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BRIEFING NOTE

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with the Legislative Assembly of Thailand

Implementation of the Thai immigration Law and Challenges Faced by Migrant Workers in Thailand

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1. Background

This briefing note describes the new Thai Royal Decree dealing with immigration and discusses the challenges faced by (undocumented) Cambodian migrant workers in Thailand. Thailand is a popular destination for migrant workers as it has an unemployment rate of only 1 percent, despite taking more than 3 million migrant workers into its labour force. Demographic trends suggest that labor shortages in Thailand will grow even more over the coming decades.[3] This structural demand means that there are jobs available for Cambodian migrants with or without proper documentation.[5]

Irregular or undocumented migrants

In many official documents the term “illegal immigrant” is avoided for two main reasons; it is seen as legally inaccurate and it may be considered dehumanising. Illegality is closely linked to criminality, but not having papers is not a crime in most countries - it usually falls under administrative law. Even in places where it is a crime, committing a criminal offense does not make the perpetrator illegal. In addition, ‘being’ illegal undermines a human being’s inherent right to recognition as human being before the law.[1]

Many international organizations have acknowledged this as well:

In 1975, the United Nations General Assembly requested all UN organs to use “non-documented” or “irregular migrant workers” in all official documents.[2] The Programme of Action from the International Conference on Population and Development, which Cambodia endorses, confirmed “undocumented or irregular migrants” as the term for “persons who do not fulfil the requirements established by the country of destination to enter, stay or exercise an economic activity”. [4] In 2009, the UN High Commissioner for Human Rights reaffirmed that the term “illegal immigrant” should be avoided.[6] The Council of Europe,[7] the European Parliament,[8] and the European Commission[9] have all condemned the use of the term “illegal immigrant” and recommend using “undocumented” or “irregular migrant” instead.

In this briefing note the term “illegal immigrant” is not used, except in direct quotes.

2. History of Laws in Thailand

The most relevant laws for migrant workers are:

- Immigration Act, BE 2522 (1979)

This codified the rules around migration and permission to work for foreigners. It also laid out criminal penalties for those who smuggle migrant workers illegally.[12]

- MoUs between Thailand and Cambodia

These set out procedures for the employment of migrants, effective repatriation where needed, protection of migrant workers, and

prevention of illegal border crossing and human trafficking.[3, 11] (See below).

- Anti-Trafficking in Persons Act 2551 (2008)
This law covers the crimes of forced labor and labor exploitation, as well as trafficking.[12]
- The Foreign Workers Act BE 2551 (2008)
This law deals with work permits for foreigners and the procedures surrounding them.[12]
- “Interim measures” 70/2557 (June, 2014)[13]
This set up so-called “One Stop Service” centers (see below).
- Royal Decree on the Placement of Foreign Workers with Employers in Thailand BE 2559 (2016)
This decree aimed to regulate the recruitment of migrant labor. It set out two ways to do so; direct recruitment by the employer or indirectly through licensed recruiters. Employers recruiting directly and licensed recruiters both needed to pay a deposit and set fees for their permits.[14]
- Royal Decree on the Management of Migrant Employment (2017)
This decree repealed the Foreign Workers Act BE 2551 and the Royal Decree from 2016. There is a summary below (chapter 3), or the full text can be found in Appendix I.

2.1 The exodus of Cambodian migrants in 2014

Since there are some parallels with the current situation, it might be useful to look at what happened in 2014. On 22 May 2014 the new Thai ruling authority was established under the name National Council for Peace and Order (NCPO). Starting on 3 June 2014, undocumented migrants were arrested and deported in increasing numbers. By 12 June the government stated that “illegal migrant workers will be arrested and deported.”[11] On 15 June the governor of Banteay Meanchey reported that 25,000 Cambodians had crossed back into Banteay Meanchey on that day alone. By 20 June a total of 226,000 Cambodian migrants were reported to have come back to Cambodia in two weeks.[3, 11]The media reported that part of the reason for the return of Cambodian migrants may have been misinformation, reporting that returning migrants feared that they would be put in jail or even killed by the Thai government.[12, 15] Cambodia created One Stop Service Centres (OSSC) and reduced the price of passports for (potential) migrants to just 4 USD.[11] On 25 June, Thailand facilitated the return of Cambodian migrants through order 70/2557. This order called for “One Stop Services” to register migrant workers to be established in every province,[13] followed by two decrees to increase the number of “One Stop Service” centres in the country.[11, 12]

By November 2014 a total of 681,571 Cambodian migrant workers had registered as well as 41,695 dependent children of Cambodian migrant workers.[3, 5, 11]

When the Royal Decree on the Management of Migrant Employment was announced on 23 June 2017, more Cambodian migrants left Thailand. Exact numbers of Cambodians who have left Thailand since the new Royal Decree are not available, although 4,921 Cambodians left through the Aranyaprathet/Poipet border crossing between 23 June 23 and 5 July 5.[16] Many undocumented migrants may also have left via other border crossings, or without going through official border crossing points.

