



FACULTY OF LAW
Lund University

Carin Carlson

Recruited and exploited

The effect of deportability on third country
labour migrants' human and labour rights in
Sweden

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Supervisor: Leila Brännström
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Summary

Many Western countries are on the verge of a demographic change. This change consists of an aging population in combination with a decreasing birth rate. To meet the need following the labour shortage, the Swedish migration framework was modified in 2008. In the new framework the former labour market examination was abolished. Instead the individual employer became the decision maker of whether third country recruitment was necessary. The work permit is now directly attached to the employer, as the migrant worker is filling a specific need. If the migrant worker loses the employment, she/he will be deported after three months, unless a new employment is attained.

The purpose of this thesis is to investigate and analyze whether this framework and its consequences are in accordance with international human and labour rights conventions, established within the United Nations (UN) regime. One core universal human right is the right not to be treated in a discriminatory manner based on e.g. ethnicity or nationality. Another important right within the field of international labour law is that the work performed is supposed to be so called "decent work".

The theoretic approach focuses on investigating how the deportability of migrant workers, mainly due to the work permits' attachment to the employer (during the initial 24 months), effects their basic human and labour rights. Furthermore, the state's involvement in the construction of deportability is discussed by studying the connection between immigration and labour law and the implications of these frameworks in another judicial context.

The Swedish framework of immigration law has certain supervisory mechanisms to assure that migrant workers are not exploited and national labour laws also applies to this group of workers. In spite of this, there are regular reports on how migrant workers meet both discriminatory and degrading treatment in the Swedish labour market. The question is whether a system where the employees right to reside in Sweden is dependent on the employer ever can guarantee that the migrant workers' basic human and labour rights are not breached.

Sammanfattning

En stor del av västvärlden står inför en demografisk förändring bestående av en allt åldrande befolkning i kombination med ett lägre barnafödande. För att möta detta behov förenklades 2008 det juridiska ramverket i Sverige gällande arbetskraftsinvandring från tredje land. Det nya regelverket innebär att den tidigare arbetsmarknadsprövningen togs bort, istället blev det den enskilde arbetsgivarens uppgift att avgöra om tredjelandsrekrytering är nödvändig. Detta är anledningen till att arbetstillståndet numera kopplas till den enskilde arbetsgivaren då migrantarbetaren uppfyller ett specifikt behov hos denne. Förlorar migrantarbetaren jobbet blir personen deporterad om hon eller han inte hittar ett nytt jobb inom tre månader.

Syftet med denna uppsats är att undersöka och analysera om detta regelverk och dess konsekvenser är i enlighet med internationella konventioner gällande mänskliga rättigheter, etablerade inom Förenta Nationernas (FN) rådande system. En av de grundläggande mänskliga rättigheterna är att vara garanterad frihet från diskriminering baserad på exempelvis etnicitet och nationalitet. En annan viktig rättighet inom det arbetsrättsliga området är att det arbete som utförs ska vara s.k. ”decent work”.

Den teoretiska ansatsen syftar till att undersöka hur migrantarbetares deportabilitet påverkar deras mänskliga rättigheter i praktiken. Fokus är framför allt på det faktum att arbetstillståndet är knutet till en specifik arbetsgivare under de första 24 månaderna. Vidare är statens inblandning i konstruktionen av deportabilitet en viktig fråga som kan diskuteras genom att studera relationen mellan migrations- och arbetsrätt, samt vilka implikationer regelverken får i en annan juridisk kontext.

Det svenska migrationsrättsliga systemet har vissa kontrollmekanismer för att garantera att migrantarbetare inte utnyttjas och det arbetsrättsliga ramverket gäller även dessa arbetare. Trots detta rapporteras det regelbundet om hur denna grupp utsätts för både diskriminerande och kränkande behandling på den svenska arbetsmarknaden. Frågan är om ett system där den anställdes rätt att vistas legalt i Sverige är beroende av arbetsgivaren någonsin kan garantera att migrantarbetares grundläggande mänskliga rättigheter inte kränks.

Abbreviations

AD	Arbetsdomstolen (the Swedish Labour Court)
EU	European Union
EEA	European Economic Area
ECHR	European Convention of Human Rights
EURES	EUROpean Employment Services
HRF	Hotell- och Restaurangfacket
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
NGO	Non Governmental Organization
PROP.	Government bill
SACO	Sveriges akademikers centralorganisation
SEK	Svenska kronor (the Swedish currency)
SOU	Statens Offentliga Utredningar (Official reports of the Swedish Government)
SVT	Sveriges Television (the Swedish public television)
TCO	Tjänstemännens Centralorganisation
UDHR	Universal Declaration of Human Rights
UN	United Nations

1 Introduction

1.1 Background

The combination of poor birth rates and a growing elderly population in the European Union (EU) is increasingly worrying politicians on both a national and on a European level.¹ As a result of this fewer younger workers are left to support a significantly larger older population. Facilitating the process of recruitment from third countries has therefore become a part of the EU's strategy to implement a common and well-functioning migration policy. Increased possibilities for labour migration² can thus be seen as a means of engaging with concerns regarding the demographic situation and preventing its effects.³ As the EU is also dependent on seasonal work, there has been a policy shift, as it has become evident that in the future we will see a growing lack of workers willing to engage in such fields of employment. There is now a general acceptance that the structural demand for non-educated, low-skilled workers will continue to increase. As a result, the EU will have to encourage temporary as well as permanent labour immigration of low-skilled third country workers.⁴ However, in its policies, the EU has been focusing on high-skilled workers.⁵

The idea of labour immigration is that it should lead to a positive result for the employee, as well as the employer and the state. Such practices are connected to certain risks, which is the reason behind sharing the responsibility among various actors. The employer recruits from abroad, the worker migrates to a country with other social and cultural traditions and a new language, and the state is responsible for the security of the individual and her/his family if something unexpected should happen.⁶ Migrant workers are often described as working in de-regulated labour markets where the jobs are characterized by insecurity, low wages and obfuscated employment relations. Hence, they provide a flexible working source as they are considered to be available as needed. There are several explanations to why this group is over represented in this kind of work, such as poor language skills, discrimination as well as a lack of recognition of (foreign) qualifications.⁷ Insecurity is one main characteristic in the concept of precarity.⁸ Insecurity affects a person very hard, as an insecure future makes it difficult to make rational plans. Moreover, the small amount of faith in the future makes it harder to protest, both as an individual or as part of a group, against unbearable living standards. Insecurity also affects everyone more or less, as it is always present in people's

¹ The Work Environment Authority, report 2012:4, "*Migration, arbetsmiljö och hälsa*", [Migration, work environment and health], p. 33f.

² There are several notions used to describe persons with foreign citizenship coming to Sweden to perform work, of which migrant workers, guest workers and labour migrants are examples. I will mainly use the term migrant workers and labour migration throughout this thesis as these terms, in my opinion, are relatively clear and descriptive.

³ The Work Environment Authority, report 2012:4, p. 31.

⁴ Ibid, p. 34f.

⁵ Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

⁶ SOU 2006:87, "*Arbetskraftsinvandring i Sverige - förslag och konsekvenser*", [Labour immigration in Sweden- proposals and consequences], p. 118ff.

⁷ Anderson, B., "*Migration, immigration controls and the fashioning of precarious workers*", p. 300f.

⁸ The concept of precariousness can be described as involving lack of protection, instability, insecurity and economic or social vulnerability. Precarious jobs is thus identified by different combination of these factors. Rodgers, G and Rodgers, J, *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe*.

consciousness.⁹ Precarity therefore has implications, which go further than just the question of employment, as it also envisages the connected weakening of social relations connected to precariousness.¹⁰ Political policies such as “flexicurity” might be criticized as it increases the insecurity, aggregating the risk of ending up performing precarious work.

Research from the ILO has established that third country migrant workers in the EU often have insecure employments and inferior working environment compared to EU-citizens. Moreover, their working conditions are often characterized by temporary contracts, long working hours, precarious working environments, lower salaries and a low union representation.¹¹ Recent research also indicates that migrant workers are exposed to more safety and health risks than other groups of workers as a result of their often short time in the receiving country, but also due to limited knowledge concerning health and safety regulations. In addition to this, lack of language skills, the fear of losing the job, unsatisfactory job introduction and safety training, as well as insufficient or no knowledge of labour rights, places such workers in an even more vulnerable position. Some of the inferior working conditions are, according to the researchers, attached to the difficulties of being granted a work permit, even in situations where there is an established labour shortage.¹²

The Swedish legal change in 2008 created further opportunities to recruit labour from outside the EU and EEA, as the employer gained the right to decide over whether or not there was a need for recruitment. The purpose of the new regulations was to achieve a more flexible and efficient system for labour migration and to facilitate the recruitment of third country migrants.¹³ Since then, considerable attention has been paid to migrants working in Sweden, in both low-wage and often abusive employments. This exploitation of migrants is not a Swedish phenomenon, it has e.g. also been made visible in the United Kingdom, where the UK Home Office in 2007 stated that: “...*the fact that many immigrants, at the end of their journey, end up in shadowy jobs in the grey economy undermines the terms and working conditions...*”¹⁴ As a way of meeting this problem, immigration controls and enforcement have acted as measures to protect national workers and illegitimate competition between businesses.¹⁵

The new regulation represented a widespread change regarding immigration policies. Before the change, the so-called labour market examination was performed meaning that work permits were examined in relation to recruitment needs in the national labour market. The Employment Agency set the guiding principles for the assessment of work permits, which were subsequently examined by the Migration Board. Before these guidelines were issued, organizations of workers and employers had the possibility to examine the conditions of the recruitment.¹⁶ Hence, Sweden went from a restrictive policy regarding labour immigration from third countries, where work permits were only given in sectors with a documented labour shortage, to a demand driven and less regulated labour immigration.¹⁷ When the

⁹ Bourdieu, P., “Otryggheten som samhällsfenomen”, p. 113.

¹⁰ Anderson, B., “Migration, immigration controls and the fashioning of precarious workers”, p. 303f.

¹¹ The Work Environment Authority, report 2012:4, p. 36f.

¹² Ibid, p. 40-46.

¹³ Prop. 2007/08:147, “Nya regler för arbetskraftsinvandring”, [New regulations concerning labour immigration], p. 1.

¹⁴ Anderson, B., p.301f.

¹⁵ Ibid, p. 303.

¹⁶ SOU 2006:87, “Arbetskraftsinvandring i Sverige - förslag och konsekvenser”, [Labour immigration in Sweden- proposals and consequences], p. 127.

¹⁷ Prop. 2007/08:147, p. 2.

regulations were adopted there was an intense debate regarding the legal changes, a debate which has continued as further abuses have continued to be exposed. Once the Migration Board has granted the temporary work permit, the migrant worker can move to Sweden and start the employment. After this point, there is very little control by both government agencies, as well as workers' organizations (as many employers are not bound by collective agreements and many migrants are non-unionized).

During the last couple of years, the negative side of third country labour migration has become increasingly visible, e.g. by the widespread exploitation of berry-pickers from third countries. Swedwatch¹⁸ has described their working situation in a report, showing how many migrant workers have been forced to return largely in debt after a stay in Sweden, characterized by poor living standards, terrible sanitary conditions, a six day work week, long working hours, low wages (or sometimes no payment at all) and no possible way of changing their conditions. The report showed the weaknesses of the Swedish regulation regarding third country labour migration.¹⁹ Since then, the criteria for recruitment have changed and the Migration Board now demands specific information and protection for berry-pickers. According to the authorities, this has had a positive outcome.²⁰ However, throughout time, new reports are consistently describing how migrants are being exploited in new ways. The question is if there are actually any efficient measures to ensure that migrant workers' labour rights are guaranteed under the current framework.

1.2 Purpose and research questions

This thesis aims to analyze whether Sweden is fulfilling its international human and labour rights obligations when it comes to third country migrants. The intention is to evaluate the efficiency of the international human and labour rights framework and its implementation (through the national framework regarding discrimination/ equal treatment), focusing on Sweden's positive obligations. This will be explored by assessing the labour immigration framework which was fundamentally changed in 2008. Further this thesis will focus on some of the problems of this framework, specifically in relation to equal treatment for migrant workers, both by direct (lack of access to labour market measures) and indirect discrimination (deportation) of such workers.

Moreover, the result of the current framework will be discussed, namely how the risk of deportation²¹ leads to precarious work, as the risk of deportation in combination with a work permit attached to the employer increase the risk that migrant workers may not dare to report problems regarding their working conditions. There is always a certain inherent imbalance in the employment relationship, where the employee is subordinate to the employer, as the employee is bound to perform the job in accordance to the instructions and under the control

¹⁸ Swedwatch is an independent research organization focusing on social and environmental problems connected to Swedish companies. Swedwatch Report #41: "*Mors lilla Olle är underbetalt vietnames. Så exploateras asiatiska bärplockare i de svenska skogarna*"

¹⁹ The Work Environment Authority, report 2012:4, p. 29f.

²⁰ The Migration Board, "*Skärpta riktlinjer har förbättrat situationen för bärplockare*", [Tougher regulations have improved the situation for berry-pickers]

²¹ The term deportation is used as the description of "... removal of aliens by state power from the territory of that state, either "voluntarily", under threat of force, or forcibly." W. Williams, "*Deportation, Expulsion, International Police*", p. 73.

of the employer.²² However, this imbalance is further exacerbated between the migrant worker and the employer, as the temporary work permit is attached to the employer, and the migrant will be deported if she/he loses the work position and is not able to find a new one within three months. As a result of this construction the migrant worker has a very weak negotiating status with regards to conflict due to their deportability, a weakness which may be assumed to be attributed to the migrant workers' "precarious" employment situation.²³ Furthermore, by discussing migrant workers' situation in terms of precarity, one also acknowledges that atypical and insecure employment has implications beyond the employment relationship.²⁴

The overall purpose of this thesis is to examine how the migrants' risk of deportation affects their international (and national) human and labour rights in Sweden. The study will discuss whether the *de facto* loss of such rights is in breach of Swedish and international human rights and labour rights. The idea is to, *de lege lata* and *de lege ferenda*, examine whether the Swedish system's existing legislation and collective agreements ensures that migrant workers' human and labour rights are respected.

