

FOCUS ON LABOUR EXPLOITATION

Working to end trafficking for labour exploitation

Migration Advisory Committee Call for Evidence: EEA-workers in the UK labour market

Submission of Focus on Labour Exploitation (FLEX)

27 October 2017

Summary

Focus on Labour Exploitation (FLEX) welcomes the opportunity to contribute to the Migration Advisory Committee's Commission to advise on the economic and social impacts of the UK's exit from the European Union ('Brexit').

FLEX is a UK-based charity that works to end human trafficking for labour exploitation, both in the UK and worldwide. To achieve this, FLEX conducts research and policy advocacy that aims to prevent labour abuses, protect the rights of trafficked persons and promote best practice responses to human trafficking for labour exploitation. In the UK, FLEX has conducted research on a range of issues relevant to the current inquiry, including the impact of migration status, labour market structures, and immigration control measures on vulnerability to exploitation.

FLEX is also the founder and secretariat of the Labour Exploitation Advisory Group (LEAG) – a group of experts from migrant, community and worker organisations working with potential and actual victims of trafficking for labour exploitation. LEAG aims to build a shared understanding of the experiences of vulnerable and exploited workers in the UK, and to ensure that their voiced needs form the basis of all actions to address trafficking for labour exploitation.

In August 2017 FLEX and LEAG published a position paper titled "*Lost in Transition: Brexit and Labour Exploitation*"¹, that detailed how migrant worker vulnerability to exploitation has been affected by the UK referendum vote to leave the European Union. This submission refers to and builds upon the findings of that paper.

This submission outlines the existing and anticipated vulnerability of EEA migrants to labour exploitation as a result of Brexit. The submission highlights the way in which previous migration restrictions have increased the vulnerability of particular groups of EEA migrants,

¹ FLEX and Labour Exploitation Advisory Group, *Lost in Transition: Brexit and Labour Exploitation*, 2017. Available at <http://www.labourexploitation.org/sites/default/files/publications/LEAG%20POSITION%20Impacts%20of%20Brexit-Final.pdf>

and how the current political and social discourse around Brexit is making it increasingly difficult for EEA migrants to resist or report abusive working practices. The submission then outlines the increased risks of exploitation facing EEA workers post-Brexit, in particular as a result of uncertain or irregular status, difficulties in obtaining regular status, and as a result of the introduction of temporary worker schemes. The bulk of the submission then addresses the likely introduction of a temporary migration scheme to address labour shortages post-Brexit, and the risks of exploitation that may arise in such schemes. FLEX in particular notes the abuses suffered by workers under temporary migration schemes in Australia and the United States, primarily as a result of the significant power imbalance that such schemes create between workers and employers.

FLEX submits that clarity about the status of EEA workers in the UK is urgently needed, and that the provision of information to EEA workers must be improved.

FLEX stresses the need for a clear, simple and affordable system for settled status, that takes account of the range of circumstances in which EEA migrants live and work in the UK.

FLEX recommends that the development of any new temporary migrant worker schemes be informed by the experiences of such schemes abroad, that it closely involve migrant and worker organisations, and that the protection of the rights and conditions of migrant workers be a primary objective.

I. Existing vulnerability of EEA migrants due to structural factors

In 2014, the National Crime Agency found that 82% of potential victims of labour exploitation were EEA nationals legally entitled to reside and work in the UK.² EEA migrants are particularly vulnerable to labour exploitation, in part as a result of structural factors that have governed their living and working conditions in the UK in recent years. These factors include the A2 and A8 transitional measures that pushed many EEA workers from Romania and Bulgaria into self-employment, and that created uncertainty around their status that was exploited by employers. Tightening of access to welfare³ and the threat of deportation for homeless EEA migrants also increases the desperation of some EEA migrants for work, and as a result has increased the risk that they will be exploited.

a) High rates of self-employment as a result of A2 and A8 transitional measures

Figures from the Office of National Statistics demonstrate that A2 nationals living in the UK in 2016 had the highest proportion of self-employed 16- to 64-year-olds (estimated 25%) in 2016, compared with an estimated 14% of UK nationals.⁴ As the MAC's briefing note for this commission points out, these self-employed workers are concentrated in 'low-skilled' occupations, predominantly in the construction and related sectors.⁵

The high levels of self-employment among Romanian and Bulgarian migrants in particular can largely be attributed to the transitional arrangements that operated for these workers between 2007 and 2014. These arrangements established a worker authorization registration scheme that restricted the rights of Romanian and Bulgarian nationals to work in the UK, but allowed them to conduct business or work as self-employed. As a result, the primary route for Romanian and Bulgarian nationals to carry out work in the UK was as a self-employed person, whether or not they were in fact self-employed, and this pattern has continued following the end of the transitional arrangements.