2.2 MoU between Cambodia and Thailand (May 2003)

Migrating under this MoU requires approximately three months and costs migrants between USD 560 and 620. This is a substantial cost -often paid partly upfront and partly through salary deductions - especially considering that many migrant workers (even those with legal status) earn below the minimum wage. With a minimum wage it would take about 70 days to pay it off, but it takes many migrants longer than that. Going through the MoU process allows a migrant to work legally in Thailand for a maximum of two years [3, 11]

3. The New Royal Decree

The Royal Decree on the Management of Migrant Employment was promulgated using section 172 of the Constitution, which allows the cabinet to issue a Royal Decree “for the purpose of maintaining national or public safety or national economic security” without consulting the National Legislative Assembly. It came into force on 23 June 2017. A special order on 4 July 2017 suspended sectionsⁱ 101, 102, 119, and 122 until 1 January 2018.[17]

The Decree has 145 sections:

Sections 1-100 deal with general provisions, procedures, and implementation; sections 101-133 are penalty provisions; and sections 134-145 are transitory provisions.

An unofficial translation of the New Royal Decree can be found in Appendix I, courtesy of the Migrant Working Group.

3.1 Summary of sections 1-100

After repealing the Foreign Workers Act BE 2551 from 2008 and the Royal Decree on the Placement of Foreign Workers with Employers in Thailand BE 2559 from 2016 [Section 3], the decree sets out two main points: prohibiting foreigners from working in Thailand without a permit [section 8] and prohibiting Thai companies from hiring workers without a permit [section 9]. However, diplomatic officials, UN staff, and foreign dignitaries are exempt from these rules [section 4]. The decree does leave room for the possibility for foreign workers from neighboring countries to acquire

ⁱ In the translation found in Appendix I, the articles of the decree are referred to as “sections”, a terminology that is used in the references here as well to avoid confusion

special permission to work temporarily in specific areas, but notes that provisions for this are to be set by other laws/decrees [section 64].

The decree establishes a Policy Committee on the Management of Foreign Workers' Employment; this is to have 25 officials from various Ministries and government agencies, experts appointed by the Minister, and two representatives of employees' organizations [section 17]. The committee has an oversight role [section 21]. However, it is stipulated that membership of an employees' organisation is available only to Thai nationals [section 18], which means migrant workers are not directly represented on the committee.

Part one of the law [sections 26 to 45] deals with businesses that bring in foreign workers to work for Thai companies; these can be either just brokers or employers of foreign workers themselves. There is a list of conditions for such businesses, including the requirement that three quarters of the shareholders and the capital be owned by Thai nationals, and they have a manager who is a Thai national [section 27]. Applicants for a permit to bring in foreign workers also have to pay a depositⁱⁱ of at least 5 million baht (roughly USD 147,000) to the Director-General of the Department of Employment [section 28]. This deposit may be used to compensate a foreign worker who has had "damages caused" to them by an employer or the agent who brought them into the country [section 57]. In addition, if a foreign worker "has to be repatriated back to the country of origin" the costs of this may be deducted from the deposit [section 56].

The decree also calls for the creation of a Management of Foreign Workers' Employment Fund [section 75], which receives money from (among other sources) the fees from the permits set out in this decree [section 76]. One of the uses of the fund is to help migrant workers whose employer has violated the labor law, and assist agencies that implement welfare projects and/or protections of the labor law for migrant workers, as well as repatriation if needed [section 77].

Finally, the decree allows officials from the Department of Employment to enter workplaces to conduct inspections and to search premises if there are reasonable grounds to believe that there are undocumented migrant workers, and to confiscate and seize documents and evidence related to bringing migrant workers into Thailand without proper documentation. It is mentioned that a warrant is needed to search premises or confiscate evidence, except when there are "reasonable ground[s] to believe that getting a warrant would take a long time, and the foreign worker may be harmed, transferred or hidden" [section 98].