Beyond considering the implementation of human and labour rights the relationship between migration policies and labour regulations will be studied. The key difference between migrant workers' and nationals' situation on the labour market is the migrant workers' deportability, hence the need to explore the factor of migration. The objective is to evaluate whether the current labour migration policies are actually able to ensure migrants' rights taking heavily into consideration the understanding that the very deportability of the migrant worker is one of the factors which indeed makes them more desirable to many employers.²⁵

By dismissing a migrant worker from their employment- resulting in deportation after three months unless a new position is found- a situation is created where employers indirectly have the possibility of "illegalizing" the worker. This legal construction therefore increases the risk of migrant workers having to perform precarious work, as their deportability limits their scope of action, and makes them highly dependent of their employer.

Therefore, central research questions for this thesis are:

- How is the framework for Swedish third country labour migration constructed?
- How does the construction of the framework affect the commencement, continuation and termination of the employment relationship?
- Is the result of this framework in accordance with international labour standards and human rights?
- Does the Swedish model ensure decent labour standards for migrant workers? How does the Swedish state guarantee that the deportability of third country labour migrants does not limit the access to those rights?

²² Källström K. and Malmberg, J., p. 23.

²³ The Work Environment Authority, report 2012:4, "*Migration, arbetsmiljö och hälsa*", [Migration, work environment and health], p. 16ff.

²⁴ Andersson, B., "*Migration, immigration controls and the fashioning of precarious workers*", p. 303.

²⁵ Anderson, B., and Ruhs, M., "*Migrant Workers: Who Needs Them? A Framework for the Analysis of Staff Shortages, Immigration, and Public Policy*", p. 109.

To make the information more accessible and to link important areas to each other I have divided the migrant workers employment situation into different phases, which are treated separately. The separation is based on the fact that different regulations are applicable depending on for example: whether the issue concerns mainly immigration or labour policies, if there is an employment relationship or not and whether the migrant worker is unionized.

1.3 Delimitations

This essay deals with labour conditions of migrant workers with non EU/EEA citizenship holding temporary work permits in Sweden, with a focus on low-skilled workers and how these conditions are affected by the risk of deportation.

A significant part of those migrating to Sweden for work are classified as highly qualified labour, e.g. engineers recruited by large companies to be part of extensive projects. Compared to non-skilled workers, highly skilled workers are much less frequently to be found in such an exposed situation in relation to the employer. As a result, their deportability is not as high, therefore motivating the focus here to be maintained upon the position of low-skilled workers.

1.4 Theory

The design of this thesis is influenced largely by Bridget Anderson and Nicholas De Genova, and their research regarding *deportability*, explaining how the possibility of deportation is connected to migrant workers position in society. The starting point for this thesis is research about deportability, which is divided into three areas:

Firstly, how the fields of labour law and immigration law interconnect. This approach provides a framework to analyze the system where migrant workers' level of deportability is dependent upon their employer. As a result of this construction, the power asymmetry already inherent in the employee-employer relationship is made even wider.

Secondly the issue of state complicity, that is whether the state has breached its positive obligations and participated in the creation of a framework which negatively effects migrants' access to their rights.

Finally how the immigration framework regarding third country migrants affect labour conditions in general, creating a widespread "feeling" of uncertainty. By using the perspective of deportability the idea is to show the state's complicity in creating precarity. The latter allows us to evaluate whether the framework regarding temporary work permits for low-skilled workers is effective or if it in fact only serves to increase the risk that such workers will be pressured into performing so called precarious work. The Swedish and European trend regarding "flexibility" at work also creates uncertainty for workers: migrant workers are more

flexible (a.k.a. desirable) as they are deportable and hence always close to being “illegal”. Such workers therefore will be ultimately desirable for employers looking to reduce their responsibilities and gain competitive advantages.

By using this theoretical approach, it is possible to discuss whether the Swedish state, through its immigration policies and lack of efficient guarantees of human and labour rights, participate in creating precarity among third country migrant workers. The aspect of precarity is in this thesis used as a means of showing concrete effects of deportability, but also to put the legal framework into a political context. The fact that migrant workers are highly exposed to precarious work seems to be institutionalized by the state’s choice of immigration and labour policies.

1.5 Methodology and material

The approach for this thesis is focusing on descriptive, analytical and interpretative methods. The actual conditions and policies of third country migrant workers in Sweden will be described and analyzed in relation to the related legal instruments.

The legal framework concerning human and labour rights as well as the international framework regarding migrant workers will be described *de lege lata*. A legal dogmatic method is used, illustrating the current legal system regarding equal treatment and decent labour standards within the UN structure, including the ILO. This is achieved by looking at the relevant conventions and declarations and how these are being interpreted in general comments, guidelines and publications from different UN bodies and agencies.

Moreover, regarding the assessment of the Swedish legal framework, the traditional Swedish dogmatic method is used. This means that the traditional Swedish legal sources are used in the essay; law, preparatory works, and doctrine. The doctrine mostly concerns issues regarding migration law and labour law, as well as works treating the interaction between the two. The focus in this thesis is to analyze Sweden’s positive obligations in regards to human and labour rights, and the effectiveness of these obligations on a national level. The jurisprudence within this specific subject is brief, which is most probably closely related to the fact that migrant workers risk losing their work permit, facing the risk of deportation, if they bring a complaint against their employer.

The labour law system in Sweden is in its construction different to other legal areas. As a result of this, collective agreements may also serve as important legal sources, even though they do not form part of the national legislation. It is arguable that collective agreements are in fact the most important instrument regulating labour conditions. In spite of this importance, there will not be a review concerning their content, instead the function and effect of such agreements within this field of law are considered.

As this judicial topic is closely related to politics, the essay has also a perspective of legal theory. The analysis is interpreted in relation to a theoretical approach regarding

deportability. This theory is used as a means of analyzing the interrelationship between labour and migration law, and the effect of deportability on migrant workers. As the issues at hand are relatively unexplored, the empiric material consists of untraditional sources such as newspaper articles and debate contributions as well as reports from different organizations which have also played an important role. The selection has been made intuitively in regard to media reports regarding the ill treatment of third country migrants and debates concerning problems with the current immigration framework.

1.6 Disposition

This thesis is divided into 6 chapters:

- Chapter 1 gives an introduction, which briefly defines and describes the main facts of the problem, explains the purposes and aims of the thesis. Further it clearly outlays the research questions, the methodology and the delimitations of the thesis.
- Chapter 2 describes the theory of “deportability” and its connection to “precarious” work and the creation of “illegal” aliens and the effects this has on the employment power asymmetry.
- Chapter 3 contributes to the description as well as the background of the legal framework concerning human and labour rights affecting migrant workers, from a national (Swedish) and international (UN/ILO) perspective.
- Chapter 4 outlines the relevant facts concerning the establishment and termination of the employment. This includes a description of the legal framework, the role of the Migration Board and the impact of the trade unions and collective agreements. Furthermore, the implications of the work permit being attached to the employer and issues connected with the labour shortage are described.
- Chapter 5 discusses the situation for migrant workers during their ongoing employment, which forms the empiric material, pointing towards the fact that there are several deficiencies regarding the migrants’ working conditions. Moreover, an example of labour control performed by a Swedish trade union is presented to illustrate the frequency and the difficulties of the current problems.
- Chapter 6 concludes the study by summarizing the answers brought by the analysis of the study in relation to the research questions, and will also give certain recommendations to the current problems.

2 Theoretic approach

The structure of this thesis is closely connected to research regarding deportability. The idea of this research topic is that instead of separating the relation between labour markets and immigration we rather be able to study the interaction between the two, envisaging how the immigration policies illegalize certain groups while legalizing others. By doing so immigration controls can actually be conceived as constructing certain types of workers *“through selection of legal entrants, the requiring and enforcing of certain types of employment relations, and the creation of institutionalised uncertainty.”*²⁶

This chapter presents the theoretical approach used in analyzing how migrant workers' deportability affects their position in the Swedish labour market, which leads to their more precarious situation in comparison to nationals, due to their migratory status. By using this approach, Sweden's international human and labour rights obligations may be analyzed, as well as considering potential difficulties in their national implementation.

Section 2.1 describes how immigration control forms part of a theoretic framework and the result of its construction. Moreover, the interrelation between the fields of labour law and immigration law through deportability and its effects on the individual level is described.²⁷

Section 2.2 presents how states have historically used deportation as a means of controlling that which constitutes their populations. Moreover, the issue of “illegality” is used to illustrate the role of the state in the creation of precarity, as migrant workers' deportability is related to their possible “illegalization”, which occurs if they lose their work permit.

Section 2.3 describes how the deportability of migrant workers affects society and general labour conditions, this in the sense that their migratory status can be a factor which an employer considers in the recruitment process. As the work permit is attached to a specific employer, this directly affects the individual employment relationship. Further however this also has consequences regarding the general power structure and labour norms in society between employers and employees.

2.1 The connection between labour conditions and immigration frameworks

*Within the discourse of international law, the practice of deportation can be derived from the sovereign right of states to control their territories and the discretion they have regarding the admittance and residence of aliens.*²⁸

Historically, immigration policies have been used as a means of recruiting migrant labour from abroad. In this sense, deportation has worked as a way of regulating these temporary

²⁶ Anderson, B., *“Migration, immigration controls and the fashioning of precarious workers”*, p. 312.

²⁷ De Genova, N. and Peutz, N.: *“The Deportation Regime. Sovereignty, Space and the Freedom of Movement.”*, p. 7.

²⁸ Walters, W. *“Deportation, Expulsion, and the International Police of Aliens”*, p. 83.

workers in times of economic recession.²⁹ This inherent right for the state to regulate entrance to its territory however has severe effects for migrant workers. De Genova has argued that

*(I)t is **deportability**, then, or the protracted possibility of being deported- along with the multiple vulnerabilities that this susceptibility for deportation engenders- that is the real effect of these policies and practices. **Deportation regimes are profoundly effective**, and quite efficiently so, exactly insofar as the grim spectacle of the deportation of even just a few, coupled with the enduring everyday deportability of countless others (...) produces and maintains migrant “illegality” as not merely an anomalous juridical status but also a practical, materially consequential, and deeply interiorized mode of being, and of being put in place.³⁰*

The term “deportation” can be understood as the compulsory removal of “aliens” from the physical, judicial and social space of the state. Even though the result of such a policy is very severe for the individual, the recourse to deportation is seldom recognized as being a policy option; instead it is commonly presented as the natural and only retribution on the part of the state to deal with the issue of “illegal aliens”.³¹ The status of “illegality” for migrants is connected to the evident possibility of deportation, which constitutes deportability. Deportation can also be described as a regime, which “*manifests and engenders dominant notions of sovereignty, citizenship, public health, national identity, cultural homogeneity racial purity, and class privilege.*”³² Moreover, this regime, concerned with the question of freedom of movement, is just as much concerned with issues of border control and excluding foreigners whom are seen as “undesirable”.³³ By acknowledging the use of deportation as a structural policy, it becomes possible to see what effects it has on other fields of law, such as labour law.

Immigration controls should not be understood as a neutral framework facilitating the categorizing of individuals by intentions and identities into particular categories. Instead, such systems produce a specific migratory status in which the type of visa obtained often affects where the migrants can be employed in the labour market in a highly important way and for a long period of time. As a result, immigration controls do not only concern the conditions of entry at the border but also the conditions of stay. As soon as non- citizens have entered into Sweden legally their visa status states the conditions on which their stay is dependent. Non-citizens who have been admitted to work in the country almost always have certain limitations regulating their access to the labour market.³⁴

As a result of their construction, immigration controls may therefore not have the intended function of protecting jobs for citizens, but actually creating a specific group of workers who are considered as more desirable for certain occupations. This is due to e.g. the enforcement of atypical employment relations as well as the dependence on the employer for legal status. Instead of acknowledging “illegality” as merely an absence of status, it can be seen as a product of migratory processes and immigration controls, shaping certain forms of labour, whereof some are regarded as precarious workers.³⁵ In this sense, “*(I)migration controls are not a means of protecting migrants’ employment rights, but rather produce uncertainty*

²⁹ Walters, W., p. 86.

³⁰ De Genova, N. and Peutz, N., p. 14.

³¹ Ibid, p. 1.

³² Ibid, p. 2.

³³ Ibid, p. 3.

³⁴ Anderson, B., “*Migration, immigration controls and the fashioning of precarious workers*”, p. 308f.

³⁵ Ibid, p. 313.

and dependence on the employer, not just for work, but often for legal or at least continuing residence... ”³⁶

2.2 State complicity in regards to the creation of precarity by means of deportability

Modern deportation law- whereby immigration enforcement became a matter of national sovereignty- emerged from the particular confluence of in the late nineteenth century and the early twentieth of sovereign nation-states monopolizing the legitimate means of movement...³⁷

It can be argued that deportation during this period was both nationalized and socialized, as states increasingly used deportation as a means of regulating the welfare of their people. This was performed by both excluding socially “undesirable” groups (e.g. prostitutes, criminals, anarchists, insane, etc.) and by actions taken to remove foreign labour during periods of economic recession in the country.³⁸ The use of deportation can thus be considered as both a mechanism of immigration and social control.³⁹

What makes deportability so decisive in the legal production of migrant “illegality” and the militarized policing of nation-state borders is that some are deported in order that most may remain (un-deported)—as workers, whose particular migrant status may thus be rendered “illegal.”⁴⁰

Migration “illegality” is connected to the space of nation-states, in which migrants may be categorized as “illegal aliens”. Space is therefore an inherent condition of “illegality”, and serves to reproduce the physical borders in the everyday life of migrants once they have crossed the border.⁴¹ Deportation is in this sense a territorial division between nation-states as well as a way of dividing the “rightful” members of the state (citizens) and nonmembers (aliens) who lack the certain rights.⁴² The state creates “states of exception”, by categorizing people as “illegal”, - where migrants are deprived of fundamental political rights.⁴³ One can argue that “illegal aliens” thereby embody the absence of state protection. They also serve as frightening examples for those lacking respect for the state, envisaging what it means to not be entitled to protection, thus spreading fear into the whole population. The construction of immigration law and its practice is therefore the source of the creation of legality as well as its counterpart.⁴⁴ As a result, illegality is actually the product of state laws and policies.

These so-called “illegal” workers are often considered to be highly vulnerable to abuse and exploitation by employers, as their lack of legal status can be used as a means of threat and

³⁶ Anderson, B., p. 313.

³⁷ De Genova, N. and Peutz, N., p. 10.

³⁸ Ibid, p. 10.

³⁹ Anderson et al. “*Boundaries of belonging: deportation and the constitution and contestation of citizenship*”, p. 543.

⁴⁰ Nyers, P., “*Abject Cosmopolitanism: The politics of Protection in the Anti-Deportation Movement*”, p. 439.

