

ILLEGAL IMMIGRANTS IN MALAYSIA: INVESTIGATION AND PROSECUTION CHALLENGES

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I. ABSTRACT

The issue of trafficking in persons and smuggling of illegal immigrants in Malaysia is a cross-border crime that creates an alarming situation. The terms trafficking and smuggling of migrants are often used incorrectly by the general public. The discrepancies between the terms and proper understanding of these issues need to be identified, which is important to providing appropriate legal and other protection to victims of trafficking or trafficking in persons in Malaysia. In addition, forced labour is often overlooked by the authorities because of the workers' status as illegal immigrants. Restricting the situation when the legislation of the country, particularly the Anti-Trafficking in Persons and Migrant Anti-Smuggling ACT 2007 (hereinafter referred to as "ATIPSOM") [Act 670], also did not clearly state the interpretation of the act. Based on cases decided by the Malaysian courts, it was found that the court interpreted a situation as 'trafficking of persons' based on the purpose and form of exploitation outlined in the act.

This paper discusses the approach adopted by international law and Malaysian law in enforcement aspects, as well as widens the interpretation of the meaning of trafficking in persons and smuggling of migrants in line with the era of globalization. Less knowledge and awareness of the exploitation of the victim complicates the process of prosecution of trafficking offenders. Hence, this study does not only examine the issues arising from the obscurity of trafficking in persons in the Malaysian legislation but instead tries to attract the attention of the authorities and the community to be more sensitive to this issue. Efforts using effective enforcement methods can help the authorities enforce ATIPSOM, 2007 more effectively.

II. INTRODUCTION

The influx of migrants in Malaysia has existed since the early 1970s following the outbreak of the Vietnam War. In addition, the country also faced the problem of a shortage of workers in various sectors at the time, which had affected the stable economic and political situation in Malaysia but also opened up employment opportunities. This atmosphere has attracted foreign nationals from all over the world to enter the country to seize these job opportunities. Foreigners from Indonesia, Philippines, Bangladesh, Myanmar, India, Pakistan, Sri Lanka and the People's Republic of China (PRC), the majority of which are economic refugees have entered this country mostly for the purpose of obtaining employment opportunities in the country.

In addition, Malaysia is also a transit country by foreign smuggling syndicates comprising citizens of Myanmar, PRC, Sri Lanka, India, Pakistan, Iran, Iraq, Afghanistan and others to destination countries such as the United States of America, Australia, New Zealand and Western Europe.

The issue of trafficking in persons has earned global attention as a serious cross-border crime similar to the smuggling of weapons and drugs. It is estimated that the profit from the crime of trafficking in persons amounts to USD 38 billion a year. There are many factors that contribute to the crime of trafficking in persons. Among them are poverty, illiteracy, economic crisis, domestic and regional conflict, political instability and displacement. The migration aspect is also closely related to the crime of trafficking in persons. In this regard, this aspect needs to be addressed as the number of migrant's increases and estimates of the number of migrants globally amount to 240 million people. Migration leads to labour-trafficking issues as exploited by individuals and irresponsible syndicates. Based on this background, the Malaysian government is aware of the importance of establishing ATIPSOM and the National Action Plan as an instrument for addressing this

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crime particularly affecting the areas of prevention, rehabilitation and protection of trafficking victims, including prosecution.

Malaysia is one of the transit countries for trafficking in persons, receiving immigrants from neighbouring countries such as Indonesia, Thailand, Philippines, Cambodia, Vietnam, Myanmar, Pakistan, and China directly or indirectly through syndicated agencies. The acceptance of Malaysia in the United Nations (UN) and acceptance of international conventions, such as the UDHR, the UNTOC and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter referred to as the “TIP Protocols”) and Protocols Against the Smuggling of Migrants by Land, Sea and Air, it places responsibility on Malaysia as a member to comply with the agreements entered into by providing protection against trafficking victims and smuggling. Malaysia ranks on the second-tier list (tier 2 watch list) in the 2018 United States Department of State’s Trafficking in Persons Report.

The second level places Malaysia as a state that does not fully comply with the minimum standards of the Trafficking Victims Protection Act (TVPA), but it is actively pursuing a move towards compliance with the standards. Awareness of the position of the Malaysian government in curbing the smuggling problem of people has made Malaysia more proactive in combating humanitarian crimes. The Malaysian Government through the National Action Plan has established a collective strategy involving the participation of government, civil society, the private sector, non-governmental organizations (NGOs) and the general public in addressing this problem.

The difficulty in distinguishing between migrants and trafficking victims, who often overlap and relate to each other, makes it difficult for the Malaysian government to provide protection to victims. If smuggling of migrants was easier to do when they tried to smuggle them into Malaysia across the border, it was harder to track because they were smuggled through fraudulent documents from fraudulent syndicates. Hence, the essential element to distinguish between migrants and trafficking victims is whether the migrants are being exploited. When a person is exploited for certain purposes such as prostitution and forced labour without paying any wages, they belong to the category of trafficked persons and should be protected, even though at the beginning of their involvement they were “unauthorized foreigners”.

