

FOREIGN WORKERS

The Law And Practice In Malaysia

*Ashgar Ali Ali Mohamed
Farheen Baig Sardar Baig
Muzaffar Syah Mallow
Mohammad Naqib Ishan Jan*



CLJ Publication

FOREIGN WORKERS

The Law And Practice In Malaysia

*Ashgar Ali Ali Mohamed
Farheen Baig Sardar Baig
Muzaffar Syah Mallow
Mohammad Naqib Ishan Jan*



CLJ Publication

Foreign workers : the law and practice in Malaysia /

Ashgar Ali Ali Mohamed ... [et al.]

Includes index

ISBN 978-967-0379-26-5

1. Labor laws and legislation--Malaysia.
2. Foreign workers--Legal status, law, etc.--Malaysia.

I. Ashgar Ali Ali Mohamed.

344.59501

Published by

The Malaysian Current Law Journal Sdn Bhd

E1-2, Jalan Selaman 1/2,

Dataran Palma, 68000 Ampang,

Selangor Darul Ehsan, Malaysia

[Co No 51143 M]

Tel: 603-42705400 Fax: 603-42705401

2013 © The Malaysian Current Law Journal Sdn Bhd ('MCLJ').

All rights reserved. No part of this publication may be reproduced or transmitted in any material form or by any means, including photocopying and recording, or storing in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication, without the written permission of the copyright holder, application for which should be addressed to the publisher. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

Although every effort has been made to ensure accuracy of this publication, The Malaysian Current Law Journal accepts no responsibility for errors or omissions, if any.

Edited by Baizura Abd Razak

Printed by

Printmate Sdn Bhd

No. 14 & 16, Jalan Industri P.B.P. 7,

Taman Industri Pusat Bandar Puchong,

47100 Puchong, Selangor Darul Ehsan.

CONTENTS

Preface	i	2.4 CONTRACT OF EMPLOYMENT: A COMMERCIAL OR PERSONAL CONTRACT	33
Acknowledgement	iii	2.4.1 Employer-Employee Relationship: A Special or Personal Relationship	33
Foreword	v	2.4.2 Relationship between Employer and Employee - Regulated by 'Status' not 'Contract'	36
Biographies of Contributors	vii	2.4.2.1 <i>The Introduction of Statutory Protection and Erosion of Freedom to Contract</i>	38
List of Abbreviations	ix	2.4.2.2 <i>Against Exploitation of Workers in Employment: Implying Terms</i>	40
Table of Cases	xi	2.4.3 Implying Terms in the Contract of Employment	41
Table of Legislation	xxix	2.4.3.1 <i>The Recognition of the Implied term of Trust and Confidence</i>	44
Table of Foreign Legislation	xxxvii	2.4.3.2 <i>The Origin of the Implied Trust and Confidence Term</i>	46
		2.4.3.3 <i>The Employer's Conduct of Infringing the Implied Term of Confidence and Trust</i>	49
CHAPTER 1		2.4.4 International Labour Organisation Slogan: 'Labour is not a Commodity' and the Performance of Service is not Akin to the Supply of Goods	53
MIGRANT WORKERS: AN INTRODUCTION		2.5 CONCLUSION	55
<i>by Farheen Baig Sandar Baig</i>			
1.1 INTRODUCTION	1		
1.2 MIGRANT WORKER AND WORK PERMIT	9		
1.3 EMPLOYMENT OF MIGRANT WORKERS IN A FOREIGN LAND: THE REASONS	11		
1.4 EXPLOITATION OF MIGRANT WORKERS	15		
1.5 CHAPTERIZATION	21		
1.6 CONCLUSION	24		
CHAPTER 2			
CONTRACT OF EMPLOYMENT: A NON-COMMERCIAL CONTRACT			
<i>by Ashgar Ali Ali Mohamed</i>			
2.1 INTRODUCTION	25		
2.2 CONTRACT LAW IN RELATION TO EMPLOYMENT	28		
2.3 FREEDOM OF CONTRACT: A REALITY IN CONTRACT OF EMPLOYMENT?	29		

**CHAPTER 3
MIGRATION OF FOREIGN
LABOURERS INTO MALAYSIA**

by Ashgar Ali Ali Mohamed

3.1	INTRODUCTION	57
3.2	FOREIGN INVASION INTO THE MALAY PENINSULA	61
3.3	MIGRATION OF FOREIGN LABOURERS	62
3.4	CONDITIONS OF MIGRANT WORKERS	63
3.5	LABOUR LEGISLATION PROTECTING MIGRANT WORKERS	66
3.7	INFLUENCE OF THE DOCTRINE OF <i>LAISSEZ-FAIRE</i>	69
3.7	INFLUX OF MIGRANT WORKERS SINCE 1957	70
3.8	CONCLUSION	71