⁴¹ Ibid, p. 439.

⁴² De Genova, N. and Peutz, N., p. 7.

⁴³ McGregor, J., “*Contestations and consequences of deportability: hunger strikes and the political agency of non-citizens*”, p. 599.

⁴⁴ Kerber, L.: “*The Stateless as the Citizen’s Other: A View from the United States*”, p. 76.

control. Interestingly enough, even when the state condemns such abusive measures it is still the state that keeps enforcing the employers' threats in reality.⁴⁵ However, it is important to recall that even "legal" migrants, although not as unprotected, remain ultimately deportable. This is related to the fact that their work permit is attached to their employer, who therefore has the ultimate power to withdraw the permit, making the migrant illegal. A migrant worker who is dependent on her/his employer to stay in the country is therefore always close to being "illegalized", meaning that the level of deportability is almost as high as a migrant without a work permit.⁴⁶

As the fixed term contract can be terminated by the employer and the termination of such contracts have implications in other areas than just at the workplace, the immigration control for these workers therefore puts them in a situation of temporariness, as they are dependent on their employer's goodwill. Due to this temporariness, implying that the employer can actually ask for enforcement of the state in removing the worker, even legal migrants who are subject to immigration control can be considered as being "*precarious workers*".⁴⁷

From this perspective, the policies of immigration restriction and its enforcement are thereby not only insufficient to reduce the precarity for migrant workers, but actually take part in producing and reinforcing it.⁴⁸

2.3 The overall effect on labour conditions and social conditions

Today, the length of stay in a country has implications for rights based claims in most liberal democracies. Therefore, the states have an interest in trying to force temporariness upon migrants to limit their stay, to ensure that they do not become entitled to such claims. It is possible to argue that immigration controls work both with as well as against migratory processes in creating workers with certain relations to employers and the labour market. Migrant workers therefore have a more insecure position, making it difficult to demand basic labour rights. The structure can be regarded as immigration controls producing "illegality" among migrants and not just the absence of status and access to state protection.⁴⁹

The existence of immigration controls is motivated by its function as a filter that allows certain desirable groups as skilled workers, students, tourists and those with family ties to enter, while at the same time filtering out those considered as undesirable. The latter includes e.g. criminals and those without the skills to benefit the economy. This function of immigration controls and how it affects and constructs the labour force is broadly recognized. Moreover, the settlement process, in which migrants establish themselves in social as well as other networks outside their work, may also be affected negatively due to requirements connected to immigration and citizen policies.⁵⁰

⁴⁵ Anderson, B., p. 311.

⁴⁶ De Genova, N. and Peutz, N., p. 15.

⁴⁷ Anderson, B., "*Migration, immigration controls and the fashioning of precarious workers*", p. 309.

⁴⁸ Ibid, p. 314.

⁴⁹ Ibid, p. 306.

⁵⁰ Ibid, p. 307f.

Research from the United Kingdom, performed by the UK's Migration Advisory Committee⁵¹, show that there is an increased demand for migrant workers on the labour market in high income countries. The call for migrant workers is often explained by employers as a "labour and skills needs" that cannot be provided by the domestic labour force. The employers' notion of "skill" is, interestingly enough, very vague.⁵²

*It has long been recognized that certain types of bodies (most obviously, gendered, racialized, and aged) are considered more suitable for certain types of work and that bodies may be used as signifiers for certain attributes, for example, stamina, or laziness.*⁵³

The recruitment of suitable workers to employment is therefore not purely based upon the individual's merits, but rather may equally be grounded in other factors. This may depend on either personal prejudices by the recruiter or incomplete information of the applicants regarding personal attributes and characteristics. The importance of nationality of the workers has not been studied to the same degree as other grounds but some research show that employers choose job candidates by racial and ethnic origin. The factors used in "national stereotyping" by employers giving preference to certain groups are often interconnected as well as overlapping.⁵⁴ A study in Sweden from 2013 supports this research, showing that job candidates are sorted out based on stereotypes and prejudices related to ethnicity.⁵⁵ It is important to emphasize that the stereotypes used often are both gendered and racialized. The fact that many migrants are willing to work under less favorable working conditions and with a lower wage means that they are more attractive than locals for employers searching for cheap labour. However, there might also be different levels of reservation wages between different migrant groups. It has been argued that employers effectively choose the ethnic composition of their workforce, by setting the pay rates and employment conditions for particular jobs.⁵⁶

Moreover, studies regarding employers' comments about migrant workers often show that migrants are perceived to have a superior "work ethic" and "attitude" than local (national) workers. Interestingly, these concepts seem to be based on a notion that migrants are more willing to do a job on the employers' terms, are less unionized, and are more likely to work long hours and living on-site since they often lack or have a smaller amount of family and friends.⁵⁷

Migrants with work permits therefore do not only have a limited employment mobility designated by the state, but also the employers are given additional means of control. Due to the combination of labour market immobility and temporariness, which are upheld as requirements for the work permit system, migrants' dependence on their employer increases. This constructs a position where compliant workers might not dare to challenge their employers. In addition to this, there are examples where employers have exercised this power to e.g. forbid union membership. Since migrants subject to immigration control cannot make claims in such cases, they may be seen as more desirable workers.⁵⁸ By creating filters in

⁵¹ An independent body of academic economists advising the UK government on labour immigration policies.

⁵² Anderson, B. and Ruhs, M., "*Migrant Workers: Who Needs Them? A Framework for the Analysis of Staff Shortages, Immigration, and Public Policy*", p. 17ff.

⁵³ Ibid, p. 20.

⁵⁴ Ibid, p. 27f.

⁵⁵ SvD, "*Fördomar ger olika jobbchanser*", 2013-04.05.

⁵⁶ Anderson, B. and Ruhs, M., p. 27ff.

⁵⁷ Ibid, p. 29f.

⁵⁸ Anderson, B., "*Migration, immigration controls and the fashioning of precarious workers*", p. 310.

connection to legal vulnerability for migrant labour, materialized through deportability, one augments the preconditions for the already routinized subordination (in form of the employer-employee relationship) of the workplace.⁵⁹ Furthermore, it increases the risks of legitimization as well as creating discrimination based on ethnicity and nationality, which has effects on the society as a whole.

⁵⁹ De Genova, N., *"The Deportation Regime. Sovereignty, Space and the Freedom of Movement."*, p. 47.

3 The relevant legal framework

Sweden has ratified several international human and labour rights conventions, which are therefore to be respected in the drafting and implementation of national law. However, as Sweden uses a dualist approach⁶⁰ in such implementation, there is always a certain risk that the national legislation fails to meet the criteria set up by the international framework. Moreover as such issues are always free to interpretation it is possible that national courts interpret the framework differently than that which was initially intended.

Section 3.1 presents the international obligations, which either concern or could concern migrant workers' labour situation on a national level, such as the prohibition of discrimination.

In section 3.2 the Swedish legal framework concerning human and labour rights is discussed, which initially begins with the framework concerning the right to equal treatment. Beyond this the general employment protection scheme is described, to explain the legal framework to how issues regarding establishment and termination of employment are regulated and supervised.

In section 3.3 the different control mechanisms in the Swedish labour system are described, which according to the Swedish model are based on a division between state agencies and trade unions. Some of the consequences of which will be here elaborated upon with the intention to problematize the weak protection for non-unionized workers.

The legislation concerning the rules for dismissal is outlined in section 3.4, which separates termination of employment based on personal reasons and labour shortage respectively.

Finally, section 3.5 concludes this chapter by describing the framework regulating the legal proceeding in cases of labour conflict.

3.1 The UN and the ILO – a human rights approach

3.1.1 Relevant UN instruments and policies

There are many international instruments that regulate issues concerning equal treatment and establish a right to certain work standards. An example of such regulation can be seen in the fact that several of the socio-political commitments enshrined in the *Universal Declaration on Human Rights* (UDHR) concerns the labour market. Article 23 of the Declaration defines work as a right and that:

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

⁶⁰ Meaning that Sweden transforms the content of international conventions into national legislation instead of directly incorporating the convention as a whole, Thomson förlag

- (2) *Everyone, without any discrimination, has the right to equal pay for equal work.*
- (3) *Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.*
- (4) *Everyone has the right to form and to join trade unions for the protection of his interests.*

Article 7 of the *International Covenant of Economic Social and Cultural Rights (ICESCR)*, ratified by Sweden, specifies certain conditions that has to be met and states that:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

- (a) *remuneration which provides all workers, as a minimum, with:*
 - (i) *fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*
 - (ii) *a decent living for themselves and their families in accordance with the provisions of the present Covenant;*
- (b) *safe and healthy working conditions;*
- (c) *equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;*
- (d) *rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.*

According to the *General Comment No.18* on the ICESCR, work according to the convention must be so-called decent work, which is described as work that

... respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families as highlighted in article 7 of the Covenant. These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment.⁶¹

As a ratifying state, Sweden is bound to ensure that these conditions are met for all workers, including migrants.

The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is one of the nine so called core conventions of the UN. It was adopted by all member states in the UN General Assembly in 1990, but did not come into effect until July 1st 2003. According to the convention, migrant workers have right to: form associations and trade unions in the country where they are employed, to enjoy treatment no less favourable than that which applies to nationals regarding termination of the employment relationship, to social security benefits, etc. Article 25.3 states that:

State Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of any such irregularity.

⁶¹ General Comment No.18, E/C.12/GC/18, p. 3.

Unfortunately, few states have ratified the convention, and most of those who have are Sender states. Sweden has not ratified it, even though the state actively participated in its construction, nor has any other EU member state. The reason proposed was that the convention did not fulfill the desired demands, as it e.g. does not distinguish between persons working and residing in a country with permits and those lacking permits, as states are generally not in favour of extending certain rights, especially social rights, to illegal migrant workers. As a result, parts of the convention provide a lower standard of protection for migrant workers and their rights in comparison with other human rights documents. The final argument to not ratify the convention is that many of the rights in the convention are included in other already ratified conventions that include migrant workers.⁶²

3.1.2 The labour specialists within the UN – the ILO

Since 1946 the ILO is an independent agency within the UN system and has the aim to ensure social justice and better working conditions in the member states. The organization is built on a tripartite structure, in which representatives of governments, employers and workers jointly shape policies and programmes promoting decent work.⁶³ The Decent Work Agenda, formulated in 1999, establishes that the primary goal of the ILO is to “*promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity*”.⁶⁴

Since its establishment, the ILO has adopted more than 200 conventions, of which two specifically concerns migrant workers: *Migration for Employment Convention*, (No.97) from 1949 and the *Migrant Workers Convention* (No.143) from 1975.⁶⁵ Sweden has to date only ratified Convention No. 143, where article 11 defines a migrant worker as a

... person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker.

Article 1, convention 143 declares that each ratifying member has to respect the basic human rights of all migrant workers. Article 8 state that:

- 1. On condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit.*
- 2. Accordingly, he shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining.*

It is important to mention that these conventions are not as ambitious as the UN Migrant Convention, in regards of the narrower definition of migrant workers and fewer named rights.

⁶² Boeles, P. *et al.* “*European Migration Law*”, p. 226.

⁶³ www.ilo.org, 2013-03-07

⁶⁴ Likić-Brborić, B., “*Globalisation, EU Enlargement and New Migratory Landscapes: The Challenge of the Informal Economy and Contingencies for Decent Work*”, p. 176.

⁶⁵ *ILO Migration for Employment Convention (Revised), 1949, (No. 97), ILO Migrant Workers (Supplementary Provisions) Convention, 1975, (No. 143)*

Moreover, there are few possibilities to sanction countries breaching the conventions even if they have been ratified.⁶⁶

Another relevant instrument is the ILO *Discrimination (Employment and Occupation) Convention* (No.111), from 1958 (ratified by Sweden in 1962) which sets a minimum standard regarding discriminatory measures. Article 1 of the convention states that:

1. For the purpose of this Convention the term discrimination includes-- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

There are various types of discrimination of migrants in the labour market, e.g. unwarranted denial of employment, unacceptably low wages, longer working hours, harassments, denial of basic rights e.g. in a trade union.⁶⁷ The provision above does not explicitly mention migrant status as a ground for protection but it is possible to argue that complaints can be filed based on national extraction or race. This could also be based on the prohibition of racial discrimination stated in the *International Convention on the Elimination of All Forms of Racial Discrimination*, which was ratified by Sweden in 1971.

As a conclusion, several ILO and UN instruments affect migrant workers' rights, and are of binding legal status in Sweden due to the ratifications made. Therefore, they must be considered when working with these issues and integrated in the measures taken to reduce the vulnerability of migrant workers.

3.1.3 The European Convention on Human Rights and Fundamental Freedoms

According to the Swedish constitution⁶⁸ the *European Convention of Human Rights and Fundamental Freedoms* (ECHR) is legally binding, and no national legislation or directive can be announced if it is not in accordance with the convention. Article 14 in the convention establishes a prohibition of discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁶⁶ Olofsson J. and Wadensjö E., ”Arbetsmarknadspolitik. Förändrade förutsättningar och nya aktörer”, p. 117 ff.

⁶⁷ The Work Environment Authority, report 2012:4, ”Migration, arbetsmiljö och hälsa”, [Migration, work environment and health] p. 12ff.

⁶⁸ The Instrument of Government (1974:152), chapter 2 article 19.

If migration workers are not granted the same working conditions as nationals for performing the same kind of job, this will constitute a breach of the convention. Several other articles of the Convention could be relevant both individually, and in combination with article 14.

3.2 The Swedish legal framework

According to the ILO's Global Report "*Equality at work: The continuing challenge*" from 2011 the number of complaints regarding discrimination is increasing and the nature of the discrimination is more varied as well as based with increasing frequency on multiple grounds.⁶⁹ The legal framework concerning issues of discrimination also becomes important, as it stipulates specific rights that all workers must be acknowledged, notwithstanding their migratory status.

The prohibition of discrimination is regulated in Sweden through the Discrimination Act (SFS 2008:567), which reflects national and international law on this topic. The purpose of such a prohibition is based on one of the premises connected to the rule of law: that equal should be treated equally. Migrant status is not recognized as a specific ground for protection against discriminatory measures, but may arguably be included in the ground "ethnicity". As the conditions of the Swedish labour market are based on freedom of contract and as there is no national minimum wage, there are no general principles regarding wage setting. The prohibition of discrimination does form certain restrictions as an employer cannot legally differentiate wages on basis of e.g. nationality or ethnicity.⁷⁰ A foreigner ideally therefore should encounter few formal obstacles regarding access to working positions in Sweden, statistically however it is shown that national origin matters when it comes to obtaining a job.⁷¹ As a result of this it is important to emphasize that migrant workers formally are entitled to the same labour protection as nationals.