These restrictive arrangements made it difficult for these workers to access the labour market safely and led to exploitation.⁶ LEAG members have reported that migrant workers from Romania and Bulgaria in low paid work were forced into self-employment by transitional restrictions and, as a result, many suffered exploitation in cases of 'bogus self-

² National Crime Agency, *NCA Strategic Assessment: The Nature and Scale of Human Trafficking in 2014*, 2015. Available at <http://www.nationalcrimeagency.gov.uk/publications/656-nca-strategic-assessment-the-nature-and-scale-of-human-trafficking-in-2014/file>

³ See Department of Work and Pensions, *New rules to stop migrants from claiming Housing Benefit*, 2014. Available at <https://www.gov.uk/government/news/new-rules-to-stop-migrants-claiming-housing-benefit>

⁴ See Office for National Statistics, *What were the employment characteristics of foreign nationals in the UK?* 2016. Available at <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/migrationandthelabourmarketuk/2016#what-were-the-employment-characteristics-of-foreign-nationals-in-the-uk>

⁵ Migration Advisory Committee, *EEA-workers in the UK labour market*, 2017, p.22. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/636286/2017_08_08_MAC_Briefing_paper.pdf

⁶ Institute for Public Policy Research, *In Transition: Romanian and Bulgarian Migration to the UK*, 2013, p.29. Available at <https://www.barrowcadbury.org.uk/wp-content/uploads/2013/12/IPPR-In-Transition-2013.pdf>

employment'.⁷ Being restricted to particular types of work makes it more difficult to exercise choice and control over one's employment situation, and when options are limited it is easier for unscrupulous employers to take advantage, particularly if the types of employment legally available to workers (such as self-employment) offer very few rights and protections.

The problem of 'bogus self-employment' has long been a concern, and was recently examined by the Work and Pensions Committee, which found that "some companies are using self-employed workforces as cheap labour" and noted the risk of exploitation among low-paid self-employed workers.⁸ Self-employed workers have significantly fewer rights than those employed directly by the company – they are not entitled to be paid the National Minimum Wage (NMW) and are not covered by the Working Time Regulations 1998, under which other workers have rights to a maximum working week, breaks and paid holidays.

Far from being their own boss, migrant self-employed workers are often significantly disempowered in the workplace as a result of their lack of labour rights. One advocate for migrant workers in the construction sector, who had previously worked as self-employed in the sector, reported to FLEX that:

“Self-employment is pushing [the most vulnerable] to accept things and to compromise. Because definitely you know that you are not treated well. But you just accept it because you know that you're gone tomorrow someone else is coming and taking your place.”⁹

b) Right to remain tied to work and accommodation

Increasing measures in recent years to strictly enforce free movement restrictions have increased the need for EEA nationals to secure work and accommodation in order to remain in the UK. This close tying of the right to remain with the ability to secure work and accommodation makes some vulnerable EEA migrants more likely to accept poor work or living conditions, or accommodation that is tied to work, and increases their dependence upon their employers.

For example, rough sleeping is considered by the current government as a breach of EEA Treaty Rights and EEA nationals who are homeless are consequently subject to administrative removal.¹⁰ A recent study commissioned by the Independent Anti-Slavery Commissioner has shown that the homeless population in Britain is extremely vulnerable to

⁷ FLEX and Labour Exploitation Advisory Group, *Lost in Transition: Brexit and Labour Exploitation*, 2017, p.7. Available at

<http://www.labourexploitation.org/sites/default/files/publications/LEAG%20POSITION%20Impacts%20of%20Brexit-Final.pdf>

⁸ UK Parliament, *Self-employment and the gig economy*. Available at

<https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/847/84702.htm>

⁹ FLEX interview with former construction worker, 2017.

¹⁰ Home Office guidance, *European Economic Area (EEA) administrative removal*, February 2017, p.16. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/590663/GI-EEA-admin-removal-v3.pdf

exploitation, and that Central and Eastern European nationals make up 37% of the rough sleeping population in London.¹¹ Reports show that EEA rough sleepers have been specifically targeted for removal on the basis of nationality and failure to exercise treaty rights.¹² Members of the Labour Exploitation Advisory Group (LEAG) have reported that such actions push EEA nationals into entering exploitative working and living conditions in order to avoid the threat of removal.¹³ Exploitative employers and gangmasters are aware of these pressures, and specifically target homeless persons with offers of work and accommodation at soup kitchens and other areas where rough sleepers congregate.¹⁴

Summary and recommendations

The above section highlights some of the current vulnerabilities of EEA migrants to labour exploitation that have resulted from past and current measures to control EEA migration and restrict the entitlements of EEA workers. FLEX cautions that in constructing a new system for EEA migration post-Brexit, lessons should be learned from the way in which these measures have inadvertently created conditions in which employers have greater power to abuse EEA migrant workers.

In particular, FLEX recommends that:

- **Any ‘transitional’ arrangements should take account of the risk of exploitation to EEA workers, and seek to provide clarity of status and to safeguard the working conditions of EEA migrants.**

2. Increased vulnerability already experienced by EEA migrants as a result of Brexit

a) Uncertainty and misinformation

As outlined in FLEX’s position paper on Brexit and labour exploitation, uncertainty and confusion as to the immediate impact of the referendum result and what future rights and status will look like for EEA workers is already creating increased vulnerability to

¹¹ The Passage, *Understanding and responding to modern slavery within the homelessness sector*, 2017. Available at <http://passage.org.uk/wp-content/uploads/2017/01/The-Passage-anti-slavery-document.for-web.24.01.17.pdf>