3.2 Penalty provisions

Brokers who bring in migrant workers who do not have the proper permits can be sentenced to maximum of six months of jail time and/or a fine of up to 100,000 baht (roughly USD 2,900) [section 103]. In addition, advertising that you can bring in migrant workers without the proper licensing can attract the same punishments [section 104].

ⁱⁱ Called a "guarantee" in the translation in Appendix I

Actually, bringing in migrant workers without having a permit to do so can result in imprisonment from one to three years and/or a 200,000-600,000 baht (roughly USD 5,800 -17,600) fine [section 105]. An employer who accepts bribes from migrant workers to grant them permission to work can be sentenced to a maximum of six months in jail and/or a fine of 100,000 baht (roughly USD 2,900) [section 114]. It is noteworthy that this last penalty provision applies to employers who hire migrant workers but do not bring them into Thailand

3.3 The postponed sections

On 4 July it was announced that four sections would not be enforced until 1 January 2018; these sections discuss punitive measures towards migrant workers themselves or employers who merely hire undocumented migrant workers (but have not brought them into Thailand themselves).

Regarding migrants

Section 101 states that a foreign worker who comes in without a permit and is not the victim of trafficking according to the anti-trafficking in persons law, may be imprisoned for up to five years or be fined between 1,000 and 100,000 baht (roughly USD 29 to 2,900). Section 119 sets fines of between 20,000 to 100,000 baht (roughly USD 5800 to 2,900) for migrant workers who have not registered their employment with the Ministry of Labour.

Regarding employers

Businesses hiring migrant workers without permits may be fined between 400,000 and 800,000 baht (roughly USD 11,700 to 23,400) per undocumented foreign worker under Section 102. Finally, section 122 sets fines from 400,000 to 800,000 baht (roughly USD 11,700 to 23,400) for anyone who "accepts a foreign worker without a work permit to work."

4. Challenges faced by undocumented migrants

While some irregular migrants may not be fully aware of all the laws and regulations, awareness alone is not enough. Studies have shown that even when undocumented workers know about the dangers of trafficking and irregular migration, they are not less likely to be exploited or cheated.[1] After a project to counsel potential migrants on safe and legal migration, over a third of the participants later chose to migrate irregularly anyway. In fact, migrants who had been in Thailand under various legal statuses reported that they did not see many benefits in becoming documented migrants. Those with irregular status could save more money because undocumented migration is cheaper, faster and easier. Migrating irregularly means that Cambodians can be at work in border areas within a day and for as little as USD 3 (transport costs) or up to USD 200 if moving further within Thailand.[3] Effective policies and mechanisms to enable low-skilled migrant laborers to acquire documentation cheaply and quickly are still lacking.[18] Besides, regular migration does not always offer better protection from the risks of being exploited. Migrants also expressed fears that being recruited through legal

channels might lead them to lose their homes or land that they used as collateral if they leave before their employment contract is completed.[3]

Migrant workers earn less than the minimum wage and are often subject to illegal payroll deductions, excessive working hours and poor working conditions, even if they are documented. In addition, some documented migrants have their documents (illegally) confiscated by their employer as leverage.[3]

Studies suggest that migrants are not always paid their (full) salary, sometimes because they had to leave their employer before the end of the contract.[1, 10]

Reliable data on the working conditions of undocumented migrants is not always available, but a survey among deportees found that while most work under decent conditions, about 10 percent experience violence on the work floor and about a fifth work in dangerous conditions. These numbers are higher for those working on fishing boats, with up to a quarter reporting violence.[1]

While there are “damrongtham centres” where workers can file complaints,[17] most irregular migrant workers are unaware of complaint mechanisms and do not know how to seek remedies when their labor rights have been violated.[3] The Office of Foreign Worker Administration created a website with information for migrant workers (in multiple languages), but the information was not updated and some information was available only in Thai.[12] At the time of writing, this website was not online.ⁱⁱⁱ The International Labour Organization (ILO) has encouraged dialogue between employers, government and (migrant) workers to make sure information reaches all migrant workers.[19]

Finally, the ILO does warn about the risk of “remittance dependency.” However, studies suggest that most Cambodian migrants have family members back home who still work, although female migrant workers were more likely to be the sole provider for their family back in Cambodia.[10] In addition, since migrants are not spread evenly but often come from certain communities, the whole economy of these villages might become dependent on remittances.[5]

ⁱⁱⁱ The website address is <http://wp.doe.go.th/wp/index.php/th/>

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Appendix: English translation of Royal Decree
Concerning the Management of Foreign Workers'
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