3.2.1 The Employment Protection Act (1982:80)

The basic rules regarding employment protection in Sweden are found in the Employment Protection Act. The legislation defines and describes e.g. the existing forms of employment and rules concerning termination of contracts.

The most common forms of employment when it comes to third country migrants are posts with conditional tenure or of a time-limited character. In general, time-limited employments cease at the date set for termination, without dismissal. Regardless of the type of work it concerns, the employee always has the right to end the employment as long as the agreed period of notice is respected. If the employer initiates the termination there is need for a justified dismissal if the worker has a conditional tenure, e.g. labour shortage or if the worker has neglected work. In such cases, the period of notice is in general one month, but can be regulated in the collective agreement. In cases where the worker has a time limited

⁶⁹ ILO, "*Equality at work: The continuing challenge*", ILO Global Report 2011, p.ix.

⁷⁰ Schömer, E., "*Intersektionella aspekter på normer och normalitet i svenskt arbetsliv*", p. 170.

⁷¹ *Ibid*, p. 174.

employment, she/he is guaranteed work during this time, except in cases where the occupation ceases. However, in such cases, the public wage guarantee applies.⁷²

If the employee has worked for the employer for more than 12 months over a three year time period, the employer has to notify the employee that the employment relationship is ending. In cases where there is no contract enabling termination of the employment in advance of the set time limit, there are few possibilities to end the employment before the set date. The only possibility of ending a time-limited employment in advance is if one of the contracting parties has breached the contract severely.⁷³

In cases where a residence and work permit have been granted for a time period of 24 months, situations of employments being terminated early must be justified using different causes, such as the establishment closing down, labour shortages and/or conflicts at work.⁷⁴ Therefore, it is of high importance that migrant workers know their rights so they are treated appropriately with respect to the law and that other actors ensure that these rights are respected.

3.2.2 The Work Environment Act (1977:1160)

The purpose of the Work Environment Act is to ensure a good and safe working environment. The idea is that the legislation is supposed to serve as an instrument that prevent the risks of injuries and illness related to inadequacies in the working environment, and to create a good organization at the work place. This provides the employees with the possibility of influencing their working situation and presents opportunities to develop.⁷⁵ As a result of e.g. lack of language skills, migrant workers can have difficulties being included in a safe and good working environment. In such cases, the Work Environment Act plays an even more important part.

The purpose of the legislation is to prevent illness and casualties as well as in other ways ensure a good working environment.⁷⁶ The legislation applies to all activities executed for an employer, meaning that migrant workers fall under the scope of the legislation.⁷⁷ The quality of the working environment is regulated, e.g. the environment shall be satisfactory in relation to the nature of the work, as well as of the social and technical development in society.⁷⁸ The employer is supposed to take all measures required to prevent the employee being exposed to illness or injuries.⁷⁹

The Work Environment Authority is responsible for the supervision regarding the legislation and provisions issued pursuant to the same. The authority is capable of deciding over injunctions or prohibitions, to ensure that the legislation is respected. Other possible punishments are monetary fines or imprisonment.⁸⁰

⁷² SOU 2006:87, p. 135ff.

⁷³ Källström K. and Malmberg J., p. 121f and the Employment Protection Act (1982:80), article 15.

⁷⁴ SOU 2006:87, p. 135ff.

⁷⁵ Ericson B. and Gustafsson K., "*Arbetsmiljölagen med kommentar*", p. 15.

⁷⁶ The Work Environment Act (1977:1160), chapter 1 article 1.

⁷⁷ The Work Environment Act (1977:1160), chapter 1 article 2.

⁷⁸ Prop. 1976/77:149, "*om arbetsmiljölagen m.m.*", [about the Work Environment Act etc.], p. 220 ff.

⁷⁹ Prop. 2001/02:145, "*Ändringar i arbetsmiljölagen*", [Changes in the Work Environment Act], p.1.

⁸⁰ The Work Environment Act (1977:1160), chapter 7 and 8.

3.2.3 The Working Hours Act (1982:673)

Regarding working hours there is a concern that migrant workers might be working over time without compensation. An example is the situation where the employer has granted a part time employment in the application of the work permit, but in reality work full time. The migrant is only paid in accordance to the part time agreement and not for over time. In such cases, the legislation concerning working hours is highly important. The code applies to all activities executed for an employer,⁸¹ except for certain listed restrictions.⁸² Hence, migrant workers fall under the scope of the legislation.

The work during the week must not exceed 40 hours.⁸³ When needed as a result of the nature of the work, or the working conditions demands it, the working hours should not exceed 40 hours per week in average over a time period of four weeks.

The employer must note all hours that an employee has been on call, over time and additional working time and the employees as well as local trade unions with members on the working place, are entitled to take part of the information.⁸⁴

The general rule regarding the organization of the working time is that all employees shall have at least eleven hours of rest in every 24- hour period, the so called diurnal rest.⁸⁵ In certain cases, the Work Environment Authority can grant exemptions from this. Moreover, it is the Work Environment Authority that supervises the framework and they have a right to request information needed to enable them of this.⁸⁶ The Authority also has the right to make visits on sight, and also has the power to implement injunctions and prohibitions as they see fit.⁸⁷

An employer can be condemned to pay a penalty or be imprisoned for no more than a year, if she/he is found to maliciously or by carelessness have breached a prohibition or an injunction based on article 22, or a penalty for breaching another provision.⁸⁸

3.2.4 Collective agreements

The collective agreement is the main instrument regarding the regulation of wages and other labour conditions in Sweden. It is a contract between a workers' organization and an employers' organization or a specific employer. These agreements normally contain provisions regarding terms of employment, wages and other remunerations, working hours, holidays, lay- offs and issues concerning pensions and insurances. It is considered that about 90 percent of the Swedish workers are covered by a collective agreement.⁸⁹

⁸¹ The Working Hours Act (1982:673), article 1.

⁸² The Working Hours Act (1982:673), article 2.

⁸³ The Working Hours Act (1982:673), article 5.

⁸⁴ The Working Hours Act (1982:673), article 11.

⁸⁵ The Working Hours Act (1982:673), article 13.

⁸⁶ The Working Hours Act (1982:673), article 20-21.

⁸⁷ The Working Hours Act (1982:673), article 22.

⁸⁸ The Working Hours Act (1982:673), article 23-25.

⁸⁹ The Swedish National Mediation Office, annual report, *Avtalsrörelsen och lönebildningen 2012*, [The negotiation procedure and the wage formation 2012], p. 33f.

The collective agreement should be in written and include labour conditions for employees or the relationship between the employer and the employee.⁹⁰ The collective agreement binds the contractual parties, the employer and the worker organization, but also a member of the organization.⁹¹ This result in the fact that employers as well as employees bound by the agreement directly can refer to the content of the agreement in court, and demand that the included sanctions should be imposed if there has been a breach of the collective agreement, which mostly concern damages. Parties bound by a collective agreement cannot legally enter an agreement contravening the agreement.⁹²

An important factor to the wide coverage of collective agreement is that both employers as well as workers' are highly unionized. The Swedish coverage is at about 71 percent and one of the highest globally, even if there has been a decrease since the mid-1990s. Statistically it is possible to see that the coverage differs depending on branches as well as socio-economic factors.⁹³ Workers in the hotel- and restaurant sector have had the greatest drop concerning union membership, from 52 percent in 2006 to 36 percent in 2010 and 31 percent in 2012.⁹⁴ A large number of the work permits granted every year are given to persons in the hotel- and restaurant sector. In general, persons who are not born in Sweden and migrant workers are over represented in sectors and jobs, where there is a low union coverage.⁹⁵ One can presume that the collective agreement coverage is also lower for these workers than for others.

Even though there is no individual contract between the employer and the unorganized worker expressing that the collective agreement shall be respected, case law states that the working contract is based on collective agreements valid at the time, unless something else is agreed upon. This is referred to as the complementary impact of the collective agreement. A prerequisite for such a complementary status requires that the agreement have been applied at the workplace.⁹⁶ The general idea is in such cases that the non-unionized worker is entitled to the right stated in the collective agreement, but also the obligations therein.⁹⁷ According to custom, only norms of general character are included in such cases.⁹⁸

If the employer is not bound by a collective agreement, the premise is that the contracting parties are free to decide the content of the working contract within the framework of the labour law legislation, no matter if the worker is unionized or not.⁹⁹ This affects the labour conditions for all those migrant workers who are not bound by a collective agreement.

Even though an employer has never applied a collective agreement, its content can still become binding, as custom in the trade, consequently affecting the working conditions. In practice, custom from such practice have been used as to develop rules aiming at complementing incomplete and inadequate contracts, as well as when defining rules with the

⁹⁰ Act of Codetermination at Work (1976:580), article 23.

⁹¹ Act of Codetermination at Work (1976:580), article 26.

⁹² Act of Codetermination at Work (1976:580), article 27.

⁹³ The Swedish National Mediation Office, annual report, "*Avtalsrörelsen och lönebildningen 2012*", [The negotiation procedure and the wage formation 2012], p. 32ff.

⁹⁴ *Ibid*, p. 33.

⁹⁵ The Migration Board, "*Beviljade arbetstillstånd innevarande år*", [Granted work permits the present year]

⁹⁶ Källström, K. and Malmberg, J., "*Anställningsförhållandet. Inledning till den individuella arbetsrätten*", p. 181.

⁹⁷ AD 1977:62 and AD 1990:33.

⁹⁸ Källström, K. and Malmberg J., p. 181f., AD 1984 nr 79.

⁹⁹ Källström, K. and Malmberg, J., p. 183.

character of legal standard. One such example is that employees lacking precise contract regulations still have the right to a reasonable and equitable salary.¹⁰⁰

If a working contract contains provisions considered as unreasonable, it can be adjusted by the court in accordance with article 36 of the Contract Act. In assessing whether certain criteria are unfair, the content of the collective agreement is used as a benchmark.¹⁰¹

3.3 Control of labour conditions

3.3.1 The Work Environment Authority

The Work Environment Authority is responsible for supervising both the Working Hours Act and the Work Environment Act and the regulations based on them.¹⁰²

The supervision is performed through on-site inspections. According to the judicial framework, the inspectors are entitled to enter unannounced, but usually they inform the employer in advance. The inspection procedures differ with respect to the sector, size of the working place and other circumstances. Normally a safety officer or a staff representative takes part in the inspection. The inspector verbally presents information regarding how she/he has perceived the situation regarding the working environment and if any deficiencies have been observed. If such deficiencies exist, this will also be recorded in a written document.¹⁰³ In this written letter of inspection, the employer is asked to report how the defaults regarding the working environment will be addressed, as well as present a description of how the criteria are met to the Authority. This is supposed to be taken care of within a specific time frame. The letter of inspection is not a formal decision, but a request to the employer to respect the demanded provisions, based on the legislation. This means that the letter cannot be appealed. If the employer does not follow the letter, the Authority can present an injunction or prohibition to the employer, which can be combined with a penalty.¹⁰⁴

The Authority has reported on issues connected to the development of the so called “grey sector”, which is defined by lower salaries and labour conditions and employers who do not want to or cannot create decent work for their employees.¹⁰⁵ Problems highlighted have been the fact that different actors monitoring within the field are covering different parts, resulting in gaps in the system. Even though the Authority is not specifically proposing a new agency with a holistic approach, it could be practical for different actors to cooperate concerning these issues. Moreover, there might be a need to extend state responsibility as the level of unionization is decreasing, certainly for specific vulnerable groups.¹⁰⁶ There have also been proposals of introducing a new group of inspectors solely responsible for monitoring working sites with foreign labour. Additionally, introducing ID cards has been suggested for certain

¹⁰⁰ Källström, K. and Malmberg J., p. 184.

¹⁰¹ Ibid, p. 184.

¹⁰² Chapter 7 article 1 of the Work Environment Code and article 20 of the Working Hours Act.

¹⁰³ The Work Environment Authority, *”Hur går en inspektion till?”*. [Inspection- step by step]

¹⁰⁴ The Work Environment Authority, *”Inspektionsmeddelande”*. [Inspection notice]

¹⁰⁵ The Work Environment Authority, report 2012:5, *”Förstudie om det fortsatta arbetet med utländska företag och arbetstagare”*, [Pre-study about the continuing work with foreign companies and labour], p. 4.

¹⁰⁶ Ibid, p. 12.

sectors as construction and hotel and restaurants.¹⁰⁷ The implementation of such policies could be a means of ensuring that companies recruiting third country migrants meet the labour conditions. It would also declare that breaches are not accepted and that the state is willing to take measures ensuring migrants' rights. Hence, the Authority is admitting that today's system is not efficient enough when it comes to guaranteeing migrant workers' rights.

3.3.2 The trade unions and collective bargaining

The Swedish model is based on the situation where the parties of the labour market to regulate conditions and wages through collective agreements, instead of the government and parliament. The supervision over these agreements is made by the workers' organizations, which are the only organizations, except the Work Environment Authority that have a possibility to control migrant workers' situation after their employment period has started.

The right to association guarantees that employers and employees have the ability to become members of an employer or workers' organization, to make use of such membership and to engage in the workings of such an organization or in fact in the creation of such an organization.¹⁰⁸ Even though migrant workers have the option to become members of a trade union, several unions have reported that they often have difficulties in reaching out to migrant workers, as their stay in Sweden often is brief and the workers want to work as much as possible during their stay. Moreover, the migrant workers are, to a certain extent, dependent on their employer and do not want conflicts that could potentially jeopardize their position and subsequently their legal right to reside in Sweden.¹⁰⁹

Workers' organizations have the right to bargain with the employer concerning issues connected to a member or of the organization that is working, or have been working, for the employer. The employer has the same rights.¹¹⁰ The employer shall bargain with an organization with which she/he has entered an agreement with.¹¹¹ This is also the case when important changes are considered, concerning terms of employment or working conditions in general for members of the organization. When requested by a worker's organization that the employer has entered an agreement with. The employer is responsible to bargain with the organization before making any decisions that effects a member of the organization eg an employee.¹¹² The individual member does not herself/himself own the right to demand for negotiation, this right is entitled to the workers' organization, even in cases where the individual is the subject for the negotiation. This also means that an employer cannot force an employee to negotiate without representation from the union present.¹¹³

The employer is responsible of informing the workers' organization regarding questions concerning production and the economic situation of the enterprise, as well as issues regarding staff policies.¹¹⁴ The employer also must provide access for the union to documents and bookkeeping that affect their members' interests. However, the right to information must

¹⁰⁷ The Work Environment Authority, report 2012:5, p. 23f.