This difference also affects the type of protection that can be given to the victim. Migrant offenders illegally entering Malaysia will be placed in immigration detention depots such as at the International Airport detention depot, which serves as a place of detention for immigrant offenders before they are deported to their respective countries. Meanwhile, victims of trafficking in persons are stationed at shelters for trafficking victims such as the Klang Valley, Melaka, Johor and Sabah. The authorities responsible for migrants and trafficking victims are also separate, where migrants are placed under the control of the Immigration Department of Malaysia, while trafficking victims are placed under the responsibility of the Ministry of Home Affairs and the Anti-Trafficking in Persons and Migrant Anti-Smugglers (MAPOM) Council. Separate authority between the Immigration Department and the Home Ministry also creates difficulties in identifying and distinguishing between their status as either migrant or trafficking victim.

III. INTERPRETATION OF ‘TRAFFICKING IN PERSONS’ AND ‘SMUGGLING OF MIGRANTS’ IN MALAYSIAN LEGISLATION

Malaysia has adopted the provisions of the ATIPSOM. Although it does not fully adopt the TIP Protocols, supplementing the UNTOC, it is still a major reference to the ATIPSOM policy. The Act was amended in 2010 by including provisions on migrant smuggling and in line with that has raised Malaysia’s status to the level 2 observation list by the United States Department of State.

Section 2 of ATIPSOM provides the definition of ‘trafficking in persons’ as any act involving the acquisition or retention of a workforce or service of a person by coercion, and includes acts of recruiting, transporting, transferring, protecting, preparing or receiving a person for the purposes of this Act. The definition provided by the Act is somewhat vague in respect of ‘for the purpose of the act’, as opposed to the Protocol’s intention of ‘for the purpose of exploitation’. If for the purpose of the act, it includes the meaning of the criminal act of smuggling of migrants, it provides a range between trafficking victims and victims of smuggling.

IV. STATISTICS:

a) Statistics on arrest of illegal migrants in Malaysia year 2016 - 2018 by Malaysia Immigration Department.

YEAR	2016	2017	2018
TOTAL	49,496	48,464	44,837

b) Statistics on arrest of illegal immigrants by country in Malaysia (year 2016 – 2018)

COUNTRY	TOTAL (YEAR 2016 – 2018)
Indonesia	48,792
Bangladesh	28,592
Philippines	15,606
Myanmar	13,133
Thailand	9,494
Vietnam	6,658
India	5,890
Other	14,632

V. MODUS OPERANDI (LAND BORDER)

There are various modus operandi used by human smuggling syndicates. This section will emphasize the latest modus operandi in Malaysia. Since the discovery of the graves and campsite of a human smuggling syndicate in Wang Kelian, Perlis in 2015, most syndicates have reduced their activities. The case in Wang Kelian is an example that shows how migrants used land borders to enter Malaysia. This is due to the strict enforcement action taken by Bangladesh and Thailand authorities especially on the sea and land routes. Admission at borders is carried out in smaller sizes via rat routes at the Malaysia–Thailand border.

However, since late 2017, the syndicate has changed the smuggling modus operandi by focusing on smuggling using land routes by public and private vehicles from source countries to transit countries and destination countries. Syndicates have a broad network of transporters across the borders of the affected countries. Syndicates are more focused on land routes using public transport such as buses and taxis besides using private vehicles such as trucks, pick-up trucks and cars. The refugees to be brought in are collected in several cities in Myanmar and then ride to Ranong, Thailand. In addition to Myanmar cities, they are also grouped on several islands near the Myanmar–Thailand border as a transit centre. Among those used is Song Island, Myanmar (Koh Song). Upon arriving in Ranong, Thailand, the syndicate will arrange travel from Ranong, Thailand to several other cities in Thailand, the city of Chumphon and Pattalung and then to Hatyai city, Thailand. Hatyai City is being used as a major collection hub for refugees for smuggling routes using land routes in Thailand. In Hatyai, Thailand, the syndicate will distribute illegal immigrants and refugees in accordance with the agents and syndicates in Malaysia whether in Satun / Perlis, Songkla / Kedah or Narathiwat / Kelantan. The refugees and runaways will be placed in guesthouses, budget hotels and shelter houses in Hatyai to wait for the right time to smuggle them into Malaysia.

In addition to the delivery to the three provinces, there are also syndicates managing trafficking using Langkawi Island, Kedah and Kuala Perlis, Perlis as a small shelter centre. They use small canoes and passenger ferries to Kuala Perlis, Perlis or Kuala Kedah, Kedah. However, this modus operandi is less used and will be implemented when syndicates have space and opportunity. In addition to using the Malaysia–Thailand border, syndicates also use alternative routes in the Straits of Melaka to enter the country through Indonesia to the West Coast of Peninsular especially in Melaka, Negeri Sembilan, Selangor and Perak.