**CHAPTER 4
INTERNATIONAL STANDARDS
ON TREATMENT OF MIGRANT
WORKERS**

by Farheen Baig Sardar Baig

4.1	INTRODUCTION	73
4.2	INTERNATIONAL LABOUR ORGANISATION (ILO)	74
4.3	ILO MULTILATERAL FRAMEWORK ON LABOUR MIGRATION (MFLM) - NON-BINDING PRINCIPLES AND GUIDELINES FOR A RIGHTS-BASED APPROACH TO LABOUR MIGRATION	76
4.3.1	MFLM - Principles and Basic Guidelines	77
4.3.2	Review of ILO's MFLM	92
4.4	ILO RELATED INSTRUMENTS ON MIGRANT WORKERS	93

4.5	UNITED NATIONS INSTRUMENT: INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES	97
4.6	UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948 AND THE UNIVERSAL ISLAMIC DECLARATION OF HUMAN RIGHTS 1981	99

**CHAPTER 5
RIGHTS OF WORKERS FROM
THE ISLAMIC PERSPECTIVE**

by Farheen Baig Sardar Baig

5.1	INTRODUCTION	103
5.2	HISTORY OF FOREIGN WORKERS IN ISLAM	103
5.3	TREATMENT TOWARDS SLAVES / FOREIGN WORKERS	105
5.3.1	Equality	106
5.3.2	Kindness, Maintenance as a Moral Duty	106
5.3.3	Masters/Employers Should Not Have Harsh Attitude towards Servants/Workers	108
5.3.4	Humility and Respect towards Slaves and Establishing Brotherhood between Master and Slave	110
5.3.5	Human Dignity	113
5.4	CONCLUSION	116

CHAPTER 6			
EMPLOYMENT STATUTES			
AND THEIR APPLICATION			
TOWARDS MIGRANT WORKERS			
<i>by Ashgar Ali Ali Mohamed</i>			
6.1 INTRODUCTION	117	6.15.2 Employer's Duty of Care for the Health and Safety of Employee	144
6.2 EMPLOYMENT ACT 1955	118	6.16 JURISDICTION OF THE INDUSTRIAL COURT AND THE LABOUR COURT	145
6.3 EMPLOYMENT (TERMINATION AND LAY-OFF BENEFITS) REGULATIONS 1980	120	6.16.1 Industrial Court	145
6.4 EMPLOYEES PROVIDENT FUND ACT 1991	121	6.16.2 Labour Court	146
6.5 EMPLOYEES' SOCIAL SECURITY ACT 1969	123	6.17 CONCLUSION	147
6.6 WORKMEN'S COMPENSATION ACT 1952	126	CHAPTER 7A	
6.7 WORKMEN'S COMPENSATION (FOREIGN WORKER'S COMPENSATION SCHEME) (INSURANCE) ORDER 2005	127	MIGRANT WORKERS: THE IMMIGRATION LAW, RULES AND PROCEDURES IN MALAYSIA	
6.8 INDUSTRIAL RELATIONS ACT 1967	127	<i>by Muzaffar Syah Mallow</i>	
6.9 TRADE UNIONS ACT 1959	130	7A.1 INTRODUCTION	149
6.10 OCCUPATIONAL SAFETY AND HEALTH ACT 1994	130	7A.2 THE GOVERNING BODY WHICH ENFORCES THE IMMIGRATION LAWS IN MALAYSIA	149
6.11 FACTORIES AND MACHINERY ACT 1967	131	7A.3 IMMIGRATION ACT 1959/1963 (REVISED 1974)	152
6.12 WORKERS' MINIMUM STANDARDS OF HOUSING AND AMENITIES ACT 1990	132	7A.3.1 Admission and Departure	153
6.13 SECTION 28A OF THE CIVIL LAW ACT 1956	132	7A.3.2 Entry Permit	166
6.14 CONTRACT LAW	137	7A.3.3 Removal of Prohibited Immigrants from Malaysia	174
6.15 PROTECTION AT COMMON LAW	140	7A.4 CONCLUSION	175
6.15.1 Implied Term of Trust and Confidence	140	CHAPTER 7B	
		HIRING MIGRANT WORKERS: RESTRICTION WITH REFERENCE TO EMPLOYMENT (RESTRICTION) ACT 1968	
		<i>by Ashgar Ali Ali Mohamed</i>	
		7B.1 RESTRICTIONS UNDER THE EMPLOYMENT (RESTRICTION) ACT 1968	177
		7B.2 RESTRICTION UNDER THE EMPLOYMENT (RESTRICTION) (EMPLOYMENT PERMIT) REGULATIONS 1969	184