¹² The Guardian, *Home Office used charity data map to deport rough sleepers*, 19.08.2017. Available at <https://www.theguardian.com/uk-news/2017/aug/19/home-office-secret-emails-data-homeless-eu-nationals>

¹³ FLEX and Labour Exploitation Advisory Group, *Lost in Transition: Brexit and Labour Exploitation*, 2017, p.7. Available at

<http://www.labourexploitation.org/sites/default/files/publications/LEAG%20POSITION%20Impacts%20of%20Brexit-Final.pdf>

¹⁴ The Passage, *Understanding and responding to modern slavery within the homelessness sector*, 2017, p.8. Available at <http://passage.org.uk/wp-content/uploads/2017/01/The-Passage-anti-slavery-document.for-web.24.01.17.pdf>

exploitation among these workers.¹⁵ Confusion about status and entitlements makes it more difficult for workers to understand and access their rights, and easier for unscrupulous employers to take advantage. This power differential between employer and employee, as a result of lack of information, is a key factor allowing unscrupulous employers to take advantage of those who they perceive to be in a position of dependence.

Even though the official status of EEA workers has not yet changed, where workers are uncertain they are likely to fear the worst and are extremely vulnerable to deliberate misinformation. One migrant community organization recently told FLEX: “A lot of people never knew their employment rights. Now, they’re getting all these narratives that they don’t have rights. It’s easy to go from not knowing to being certain that it’s ok to be pushed around, to be overworked, to be forced to work extra hours, to not get paid.”¹⁶

The current high level of anxiety around status has been evidenced by a huge increase in demand for advice services from migrant community organisations; in the case of one migrant community organisation, demand for advice services has increased by 734% following the UK’s vote to leave the EU.¹⁷ The main areas of enquiry from those anxious about the immediate and future consequences of the referendum result were, unsurprisingly, closely connected concerns about immigration status and labour rights. This uncertainty had an immediate impact at work, with LEAG member organisations receiving multiple cases of workers calling for advice because they were being told by colleagues or employers that they were “not a legal worker any more”. One migrant community worker recently told FLEX:

“I received one woman who is European, she was working under terrible conditions, and her boss made her think that after Brexit she will become illegal and that she will not be able to work.”

The potential threat of future irregularity is already making some workers much more vulnerable to exploitation. For example, the anticipated need for EEA nationals to be able to prove they had been exercising treaty rights in order to secure documentation or permanent residence, is leading workers to accept unsafe jobs and abusive treatment. Some individuals are so desperate to have proof that they have been working, that they are staying in exploitative situations rather than risk losing their job. FLEX has been told that:

“If people learn that they have to be in employment to secure their status they go into employment no matter what. They just focus on ‘ok, so I have to keep my job. I can’t afford to drop it.’”¹⁸

¹⁵ FLEX and Labour Exploitation Advisory Group, *Lost in Transition: Brexit and Labour Exploitation*, 2017, p.4. Available at <http://www.labourexploitation.org/sites/default/files/publications/LEAG%20POSITION%20Impacts%20of%20Brexit-Final.pdf>.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid, p.7.

Uncertainty is also affecting employers' hiring decisions. FLEX has received reports of recent cases where clients had job offers removed when they revealed that they were in the process of seeking permanent residence. In other cases, newly arrived migrant workers have reported being asked to provide proof of permanent residence to get a job, and other employers have reportedly rejected EEA nationals' apprenticeship applications because they feared these applicants would have to leave the UK after Brexit.¹⁹ Where it is more difficult to obtain jobs, those most vulnerable have become more likely to be pushed into unsafe work where they are at higher risk of exploitation.

b) Discrimination and hate crime

Home Office statistics have recorded a 29% increase in hate crime in 2016/17, with a significant spike in hate crime reported around the time of the EU referendum in June 2016.

While the increase in hate crime peaked in July 2016, it has since remained at a higher level than prior to the EU referendum.²⁰ This increase is reflected in the experiences of vulnerable migrant workers supported by organisations such as the Eastern European Resource Centre, including incidents in the street, at school, at the GP, and in workplaces where individuals have been told “*you are not a legal worker any more*”.²¹ Members of LEAG believe that Brexit campaigns have lent legitimacy to more generalised anti-migrant feeling, and that this increased hostility and hate speech linked to Brexit is an extension or amplification of the ‘hostile environment’ already fostered in the UK by an increasingly punitive immigration agenda and by more openly xenophobic public and media discourse.²² This serves to undermine confidence in migrants' rights and entitlements, and to engender fear and insecurity, which ultimately leaves migrants more vulnerable to poor treatment and less able to challenge abuse.

Discrimination is already an issue faced by many EEA workers, particularly those in ‘low-skilled’ work, which can have a negative impact on their willingness to exercise their rights and leave them vulnerable to exploitation. The majority of the Romanian construction workers interviewed by FLEX in 2017 reported being the subject of discrimination or abuse as a result of their nationality. One interviewee stated: “*It depends a lot on your nationality. If you're Romanian, Bulgarian, Albanian, you know, from poorer countries, they take you for a fool. You don't have the same rights as everybody else. Or you do, but they won't give them to you.*”²³

This illustrates the chilling impact that discrimination can have on an individual's perception of their rights. Hate speech and discrimination by employers and colleagues also creates fear

¹⁹ Ibid.

