that need filling could lead to a staffing crisis, as happened last summer in Britain’s curry houses.

There is also a financial incentive behind moving irregular migrant workers out of the black economy into work that is ‘above board.’ This practice could lead to the government receiving tax that would otherwise be lost to unscrupulous gangmaster

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employers who do not pay tax on their workers. In the Parliamentary debates that led up to the *Gangmaster (Licensing) Act 2004*, it was revealed that £100 million (approximately $240 million CAD) a year is lost due to tax evasion. Of this amount, *Operation Gangmaster* found that gangmasters were responsible for VAT (Value Added Tax) offences amounting to £5.9 million (approximately $14 million CAD) and for unpaid tax and national insurance (the insurance employers are required to pay on their workers) amounting to £4.3 million (approximately $10.3 million CAD). It is thus clear from both a worker perspective and a governmental perspective that there are strong reasons to move irregular migrant workers into the legitimate economy.

Such legal entry routes should offer workers full employment rights protections. This would mean giving workers recourse to complain and protect themselves before the law should anything go wrong. Although such rights could be whittled down by opposing groups and could be interpreted in a limited fashion, having legal working rights should allow irregular migrant workers to overcome many of the barriers they face in taking legal action.

6.4.2 Regularisation

My second recommendation for moving irregular migrant workers into the legitimate economy is to implement regularisation programmes. Regularisation programmes could be useful to irregular migrant workers who are already working in the black economy. As I have described, the UK undertook a programme to regularise

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domestic workers in 1998. In Europe, more widespread regularisation programmes have also been carried out in France, Portugal, Spain, Italy and Greece.

Most recently Spain launched a programme to regularise irregular migrant workers that came into force in February 2005. Immigration minister Consuelo Rumi said that the regularisation plan had two aims: “to facilitate the social integration of foreigners and uncover the hidden economy that feeds off them.” This scheme thus aimed to serve both the Spanish government and irregular migrant workers. Socialist MP Rafael Estrella made these dual aims clear in an interview with the BBC. In his words, “We have a number of illegal immigrants in Spain who are not contributing to the system, to the social system, with their taxes and who have been working here on an irregular basis where they are exposed to the mafias”. The regularisation scheme gave applicants who could prove that they had arrived before August 2004, had a job contract and no criminal record three months to sign up as taxpayers. The policy also gave irregular migrants with six-month work contracts who had registered at the town hall and social security office a chance of gaining Spanish residency, which entails the right to live and work legally in Spain.

I suggest that the UK follows the Spanish approach and initiates a similar regularisation programme for irregular migrants in the UK. As in Spain, regularisation could benefit both the government, which would recover much lost revenue, and irregular

48 See section 6.2.
50 Ben Sills, “Spain promises amnesty to immigrants” The Guardian (23 August 2004), online: <http://www.guardian.co.uk/international/story/0,1288841,00.html>.
migrant workers. Indeed, the Spanish scheme is expected to bring in millions of euros usually lost to the black economy.\textsuperscript{52}

However, if the UK were to follow the Spanish example and implement a widespread regularisation programme, it should heed the lessons learned from the regularisation of domestic workers in 1998. This regularisation scheme encountered many different problems. First, although the scheme was announced in June 1998, many irregular migrant workers did not hear of the scheme since there was not much publicity.\textsuperscript{53} Second, long delays in the processing of applications discouraged applications and made it very difficult for these workers to plan their lives.\textsuperscript{54} As Bridget Anderson notes, "some people found themselves torn between responding to a family emergency...but thereby having no chance of returning to the UK, missing the opportunity for settlement and reunification."\textsuperscript{55} Third, in order to benefit from the scheme, applicants needed to have a valid passport. However, many domestic workers had had their passports taken by their employers. Although many embassies, such as the Philippines Embassy, willingly issued their citizens with new passports, others, such as the Indian High Commission, were far less cooperative.\textsuperscript{56} Fourth, applicants had to prove they were employed and could support themselves without recourse to public funds. This requirement also proved to be problematic, as many employers and landlords were unwilling to admit their relationship with an irregular migrant worker.\textsuperscript{57} Finally, applicants had to show that they had entered the UK as a domestic worker. However, as I

\textsuperscript{52} Ibid.
\textsuperscript{53} Bridget Anderson, \textit{supra} note 21 at 5.
\textsuperscript{54} Ibid. at 6.
\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid. at 7.
\textsuperscript{57} Ibid. at 8.
have described, domestic workers were not given any specific type of entry clearance and were treated as falling in different immigration categories. This made giving such proof very difficult.

