



Children's Commissioner for Jersey
Promoting and Protecting Children's Rights

Office of the Children's Commissioner

Brunel House
Old Street
St Helier, Jersey
JE2 3RG
Tel: +44 (0)1534 867310

Senator Steve Pallett
s.pallett@gov.je
Scrutiny
States Assembly

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Dear Senator Pallett

Ref: Scrutiny review - Migration and Population Review Panel

I am writing regarding the request for evidence on P.137/2020 Migration Control Policy (Phase 1) Scrutiny review - Migration and Population Review Panel

My advice has already been submitted in writing and in person to the Migration Policy Development Board. Rather than repeat that advice, I attach a copy as it will be relevant to the review.

The Migration Control Policy should consider and refer to the United Nations Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR). Indeed, there is a requirement for public authorities to act in a way which is compatible with the ECHR and with the UNCRC and to take into account and apply those two Conventions when reading the laws and regulations of Jersey. Therefore, the Policy has to ensure that both Conventions are at the forefront of its approach.

The Policy should also have in mind the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and, in particular, the preamble to that convention, which makes it clear that:

"...the rights of migrant workers and members of their families have not been sufficiently recognized everywhere and therefore require appropriate international protection, taking into account the fact that migration is often the cause of serious problems for the members of the families of migrant workers as well as for the workers themselves, in particular because of the scattering of the family..."

It is therefore imperative that migrants are permitted to bring their family and/or children to Jersey. Therefore, the proposal to only permit certain categories of migrants to bring

their partners and/or children to Jersey would prevent the family lives continuing in the best way possible. It would also mean migrant children remaining in their own country without one or more parent which leads to a fracture in the family life, but which is totally avoidable. The Migrant Workers Convention, although not ratified in Jersey, refers to avoiding the scattering of families. For some children, it makes them more vulnerable in their own countries and places them at risk of exploitation, trafficking and criminality. The pastoral and nurturing void created by an absent parent is filled by other more dangerous aspects for the child. Jersey should therefore consider responsibly how it attracts migrants, but also to assist migrants to have their families in Jersey with them. This is most likely to impact on the less skilled and poorer migrants because they are likely to be the ones who will not be permitted to bring their families. Whereas it is those families, and the children of such migrants, who will require more nurturing, protection and direction. Brexit is almost certain to mean many fewer migrants from within Europe, and so attracting third country nationals will be essential.

Migration is both required and necessary, but it must be achieved in a way which is fair to all migrants and even to those migrants who may come to Jersey for periods of less than one year and who might be undertaking what is seen as unskilled work or less skilled work. It will also promote good community relations if all migrants have their partners and/or children with them in Jersey. It also creates a sense of inclusion, thereby avoiding the view that there is a hierarchy of who is and is not able to bring their partners and/or children to Jersey. Therefore, all migrants feel valued and welcome by such an approach and the children of such migrants are not separated out as having fewer rights or being less important. This will assist those children to integrate better in schools and not feel like an underclass of child. Further, to deal with the global competition for migrants, if Jersey is looked at as being a good example of an inclusive, fair and safe place for families and less skilled migrants, then this is also likely to attract even more of the skilled and medical/caring migrants which Jersey needs as a priority. That is because those more skilled and medical/skilled migrants are more likely to want to live in and to be part of a society that promotes fairness for all.

The children of such migrants would not be discriminated against or treated differently by this inclusive approach. In accordance with Article 5 UNCRC, the migrant should be entitled to respect in relation to his/her responsibilities, which includes having the child live with him or her:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

I suggest that the Policy fails to protect family life as it takes a far too brief approach to family life and children, and as such, can be seen to fail to meet expectations of international law. Instead, the Policy should have at the forefront Article 8 EHCR and the UNCRC as it is obliged to do by law. The best interests of the children must be a primary consideration.

In terms of housing, it is essential that the children and their migrant parents are assisted in a way that meets the obligations placed on Jersey applying the UNCRC. Article 27, in particular, is to be noted, but Article 2 also makes it clear that there is a right to non-discrimination. It is acknowledged that housing is difficult because of space on the Island, but the approach should be to ensure migrants are given a fair opportunity to access

housing, including to buy property. A sense of ownership will lead to migrants being able to commit themselves sooner to wanting to continue to contribute to Jersey's economy. This should be the case even if they are not termed an "essential employee". A shorter period than the current five years before the migrant can purchase a property should be reconsidered, so as to give opportunities to those migrants who wish to purchase property, the option of doing so.