²⁰ Home Office, *Hate Crime, England and Wales, 2016/17*. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652136/hate-crime-1617-hosb1717.pdf

²¹ FLEX and Labour Exploitation Advisory Group, *Lost in Transition: Brexit and Labour Exploitation*, 2017, p.4. Available at <http://www.labourexploitation.org/sites/default/files/publications/LEAG%20POSITION%20Impacts%20of%20Brexit-Final.pdf>

²² Ibid, p.6.

²³ FLEX interview with construction worker.

and misinformation which increases vulnerability as migrants feel insecure and unsupported in the jobs they rely on, and therefore less able to speak out about abuse. FLEX has received reports of incidents of workers “being told to shut up because they were going to be deported soon and that they soon would become illegal.” Reported incidents in workplaces ranged from discrimination linked to being a European national: “being treated differently ... told ‘you don’t know how long you’ll get to stay here’, being pushed around by bosses or by colleagues,” to not being paid, and physical attacks:²⁴

“We had a man working in a restaurant and the owner attacked him with a knife telling him to ‘fuck off to Poland’. This man decided that staying in employment is more important than reporting the case to the police”²⁵

Summary and Recommendations

Brexit-related hate speech and discrimination on the basis of nationality increases the vulnerability of EEA workers to exploitation by further marginalising such workers, increasing their sense of uncertainty and precarity, and making it more difficult for them to resist or report abuse. This kind of discrimination can contribute to a situation of unequal power between workers and increase the power differential between workers and employers, leaving the most vulnerable workers feeling entitled to less, and less able to challenge unfair or abusive treatment. It is therefore of utmost importance that the government acts to counter hate speech and hostility toward EEA migrants, and that it ensures that EEA migrants are provided with the information and support that they need to challenge discrimination and assert their rights.

FLEX recommends that:

- **The government should initiate an information campaign targeting EEA workers and UK employers, clearly communicating EEA workers’ status and rights in a range of languages and condemning discrimination and hate speech.**
- **The government should introduce a specific migrant support and advice funding stream, or make the Controlling Migration Fund accessible to grassroots groups, to support migrant community organisations to respond to the exponential growth in demand on their services.**

²⁴ FLEX and Labour Exploitation Advisory Group, *Lost in Transition: Brexit and Labour Exploitation*, 2017, p.5. Available at <http://www.labourexploitation.org/sites/default/files/publications/LEAG%20POSITION%20Impacts%20of%20Brexit-Final.pdf>

²⁵ FLEX interview with migrant community organisation, 2017.

3. Risks of increased vulnerability of EEA migrants following Brexit

a) Ongoing uncertainty and insecurity of immigration status

As outlined above, EEA migrants' uncertainty and lack of stability regarding their immigration status, and particularly their right to work, increases their vulnerability to exploitation. At present it is unclear what the status of EEA migrants in the UK will be following Brexit, and in what circumstances they will have the right to remain and to work in the UK. In particular, it is not currently clear by what processes EEA migrants will be able to obtain permanent residence status in the UK, and what will be the qualifying criteria and documentary requirements of this process.

In its work with frontline organisations, FLEX has identified the following key concerns regarding immigration status following the UK's exit from the EU:

Cost of regularisation

Costs are one of the barriers to obtaining status for workers in poverty or low-paid employment, particularly for those with children. This includes the cost of immigration advice as well as obtaining documents. The cost of obtaining status in the UK for EEA nationals after Brexit should be carefully considered and kept as low as possible to ensure that workers are not made more vulnerable to exploitation because they are not able to pay for their documents. Further, affordable immigration advice should be available to ensure that workers understand the implications of gaining residence or citizenship and can make informed decisions about applying for status in the UK.

Requirements for regularisation

The documentary requirements for regularisation could be particularly problematic for some EEA migrants seeking to prove continuous residence in order to obtain settled status in the UK. Those workers who have been working as self-employed or 'cash in hand', who have had periods of unemployment or rough sleeping, who have worked in exploitative conditions or who have otherwise lived or worked in unstable or irregular ways could find it difficult to prove their 5 years of lawful residence in the UK. This inability could result in their application for settled status being rejected, and EEA workers being at risk of removal and/or of remaining in the UK undocumented. In this situation, EEA workers who have not succeeded in obtaining settled status will have significant uncertainty and precarity regarding their immigration status, and will accordingly be at greater risk of exploitation.

Further, as noted above, the need for EEA workers currently in the UK for less than 5 years to continue to work to demonstrate continuous residence may result in some workers remaining in exploitative conditions. This scenario has already been observed by migrant organisations, who report that some EEA workers are so afraid of losing their right to remain or being unable to meet the requirements for settled status, that they continue to

work in poor or abusive employment conditions.²⁶ Knowing this need for continued work and documentation also places employers in a position of power over workers, making it easier for them to abuse without complaint.

Access to public funds

Many migrant workers in the UK experience in-work poverty, and despite working one or often multiple jobs, also rely on welfare in order to survive. If access to benefits is removed, dependence on work increases which means workers are more likely to stay in exploitative employment in order to survive.

