

1. Executive summary

The policy for combating the exploitation of immigrant workers is analysed, in its dual dimension of control via the legal system and recognition of these workers' rights, as was implicitly shaped in the VIII Legislature (March 2004 to March 2008).

Brief analysis of irregular immigration

Over the last decade, there has been an enormous increase in the foreign population in Spain; the 637 085 foreigners registered in the 1995 census increased to 3 730 610 in 2005 and to 5 220 577 in 2008. Estimates of how many of these are irregular immigrants and irregular workers is extraordinarily difficult due to the current shortcomings in official registers and statistical sources. Nonetheless, it can be said that Spain is home to – because of its particular geographical situation as well as the important economic growth and labour market expansion it has experienced during the past decade – a significant number of irregular immigrants in spite of the considerable efforts at reduction made by the government. Most foreigners in an irregular situation are those overstaying the permitted period on their visa; however, illegal entries by sea receive much more attention from the media.

The basic legal framework consists of Organic Law 4/2000, of 11 January 2000, on the Rights and Liberties of Foreigners in Spain and their Social Integration (LOE), which has been repeatedly reformed, and its Implementation Rules (RLOE), which were approved by Royal Decree 2393/2004, of 30 December 2004, which has also been reformed.

Analytically, a distinction should be made between “special employment irregularity”, which occurs when foreign workers subjected to administrative authorisation in order to work do so without having previously obtained the authorisation, and “common employment irregularity” of a worker, regardless of his/her nationality, when a foreigner who has the relevant administrative authorisation to work is not affiliated to the social security scheme and therefore does not pay the necessary contributions, and there is also a failure to comply with tax obligations. The report gives priority to addressing the policies on “special employment irregularity”.

The structural components of the legal regime applicable to foreign workers are: (a) first, regulation of their access to the job market through the corresponding work permit (a distinction should be made between ways of accessing the job market through the primary mode and through passage of time; the “primary mode” refers to when the alien resides and works regularly,

that is to say, with the relevant authorisations from the start of his/her stay in Spain, while that based on “passage of time” is where the alien worker obtains the relevant permits to reside and work in Spain from a situation of irregularity in Spain); (b) second, in order to guarantee compliance with and the effectiveness of the legal regulations, there is a set of norms for sanctioning (the maximum sanction is expulsion); (c) third, regulation of the legal consequences of the work of irregular immigrants, apart from those of sanction, gives rise to certain obligations for the employer and the employee (also as regards social security) and the recognition of these consequences is required in order to prevent an aggravation of the social precariousness of irregular immigrant workers; (d) fourth, as regards the legal regulation of access to the public health care services, education and social services, the significance of which is obvious as regards the social integration of immigrants and the avoidance of extreme social precariousness.

Why does illegal immigration exist? Apart from the factors that foster the underground economy in general (rigidity of the regular economy and protective employment regulations, high taxation on work due to social contributions, the relative inefficiency of the system for policing the job market), the following reasons should be pointed out: sustained economic growth has required a growing number of workers for a very defined secondary job market, the entrepreneur finds a reserve workforce in foreign labour, which allows him to reduce his cost structure; the intense pressure of immigration arising in a context of unilateral globalisation; the vertiginous increase of immigrant flows to Spain, which has surpassed the management capacity of the administrative authorities; and, finally, the difficulty involved in border control in Spain, both for economic reasons (tourism) and geographical reasons.

Main characteristics of the policy for combating the exploitation of irregular immigrant workers

Reasons

Efforts to combat illegal employment of immigrants has been a constant in the policies of all Spanish governments since the beginning of the 1990s when Spain began to become a country of immigration. This is for several reasons: first, irregular employment keeps the workers in situations of social precariousness and makes them the victims of abuse and employment malpractice, giving rise to legal discrimination; second, irregular employment leads to situations of exclusion, which hinder the social integration of the immigrants; third, it is due to the serious economic malfunctioning provoked by the underground economy (unfair competition, reduction of public resources). In short, regulating the migratory flow cannot be renounced for all of these reasons, one of the main ones being the protection of the worker.

Objectives and dimensions of the policy

The main objectives of the policy, which is the subject of this report, are the following:

1. to maintain the general principles that underpin legislation concerning employment, which controls the domestic job market, in particular, and, in general, the principles on which the social market economy is based;
2. to provide greater efficacy to the regulation of the migratory flows in so far as this is considered to be a presupposition that cannot be renounced if the incorporation of foreign workers is to be carried out in normalised conditions of social integration, depending on the socio-economic possibilities of Spain at the time;
3. to prevent the exploitation and social precariousness of irregular immigrants, by safeguarding minimum levels of social integration.