VI. MODUS OPERANDI (BY SEA)

Smuggling through sea routes to date is only focused on Australia through Indonesia using boats and seaports waiting in international waters. Foreign nationals, especially those from Pakistan and Afghanistan, will be taken to temporary shelters either on the coast or near the coast. To date, the coastal states of Selangor and Negeri Sembilan and Johor have become their focus as there are many Indonesians or locals who are in conflict with syndicates. From the coast of Peninsular Malaysia, they are taken to Batam, Dumai and Tanjung Balai, Indonesia for further trafficking to Australia. There is also smuggling from the coast of Peninsular Malaysia which uses small boats to be taken to aircraft carriers that have been waiting in deep waters or international waters for smuggling into Indonesia or are even being smuggled into Australia. However, since the Australia government's new policy through "Operation Sovereign Border" which prevented the entry of unlicensed migrants to the country in September 2013, human smuggling syndicates have tried to target New Zealand as a new destination country through maritime routes using Malaysia and Indonesia as transit countries.

In May 2015, more than 1,000 migrants from Bangladesh and Myanmar landed in Malaysia after being dumped by human traffickers in shallow waters off the resort island of Langkawi. These cases show how the syndicate used a boat as transportation to bring in immigrants to the destination.

VII. MODUS OPERANDI (BY AIR)

Smuggling through the air becomes the choice of syndicates in carrying out smuggling activities of Sri Lankan citizens and the People's Republic of China (PRC) to third countries. The syndicate finds that the route is safest and the most secure. Syndicate Operating Modes are increasingly sophisticated and involve an international network of syndicates, as it involves several transit countries. Citizens of Sri Lanka who enter Malaysia either directly from their home country or through their neighbouring countries are using their own genuine passports after obtaining a social visit visa for Malaysia. Upon entering Malaysia, they are taken to a temporary shelter in hotels or in apartments around Selangor and Kuala Lumpur. Before they were smuggled out of Malaysia, they were supplied genuine Malaysia International Passports (face cutting) to facilitate them when entering and going to destinations. This syndicate has made Kuala Lumpur International Airport (KLIA) and Kuala Lumpur International Airport 2 (KLIA2 @ Low Cost Carrier Terminal) in their smuggling efforts to a third country, in particular, Western Europe.

These syndicates are also engaged with the authorities who to provide easy access (illegal) to Sri Lankan citizens from Malaysia to third countries. The use of the original passport itself, which is subsequently replaced with the fraudulent passports on board the flight or at the end or at the end of the conspiracy with the individuals in the flight agency and the enforcement at the airport, makes it difficult to track them.

The syndicates also smuggle migrants from Bangladesh, Vietnam, Pakistan, India, Uzbekistan, China, Kazakhstan and others in KLIA and KLIA 2 by using Social Visit Passes, Employment Passes and Students Passes. Syndicates are made up of citizens of Malaysia and Bangladesh and get cooperation from civil servants in the KLIA Immigration Department to obtain easy access facilities at the JIM inspection checkpoint at the KLIA Arrival Hall. In December 2017, there was a case in which two Malaysian immigration officers were detained for allegedly being involved in the smuggling of migrants.

VIII. MODUS OPERANDI (ILLEGAL MIGRANTS TO MALAYSIA AND THIRD COUNTRIES)

Information and intelligence by Malaysian authorities conducted over the past few years have revealed some of the syndicates that have been mastered by foreigners and locals have used Malaysia as a transit country or "spring board" to bring in and get false travel documents for smuggling out to third countries. The studies and information have also revealed that the smuggling activities have been carried out through sea and by air. These syndicates also involve neighbouring countries in the process of smuggling them into third countries.

Illegal of migrants enter Malaysia whether directly from their home country or through the borders of Indonesia, Singapore or Thailand and use their own genuine passports after obtaining a Malaysia social visa.

After successfully entering the country, they are taken or placed in hotels, apartments or houses in the majority of residential areas while agents operating in this country are preparing for service syndicates that arrange their smuggling in the future using sea or air routes. The syndicate and the agents take a deposit of between USD 3,000.00 and USD 7,000.00 for making preparations to manage smuggling as well as getting the forged documents or boats for further smuggling. The remaining cost of the package will only be paid when the migrants safely arrive at the destination.

Smuggling through sea routes is concentrated on Australia either through Indonesia or directly to Australia using boats and vessels that can accommodate between 40 and 600 passengers. The syndicates are involved when it is time to be smuggled out; they are taken to temporary shelters either on the coast or near the coast.