7B.3 EMPLOYING MIGRANT WORKER WITHOUT A VALID EMPLOYMENT PERMIT: THE CRIMINAL OFFENCE	188
7B.4 EMPLOYMENT OF MIGRANT WORKERS IN CONTRAVENTION OF THE 1968 ACT: ITS EFFECT ON CONTRACT OF EMPLOYMENT	191
7B.5 REMEDY OF MIGRANT WORKERS WITH VALID WORK PERMITS WHOSE EMPLOYMENT CONTRACT WAS PREMATURELY TERMINATED	193
7B.6 CONCLUSION	196

**CHAPTER 8
EXPLOITATION OF MIGRANT WORKERS: ITS FORMS**

by Mohammad Naqib Ishan Jan

8.1 INTRODUCTION	197
8.2 DEFINITION OF MIGRANT WORKERS	198
8.3 PULL AND THE PUSH FACTORS DRIVING MIGRATION	200
8.4 EXPLOITATION OF MIGRANT WORKERS	200
8.4.1 Forms of Exploitation of Migrant Workers	201
8.5 STATES' OBLIGATION TO PROTECT THE HUMAN RIGHTS OF MIGRANT WORKERS	209
8.6 CONCLUSION	218

**CHAPTER 9
EXPLOITATION OF MIGRANT WORKERS: THE LIKELY IDENTIFIABLE CAUSES**

by Muzaffar Syah Mallow

9.1 INTRODUCTION	219
9.2 THE ABUSE AND EXPLOITATION OF MIGRANT WORKERS IN MALAYSIA	220
9.2.1 Inefficient and Inadequate Legal Protection towards Migrant Workers	222
9.2.2 Social Misunderstanding toward Migrant Workers	226
9.2.3 Lack of Religious or Moral Values of the Abuser or Exploiter	226
9.3 CONCLUSION	230

**CHAPTER 10
EXPLOITATION OF MIGRANT WORKERS: A CASE STUDY**

by Muzaffar Syah Mallow

10.1 INTRODUCTION	231
10.2 AN OVERVIEW OF REPORTED CASES INVOLVING THE EXPLOITATION OF MIGRANT WORKERS IN MALAYSIA	232
10.3 ABUSE CASES INVOLVING MIGRANT WORKERS IN MALAYSIA: THE LEGAL IMPACT	240
10.4 CONCLUSION	241

**CHAPTER 11A
EXPLOITATION OF MIGRANT
WORKERS: CRIMINAL
SANCTIONS PROVIDED UNDER
THE MALAYSIAN PENAL CODE**

by Muzaffar Syah Mallowa

11A.1	INTRODUCTION	243
11A.2	AN OVERVIEW OF THE THEORY AND PRINCIPLES OF CRIMINAL LAW	244
11A.3	THE STANDARD COMMON LAW TEST OF CRIMINAL LIABILITY: <i>ACTUS NON FACIT REUM NISI MENS SIT REA</i>	249
11A.3.1	<i>Actus reus</i>	250
	<i>11A.3.1.1 Act</i>	251
	<i>11A.3.1.2 Omission</i>	252
11A.3.2	<i>Mens rea</i>	256
11A.4	EXPLOITATION OF MIGRANT WORKERS: CRIMINAL SANCTIONS PROVIDED UNDER THE MALAYSIAN PENAL CODE	260
11A.4.1	Possible Sanctions under the Malaysian Penal Code (Act 574)	260
11A.4.2	Case Study Involving Migrant Workers which Had Been Tried by the Courts under the Penal Code	267
11A.4.3	Criminal Sentencing Principle in Malaysia	279
11A.6	CONCLUSION	280

**CHAPTER 11B
CRIMINAL OFFENCES AND CIVIL
WRONGS BY OR AGAINST
MIGRANT WORKERS**

by Ashgar Ali Ali Mohamed

11B.1	PHYSICAL ABUSE OR ILL-TREATMENT OF MIGRANT WORKERS: THE PUNISHMENT	281
11B.2	OFFENCES AGAINST MIGRANT WORKERS: ILLUSTRATION FROM DECIDED CASES	284
11B.3	A REVIEW OF SELECTED CASES	289
11B.4	CONCLUSION	306