¹⁰⁸ Act of Codetermination at Work (1976:580), article 7.

¹⁰⁹ The Work Environment Authority, report 2012:5, p. 10.

¹¹⁰ Act of Codetermination at Work (1976:580), article 10, para. 1.

¹¹¹ Act of Codetermination at Work (1976:580), article 11.

¹¹² Schmidt, F., "*Facklig arbetsrätt*", p. 141ff.

¹¹³ Fahlbeck, R., "*Om arbetsprocessrätt: studier i det fackliga tvisteförhandlandets juridik*", p. 303.

¹¹⁴ Act of Codetermination at Work (1976:580), article 19.

not be used for positioning in negotiations concerning contracts and disputes, which are based on the notion from the Labour Court that the employer and trade unions lacking collective agreements are not entitled to the same.¹¹⁵ This right does not entail the obligation for an employer to give information regarding wages for non-unionized workers.¹¹⁶

An employer who is not bound by a collective agreement is according to article 13.2 only responsible to negotiate in accordance with article 11, with all workers' organizations, in cases concerning lay-offs due to labour shortages or joint ventures.

3.4 Termination of employment

When it comes to terminating an employment, there are certain specific legal criteria that have to be met, with the aim to protect both the employee and the employer for sudden changes. These criteria can be divided into two categories; firstly, dismissal due to personal reasons connected to the employee, and secondly; dismissal due to labour shortage. These grounds will be discussed separately as they are quite different. A dismissal initiated by the employer must either be qualified as due to personal reasons or because of labour shortages, as the legal framework separates these two grounds.¹¹⁷ A dismissal based on personal reasons is defined as attributable to the employee in person, whereas there is no such definition for labour shortages.¹¹⁸

No matter the cause for terminating the contract, the employer generally has to negotiate with the labour unions before doing so. The Committee of Inquiry discussed whether it would be possible to grant migrant workers further employment security as for a work permit to be granted, before the current legislation was adopted, but concluded that such policies might make employment of third country migrant more difficult. Moreover, it was argued that such policies potentially could cause problems regarding the correct order of lay-offs.¹¹⁹

3.4.1 Dismissal due to personal reasons of the employee

Regarding dismissals based on personal reasons, the central issue at hand is whether there were reasonable grounds for such a dismissal. If it would be reasonable for the employer to find a new position within the establishment there are not reasonable grounds, nor does a joint venture present such grounds.¹²⁰ Within these criteria, there is no clear definition of the concept "reasonable grounds", as the situations of dismissal for different actors can vary extensively.

According to jurisprudence, there are certain other criteria that have to be met for there to be reasonable grounds for dismissal. Initially, the employer has to present the reasons for dismissal if the employee asks for this information. Secondly, the given explanation has to be acceptable, as well as substantial. Moreover, it has to meet the demands set up by a material

¹¹⁵ Schmidt F., "*Facklig arbetsrätt*", p. 141 ff.

¹¹⁶ AD 1989:94, AD 1995:73.

¹¹⁷ The Employment Protection Act (1982:80), articles 7-10.

¹¹⁸ The Employment Protection Act (1982:80), article 7 para. 4.

¹¹⁹ SOU 2006:87, p.136

¹²⁰ The Employment Protection Act (1982:80), article 7 para. 2,3.

assessment, which is performed in each case, considering all circumstances in the case, where the employer's interest of dismissing the employee is balanced by the interest for the employee to keep the employment.¹²¹ A dismissal based solely on the fact that a worker with a working permit has complained about inadequate working conditions would not fulfill the criteria of reasonable grounds. If the migrant worker were to lose the working permit this would be ground sufficient for dismissal.¹²²

3.4.2 Dismissal due to labour shortages

The material assessment following dismissals due to labour shortages differ from those made in relation to personal reasons. According to jurisprudence, the reasons for dismissal related to labour shortages are normally accepted as reasonable grounds. In these situations there is no assessment of the employers 'economic reasons'. In such cases the workers' employment protection is based on rules concerning period of notice, the order of dismissal and the right to re-employment. The order of dismissal¹²³ is established through a principle based on the fact that the person who was hired the last, is the first to be dismissed. Consequently, the longer someone has been working the more secure position they have in times of lay-offs. Lists establishing the order of priority in connection with termination of employment due to redundancy, is generally made for every department and for every branch governed by a collective agreement. After negotiating with the trade union the employer can decide from which section of the order of dismissal are going to be made. Employers with no more than ten employees can, no matter the criteria of priority, make an exception for two workers who are considered to be of special importance to the company. For migrant workers this becomes important as they often work in places with few employees.¹²⁴

One of the core standards of the employment protection scheme is that a dismissal or termination of a contract cannot be decided without both the individual worker and the union having a possibility to negotiate with the employer regarding the decision.¹²⁵ The regulations in the Act of Codetermination at Work concerning negotiations in times of labour shortages as well as the rules in the Labour Protection Act regarding notifications, notices and consultations in personal cases also apply for migrant workers with temporary work permits.¹²⁶

The employer is responsible to negotiate before making any decisions concerning termination of contracts due to labour shortages, lay-offs or re-admittances. If the employer wants to dismiss an employee based on her/his personal reasons the employer must inform the employee of this in advance. If the employee is unionized, the employer must at the same time inform the local workers' organization to which the employee is a member. The employee as well as the union has the right to be consulted regarding the measures taken.¹²⁷

¹²¹ Källström K. and Malmberg J., p. 134ff.

¹²² AD 1979:90.

¹²³ The Employment Protection Act (1982:80), article 22

¹²⁴ The Employment Protection Act (1982:80), article 22, para. 2 and Källström, K. and Malmberg J., p. 143 ff.

¹²⁵ Lunning, L. and Toijer, G., "Anställningsskydd. En lagkommentar", p. 698.

¹²⁶ The Employment Protection Act (1982:80), article 1 and the Act of Codetermination at Work (1976:580), article 1.

¹²⁷ The Employment Protection Act (1982:80), article 29-30.

As the regulations concerning the order of priority are semi-mandatory, this means that there are no legal guarantees for the individual's position. This is because other criteria framing the order of priority can be regulated in collective agreements both locally and centrally. The employer is allowed to apply the collective agreement's regulations to migrant workers, even though they are not members of the workers' organization with the collective agreement, as long as they carry out work included in the agreement.¹²⁸

It is important to emphasize that there are migrant workers who have been granted work permits who are working for businesses that lack collective agreements. As a result, the role of trade unions as a control mechanism for workers with temporary work permits is often quite limited. This is especially serious in cases where the worker is non-unionized and the employer is not bound by a collective agreement. These migrant workers face increased risks of labour exploitation due to a lack of efficient control mechanisms investigating the labour conditions for these workers after their work permits have been granted.

3.5 Framework regarding legal proceedings

In situations where the union has decided not to represent the member, she/he has the right to participate in proceedings at the labour tribunal. This is of importance especially since the individual is never entitled to demand negotiations with the employer, as this is a right, which falls exclusively to the trade union. This is important because the individual would otherwise, in cases of conflict with the organization, lack the possibility to address the problem in a court hearing. At the same time there is a political motive to keep judicial claims at a relatively low level. Hence, the individual solely has a subsidiary right to serve as plaintiff, whereas regarding acting as defense, the organization has the subsidiary right. By this regulation one has tried to balance the rights between the parties. People without insurance covering legal expenses or the economic means to afford legal aid can be entitled to have their legal expenses subsidized by the state. However, it must be acknowledged that such rights may not be something to which the general public is aware. Moreover, since the amount of the economic value of the conflict in general has to be more than half the price base amount (which for 2013 is set to 44 500 SEK) for legal aid to be disposable and that it has to be approved to be granted,¹²⁹ this might not be a known or accessible system for migrant workers.

As a conclusion to this chapter, there are several inherent difficulties within the current system concerning labour protection. More efficient measures should therefore be taken as to ensure that third country migrants who are recruited to Sweden are entitled to the same rights as nationals. The framework does today have multiple gaps, which should be filled so as to make sure that Sweden is fulfilling its international obligations concerning migrant workers and discrimination but also, evidently, the Swedish legislation.

¹²⁸ Källström K. and Malmberg J., p. 150 and the Employment Protection Act, article 2, para. 6.

¹²⁹ The Courts of Sweden, www.domstol.se, 2013-02-16.

4 The establishment and termination of employment

The purpose of the new Aliens Act regulation from 2008 is to meet an increasing demand for labour, and can be considered as a success in this regard, as the number of granted work permits has increased considerably. In 2005 the number of granted permits for third country migrants was about 6000 permits. In 2012, the number had increased to around 16 500.¹³⁰ The employers became the deciding body on whether they had the need to recruit third country migrants due to the change in law. Consequently, labour immigration is allowed within all labour sectors as long as the employer offers contractual conditions and the employee is capable of providing for him or herself.¹³¹ The Discrimination Act is applicable in the recruitment process.¹³²

The purpose of this chapter is to illustrate the construction of the legal framework regulating the establishment and termination of employment of third country migrants. The legal framework in 4.1 presents the outline of which criteria are necessary to be granted a work permit, of which the attachment to the employer is one important criterion. The issue of labour shortage is also elaborated.

Section 4.2 outlines the control performed by the Migration Board during the assessment of the working permit. Some of the changes which have been constructed in relation to this control are also described.

In section 4.3 the control mechanism of the workers' organizations in ensuring that the required conditions are met is described.

The chapter concludes with section 4.4 and the consequences of a terminated employment from a migrant worker perspective, including the effects of a withdrawn work permit and the condition of deportation after three months of unemployment.

4.1 The current legal framework- the Aliens Act

A foreigner from a third country who is going to work in Sweden based on an employment here or abroad must have a work permit. Such a permit is always issued for a specific length of time.¹³³ If the work is for more than 3 months, a residence permit is also required.¹³⁴ A work permit cannot be granted for a longer time period than 2 years, and never longer than the length of service. The total time for work permits cannot exceed 4 years.¹³⁵ The central

¹³⁰ The Migration Board, "Översikt av beviljade arbets- och uppehållstillstånd åren 2005-2012", [Overview concerning granted work and residence permits 2005-2012].

¹³¹ Prop. 2007/08:147, p. 29ff.

¹³² The Discrimination Act (2008:567), chapter 2, article 1, para. 2.

¹³³ The Aliens Act (2005:716), chapter 2 article 7 and chapter 6, article 1.

¹³⁴ The Migration Board, form "Ansökan om tillstånd att arbeta i Sverige", [Application for authorization to work in Sweden].

¹³⁵ The Aliens Act (2005:716), chapter 6, article 2a, para. 1, 2.

regulations concerning work permits are stipulated in Chapter 6 of the Aliens Act. The Migration Board initiates its assessment by investigating whether wages and other labour conditions meet Swedish collective agreements and established practice, which is one of the fundamental prerequisites for granting a work permit.¹³⁶

The third country national must have received a job offer which enables the person to provide for herself/himself during her/his stay in Sweden. This requires a full time or part paid time position, which means that the person would not need social security to cover her/his housing and living expenses.¹³⁷ In practice, this means that the extent of the work pays a salary of at least 13 000 Swedish kronor per month.¹³⁸ An additional requirement is that the wages, insurances and other working conditions shall not be inferior to those following Swedish collective agreements or custom within the field of work. The employer is responsible for collecting information from the relevant workers' organization regarding the working conditions. This information should be attached to the application form sent to the Migration Board. If necessary, the Migration Board can collect this information itself.¹³⁹ The employer is supposed to provide information in the application form regarding the existing insurances for the employees, or planned insurances, and whether these conform to the levels established by collective agreements or custom.¹⁴⁰

Moreover, Sweden has due to the EU membership, certain commitments, including the obligation to respect the regulations concerning "community precedence" when recruiting third country migrants.¹⁴¹ This means that the Migration Board has to assess if the employers' recruitment is in conformity with this principle stating that workers from the EU firstly should cover labour shortage. Only in cases where this is not possible should third country migrants be hired. To ensure that this rule is respected, the employer can report job openings to the Swedish Employment Agency which will announce the position. The position will be made visible in the community database Eures, accessible for all EU and EEA citizens.¹⁴²

As the Migration Board does not have any contact with the migrant worker once the permit has been granted and is not updated regarding the outcomes connected to the migrant's deportability. Hence, there is no real possibility of knowing how it is affecting the employment relationship.

4.1.1 The work permits attachment to a specific employer

Article 6:2a:3 of the Swedish Aliens Act is the central article for this essay as it states that the permit is attached to a specific employer and is valid for a certain kind of work. After having worked for the employer for 2 years, the permit is only attached to the specific type of work. This change is based on the opinion that the employer best knows if she/he is in need of recruiting migrant labour. This supposedly reflects the position of the government that the work permit is granted to meet the certain labour shortage of the employer, and that this

¹³⁶ The Aliens Act (2005:716), chapter 6 article 2.

¹³⁷ The Social Services Act (2001:453), chapter 4, article 1.

¹³⁸ Wikrén G. and Sandesjö H., p. 345 and Prop. 2007/08:147, p. 27.

¹³⁹ Wikrén G. and Sandesjö H., p. 350.

¹⁴⁰ The Migration Board, form *Anställningserbjudande*. Supplement to "*Ansökan om tillstånd för att arbeta i Sverige*", [Work proposal]

¹⁴¹ The Aliens Act (2005:716), chapter 6, article 2, para. 2.

¹⁴² Wikrén G. and Sandesjö H., p. 345f.

position is what the Migration Board assessed before granting the permit.¹⁴³ To meet the critique posed by the Committee of Enquiry that the migrant would have to return home if the employment is terminated, an additional provision was added, which enable the migrant to stay and look for a new position during three months' time. This addition emphasized that the interdependence between the employer and the employee would not be too strong.¹⁴⁴ The case of workers having to return to their sending countries is thus considered a negative factor in the preparatory works, but there is no further analysis of what this provision might lead to; namely employees who fear deportation might not report problems at work and therefore risk exploitation.