In light of these difficulties, any future regularisation scheme should be well publicized, efficient, promote cooperation from foreign embassies and take into account the problems irregular migrant workers face in proving their employment, housing and form of entry. Perhaps one way of getting around the fears employers or landlords have in admitting their relationship to an irregular migrant worker would be to implement an amnesty against prosecuting those who cooperate in the regularisation programme.

Such a regularisation programme should give irregular migrant workers the legal right to work in the UK. Again, although this right could face opposition and could be interpreted regressively, they would nevertheless give many irregular migrant workers the necessary agency to assert themselves and take legal action.

Nonetheless, it is unlikely that the UK will follow Spain's example and regularise irregular migrant workers. As I have described, current UK policy takes an unsympathetic view of irregular migrant working and the government is thus unlikely to afford this group positive rights. The government has also rejected efforts to implement widespread regularisation in the past. For example, in 2002 the House of Lords European Union Committee, which scrutinises European Union law in draft form before it is agreed

58 See section 3.6.
upon,\textsuperscript{59} called for an amnesty for irregular migrants living in the UK in their report, "A Common Policy on Illegal Immigration."\textsuperscript{60} The Committee argued:

Some form of regularisation is unavoidable if a growing underclass of people in an irregular situation, who are vulnerable to exploitation, is not to be created. It is in the interests of society as a whole that long-term residents should not remain in an irregular position, but should pay their taxes and National Insurance contributions as well as have proper access to public services.\textsuperscript{61}

However, the government did not follow through on this recommendation. Moreover, widespread regularisation is unpopular with most European states.\textsuperscript{62} The UK may thus be unwilling to implement a regularisation programme and fall out of favour with their European counterparts as a result.

6.4.3 Greater Legal Protection for Irregular Migrant Workers

Clearly, the creation of legal entry routes will not catch irregular migrant workers already working in the UK. Moreover, as I have suggested, the UK government may be unwilling to regularise these workers. Alternatively, some irregular migrant workers may be unable to comply with the terms of any such regularisation programme. For these reasons, the black economy may continue to employ and exploit irregular migrant workers. It is thus necessary that the law gives irregular migrant workers greater legal rights when working in the black economy.


\textsuperscript{61} Ibid, at para. 86.

\textsuperscript{62} Ben Sills, supra note 50.
I suggest that irregular migrant workers have the legal right to bring claims for matters concerning their employment. To do this I suggest that a clause should be added into section 8 of the *Asylum and Immigration Act 1996*, the provision that prohibits irregular migrant working, to allow these workers to make a legal claim against their employer. Moreover, I suggest that this clause should include the requirement that cases brought by irregular migrant workers are judged according to employment standards that apply to UK citizens. Support for giving irregular migrant workers the same employment rights as nationals can be found in the opinion from the Inter-American Court of Human Rights from September 17th 2003. In that case the Court said that once an employment relationship is initiated, irregular migrant workers become entitled to the full range of employment rights available to legal workers. In its conclusion, the Court decided that:

> The migrant quality of a person cannot constitute justification to deprive him of the enjoyment and exercise of his human rights, among them those of a labor character. A migrant, by taking up a work relation, acquires rights by being a worker, that must be recognized and guaranteed, independent of his regular or irregular situation in the State of employment. These rights are a consequence of the labor relationship.

This case demonstrates that irregular migrant workers have been granted full employment protections in other courts. It is thus possible that UK courts might follow suit in the future.

However, as I have noted, irregular migrant workers face many difficulties in making legal claims, often being too afraid of immigration enforcement to bring a claim.

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In response, I suggest that once a worker starts a claim they should receive a temporary legal status. A temporary legal status would reduce the likelihood that fear of immigration enforcement would prevent an irregular migrant worker from bringing a claim. Although a temporary legal status could act as an incentive to bring spurious claims, it is more important that irregular migrant workers bring claims, to uncover exploitation as well as gangmasters who defraud the government of vast sums. Since irregular migrant workers may be afraid of immigration enforcement after their temporary legal status expires however, I suggest that winning a claim could result in a permanent right to work in the UK. This result would reward irregular migrant workers for uncovering criminal gangmasters in the black economy.

Despite a potential counter-argument that this proposal could lead to irregular migrant workers bringing specious claims to gain a legal status, I do not think that the system would be abused in this way. This is because irregular migrant workers could face immigration enforcement after their temporary legal status expired unless they won their claim and gained a permanent status. The threat of immigration enforcement following the expiration of one’s temporary legal status should mean that only the most meritorious cases would be brought.