**CHAPTER 12
EXPLOITATION OF NATIONAL OR
LOCAL WORKERS AND THE
LIABILITY OF THE EMPLOYER**

by Ashgar Ali Ali Mohamed

12.1	INTRODUCTION	307
12.2	LABOUR IS NOT A COMMODITY	310
12.3	FORCED LABOUR PROHIBITED	311
12.4	RELATIONSHIP OF MUTUAL TRUST AND CONFIDENCE	315
12.5	EMPLOYEES' RIGHTS IN EMPLOYMENT AKIN TO 'PROPERTY RIGHTS'	317
12.5.1	Withholding of Salary or Failure of Salary Payment	318
12.5.2	Demotion or Reduction in Status and Rank	320
12.5.3	Transfer of Employee	322
12.5.4	Secondment Must Be <i>Bona Fide</i>	326

12.5.5	Retrenchment Justifiable on Genuine Commercial Reasons	329	13.6	CASES ON NON-RENEWAL OF FIXED-TERM CONTRACTS INVOLVING MIGRANT WORKERS	360
12.5.6	Outsourcing to Victimise Employee	331	13.7	CONCLUSION	368
12.5.7	Voluntary Separation Scheme Being Forced or Coerced on Employee	332	CHAPTER 14		
12.5.8	Other Circumstances	334	MIGRANT WORKERS: ADEQUACY AND SUFFICIENCY OF LAW		
12.6	CONSTRUCTIVE DISMISSAL AND REMEDIES	335	<i>by Farheen Baig Sardar Baig</i>		
12.6.1	Constructive Dismissal	335	14.1	INTRODUCTION	369
12.6.2	Remedies for Dismissal without Just Cause or Excuse	340	14.2	MIGRANT WORKERS' ACCESS TO JUSTICE	370
12.7	CONCLUSION	342	14.3	ADEQUACY AND SUFFICIENCY OF THE LAW	374
CHAPTER 13			14.4	PROBLEMS FACED BY MIGRANT WORKERS	378
PREMATURE TERMINATION OF FIXED-TERM CONTRACT AND ITS REMEDIES			14.4.1	Discriminatory Wages	378
<i>by Ashgar Ali Ali Mohamed</i>			14.4.2	Inadequate Housing	379
13.1	INTRODUCTION	343	14.4.3	Insurance	379
13.2	FIXED-TERM ENGAGEMENT ON GENUINE GROUNDS	347	14.4.4	Medical Facilities	379
13.3	LEGITIMATE EXPECTATION OF RENEWAL OF FIXED-TERM ENGAGEMENT	350	14.4.5	Cancellation of Work Permits	380
13.4	COMPENSATION FOR PREMATURE TERMINATION OF FIXED-TERM CONTRACT	356	14.4.6	High Costs for Renewing Work Passes	380
13.5	HIRING MIGRANT WORKERS OR EXPATRIATES ON FIXED-TERM CONTRACT	358	14.4.7	Other Related Problems	381
			14.5	RECOMMENDATIONS	382
			14.6	ESTABLISHING MIGRANT WORKERS' RIGHTS: ITS IMPORTANCE	385
			14.7	CONCLUSION	388