According to the Official Report of the Swedish Government, which investigated the issue before the new legislation was adopted, the idea was that the work permit should be attached to one employer as it was granted based on the need for recruitment by one specific establishment, and thereby fulfills the need by the employer who took part in the recruitment. The Committee (writing the report) was concerned about the risk of the migration worker being dependent on the employer, as it would mean that if the working relationship did not work out and either the worker wanted to quit or the employer fired the worker, this dependency would result in the migrant worker being forced to return to where he or she came from. The same situation would occur if the company ceased to exist. To avoid this so called *absolute* dependence, the Committee proposed that the EU regulation would be introduced for all migrant workers, namely that the worker has three months to find a new job.¹⁴⁵

After the first period of 24 months, the permit will further on only be attached to a specific working area. The reason was according to the Committee that a further connection to the employer might hamper the mobility on the labour market. The argument was that it is possible that a demand for labour has occurred in the area where the migrant is active with time, but in another regional area and that there should be no restrictions for the worker to change employer.¹⁴⁶

A third country migrant who has worked and lived in Sweden for more than 4 years and by doing so, has shown a capacity of contributing to the society as well as established a strong connection to Sweden might be granted a permanent residence permit.¹⁴⁷ As work permits cannot be granted for a longer time than four years,¹⁴⁸ this article is valid once these four years have passed.¹⁴⁹

4.1.2 The criteria for recruitment: labour shortage

One of the most relevant changes from 2008 is that the work permit of a migrant worker is now directly linked to the employer who recruited her/him. This change was motivated by the argument that the employer is best suited to evaluate if there is a need for third country recruitment and that the migrant worker is meeting a specific demand therefore the working

¹⁴³ SOU 2006:87, p. 133 and Prop. 2007/08:147, p. 30.

¹⁴⁴ SOU 2006:87, p. 134 and Prop. 2007/08:147, p. 31.

¹⁴⁵ SOU 2006:87, p. 133f.

¹⁴⁶ Ibid, p. 133f.

¹⁴⁷ Prop. 2007/08:147, p. 29f.

¹⁴⁸ The Aliens Act (2005:716), chapter 6, article 2.

¹⁴⁹ Wikrén G. and Sandesjö H., p. 262.

permit should be bound to the specific employer.¹⁵⁰ Therefore, when discussing labour immigration the notion of labour shortage is highly relevant. Questions than can be posed are how such a shortage emerges, if there is a fear of a general labour shortage in the future or whether such shortages will appear in certain sectors or specific geographical areas.¹⁵¹

Labour shortage is generally described as a situation where the demand for labour is higher than the supply. There is no definite limit of how large the deficit of labour must be as for there to be an acknowledged shortage in a specific sector or the labour market at large. At an individual work place, labour shortage occurs when an employer does not successfully recruit enough staff for a position within reasonable time. The fact that an employer is not able to fill a position does not always mean that there is a labour shortage in the sector or region, as it might be a result of specific conditions associated with the employer, e.g. wage-setting or other conditions not being attractive enough for Swedish or EU-workers. The possible solutions to the problem of labour shortage differs between cases where the shortage remains even when the conditions are good or in such cases where the recruitment difficulties are due to circumstances attached to the employer.¹⁵²

Today there is a recognized labour shortage in certain professions and sectors, especially in knowledge-intensive sectors where there is a demand for workers with higher education. The demand for low-skilled workers in the Swedish labour market is decreasing rapidly, and the prognosis is that this trend will continue, meaning that those lacking higher education will have a harder time competing for the jobs further on.¹⁵³ Even though this is accepted and shown by a high unemployment rate,¹⁵⁴ 43 percent of the work permits in 2012 were granted to non-skilled workers.¹⁵⁵

The labour market examination has historically played an important role in the recruitment of third country migrants, as the general conditions for granting permits were combined with an established labour shortage as well as a control of the wages and other conditions. The labour examination implicated that the work permit was tried in relation to the national labour market. Regulations concerning the assessment of the permits were issued by the Unemployment Agency, which were later followed by the Migration Board. Before such regulations were published, organizations of both employers and workers were allowed to express their concerns.¹⁵⁶ The Committee stated that it regarded the examination as a foundation of the migration system, as such policies not only affect the individual worker and the employer, but also the society in general. The examination fulfilled two purposes according to the Committee; firstly it ensured that there was no worker in Sweden, EEA or Switzerland who could be suitable for the vacant positions. Secondly, it guaranteed that wages, insurances and other labour conditions proposed to migrant workers are equivalent to those valid for workers in Sweden. This was according to the Committee, the most efficient way of minimizing the risk of a surplus of foreign labour.¹⁵⁷ Despite this, the labour market examination was abolished in the 2008, as the government was not satisfied with its construction. In the preparatory works the argument proposed was that it is the employer who is best capable of evaluating if there is need for recruitment. Hence, the employer is more

¹⁵⁰ Prop. 2007/08:147, p. 29f.

¹⁵¹ SOU 2006:87, p. 71 ff.

¹⁵² Ibid, p. 73.

¹⁵³ Ibid, p. 78.

¹⁵⁴ Between 7 and 8 % during 2012 according to www.ekonomifakta.se, 2013-04-21.

¹⁵⁵ The Migration Board, "*Beviljade arbetstillstånd helåret 2012*", [Granted work permits 2012].

¹⁵⁶ SOU 2006:87, p. 127.

¹⁵⁷ Ibid p. 165f.

qualified in estimating whether such recruitment best is met by third country migrants. As a result, the employers' position should form the basis in errands concerning residence and work permits. By removing the labour market examination, the government argued that the needs of the employer might be met in a faster and more efficient way. As it is far easier to recruit from Sweden than from a third country, at least if the requested competence is available in the country, there therefore should be no risk of supplanting national labour. This was also the reason why one did not regard the demand for increasing the participation of the labour market actors in the recruitment process as necessary.¹⁵⁸

4.2 The control by the Migration Board

As the so called labour market examination regarding the granting of work permits is no longer used, the Unemployment Agency no longer gives recommendations concerning the assessment of such permits. According to the preparatory works, the state is still responsible for ensuring that the community precedence and that the proposed conditions concerning wages, insurances etc. are at least fulfilling those for resident workers. In this assessment, the Migration Board therefore has a very important role to play as the responsible agency.¹⁵⁹

Moreover, the Migration Board also has the responsibility to ensure that the criteria in chapter 6 article 2 paragraph 2 are respected, namely that the recruitment is consistent with the EU framework. If this is not the case, the working permit should not be granted.¹⁶⁰ They also have the possibility (as stated above in section 4.2) to collect information from the workers' organization if the employer has not succeeded in doing so.¹⁶¹

It is worth noting that the provisions regarding work permits are especially attached to the granting of the work permit and the establishment of the employment, which only affects the labour conditions indirectly during the employment, as the contract proposed by the employer is not legally binding. For example, a permit can be granted in cases where the migrant has been offered work with stated conditions regarding wages, insurances and other conditions that are equal to conditions in Swedish collective agreement or practice.¹⁶² The provision is connected to what was proposed at the time of the assessment and not the factual conditions during the employment.¹⁶³

Moreover the Migration Board shall collect information from the workers' organization regarding wages, insurances and other labour conditions. The presumed employer is responsible for getting an opinion of the provisions the employer is proposing to the worker. If the employer cannot attain such information, the Migration Board can refer the case directly to the labour organization.¹⁶⁴

¹⁵⁸ Prop 2007/08:147, p. 25ff.

¹⁵⁹ Prop. 2007/08:147, p. 26. and The Aliens Act (2005:716), chapter 6, article 5.

¹⁶⁰ Wikrén G. and Sandesjö H., p. 345ff.

¹⁶¹ Ibid, p. 350.

¹⁶² The Aliens Act (2005:716), chapter 6, article 2, para. 2.

¹⁶³ SOU 2006:87, p.133 and Prop.2007/08:147, p. 30.

¹⁶⁴ Wikrén G. and Sandesjö H., p. 350.

4.2.1 Enhanced control

Since 2011 there has been an intense debate in Sweden regarding exploitation of migrant workers, especially regarding berry pickers. In this debate the 2008 legal framework has been severely criticized as not protecting workers from abuse. In this debate the Migration Board argued that they could not make controls after granting the permits, due to the legal framework.

In 2011 the Migration Board introduced an enhanced control and demands for employers in the berry industry.¹⁶⁵ These enhanced regulations were introduced in January 2012 for other branches as well, e.g. hotel and restaurants, the cleaning business, forestry and all new establishments.¹⁶⁶ The regulations now demand that employers, in e.g. the service industry and those hiring unskilled labour, must be able to show that they can guarantee the wages for the applicant. If they have hired migrants earlier, they are to show that they have paid the salaries correctly and that all the insurances have been in order. Due to this, the Migration Board has reported a decrease in the number of approved working permit errands in several of the branches concerned of these new regulations. According to the report "*Verksamhets- och kostnadsprognos 2013-02-04*", the Migration Board's stronger control to minimize the risk of abuse in the recruitment process of third country migrants has simplified the identification as well as the refusal of applications which do not fulfill the criteria.¹⁶⁷

Another example of this increased control is a certifying system introduced for employers having continuous needs for non-EU labour, and which have been recognized as fulfilling the requests. Employers which have been certified receive a shorter administration time-limit. Most of the certified companies have many co-workers working in different countries, and are in need of high-skilled specialized labour, e.g. Ericsson and IKEA.¹⁶⁸

The discussion regarding the effects of the deportation clause, the work permits' attachment to the employer and the system's role in "creating" precarity, has so far been lacking. One can therefore argue that one is trying to patch together a system which is failed in its core structure, which evidently will not put an end to abuses of migrant labour.

4.3 Union control

Historically, trade unions have had an important influence on labour immigration. Up until 2008 when the so called labour examination ceased, the unions played a significant role in the consideration as to whether a work permit would be granted or not, as they were allowed to express their concerns before the Unemployment Agency issued regulations on the matter.¹⁶⁹

¹⁶⁵ The Migration Board, "*För dig som vill anlita utländska bärplockare*", [For those interested in hiring foreign berry-pickers]

¹⁶⁶ TCO, "*Bättre kontroll för bibehållen öppenhet – Så kan reglerna för arbetskraftsinvandring förbättras*", p. 14f.

¹⁶⁷ The Migration Board: "*Verksamhets- och kostnadsprognos 2013-02-04*", [Activity and expenses, prognosis 2013-02-04].

¹⁶⁸ The Migration Board: "*Nytt certifieringssytem för företag*", [A new certifying system for companies] 2013-02-19.

¹⁶⁹ SOU 2006:87, p. 127.

Moreover, through their assessment of the labour conditions and whether there was a labour shortage the trade unions were therefore able to influence the labour immigration to a larger extent than after the legal changes.

The employer is still supposed to collect the opinion of the union regarding the working conditions. Furthermore, the Migration Board is supposed to let workers' organizations within the sector of the application come with a statement, as to ensure that wages, insurances and other provisions are not inferior to those following Swedish collective agreements or established practice in the sector.¹⁷⁰ If such a statement has already been received, is assumed to be unnecessary or due to specific circumstances, the Migration Board is allowed to determine the errand without it.¹⁷¹ There are no examples proposed in the preparatory works as when such information is not needed. However, even though the information is supposed to be collected from the union in conjunction with every application this information is only of advisory character, as it is always the Migration Board which determines whether an application should be granted or not.¹⁷²

The power and insight of the trade unions have decreased with the new framework, which can be problematic as they are responsible for the control of whether the conditions are met or not. Moreover, they are the actors most informed of the specifics within the different labour sectors, and should therefore be considered as quite important actors in e.g. the assessment of labour shortage and labour standards. Even though today's system allows individual considerations it is evident that the earlier system facilitated more structural analysis connected to labour shortage in the labour market.

4.4 Consequences of a terminated employment

According to the Aliens Act, a work permit/residence permit can be withdrawn if the migrant has deliberately provided false information or concealed circumstances relevant to the permit being granted.¹⁷³ This is motivated in the preparatory works as reasonable, as it is a general principle in all areas of society that someone who has received a benefit or subsidy by leaving false information can lose the benefit or be forced to repay the subsidy.¹⁷⁴ If the foreigner has resided in the country for more than four years, the residence permit can only be withdrawn if there are serious reasons.¹⁷⁵

Work permits can furthermore be withdrawn before the foreigner has entered Sweden if there are particular reasons. These reasons according to the preparatory works include situations where the foreigner at the time of entrance lack means to provide for her/himself.¹⁷⁶

Moreover, the residence permit can be withdrawn from a migrant worker who has already entered Sweden with work permit but the employment has been terminated and the foreigner has not within the three month period been able to find a new position covered by the permit,

¹⁷⁰ The Alien Ordinance (2006:97), chapter 5, article 7a.

¹⁷¹ Wikrén G. and Sandesjö H., p. 350.

¹⁷² Prop. 2007/08:147, p. 37.

¹⁷³ The Aliens Act (2005:716), chapter 7, article 1.

¹⁷⁴ Wikrén, G. and Sandesjö, H., p. 355 and Prop. 1997/98:36, p. 17.

¹⁷⁵ The Aliens Act (2005:716), chapter 7, article 1, para. 2.

¹⁷⁶ The Aliens Act (2005:716), chapter 7, article 2 and Wikrén, G. and Sandesjö, H., p. 357f.

or within the same time period applied for a new permit due to a new employment and the application is later approved.¹⁷⁷

When assessing whether the residence permit should be withdrawn one should take into consideration to the affiliation that the migrant worker has to the Swedish society and if there are reasons against withdrawing the permit. During the assessment the living situation of the migration should also be considered including whether the migrant has children in Sweden and how this relationship could be affected, as well as other family relations and how long the migrant has been residing in Sweden.¹⁷⁸

Before the 2008 reform there were no possibilities of withdrawing a resident and work permit in cases where the migrant had already entered Sweden and subsequently lost the employment during the time period. By limiting the time frame to three months for finding a new position, the idea was to minimize the potential support the society might have to provide to the migrant worker.¹⁷⁹ The Committee argued that a third country migrant in possession of a residence and work permit should not be entitled to stay in the country if she/he lacks support through work, they proposed the possibility to revoke the permit. As the worker is given three months of time to find a new job, they considered that revoking the permit would occur in relatively few cases. The Committee emphasized that a prerequisite for granting a permit in the first place is that the third country migrant has a competence of which there is a shortage in Sweden. A migrant worker who loses a permit should be able of finding a new employment due to this special competence and after an assessment should be granted a permit to stay. In cases where the application is not granted, the Committee proposed that three months should be sufficient time to prepare the return journey for the worker, and in some cases their family.¹⁸⁰

The possibility of withdrawal (prior to the conclusion of the set time frame) of a work permit is what makes migrants fear losing their position, as a loss of work permit means that they lose their right to remain in Sweden. It is this fear of deportation that makes it possible the employers to exploit the workers. As a result of such fear, migrants might hesitate to contact a trade union or the authorities to report substandard working conditions. They probably also want to avoid a potential conflict with the employer, as a disagreement could increase the risk of being fired resulting in withdrawal of the work permit, which ultimately leads to deportation.