The policy presented has two dimensions or components, which are structured complementarily:

- a. the regulating dimension or the control of the job market;
- b. the dimension concerning recognition of irregular immigrant workers' rights and access to social benefits.

Measures of a legal nature

The measures of a legal nature which implement both dimensions are as follows.

As regards access of foreign workers to the Spanish job market, the initial concession of a work permit requires an evaluation of the domestic employment situation. The 2004 RLOE includes several methods to achieve this: (a) the drafting of a Catalogue of Jobs Difficult to Cover by the Public State Employment Service, in such a way that the inclusion of an occupation in this catalogue implies the possibility of processing a temporary residence and work permit for the foreigner; (b) direct management, which consists of the employer presenting the offer of a job to the public employment service in order to process this and, if the post is not covered in 15 days, the public service will issue a certificate that will make it possible to engage a foreign worker; (c) an annual contingent which is usually aimed at the nationals of countries Spain has concluded bilateral agreements with.

As regards the system of administrative authorisations in order to carry out paid activities, there is a group of legal techniques that provide it with a degree of diversification and specialisation required by current circumstances. Thus, there is a broad typology of modalities and classes of authorisation (each with their own characteristics as regards their concession and the scope of the authorisation of the holder). These include cases in which the need to

obtain a work permit to carry out paid activities is excluded and the so-called preferences for obtaining the work permit (cases in which the domestic employment situation is not taken into account), and, finally, the groups of persons who are not obliged to obtain authorisation to work as they are totally or partially excluded from the scope of application of the general legal regulations on foreigners and immigration (for example, refugees who have their own legal regime).

With regard to the regime of sanctions guaranteeing compliance with legal regulations, there are several modalities of expulsion: firstly, preferential expulsion and ordinary expulsion, both of which are of an unmistakably sanctioning nature and are differentiated by the procedure followed in order to implement them; secondly, *refoulement* and return, which constitute administrative measures at the borders rather than sanctions. In order to guarantee the expulsion, precautionary detention and preventive internment in internment centres are stipulated. If a foreign employer engages foreign workers without work permits, he/she commits a very serious infringement and can be sanctioned with expulsion; moreover, if a foreign worker is working in Spain without having first obtained a work permit and lacking a valid residence permit, he/she commits a serious infringement and can be sanctioned with expulsion.

The policy analysed includes other possibilities for the judicial treatment of irregular work of a non-sanctioning nature. Thus, legal consideration of the work contract of an irregular immigrant is changed: from being considered null and void in law, it is now considered to apply to both parties in order to prevent exploitation of the worker by the employer. In addition, procedures for single, ordinary regularisation can be contemplated. This will “normalise” the exceptional cases of concession of residence and/or work permits, based on settlement, which has three modalities: employment stability (continued stay in Spain for a minimum of two years and the existence of employment relationships for a minimum of one year); social settlement (continued stay in Spain for a minimum of three years, having an offer of work, and either the accreditation of family bonds with other foreign residents or the submission of a local report on social integration); and family settlement, where the children of a father or mother who were originally Spanish are involved.

Finally, access to education, health care and basic social services is legally assured to irregular immigrants in order to prevent social precariousness.

Execution of the policy and its difficulties

Execution of the policy explained depends on different authorities and administrative bodies in accordance with the following.

The concession of work permits is the responsibility of the administrative authority for employment, which is dependent on the Secretariat of State for Immigration and Emigration attached to the Ministry of Employment and

Social Affairs, although there is a certain recognition of the competence of the Autonomous Communities.

The concession of residence permits is the responsibility of the police authorities (Police Administration for Foreigners and Documentation of the Ministry of the Interior).

The granting of visas is undertaken by the Department of Consular Affairs and Assistance, as part of the Ministry of Foreign Affairs and Co-operation.

Responsibility for public health care and education services has been transferred to the Autonomous Communities, while basic social services are the responsibility of the local administration, as is the management of the Municipal Register.

In addition, control of entry across borders falls within the competence of the Police Department, while border security is the responsibility of the Civil Guard.

Compliance with employment legislation and social security is overseen by the Work and Social Security Inspectorate, while the Tax Agency is responsible for national tax management, including the fight against tax fraud.

In general, all the administrative instances involved carry out their remits with insufficient human, material and financial resources, which hinders them from complying efficiently, fundamentally due to an extension of the periods agreed upon to resolve the procedures. In recent years, however, increasingly more resources have been allocated to the management of the foreign office and to immigration, whilst procedures and the organisation of resources have also been improved. The same can be said of the public health care and education services.