Recommendations

- **Routes to regularisation of status should be clear, simple and low-cost, and should take account of the range of living and working situations of EEA migrants in the UK, including the possibility that EEA migrants have worked in irregular and exploitative conditions.**
- **EEA migrants should have access to affordable, regulated immigration information and advice.**
- **EEA migrants should continue to have access to public funds, including during any application, qualifying or appeal periods related to settled status.**

b) Increase in undocumented workers and threat of immigration enforcement

A key concern for FLEX and its partners is that increased barriers to entering UK and working legally will increase numbers of irregular migrant workers, creating a hidden workforce who are much more vulnerable due to lack of status. Restricting legal routes for migration increases the demand for irregular modes of movement, and increases the risk that human traffickers will use the desire of migrants to work in the UK to entrap and exploit them. Further, increased immigration control focussing on the right to work would have a significant negative impact on efforts to tackle labour exploitation, as victims of labour exploitation may be treated as 'illegal workers' rather than victims of crime, and victims who are afraid of immigration enforcement will not come forward, as is already too often the case.

²⁶ FLEX and Labour Exploitation Advisory Group, *Lost in Transition: Brexit and Labour Exploitation*, 2017, p.8. Available at <http://www.labourexploitation.org/sites/default/files/publications/LEAG%20POSITION%20Impacts%20of%20Brexit-Final.pdf>

If the right of EEA nationals to work in the UK is significantly restricted, and/or there is ongoing uncertainty for many EEA nationals about their right to live and work in the UK, there will be an increased risk of exploitation of EEA workers. This is due to the inability of such workers to safely report their abuse, and the ability of exploiters to use threats of deportation and criminalization to control their victims. The risk may also be increased as the profile of EEA workers coming to the UK changes, and workers with better bargaining power choose to work in other EEA countries rather than deal with the complexities of working in the UK or the hostile environment towards migrants that the UK has created. This means that the EEA workers still coming to the UK are likely to be lower-skilled, with poorer English and fewer options for work. As a result, they will be more vulnerable, more dependent on their employers, and less able to understand and access their labour rights, making the risk of exploitation among these workers even greater.

The threat of being reported to immigration authorities or criminalized for ‘illegal working’²⁷ is a powerful tool used by exploiters to control migrant workers, including those with both irregular and regular status. Further, when such threats are made in the context of a deliberately created and widely publicised ‘hostile environment’ for undocumented workers, migrant workers understandably feel targeted and believe that any complaints of labour abuses will be overshadowed by concern with their immigration status.

This fear has been justified in a recent report of Her Majesty’s Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS), which found a focus on the immigration status of both victims and offenders was a recurring theme in the police response to modern slavery cases.²⁸

The report found that, from the very beginning, potential victims of modern slavery and human trafficking were often identified and treated by police as immigration offenders, rather than victims. The report also found a tendency in some police forces to refer both suspects and victims without legal status in the UK to immigration authorities rather than to investigate modern slavery and human trafficking offences.

EEA workers currently make up 7% of the UK workforce,²⁹ and sectors such as agriculture and construction rely heavily on EEA workers to fill their labour needs.³⁰ Following Brexit,

²⁷ Under section 34 of the *Immigration Act 2016* a person commits an offence punishable by imprisonment if they work when disqualified from working by reason of their immigration status.

²⁸ Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, *Stolen freedom: the policing response to modern slavery and human trafficking*, 2017, p.38. Available at <http://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/stolen-freedom-the-policing-response-to-modern-slavery-and-human-trafficking.pdf>

²⁹ Office for National Statistics, *International immigration and the UK labour market, UK: 2016*. Available at <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/migrationandthelabourmarketuk/2016>

³⁰ “‘Construction needs immigrants’ – industry reacts to Brexit’, *Construction Manager Magazine*, 28.06.16. <http://www.constructionmanagermagazine.com/news/keep-po9les-co6ming-con5truction-reacts-brexite/>; Agriculture & Horticulture Development Board (2016) *The Impact of Brexit on the UK agricultural workforce*, https://ahdb.org.uk/documents/Horizon_Brexit_Analysis_20September2016.pdf

this demand will not be able to be immediately met by other sources, and migrant workers will continue to be used to perform this work. The difference leading up to and following Brexit will be that such workers are likely to have significantly less secure or certain migration status, making them more vulnerable to exploitation as outlined above. This vulnerability is compounded by the fact that the nature of the work that many migrant workers do in these UK sectors is often already insecure and low-paid, and labour abuses in these sectors are already widespread.³¹

Summary and Recommendations:

Any future restrictions on the rights of EEA nationals to live and work in the UK is likely to increase the risk of exploitation of vulnerable EEA workers. To address this increased risk, it will be necessary to provide maximum possible clarity on the rights of EEA workers, and to ensure that those rights are effectively monitored and enforced through well-resourced labour inspectorates. Further, it is crucial that labour market enforcement does not become the point of enforcement of immigration policy, as this will deter victims from coming forward.