Support for the concept of awarding temporary legal statuses to irregular migrants can be found in the experience of Italy and the Netherlands who award short residency permits to victims of trafficking. In Italy a law was introduced in 1999 that gives victims of severe exploitation six-month residency permits. These permits are designed to protect both victims who have escaped from their trafficked situation and are in danger and victims who are co-operating in criminal proceedings from immigration enforcement.
This law is proving effective. Since it has been introduced there has been a vast increase in the prosecution of traffickers. In the Netherlands, temporary residence permits are also given to victims of trafficking who are co-operating with the police. Again, this law has increased the number of prosecutions of traffickers.\textsuperscript{65} The success of awarding permits to victims of trafficking in Italy and the Netherlands suggests that such an approach could work for irregular migrant workers in the UK as well and lead to more prosecutions of criminal gangmasters.

\textbf{6.4.4 Giving Rights a Chance: Social Services for Irregular Migrant Workers}

To mitigate the difficulties that many irregular migrant workers face in the UK and encourage these workers to bring legal claims, I suggest that an agency should be created to help irregular migrant workers. In order to appropriately respond to the needs of irregular migrant workers, this agency would have to meet many different criteria.

First, this agency should be confidential. This would give irregular migrant workers who are scared to speak to public officials somewhere to turn. A confidential agency would also reduce the likelihood of irregular migrant workers being too scared to speak out owing to fear of reprisal. To be fully confidential however, this agency would have to be exempted from sharing information with other government departments that are involved in irregular working and immigration control. Otherwise there would be a risk of information being shared with the Immigration and Nationality Directorate, the

body within the Home Office that enforces immigration control, for example.\textsuperscript{66} Of course a private agency would clearly be exempt from information sharing in this way. However, I propose that this agency should be governmental so that it has the power to carry out comprehensive investigations.

Experience from the National Minimum Wage Agency (NMWA), the body that oversees the implementation of the national minimum wage in the UK, shows how important it is for such an agency to carry out investigations. The NMWA has a helpline and investigates complaints, including anonymous complaints, from individual workers and third parties. The NMWA then conducts unannounced on-site inspections of selected employers, telling the employer that no complaint has been made and that the agency is simply meeting its obligations in performing the investigation.\textsuperscript{67} This pro-active approach takes the burden off workers in ensuring that they receive appropriate wages. Like irregular migrant workers, legal workers may also be unwilling to complain due to fear of losing their job or reprisal from an employer for speaking out. The NMWA's pro-active approach also has the advantage of promoting rights for a wide range of people. Unlike rights claims, which can be criticized as being dyadic and not directly affecting more persons than the parties involved in a legal case, investigations into a particular workplace could uncover a wide number of violations. In effect, workplace investigations could win rights for a wide range of people.

This proposed independent government agency should also employ sensitive and capable staff. It is important that the staff could, between them, speak many languages,

\textsuperscript{66} See further: the Immigration and Nationality Directorate, online: <http://www.ind.homeoffice.gov.uk/ind/en/home.html>.
\textsuperscript{67} Citizens Advice Bureau, Nowhere to turn – CAB evidence on the exploitation of migrant workers (27 February 2004) at 4.
as irregular migrant workers often do not speak English. Multi-lingual staff could also be in charge of teaching irregular migrant workers English, to help them integrate into UK society. Free English lessons have been put into place by the government for some migrants in the past, but irregular migrants have not yet been included on the list of recipients. It is to be hoped that the government will fund English lessons for irregular migrant workers in the future. Such funding could be justified to the electorate as necessary to help integrate these workers, who are essential to the economy, into UK society. It would also be helpful if some of the agency staff were persons who have been employed in the black economy and thereby understand how it works. Hiring women who have suffered sexual exploitation at work could also allow the agency to better appreciate the experiences of some irregular migrant women.

Finally, the low wages that irregular migrant workers receive make it essential that this agency provides its service free of charge. Some of these services should include giving legal advice on irregular migrant workers’ rights. As I have explained, many workers may not exercise their rights because they might not think they have any. The agency should be able to advise irregular migrant workers on matters such as how to initiate a legal claim, how to apply for regularisation (should this possibility exist), and how to leave squalid housing for example. To do this, the agency could work with pro bono lawyers. Without legal aid, taking legal action would otherwise be too expensive for irregular migrant workers.