¹⁷⁷ The Aliens Act (2005:716), chapter 7, article 3.

¹⁷⁸ The Aliens Act (2005:716), chapter 7, article 4.

¹⁷⁹ Prop. 2007/08:147, p. 32.

¹⁸⁰ SOU 2006:87, p. 135ff.

5 Empiric material in relation to the ongoing employment

At the end of 2010, Tjänstemännens Centralorganisation (TCO),¹⁸¹ presented the opinion that they thought that the new migration framework seemed to be working. Recruitment of migrant labour meant that employers often agreed to become parties to collective agreements, as this was the easiest way to fulfill the criteria. However, about a year later the union was not as positive as they identified several instances where they suspected that the migration framework was misused, in terms of abuses and false contracts.¹⁸²

Moreover, TCO have presented the opinion that even if the labour markets' parties have an important role regarding the supervision of migrant workers' situation, the regulations still have a character of public law. Therefore, to ensure that such workers get their salaries, insurances and other conditions that are equal to the collective agreement, TCO argues that a criterion should be added to the regulations for granting permits. These additional criteria should spell out the requirements for the relationship between the employer and employee. It should be in the state's interest to ensure that these criteria are not just fulfilled theoretically, but also in reality.¹⁸³

This chapter will present material indicating that there are several problems regarding migrant workers' labour conditions in Sweden, e.g. regarding wages, work environment and (recruitment)

Section 5.1 gives a background to the existing research regarding precarious work, to show some of the current obstacles.

In section 5.2 the question regarding ethnic discrimination is discussed, as to further problematize the problem of discrimination that migrant workers face in the Swedish labour market.

Section 5.3 contains a summary of a labour inspection performed with the aim to control migrant workers' labour conditions. According to the Swedish model, it is the unions that have the best possibilities to ensure that the labour conditions are met.

Further reported problems which migrant workers have been exposed to are presented in section 5.4. This serves to show how the current system is not efficient enough to ensure decent working standards, and that the state therefore has a responsibility to act.

¹⁸¹ A cooperation of trade unions for white-collar workers.

¹⁸² TCO, "Bättre kontroll för bibehållen öppenhet – Så kan reglerna för arbetskraftsinvandring förbättras", p. 9.

¹⁸³ TCO, "Så kan reglerna för arbetskraftsinvandring vårdas och förbättras", p. 10 and "Bättre kontroll för bibehållen öppenhet – Så kan reglerna för arbetskraftsinvandring förbättras", p. 18.

5.1 Precarious work of migrant workers in Sweden

Several international and Swedish studies show that the labour market in Sweden is both ethnically and gender differentiated/ segmented. Migrants are over-represented in high-risk sectors, notwithstanding their education and other qualifications. When compared with other workers in the same kind of employments, migrants perform the most dangerous tasks. Migrants more often have insecure employments and lack knowledge concerning labour regulations. Finally, this group is also less unionized. Irregular workers, lacking legal status, have the worst labour conditions and therefore run a higher risk of being injured at work.¹⁸⁴

Even though the legal status of migrant workers is regulated in both international conventions and national legislation, there might be a tendency to assume that there are no existing problems regarding labour conditions and work environmental conditions. However, this is not the case, which of course has many explanations, connected both to the global structure of large informal sectors for migrant workers, but also unwillingness by national employers and agencies to ensure that legislation and regulations are followed. The existence of widespread discrimination based on ethnicity is one specific difficulty that many migrant workers face. As migrant workers often lack information concerning their basic rights, risk deportation and other reprisals, there are probably a great number of unreported accidents and illnesses among migrant workers, in comparison to nationals.¹⁸⁵

Swedish studies show that migrant workers in general have a weaker social economic status than Swedish nationals, which affects their health status negatively. One important explanation proposed is the uncertain position on the labour market. Moreover, a study analyzing 80 scientific articles engaged in migrant women's' health in Sweden show that this group has more health problems than nationals. Five reasons for this is proposed; they often perform hard and monotone assignments, are to a high degree exposed to environments where musculoskeletal problems are common, and are to a greater extent exposed to the risk of invalidity pension and long-time dependence upon subsidies. Migrants are also over-represented in low-wage sectors and are in comparison with Swedish workers more often tied to working contracts of atypical character and short-term employment.¹⁸⁶

5.2 The issue of ethnic discrimination

The Swedish labour market has been criticized by e.g. the Swedish docent in sociology Wuokko Knocke¹⁸⁷ for both open and hidden racialization of the labour force. By structural discrimination society is divided into "us" and "the others", where the latter are diverged from existing norms in society.¹⁸⁸ An official report of the Swedish government from 2005, discusses structural discrimination on the labour market connected to ethnicity. The notion of structural discrimination aims to describe norms and practices integrated in institutions and social structures, preventing individuals or groups to obtain the same rights and opportunities

¹⁸⁴ The Work Environment Authority, report 2012:4, "*Migration, arbetsmiljö och hälsa*", [Migration, work environment and health], p. 4ff.

¹⁸⁵ Ibid, p. 12ff.

¹⁸⁶ Ibid, p. 20ff.

¹⁸⁷ Knocke has focused her work on issues related to ethnicity and structural discrimination.

¹⁸⁸ Schömer, E, "*Intersektionella aspekter på normer och normalitet i svenskt arbetsliv*", p. 168f.

as others. This form of discrimination need not be intentional, but might serve as reason why migrants more often lose their working positions during economic depression than Swedes, more often have temporary employments, often are sorted out early in the recruitment process, have a higher degree of unemployment or unqualified employments notwithstanding their equal education, have lower wages, more seldom are proposed internal education and carrier possibilities and more often experience discrimination, threats and harassments.¹⁸⁹ The racialized¹⁹⁰ labour market has been developed through the interaction of social and legal norms, where labour migrants have been placed in subordinate positions. As the legal norms have changed, making open and direct discrimination based on ethnicity harder, new forms of discrimination, which are more subtle and indirect, seem to have appeared.¹⁹¹

Research regarding wage discrimination has mostly been focusing on differences based on sex, in both national and European praxis.¹⁹² By recognizing the problems with structural discrimination on the labour market, it can be considered that migrant workers' who have lost their position might have difficulties to find a new job within three months. Moreover, as this is a generally known fact, it is plausible that employers are aware of such difficulties, and using this as a threat in the employment relationship. Issues of discrimination and deportability thereby interact in making migrant workers more exploitable.

5.3 An example of labour inspection

Over the past few years, Hotell- och restaurang facket (HRF),¹⁹³ has engaged in migrant workers' situation in Sweden. In 2011 they performed a study, "Migrationsprojektet" in Stockholm over three months period where they visited 54 working places. The purpose was to evaluate how the collective agreements were followed in enterprises which had employed third country migrant workers in accordance with the legal change in 2008 and in combination with this recruitment become parties to a collective agreement. The idea was to see if the migrant working in such places were entitled to the rights stated in the agreement, ensuring appropriate employment as well as countervailing unfair competition.

In 33 of 54 the working places the union found problems, which were addressed through negotiations. In the 21 working places where the union decided not to take action, few were faultless but were of such magnitude that they could easily be dealt with. According to the report inadequate wages, incomplete wage specifications and contracts are the most common breaches and were reported in 26 and 22 cases respectively. Wrongful compensation for holidays was reported in 11 cases, and wrongfully reported working hours in 5 cases. The majority of the cases ended in an agreement between the parties, whereas only a few went further to central negotiations. The union received damages in several cases but in none of the cases an individual member was granted damages. According to the union, this was due to the fact that members with work permits were afraid of losing their right to work and reside in Sweden.¹⁹⁴

¹⁸⁹ The Work Environment Authority, report 2012:4, p. 31f.

¹⁹⁰ Meaning that people work in different areas of the labour market depending on colour, race, nationality and ethnicity.

¹⁹¹ Schömer, E, p. 169f.

¹⁹² Glavå, M., "Arbetsrätt", p. 637.

¹⁹³ A union for employees in the hotel and restaurant sector.

¹⁹⁴ HRF, "Slutrapport Migrationsprojektet", p.3-8.

In 2012, the HRF followed up the previous report with *“Till vilket pris som helst? - en uppföljning av arbetskraftsmigranternas villkor i hotell och restaurangbranschen”*. This report presents information showing that 61 of 64 employers were in breach of the national legislation.¹⁹⁵ The union points out that they suspect that certain employers recruit third country migrant workers because they see the possibility to make great financial gains. The only way of doing so is to minimize wages and other payments whilst simultaneously increasing working hours. Some employers even admit that migrant workers are more “flexible” and “cheaper” than ordinary personnel. During on-site visits union representatives met migrant workers working 12 hours a day, seven days a week with a monthly salary of 3-4000 SEK.¹⁹⁶ As the migrant workers fear losing their permits they do not dare to engage in conflict with their employer, even if their rights are not respected. It is important to emphasize that these investigations have been made in places bound by collective agreements.

Although the Migration Board has increased its control regarding recruitment to hotels and restaurants, these reports clearly show that the regulations are inefficient in protecting migrant workers from substandard labor conditions.

5.4 Media reports regarding substandard labour conditions

In 2011 the organization Swedwatch published the report *“Mors lilla Olle är underbetald vietnames. Så exploateras asiatiska bärplockare i de svenska skogarna”*. In this report, they focused on Asian berry-pickers coming to work in Sweden, and have continued to examine labour conditions for such workers, even after the Migration Board changed their criteria for recruitment of berry-pickers in 2011.¹⁹⁷ On October 2012, Swedwatch summarized the berry-pickers situation during the summer: even though there have been certain improvements, they stated that many of the problems remained since there is no agency responsible for assessing the need for recruitment.¹⁹⁸

In December 2012 it was revealed that two employers at McDonalds had recruited third country migrants by selling work permits (for a price of approximately 100 000 SEK). The workers had taken large loans to pay the trip to Sweden, and once they started working they were forced to start to pay off their permit. As the migrant workers are dependent on their work permit, they did not have the possibility to complain, as they would then risk being deported back home, largely in debt.¹⁹⁹

In January 2013, Sveriges Television (SVT),²⁰⁰ showed a documentary about several migrant workers from Cameroon, who had been promised forestry work for a salary of 18 500 SEK per month, for a period of six months. To be able to pay for the tickets, they mortgaged family

¹⁹⁵ HRF, *“Till vilket pris som helst? - en uppföljning av arbetskraftsmigranternas villkor i hotell och restaurangbranschen”*, p. 2.

¹⁹⁶ HRF, *“Till vilket pris som helst?”*, p.14.

¹⁹⁷ Swedwatch, *“Mors lilla Olle är underbetald vietnames. Så exploateras asiatiska bärplockare i de svenska skogarna”*, p. 6f.

¹⁹⁸ *“Ingen ser skogen för alla träd”*, Swedwatch, 2012-10-17.

¹⁹⁹ *“Chefer på Mc Donalds misstänks ha sålt jobb”*, Sveriges Radio, 2012-12-02 and *“Avslöjandet är bara toppen på ett isberg”*, Aftonbladet, 2012-12-05.

²⁰⁰ A public service TV Channel.

property, and paid 25 000 SEK to travel to Sweden. Additionally, they were told to pay 6000 SEK to the employer as a “registration fee”. However, once they arrived they received a new contract, stating that they would be paid according to the number of plants set, specifically 0,228 SEK per plant. Further the employer had changed the set time frame to three months of work instead of six. They had to work for 10 hours per day, six days a week, and still they did not earn a fraction of what was initially promised. Fortunately, as this situation got so much attention, the workers will receive the correct salaries, a decision made by both the union and the employers’ organization involved.²⁰¹.

In the beginning of May 2013, one of the largest newspapers in Sweden, Dagens Nyheter (DN) interviewed a person (here called Hassan) who had been recruited from Iraq to work as a nursing assistant between 2009 and 2011, with a promised salary of 26.500 SEK. The Migration Board granted the work permit, but when Hassan came to Sweden the working conditions were very different from that which had been promised. Hassan was in fact expected to work seven days a week for a salary of 8000 SEK. After a while he found out that the company had not paid any taxes for 2009, even though it said so on the payslip. As he would be forced to leave Sweden if the issue was reported to the authorities, he did not do so. When the initial permit had run out, the employer asked for an extension of the work permit, which was granted by the Migration Board. However, they did not control whether the employer had fulfilled the obligations concerning taxes and the payment of wages before granting a new one. Despite having a permit, Hassan did not get any new work assignments from the employer after this. When he contacted the union, the employer threatened with a letter (in Swedish) saying that the employer had lent him 100 000 SEK, which Hassan had felt compelled to sign immediately when he arrived to Sweden as the employer said that this was customary. Due to this, he will probably be forced to return to Iraq, after almost four years in Sweden, in debt.²⁰²

There is a widespread awareness from many factions of society: trade unions, non governmental organizations (NGO:s) and various media branches which have strived to point out how third country migrants are systematically exploited in different ways. There have been reported inadequacies concerning issues of recruitment, wages and breaches of national labour law, concerning e.g. working hours. Moreover, problems are reported from different working sectors: hotel and restaurants, forestry, nursing and berry picking: implying that the problems are much more widespread than presumed.

²⁰¹ *”Slavarbete utan kontroll”*, Arbetarbladet, 2013-01-25.

²⁰² *”Hassan utnyttjades av arbetsgivaren”*, DN, 2013-05-05.

6 Analysis and conclusion

From the theoretical perspective of deportability, developed by e.g. Nicholas De Genova and Bridget Anderson, it is evident that today's legal frameworks concerning migration and labour rights have certain complications for third country migrant workers. More specifically, the framework makes it difficult for migrant workers to demand their basic human and labour rights and this exposes them to labour exploitation.

This chapter is divided into three sections, where initially in section 6.1, some of the difficulties that have been reported regarding migrant workers working conditions in Sweden are discussed. The overall purpose has been to investigate whether Sweden is fulfilling its international human and labour rights obligations.