FLEX therefore recommends that:

- **A strict firewall should be maintained between labour inspection and immigration enforcement.**
- **The Gangmasters and Labour Abuse Authority (GLAA) be adequately resourced to address the increased risk of exploitation arising from the changed status of EEA workers.**

4) Temporary migration schemes and tied sponsorship

If freedom of movement is ended post-Brexit, the ongoing demand for labour in certain UK sectors will need to be met with schemes to facilitate and control labour migration from the EEA. FLEX expects that this will result in the creation of new categories of temporary or seasonal working visas, which allow workers to enter for a limited time to perform specific work.

³¹ See National Crime Agency, *NCA Strategic Assessment: The Nature and Scale of Human Trafficking in 2014*, p. 21.

Temporary migration schemes often include restrictions, such as prohibitions on ‘switching to a different work permit scheme and bringing family members to the country’.³² The International Labour Organization (ILO) has highlighted the labour rights issues associated with such schemes, stating that ‘in practice their potential benefits are often eroded by insufficient regard to the protection of migrant workers’ rights, resulting in their exploitation’.³³ Recognising the risks inherent in such programmes, the ILO developed a Multi-lateral Framework on Labour Migration, which recommends, inter alia, “implementing effective and accessible remedies for workers whose rights have been violated, regardless of their migration status”.³⁴

Temporary migrant worker schemes have previously operated in the agriculture sector in the UK, and currently operate in the domestic work³⁵ sector in the UK and in a number of other countries, such as the United States and Australia. FLEX is concerned that such schemes often involve high levels of dependence and therefore a power imbalance between the worker and the employer, leading to significant levels of labour abuse and exploitation. Close attention to the structures of existing and planned schemes, and their impact on workers’ agency and working conditions, is therefore required.

Seasonal Agricultural Workers Scheme (SAWS), United Kingdom

Until 2013, the UK operated the Seasonal Agricultural Workers Scheme (SAWS) that allowed fruit and vegetable growers to employ migrant workers to carry out short-term, low-skilled agricultural work. Eligibility rules, quota size and operations changed through the years to accommodate the sector’s need for labour, especially during peak seasons.³⁶

Under SAWS, permission to work in the UK was tied to a specific employer, and valid for a maximum period of six months. While workers were entitled to receive the national minimum wage, paid holiday, agricultural sick pay, night work pay, on-call allowance, rest breaks, and pay even if bad weather stopped work, this was not always respected.³⁷ Aware

³² International Labour Organisation, *International Labour Migration: A Rights-Based Approach*, 2010, p.30. Available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1086&context=intl>

³³ Ibid.

³⁴ International Labour Organisation, *ILO Multilateral Framework on Labour Migration*, paragraph 11.3. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_178672.pdf

³⁵ An Independent Review of the Overseas Domestic Workers Visa in 2015 concluded that: “the existence of a tie to a specific employer and the absence of a universal right to change employer and apply for extensions of the visa are incompatible with the reasonable protection of overseas domestic workers while in the UK”. See, James Ewins, *Independent Review of the Overseas Domestic Workers Visa*, 2015, p.5. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486532/ODWV_Review_-_Final_Report_6_11_15_.pdf

³⁶ Migration Advisory Committee, *Migrant Seasonal Workers: The impact on the horticulture and food processing sectors of closing the Seasonal Agricultural Workers Scheme and the Sectors Based Scheme*, May 2013, p.48. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257242/migrant-seasonal-workers.pdf

³⁷ Ana López-Sala et al, *Seasonal Immigrant Workers and Programs in UK, France, Spain and Italy*, 2016, p.14. Available at <http://www.temperproject.eu/wp-content/uploads/2015/06/Working-Paper-I-DF2.pdf>

of the power imbalance that comes with tied-visas, some unscrupulous employers used the threat to return workers home to implement decreases in pay.³⁸

The SAWS was managed by nine approved operators on behalf of the UK Border Agency. These operators were not only in charge of recruiting participants and allocating them to employers, but also of monitoring their pay and working conditions.³⁹ The Gangmasters Licencing Authority (GLA) registered multiple operators and had the power to conduct inspections. In addition, once a year, the UK Boarder Agency conducted inspections on farms and operators using SAWS workers.

Despite these preventative measures, different investigations reported cases of underpayment of wages, long working hours, no days off or rest, and poor living conditions. A study uncovered a strawberry picker earning £6 after working for three to four hours,⁴⁰ while another described workers working in isolated environments, and living under poor conditions without the ability to change employers due to their tied-visa limitations.⁴¹

The SAWS was supported by employers as it provided a ‘flexible and reliable workforce’ that was ‘unlikely to leave for other work ... or when conditions are particularly difficult’.⁴² However, this temporary visa scheme with tied-visa components increased some workers’ vulnerability to exploitation and impeded their ability to remove themselves from unsafe situations. As changes of employer were almost impossible,⁴³ exploited workers had to choose to either stay in an abusive situation or to leave the UK.