CHAPTER 15			
ASYLUM SEEKERS AND THE RIGHT TO WORK			
<i>by Mohammad Naqib Ishan Jan</i>			
15.1	INTRODUCTION	389	
15.2	THE DEFINITIONS OF ASYLUM AND ASYLUM SEEKERS	391	
15.2.1	Definition of Asylum	391	
15.2.2	Definition of Asylum Seeker	393	
15.3	PROTECTION TO ASYLUM SEEKERS EASIER SAID THAN DONE	394	
15.4	CLASSIFICATION OF ASYLUM	395	
15.4.1	Territorial Asylum	396	
15.4.2	Extra-Territorial or Diplomatic Asylum	399	
15.5	THE RIGHT TO WORK: IS IT AVAILABLE UNDER INTERNATIONAL HUMAN RIGHTS LAW TO ASYLUM SEEKERS	404	
15.6	THE RIGHT TO WORK: IS IT AVAILABLE TO ASYLUM SEEKERS IN MALAYSIA?	412	
15.7	CONCLUSION	414	
CHAPTER 16			
HUMAN TRAFFICKING AND SMUGGLING OF MIGRANTS: THE INTERNATIONAL INSTRUMENTS AND DOMESTIC LAWS OF MALAYSIA			
<i>by Ashgar Ali Ali Mohamed</i>			
16.1	INTRODUCTION	415	
16.2	HUMAN TRAFFICKING: THE INSTRUMENTS	416	
16.2.1	United Nations Convention Against Transnational Organized Crime	416	
16.2.2	Malaysian Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670)	430	
16.3	DECIDED CASES OF HUMAN TRAFFICKING: A REVIEW	454	
16.4	ISLAMIC APPROACH TO HUMAN TRAFFICKING	475	
16.5	CONCLUSION	477	
CHAPTER 17			
DILIGENCE AND TRUSTWORTHINESS: THE QUALITIES OF A MUSLIM EMPLOYEE			
<i>by Ashgar Ali Ali Mohamed</i>			
17.1	INTRODUCTION	489	
17.2	EMPLOY HIM WHO IS STRONG AND TRUSTWORTHY	493	
17.3	CONCLUSION	504	
CHAPTER 18			
IMMIGRATION LAW, RULES AND PROCEDURE FOR MIGRANT WORKERS: A COMPARATIVE STUDY FROM VARIOUS JURISDICTIONS			
<i>by Muzaffar Syah Mallow</i>			
18.1	INTRODUCTION	507	
18.2	IMMIGRATION LAW, RULES AND PROCEDURE FOR MIGRANT WORKERS UNDER VARIOUS JURISDICTIONS	510	
18.2.1	United States of America	511	
18.2.2	United Kingdom	516	
18.2.3	Australia	519	
18.2.4	Hong Kong	520	
18.2.5	Singapore	525	
18.2.6	Saudi Arabia	527	

18.3	THE ISSUES ON THE EXPLOITATION OF MIGRANT WORKERS IN SINGAPORE, SAUDI ARABIA & HONG KONG	528	19.7.6	Protection of Informers or Whistleblowers	556
18.4	CONCLUSION	532	19.7.7	Implementation of Minimum Wages Order: The Guidelines	557
CHAPTER 19			APPENDICES		579
THE LAW ON MINIMUM WAGES IN MALAYSIA			Appendix A		579
<i>by Ashgar Ali Ali Mohamed</i>			Appendix B		582
19.1	INTRODUCTION	533	Appendix BA		599
19.2	MINIMUM WAGE FIXING CONVENTION, 1970 (NO. 131)	534	Appendix C		619
19.3	MINIMUM WAGE FIXING RECOMMENDATION, 1970 (NO. 135)	536	Appendix CA		628
19.4	MINIMUM RATE OF WAGES FROM ISLAMIC PERSPECTIVE	539	Appendix D		637
19.5	MINIMUM WAGE LAW IN SELECTED COUNTRIES	541	Appendix E		676
19.6	MINIMUM WAGES ORDER 2012 (MALAYSIA)	545	Appendix F		682
19.7	APPLICATION OF MINIMUM WAGES ORDER: AN EMPLOYEE UNDER A CONTRACT OF SERVICE	546	INDEX		697
19.7.1	The Rates of Minimum Wages	549			
19.7.2	Council to Review Minimum Wages Order	553			
19.7.3	Negotiation for Restructuring of Wages	553			
19.7.4	Enforcement of the Minimum Wages Order	554			
19.7.5	Compounding of Offences	555			

**HIRING MIGRANT WORKERS:
RESTRICTION WITH REFERENCE TO
EMPLOYMENT (RESTRICTION) ACT 1968*****7B.1 | RESTRICTIONS UNDER THE EMPLOYMENT
(RESTRICTION) ACT 1968**

The employment of a non-citizen in Malaysia is subject to certain restrictions as contained in the Employment (Restriction) Act 1968 (Revised 1988) (hereinafter referred to as 'the Act').¹ The Act regulates the hiring of a non-citizen in any business, industry or undertaking whatsoever including any department of the federal or state government, any local authority and any statutory body. Section 5 of the Act provides that a non-citizen shall not be employed or accepted for employment in any business in the Federation without a valid employment permit and no person can employ a non-citizen unless the latter has a valid employment permit.² 'Business' is defined in s. 2 as:

'any form of trade, commerce, craftsmanship, calling, profession or other activity carried on for the purpose of gain'.

Where the employment permit is issued, the permit shall, unless otherwise specified, be valid only in respect of the particular employment and the employer specified therein. Further, the employment permit so issued

* This chapter is contributed by Ashgar Ali Ali Mohamed.

1 The Employment (Restriction) Act 1968 is administered by the Department of Labour.

2 The employment permit is issued by the Immigration Department of Malaysia pursuant to the Immigration Act 1959/1963.