In so far as access to healthcare is concerned, the Policy refers to a new tier of eligibility for access to healthcare. However, this is likely to require medical professionals and others to make difficult policy decisions on the frontline regarding whether or not the person they are treating should receive medical treatment. This includes both in respect of children and in respect of adults. Such an approach would be a breach of the UNCRC. Access to medical care, be that physical care and/or mental care, is essential. To restrict access and to have a two-tier system would fundamentally breach the UNCRC. It would also lead to children of such migrants being placed in a different group to others who live and work in Jersey. This may leave such children with a sense of difference and isolation, and may affect confidence.

I have sought independent legal advice from leading counsel on the MPDB proposals and wish to share the following observations:

THE HYPOTHETICAL WORK PERMISSIONS

In respect of the four new CHW hypothetical work permission (W, X,Y and Z), the following observations are made:

(1) Employers will have much influence and control of migrant employees. It is essential that employers therefore have met minimum levels of ensuring that they are aware of acting fairly and in compliance with equality duties and that they must not seek to take advantage of the imbalance between them and the potential employee. The employee is in a very weak position. This is perhaps even more important for the less skilled and unskilled migrants who may be less educated and less able to take legal advice on their position. Such employees will live in lodgings provided by their employer and therefore under the 'watch of' the employer at all times. It is imperative that such employer does not abuse and is not tempted to abuse the employer-employee relationship;

(2) There should be independent monitors of employers with announced and unannounced visits where migrants are employed to ensure that there is compliance with duties of fairness by the employers. The monitors should be given the ability to speak with migrant employees privately about their treatment at their place of work;

(3) For "W" applicants they should be given the option to have their children and or partners live with them in Jersey;

(4) Periods of residence should accumulate towards any other rights. This, for the reasons referred to above, gives a sense of inclusivity to all migrants and ensures that there is no sense of hierarchy. It also gives ambition to those on lower paid and less skilled jobs to work towards better paid and more skilled work.

(5) There should be a right of appeal to a Tribunal or similar from within Jersey with access to free legal advice where a migrant alleges a breach of fairness in approach by his or her employer in terms of work or accommodation provision. This will ensure that the employer is aware that abuse is likely to be investigated and should not occur.

(6) It is unlikely to be possible to show that the conditions for permission W in themselves contravene nationally binding obligations of international law. In other words, the scheme, as a scheme, for the entry of workers in this category is likely to withstand scrutiny in a court. Nevertheless, there is a risk that the application of the conditions for the grant of permission W may give rise to a breach of those international obligations, in particular Art 8 ECHR, in at least some individual cases.

(7) In relation to permission X the migrant must leave the island for at least one year before reapplying for any other such permission. This could in some circumstances potentially violate article 8 ECHR. Family and private life may have developed to such an extent in Jersey that it becomes disproportionate for article 8 ECHR purposes (having regard to the best interests of the child) to require the family to leave and go abroad and apply again after a year.

(8) Additional protections should be put in place to achieve better compliance with a human rights framework.

(9) Migrants in all of the categories will be regarded as ordinarily resident in Jersey. This is undoubtedly correct: see the well-known definition of this concept in *Shah v Barnet London Borough Council* [1983] 2 AC 309, 343, HL, per Lord Scarman. If they are ordinarily resident, they are also likely to be paying local taxes. Some consideration should be given as to what they might expect in return in the way of access to local benefits.

I also attach a handbook entitled 'Protecting migrants under the ECHR' as it may be useful in your research.

To get the best and most committed migrants, it is vital to respect, promote and protect the private and family lives of those migrants. It should not merely be a matter of getting the most hard-working migrants into Jersey. Jersey should set a good example and ensure that those migrants it attracts also have the option to have their partners and/or children live with them in the Island. The Conventions such as Article 8 ECHR and various Articles of the UNCRC require that to be so.

Yours sincerely



Deborah McMillan
Children's Commissioner for Jersey