CASE STUDY: Australian Seasonal Worker and Working Holiday Visas

The Australian Seasonal Worker Programme was designed to alleviate labour shortages in the horticulture industry by providing migrant workers from Pacific island countries to undertake low or unskilled seasonal work. The National Union of Workers and others reported that the programme’s rule tying a worker to one approved employer, who acts as visa sponsor and in most cases provides accommodation and transport, created dependency which ‘makes workers vulnerable to abuse and reluctant to raise concerns.’⁴⁴ This system,

³⁸ Donna Simpson, *Salads, Sweat and Status: Migrant Workers in UK Horticulture*, 2011, p.159. Available at http://sro.sussex.ac.uk/7601/1/%282012.12.01%29_Simpson%2C_Donna.pdf

³⁹ Migration Advisory Committee, *Migrant Seasonal Workers: The impact on the horticulture and food processing sectors of closing the Seasonal Agricultural Workers Scheme and the Sectors Based Scheme*, May 2013, p.51-52. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257242/migrant-seasonal-workers.pdf

⁴⁰ Ben Rogaly, *Intensification of workplace regimes in British horticulture: the role of migrant workers*. *Population, Space and Place*, 14(6), 2008, p.14. Available at <http://sro.sussex.ac.uk/11584/>

⁴¹ Ana López-Sala et al, *Seasonal Immigrant Workers and Programs in UK, France, Spain and Italy*, 2016, p.14. Available at <http://www.temperproject.eu/wp-content/uploads/2015/06/Working-Paper-I-DF2.pdf>

⁴² Migration Advisory Committee, *Migrant Seasonal Workers: The impact on the horticulture and food processing sectors of closing the Seasonal Agricultural Workers Scheme and the Sectors Based Scheme*, May 2013, p.62. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257242/migrant-seasonal-workers.pdf

⁴³ Ana López-Sala et al, *Seasonal Immigrant Workers and Programs in UK, France, Spain and Italy*, 2016, p.14. Available at <http://www.temperproject.eu/wp-content/uploads/2015/06/Working-Paper-I-DF2.pdf>

⁴⁴ National Union of Workers, *Joint Standing Committee on Migration Inquiry into the Seasonal Worker Programme: Submission of the National Union of Workers*, p.2. Available at

allowing employers to provide and make deductions for accommodation and transport from workers' pay, was found to be open to abuses such as unclear and unfair deductions, above-market charges, and overcrowded, inadequate accommodation. Without a clear, formal process for redeployment of participants in cases of abuse, workers were too afraid of losing their job, or not being allowed to participate in future, to challenge abusive and exploitative practices.⁴⁵

The 2016 Australian Senate Committee report “*A National Disgrace: The Exploitation of Temporary Work Visa Holders*” detailed numerous instances of exploitation of workers on 457 visas, including gross underpayment, appalling living conditions, and unsafe working conditions. The Committee concluded that “**one of the key factors leading to the potential for exploitation is the structural dependence of the 457 visa worker on their sponsoring employer**” and that such structural factors should be addressed. The Senate Committee also found that temporary visa holders face greater difficulties in enforcing their workplace rights and accessing justice than Australian permanent residents and citizens. The Committee found that this was largely due to the fear of temporary visa holders that taking a complaint against their employer would jeopardize their visa status and the potential for permanent residency. It was also due to the inability of temporary workers to remain in the country to pursue claims against their employers after their employment had ended.

Similar situations of dependence have been created by the requirements placed on Working Holiday Makers on “417 visas”. Under this visa category, young workers are eligible to work and travel within Australia for up to 12 months, but must not work for more than 6 months for one employer. Workers may apply for a second year on the visa, but to do so must undertake at least 88 days of work in a regional area in the agriculture, mining or construction industries. A major inquiry conducted by the Australian Fair Work Ombudsman reported in 2016 that the vulnerability of 417 visa holders was increased by the requirement to work in remote locations and the dependency on the employer to ‘sign off’ on this work in order to obtain the second year of the visa.⁴⁶ In particular, this structure led to workers being required to perform work unpaid, being sexually harassed or coerced into sexual activity, or having to pay their employers to get the required sign off. This system places significant power in the hands of employers, and as a consequence some employers abuse this power to exploit their vulnerable workers.

CASE STUDY: United States H2 Guestworker Program

The H-2 Guestworker Program provides tens of thousands of temporary farmworkers and labourers to industries such as agriculture, forestry, and construction, for a maximum stay of 3 years.⁴⁷ Two schemes operate with slightly different regulations and entitlements: the

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/Seasonal_Worker_Programme/Sub_missions

⁴⁵ Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, 2016. Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report

⁴⁶ Fair Work Ombudsman, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program*, October 2016, p.3.

⁴⁷ <https://www.uscis.gov/working-united-states/temporary-workers/h-2a-temporary-agricultural-workers>

H2A program for agricultural workers, and the H2B program for non-agricultural workers. Most workers entering the United States on H2 visas in recent years were male and from Mexico.⁴⁸

Between 2011 and 2013 the US National Human Trafficking Resource Centre received over 1400 complaints alleging labour abuses related to the H2A and H2B programs.⁴⁹

Under both systems, workers are tied to a single employer who petitions the Department of Labour for their services. Guestworkers may work only for the employer who sponsored their visa and must leave the country when their visa expires. Critics have reported that this restriction has led to workers being ‘systematically exploited and abused’, as they are forced to choose between remaining in exploitative working conditions or returning home.⁵⁰ According to the Southern Poverty Law Center (SPLC):

‘The most fundamental problem with guestworker programs, both historically and currently, is that the employer — not the worker — decides whether a worker can come to the United States and whether he can stay. Because of this arrangement, the balance of power between employer and worker is skewed so disproportionately in favor of the employer that, for all practical purposes, the worker’s rights are nullified. At any moment, the employer can fire the worker, call the government and declare the worker to be “illegal.”’