Evaluation of the policy

Without running too much risk of contradiction, it can be stated that the tendency over these years has been to maintain a certain volume of irregular immigration (an increase in absolute terms; a reduction in relative terms). If this evaluation is correct, it cannot be said that the policies are very efficient. Reasons for this can be found in the strong growth of the Spanish economy over the past decade, coupled with the growth of employment and the pressing need for labour, all of which, combined with other factors that have hindered access to the channels of legal migration, have contributed to this situation of irregularity. Not least amongst these factors would be the structure of Spanish business.

With regard to the alternatives implemented by the government in order to encourage regularity, it should be mentioned that endeavours have been made to ensure more efficient border controls and this seems to have been partially achieved, with strong support from European institutions, reaching

an effectiveness of 92.3 % in 2007 as regards repatriations (in fact, of the 50 318 arrivals detected, 46 471 were repatriated). The resources used to facilitate recruitment in the countries of origin have had good results for large companies and in certain areas of the country the results have been good for seasonal employment; in short, the results of the Work and Social Security Inspectorate have improved.

As regards the positive dimension of the policy against the exploitation of irregular workers, which is intended to increase their legal protection and reduce their social precariousness, the results achieved have been more than noteworthy.

Case law has recognised that the work of the irregular worker under contract guarantees his/her salary, compensation in the event that employment terminates, and protection as concerns contingencies due to occupational accidents or disease, all of which must be paid by the employer.

Measures taken for ordinary regularisation have had limited success in quantitative terms (in 2007, 696 were granted due to employment stability and 27 618 due to social settlement; in 2008, up to 31 August, 795 were granted on the basis of employment stability and 39 842 on the basis of social settlement). Employment stability constitutes a narrow channel of regularisation as employers are reluctant to collaborate because they are exposed to the sanctioning regime regarding foreigners; however, applications on the basis of social settlement are more numerous, although the practice of municipal governments when issuing reports on integration is very disparate.

Access to social rights by irregular immigrants is legally guaranteed. In general terms, the practical application of this access can be classified as the normalisation of the use of public services which provide these social rights. It can, however, be conjectured that tensions, due to insufficient resources in the public health care and education systems allocated to cope with the growing population, will be exacerbated in the next few years given the change in economic conditions.

2. Introduction

As stated in the title, this report analyses policies for combating the exploitation of immigrant workers, stressing the positive aspects of the recognition of their rights and access to social services, in order to overcome the unilateral policy based merely on a legal system of control and a regime of sanctions, although the latter continues to predominate.

From the start, it should be clarified that this report is focused on the VIII Legislature during the government of the Spanish Socialist Workers' Party, namely between March 2004 and March 2008. Besides this, an attempt is made "to construct a discourse" on all the policies designed

and implemented during the last legislature, taking into account the fact that there is no official document which summarises this group of policies from the stated perspective. In fact, the reports or plans adopted by the Spanish authorities include immigration from more general viewpoints. Among these, we should mention the report of the Ministry of Employment and Social Affairs for the Council of Ministers of 19 November 2004, in which the Project for the Regulation of Foreigners was approved and, in particular, the Strategic Plan for Citizenship and Integration 2007-2010 approved by the Council of Ministers on 16 February 2007. It can, however, be said that a general formulation of the government's policy on regulation of immigration, which was then transposed into the Regulations on Foreigners, is contained in the aforementioned report. The strategic plan, on the other hand, develops an ambitious plan for the social integration of immigrants, based on normalising their access to social rights and to public services.

From the point of view of the content of the policies addressed, this report will place special emphasis on the legal framework put in place in order to implement the proposed policies.

Finally, the dramatic change in the economic situation that has occurred in recent months hinders an evaluation of the implementation of the policies, which was already difficult to carry out, although we have done our utmost in this report to avoid mechanical or unconscious projections of current reality on the immediate past.

3. Brief analysis of irregular immigration

3.1. Basic statistical data on irregular immigration

The data show that in the last decade there has been an extraordinary increase in the foreign population in Spain to the point that the numbers reached by the migratory flows has surprised all the social actors. In fact, the number of foreigners entered on the Municipal Register grew from 637 085 in 1995, to 3 730 610 in 2005, and 5 220 577 in 2008 (data from 1 January 2008, see Table 1 in the appendix).

Part of the migratory flows occurred outside the established legal system, giving rise to a recurrent number of irregular immigrants.¹ Estimations are usually made of the number of irregular immigrants based on the difference between the number of foreigners registered on the Municipal Register and the number of foreigners with residence permits. The latter is obtained from

1. This is despite the extraordinary regularisation processes implemented (see Table 2 in the appendix). More will be said about it further on, but it must be noted that the last one to take place, the so-called process of normalisation of 2005, was strictly linked to work and was carried out with praiseworthy rigour; as a result a very significant number of irregular employments emerged.