Secondly, in section 6.2, the highlighted problems are investigated in relation to the theoretical aspects drawn from research concerning the regime of deportation. The purpose is to show how the fields of immigration law and labour law intersect and create a specific framework that makes it difficult for migrant workers to demand their rights and often find themselves engaged in more precarious work than nationals. Immigration policies, in their current structure, have a direct impact on creating exploitable situation for this group of workers.

Section 6.3 concludes the thesis by proposing some solutions that might reduce migrant workers vulnerability in the Swedish labour market.

6.1 Is Sweden fulfilling its international human and labour rights commitments?

When work permits for third country migrant workers are assessed, the legal framework demands that wages, insurances and other working conditions are equivalent to those established by Swedish collective agreements or custom. The idea is to protect the migrants from substandard conditions, as well as to protect national workers from unfair competition. However, the form signed by the employer granting these criteria is not legally binding.

Since 2008 the employer is the one who decides whether there is a need for recruiting third country migrants, due to the abolishment of the labour examination. This is also one of the reasons why the work permit is attached to the specific employer, as the migrant is meeting an explicit need. Interestingly enough the demand for low-skilled workers is not decreasing even though the national unemployment rate is at a high level. This indicates that the labour shortage presented by approximately 40 percent of the current employers is fictive and that their demand for third country migrant workers is based on other reasons.

The Migration Board is responsible for the assessment of work permits and collecting information that ensures that the criteria for recruitment are met. In spite of this, there are regular reports of abuses of migrants at places of work. This might be related to the fact that the Migration Board does not have a mandate to monitor or control the work place once the permit has been granted. Few effective sanctions available in cases where an employer has breached the law could be another explanation.

By abolishing the labour market examination the state also reduced the influence of the trade unions in the assessment of third country labour migration. Before the legal change, the trade unions had the opportunity to influence the assessment as to whether there was an acknowledged labour shortage within the specific sector. The sole involvement of the trade unions is now to ensure that the employer promises to grant the same conditions as the collective agreement. If the employer does not enter into a collective agreement there are very few possibilities for the union to control the working conditions once the work permit has been granted.

There are a number of legislations in the field of labour law that define the basic rights for all workers. These are combined with collective agreements to ensure decent employment. Different control mechanisms exist within the framework to guarantee that these rights are respected. Some examples of these control mechanisms are the Working Environment Authority, the trade unions and civil suits brought to court. However, as the different actors do not cooperate and have different mandates, the supervisory mechanism is not very efficient.

The Aliens Act, which is the core legislation in the initial state of granting the permits, does not regulate how the migrant's employment is proceeding once the permit has been granted. The Working Environment Authority is the responsible actor in ensuring a good and safe working environment and that the working hours are in accordance to the legislation. The Authority supervises through on-site visits, or by collecting relevant information. Since these visits most commonly are announced to the employer beforehand, it makes it very easy for employers to adjust irregularities before the agency arrives. Moreover, the Authority is not responsible for issues connected to wages, as there is no minimum wage in Sweden.

Trade unions have the possibility to supervise employments in places bound by a collective agreement if they suspect that there are irregularities or contract breaches. Additionally, the employer is obliged to bargain with the organization concerning issues related to a member. The trade unions thereby have the best chance of actually supervising and ensuring that migrant workers' rights are respected. Although this is the case, the reports from HRF show that even migrant workers working for employers bound by collective agreements systematically have substandard labour conditions. Moreover, as the coverage of collective agreements and union membership varies on the labour market, in e.g. the hotel and restaurant sector with a low coverage and a high amount of migrant workers, it is very difficult to access information and ensure that the labour conditions are fair.

It appears as if the monitoring system regarding labour rights has several gaps as it consists of several actors with different competences and work areas. As the Swedish model is also

deeply dependent on collective agreements and unions only have access to working places bound by a collective agreement, areas where such agreements are lacking are virtually uncontrolled. As a result, the risk for migrant workers ending up performing precarious work is increased especially when including issues concerning structural discrimination and racialization.

It is possible to argue that the state has transferred its responsibilities to the trade unions, which themselves have neither the resources nor the legal capacity to control all employers who have recruited third country migrant workers. Furthermore, the trade unions are financed by its members and are supposed to act in their favour. As many migrants are non-unionized they do not formally represent the trade unions' interest group, which of course result in a problematic situation. By not ensuring that the labour standards are correctly met, by e.g. introducing an agency responsible for controlling the migrants' situation after recruitment, or giving the unions the possibility of controlling non-unionized working places (and financing such investigations), the state is partly responsible in creating precarious working situations for the migrant workers.

The legal framework regulating the employment protection sets up certain specifics when it comes to terminating a contract. The employment protection is quite strong when it concerns dismissals related to personal reasons, as it requires reasonable grounds. If the dismissal is due to labour shortages the main protection is that there is an order of priority that has to be respected unless the employer and the trade union has decided a specific order for the employees. As many migrant workers are not unionized they are most commonly not included in such negotiations. Furthermore, there is little chance a migrant worker will be familiar with the legal framework. As a result, there are few real possibilities to fight an unjust termination.

Even though the Aliens Act presupposes that the labour conditions and wages for migrant workers must be in accordance with collective agreements or custom there is no efficient way of ensuring this in employments lacking collective agreements. Moreover, as there is no legislation concerning minimum wage the Work Environment Authority does not have to competence to supervise the wages. The only possibility for the migrant worker to demand her/his rights is therefore by going to court, which could be a very expensive matter. As she/he is at risk of losing her work permit by engaging in such action this option is probably not very attractive. In reality, migrant workers employed by establishments lacking collective agreements, are in a very poor situation regarding having access to both justice and effective remedies.

A human rights approach can be useful to establish state responsibility in ensuring protection against discrimination, securing just and favourable conditions, a safe and healthy work environment, fair wages and equal remuneration for work of equal value. Due to the reasons explained above, the Swedish construction makes it difficult for migrant workers to realize their basic human and labour rights as stipulated in national legislation, the ECHR and international conventions from the UN and the ILO. Some of the rights clearly include migrant workers while others are more debated and considered to concern social rights. The realization of these rights in practice for migrant workers in Sweden thereby appear to be very

difficult due to the framework and its application, as it is strongly dependent on union membership. Therefore it can be questioned whether Sweden is in fact fulfilling its obligation as national workers have a much higher possibility to have access to these rights.

6.2 Theoretical approach of the problem

The purpose of this thesis is to analyze whether Sweden is fulfilling its international human and labour rights obligations when it comes to third country migrants. The intention is to evaluate the efficiency of the international human and labour rights framework and its implementation in Sweden.

The result of the current framework will be discussed, focusing on how the risk of deportation²⁰³ leads to precarious work for migrant workers. This is due to the fact that the risk of deportation, in combination with a work permit attached to the employer, increases the vulnerability of such workers. The problems of exploitation of migrant workers, reported regularly since the change of the Aliens Act in 2008, should not be seen as individual, isolated breaches but rather as part of an international structural system that creates precarity among migrant workers.

The work permit system which allows migrant workers stay in Sweden is dependent on the good-will of the employer and is thereby a construction of institutionalized uncertainty. This system establishes specific forms of labour such as precarious work where migrant workers are over-represented. This uncertainty can be connected to a general policy shift in labour politics in both the EU and Sweden of so-called “flexicurity”. This insecurity in the labour market is according to Pierre Bourdieu, always present and effecting everyday life. Together with a residency dependent on the employer, migrant workers therefore have a less secure position than nationals. This makes it difficult for migrant workers to demand their basic human and labour rights as this might lead to expulsion. Many of these rights can only be claimed if you are a resident, implying that states have an interest in establishing temporariness on migrants. The state’s interest in doing so is closely linked to the creation of dependence to the employer. The current structure of immigration control facilitates the production of illegality among migrants, as their legal stay in Sweden is dependent on the employer.

Immigration policies have two functions as it both creates a filter for desired workers (high-skilled, benefits the economy) and also creates a specific “migratory” status. The latter includes conditions of stay that creates a situation of temporariness and gives the employer the explicit right to remove the worker with state help. As a result, all migrant workers become “precarious” as they are dependent on their employer to keep their legal status. Through this construction the employer receives an additional means of control over migrant

²⁰³ The term deportation is used as the description of “... removal of aliens by state power from the territory of that state, either “voluntarily”, under threat of force, or forcibly.” W. Williams, *Deportation, Expulsion, International Police*”, p. 73.

workers, resulting in aggravating the power asymmetry that already exists between the worker and the employer.

This “regime of deportation” shows how states use their sovereignty in recognizing what persons are permitted to enter and exit their territory. At the same time there are global and regional trends of escaping traditional norms of boundaries, for example the European citizenship and the Schengen framework etc. However, these new trends are constructed within a narrow European context where “outsiders” such as third-country migrant workers are excluded from this scope. This is the case even though the EU policies recognize that such workers are needed to guarantee the welfare of Europe’s decreasing population. Migrant workers are seen as highly desirable but at the same time there are severe policies put to place to ensure that these workers are not guaranteed the same social rights as nationals. The possible creation of “illegality” and deportability must therefore be seen in this context as a means of both immigration and labour control.

The term “illegality” is a result of immigration laws and sets up the criteria of inclusion or exclusion. The notion of deportability reveals how legal and other normative boundaries are attached to the state membership, which as a result deprives migrant workers of their fundamental labour rights. The risk of being seen as “illegal”, thereby lacking access to basic rights, makes migrant workers unwilling to report when these same rights are breached as this might lead to “illegalization”. Immigration policies with the result of creating “illegality” therefore serves as a means to envisage what happen if you are not entitled to protection. By connecting the working permit to a specific employer the state puts the migrant workers in a constant acknowledge of her/his high deportability.

The Swedish construction of immigration control does therefore not protect migrant workers from exploitation, or national workers from unfair competition. This is because it creates a very desirable group of workers who are, due to their legal status, forced to accept the rules of the employer. The power imbalance of such employment relations is higher than normal and lead to the fact that the state is partly responsible for creating precarious work. This statement is supported by current research regarding the demand for migrant workers performed in the United Kingdom. This research show that “national stereotyping” is not uncommon and that employers might sometimes prefer migrant workers due to their “work ethic”. The perceived “work ethic” is related to a higher willingness to accept the employers’ terms and a lower degree of union membership. This is also verified by the reports from the HRF regarding labour conditions within the Swedish hotel and restaurant industry. These factors are combined with the fact that their deportability makes migrant workers more willing to accept substandard working conditions.

Finally, Swedish research shows that the Swedish labour market is ethnically segmented. The research points to migrants being over-represented in high risk sectors where they perform the most dangerous tasks and are less securely employed and unionized than the nationals. Additionally, many lack information and knowledge of their basic right, which might serve as a reason for dubious employers to prioritize these kinds of workers.

6.3 Conclusion and proposed changes

The spread of insecure and precarious work can be seen as an international phenomenon where migrant workers are exposed to safety, health and economic risks to a higher degree. The demand for low qualified and low skilled workers is consistent within the EU even in times of high unemployment of national workers. However, the political focus is on high-skilled workers and their rights. In Sweden, as well as internationally there is a focus on “flexicurity” to meet demands related to competitive needs due to a globalized market, which implies and recommends more flexible constructions within the labour market. In general there are no additional demands of more secure unemployment benefits for the workers. The constant power inequality between the employer and the worker is increased as a consequence of the framework and the structural discrimination based on ethnicity in society. Therefore, it is imperative to investigate the interrelation between migration and labour law and its effects on migrant workers’ rights.

Due to the intersection between the two fields of law, the widespread abuses of migrant workers (a group with difficulties claiming their right due to their deportability) are not surprising. The level of state participation in creating such a weak legal status can vary and therefore there are several aspects that Sweden must act as a state that takes human and labour rights seriously.

A first step would be to adjust the current Swedish framework by:

- reinstating the labour market examination to ensure that the need for recruitment is based on an established labour shortage,
- abolishing the work permits attachment to the employer,
- making the employment contract proposed to the Migration Board in the recruitment legally binding,
- creating a more efficient control mechanism ensuring that migrant workers’ rights are respected in every level of the employment and
- establishing more efficient and severe sanctions for employers abusing migrant workers and a right to stay longer in the country in cases of conflict.

If these areas were improved the deportability of the migrant worker would probably decrease, thus affecting their access to basic human and labour rights in a positive manner.

Secondly, Sweden should ratify The UN Migrant Workers Convention to further assure migrant workers labour rights and also indicate that these rights are important. Moreover, Sweden should also actively work to respect article 8 of the ILO Convention No.143, which states that a work permit should not be withdrawn due to the loss of the employment is respected, in contrast from the norm today, which constitutes a breach of this article. Additionally, it can be discussed whether deportation after three months means that migrant

workers do not have the same access to labour protection (e.g. in cases of wrongful dismissals, or access to employment benefits based on membership), re-training and alternative occupation as national workers. In this sense, it can be argued that migrant workers in this sense are not treated on an equal basis with national workers. This could imply that the Swedish legislation is not respecting article 8. Furthermore, ILO Convention No. 111 states that all ratifying states must ensure that workers are not discriminated upon based on different factors, e.g. their national extraction or race. As migrant workers often have inferior working conditions and lower salaries than nationals this constitutes a breach of this convention. Sweden should therefore take action to minimize the risk of such unjust treatment. Furthermore, Sweden should to a larger extent engage for a policy shift within the EU to ensure that also low-skilled workers are included and have access to justice and remuneration if their rights are breached.

As a summary: Sweden's current immigration policies participate in the process of making migrant workers' level of deportability higher, as their work permit is attached to the employer. This increases the vulnerability of migrant workers in the Swedish labour market. The Swedish system of labour law further makes it difficult for these workers to access their basic rights, which unfortunately seems to make them more attractive to unscrupulous employers. This is a consequence of the fact that they have fewer possibilities to complain and the employer holds the deciding power regarding third country recruitment. The construction of the system contributes to the creation of precarity among migrant workers based on their deportability. By allowing actors to discriminate against workers based on nationality/ethnicity the state is taking part in a normalizing such behaviour. Such a process runs the risk of leading to a widespread national acceptance that those migrants have other (inferior) conditions. This would clearly be in breach of international as well as national human rights and labour standards. Therefore, Sweden must engage in these questions at once and make sure that effective measures are taken to ensure third country migrant workers the same rights as national workers.

As reports regarding exploitation of third country migrant workers are coming from several work sectors, one can assume that the problem is more widespread than previously thought. The Swedish government should therefore take due action to investigate how widespread such abuses are and make sure that the deportability of migrant workers does not lead to exploitation. By failing to do so the state makes itself complicit with those persons directly responsible for the exploitation.

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