Clearly an agency that provided these services would require funding, and would be vulnerable to attack from right wing groups and resource cuts. However, the potential

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of these investigations to uncover fraudulent employers who do not pay proper tax should be a good incentive to support such an agency. Moreover, the possibility of irregular migrant workers forming political groups to fight for their own interests may reduce the chances of their rights being defeated.

6.4.5 Maintaining Rights: Political Movements

As I have shown, rights are indeterminate as they may be at threat from right wing groups such as large businesses and branches of government with conflicting interests. These groups may whittle down the rights that I have proposed until they are meaningless.

To reduce this possibility, I suggest that irregular migrant workers should come together and form political groups. Such groups could campaign to protect their rights from being undermined by opposing parties. Although the resources of an irregular migrant workers’ group would pale in comparison with that of a large corporation, such a group could raise enough public awareness to protect its interests. Such a group could also lobby for more rights as and when they appear necessary.

Past experience of grassroots domestic migrant worker organisations in the UK reflect that it is possible for these groups to make huge political strides. For example, the group formerly known as “Waling Waling,”69 which began in 1984 as a meeting place for domestic migrant workers became a political organisation that successfully campaigned for the regularisation of migrant domestic workers. As Anderson writes in the context of this political movement:

69 This group is now known as the “United Workers Association.”
This is transnationalism from below, a manifestation of popular resistance in the face of globalisation, self-consciously resistant and political. The forging of a common identity in spite of national, religious and ethnic differences is based first and foremost on type of employment – working as a migrant domestic worker.70

The success of Waling Waling’s campaigns is partly down to their relationship with the media who told their stories of abuse and exploitation. As Anderson explains:

[Telling the media individual experiences] gave campaigning material a very strong human rights focus, taking individual cases of abuse, people’s stories, then drawing out the role of immigration legislation in facilitating this abuse and showing the possibilities for change. This meant that the campaign could appeal to an audience not necessarily sympathetic to undocumented workers. Having statistics available bolstered the media work. It meant that women’s experiences could not be passed off as simply due to a bad employer, and encouraged people to look for the structural causes of such abuse.71

As well as public support and media pressure, Waling Waling also benefited from the help of other migrant and refugee groups, churches and human rights organisations. For example, the Transport and General Workers Union, was especially helpful as it provided funds that paid for a coach that allowed members of Waling Waling to attend the Labour Party conferences.72 It is to be hoped that Waling Waling’s experience will encourage other irregular migrant workers to come together and work as a group to protect and advance their interests.

6.5 Conclusion

In this chapter, I have recommended that irregular migrant workers should receive more legal rights in the UK. I have argued that greater legal rights, with the support of an

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70 Bridget Anderson, supra note 21, at 3.
71 Ibid. at 4.
72 Ibid.
agency that provides social services, could reduce the exploitation of these workers and also uncover fraudulent employers. Moreover, I have proposed that a political group of irregular migrant workers could advance and protect their interests. Although these initiatives may make a difference, they will not end the deep-rooted social inequality that affects irregular migrant workers.

As a result, UK residents have a part to play in ending the social inequality that allows the exploitation of irregular migrant workers to continue. As Bakan writes, "The struggle for social justice is much larger than constitutional rights; it is waged through political parties and movements, demonstrations, protests, boycotts, strikes, civil disobedience, grassroots activism, and critical commentary and art." Following Bakan, I suggest that there are many ways in which persons in the UK can participate to end the exploitation faced by irregular migrant workers. For example, we can campaign for labelling that describes how workers who produce various goods are treated. Britain now has the biggest fair trade market in the world, which suggests that such an idea may be well received. Alternatively, we could demand public education on migration issues. This would allow the public to better understand that irregular migrant workers are essential to the UK economy. Such education is particularly necessary at present. Research published in December 2004 by the National Centre for Social Research shows that opposition to immigration into Britain has hardened since Tony Blair came to power. The researchers said that these changes could be explained by "the increase in government statements and proclamations on [immigration], many of which were quite

73 Bakan, *supra* note 27 at 152.
negative in tone and content.” Such education could help the public to understand “the myth that millions, bags packed, only await the opportunity of a lowering of the guard of developed countries to invade is a fantasy designed to panic people and defraud them, to win their vote or support.” An education strategy could be carried out through television programmes for example.

Through measures such as these, legal rights may be effectively supported by a political discourse that is sympathetic to irregular migrant workers. As I have explained, legal rights are valuable but limited tools and their interpretation and use depends on having a sympathetic political context. In promoting this context, we all have a part to play.

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76 Nigel Harris, *Thinking the Unthinkable: The Immigration Myth Exposed* (London: I. B. Tauris, 2002) at 120.
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