Abuses such as non-payment of wages, withholding of documents, poor living conditions and denial of medical benefits for on-the-job injuries have been reported to be widespread within this scheme, but workers are unable to challenge them due to fear of losing their job and future right to return to the US, as leaving an abusive employer means becoming undocumented.⁵¹ The Government Accountability Office specifically found that “the structure of the H-2A and H-2B programs may create disincentives for workers to report abuse” and pointed specifically to the fact that workers are restricted to working for their sponsoring employer.⁵² The lack of legal protections and lack of enforcement of the protections offered to workers under this scheme also contribute to the endemic abuse suffered by workers.⁵³ Further, the fact that non-agricultural workers were not entitled to

⁴⁸ United States Government Accountability Office, *H-2A and H2B Visa Programs: Increased Protections Needed for Foreign Workers*, March 2015 (revised May, 2017), <http://www.gao.gov/assets/690/684985.pdf>, p.17.

⁴⁹ Ibid, p.36.

⁵⁰ Southern Poverty Law Centre, *Close to Slavery: Guestworker Programs in the United States*, 2013, p.1. Available at https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf

⁵¹ Ibid. See also Polaris, *Labor Trafficking in the US: A closer look at temporary work visas*, https://polarisproject.org/sites/default/files/Temp%20Visa_v5%20%281%29.pdf

⁵² United States Government Accountability Office, *H-2A and H2B Visa Programs: Increased Protections Needed for Foreign Workers*, March 2015 (revised May, 2017), <http://www.gao.gov/assets/690/684985.pdf>, p.37.

⁵³ Southern Poverty Law Centre, *Close to Slavery: Guestworker Programs in the United States*, 2013, p.2. Available at https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf.

federally funded legal services meant that accessing legal information or taking legal action to enforce rights was simply not affordable for many workers.⁵⁴

H2 workers are usually recruited outside the United States via third party recruiters. A 2015 study by the US Government Accountability Office (GAO) found numerous abuses in the recruitment process, including deceptive recruitment and the charging of prohibited recruitment fees.⁵⁵ The GAO further found that some of these abuses during recruitment made workers more likely to tolerate abuses later during employment,⁵⁶ in part due to the need for workers to accrue large debts in order to pay recruitment fees. In addition, Guatemalan workers interviewed by SPLC reported that they had been required to leave some form of 'collateral', for example property deeds, with the recruiter as a guarantee that the worker will comply with contract terms. This proved 'enormously effective at suppressing complaints about pay, working conditions or housing', as workers were afraid of fines or threats from the recruiter if they complained.⁵⁷

The H2-B program does not specify a minimum number of hours that must be guaranteed to workers, and so when workers arrive and are not offered work for long stretches or much lower hours than promised, they have no recourse. Furthermore, as they are tied to a single employer, they cannot offer services elsewhere and so have no protection against the huge financial impact of not being given work, even for short periods. There are also no regulations governing the standard of housing provided to H2-B workers, meaning that accommodation often lacks basic necessities. Even under the H2-A scheme, which does require certified housing, conditions were reported to be often substandard and even dangerous.⁵⁸

⁵⁴ Ibid p.41.

⁵⁵ United States Government Accountability Office, H-2A and H2B Visa Programs: Increased Protections Needed for Foreign Workers, March 2015 (revised May, 2017), <http://www.gao.gov/assets/690/684985.pdf>

⁵⁶ Ibid p.28.

⁵⁷ Southern Poverty Law Centre, *Close to Slavery: Guestworker Programs in the United States*, 2013, p.11. Available at https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf

⁵⁸ Ibid p.35.

Summary and Recommendations

The above case studies demonstrate the need to carefully structure any temporary migration schemes to prevent the exploitation of migrant workers who come to work in the UK under such schemes. In many cases, the few rights workers are afforded under temporary migration schemes are rendered virtually meaningless by lack of monitoring and enforcement. There is therefore also a need for effective monitoring of workers in schemes facilitating access to UK labour market for overseas workers, as well as robust enforcement measures, to ensure that their rights are upheld.

FLEX therefore recommends that:

- **Extensive consultation should be conducted with key stakeholders, including migrant and worker organisations, on the potential impacts of proposed temporary migration schemes, their structure and oversight.**
- **Any proposed temporary migration schemes should include the right of workers to change employers without losing their status or entitlements, and without having to incur further charges or waiting periods.**
- **Any proposed temporary migration scheme should include measures for the oversight and enforcement of labour standards under the scheme, including designating specific agencies with responsibility for monitoring, inspecting and remedying labour abuses.**
- **Workers on temporary and seasonal worker schemes should be informed of their rights in their native language, and have an assigned point of contact to provide advice and assistance in cases of abuse.**
- **Workers who have suffered labour rights abuses should be permitted to remain in the UK until they have been remediated.**
- **There should be a pathway to permanent residency and family reunification available for temporary workers.**