From the coast of the peninsula of Malaysia, they are taken to Batam, Aceh and Medan, Indonesia for further trafficking to Australia. There is also smuggling from the coast of Peninsular Malaysia which uses small boats to be taken to aircraft carriers that have been waiting in deep waters or international waters for smuggling into Indonesia or even being smuggled into Australia. Direct smuggling to Australia using the Strait of Melaka route, touring north of Sumatera and directly to Australia. The balance of the smuggling package will only be paid after the migrants have completed the 7-month stay at Christmas Island and get refugee rights from the Australian government.

On 1 May 2018, the Royal Malaysia Police busted a syndicate attempting to smuggle 131 Sri Lankans from Johor, Malaysia to Australia and New Zealand using a modified tanker ship called 'ETRA'. 98 men, 24 women, 9 children and 16 suspects were detained.

IX. FRAUDULENT TRAVEL DOCUMENT SYNDICATE

Syndication of counterfeit identification and travel documents begins when syndicated agents, whether locals or foreigners, who will try to identify potential customers for the identification and travel documents of Malaysia. At the same time, the counterfeit agent will cooperate with civil servants, namely the National Registration Department Officer (JPN) or the Immigration Department of Malaysia (JIM), who are willing to conspire with the counterfeit agent.

When counterfeiting agents acquire customers who are interested in obtaining Mykad (Malaysia Identity Card) and International Malaysia Passports (PMAs), agreement in terms of payment price and timeframe will be fixed. Payments are usually made in cash, for example, being illegally brought in via electronic money transfer through a foreign currency company. Payments charged for earning Mykad and PMA are dependent on the degree of authenticity. To get a birth certificate, MyKad and PMA packages, the rate charged by the syndicate can now reach up to RM500 thousand per person. When approval of the price is obtained, the customer will be brought to meet the JPN Officers either at the office or at a specific location such as the hotel to record fingerprints. Once MyKad is created, the agent will bring the customer to test the authenticity of MyKad made by opening a local bank account. For the record, from January 2017 to May 2018, 117 cases of Mykad forgery involving foreigners were recorded. It consists of Filipino, Indonesian, Thai, Chinese, Russian and Singaporean nationals. The cases of two Iranians who used fake passports in the case of the MH370 missing flight on Mac 2014 is one of the popularly known cases that happened in Malaysia.

X. SUGGESTIONS FOR ENFORCEMENT AND ENHANCEMENT OF ATIPSOM IN MALAYSIA

Based on the research conducted on the resolution of the issue of enforcement and the interpretation should be in line with the improvement of external aspects as follows:

- a. Strengthen legislative mechanisms. The effectiveness of implementing the enforced laws can be achieved by reviewing and improving the law, especially in relation to investigations, prosecution and penalties. Existing Operational Procedures may be reviewed if it is deemed necessary to improve the degree of investigation, protection and prosecution in accordance with current requirements. The proposal, by listing the trafficking criminal offences of persons in the Penal Code [Act 574] or the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 [Act 613], will prevent the occurrence of

this crime.

- b. Enhanced law enforcement actions under anti-trafficking laws, particularly labour trafficking cases. Execute severe penalties against those involved in fraudulent hiring or forced labour exploitation. Increase efforts to prosecute and punish public servants who benefit or engage in trafficking in persons, or those who exploit trafficking victims. Develop and implement procedures for identifying labour trafficking victims among vulnerable groups such as foreign workers and referring them to existing protection services. Increase protection for victims in government facilities by providing legal assistance to victims, and providing effective counselling and care to victims of trafficking. Develop and implement mechanisms to enable adult trafficking victims to walk, work and live outside government shelters. Provide legal alternatives for expulsion of trafficking victims to countries where they will face penalties or hardships.
- c. Amendments to penalties and penalties within ATIPSOM need to be done to prove the seriousness of this trafficking crime. It is proposed that penalties be increased to RM 5 million and include penalties and death sentences against offenders relating to trafficking. In addition, the government should also launch or set up a National Anti-Trafficking in Persons plan as a guide to implementing the crime prevention efforts. The plan should outline the government's strategy in curbing such crime at both domestic and international levels. Public awareness programmes also need to be intensified among them to attract NGOs and private agencies in efforts to combat this crime.
- d. Study the laws of other countries or international law regarding the approach adopted by that country. Close cooperation with ASEAN countries and foreign countries such as Australia, the United States, the Netherlands, the United Kingdom and international organizations are essential to curbing such crimes and to discuss further in respect of the blurring of laws protecting victims of trafficking with illegal migrants moving without legitimate documents.
- e. The most practical advice needs to be implemented immediately by establishing a specialized agency with autonomy and full authority in enforcing, investigating, monitoring, executing and managing and controlling all matters relating to human trafficking crime. This agency needs to be placed under the Prime Minister's Department and may be named the Human Rights Enforcement Commission. This is a good move to avoid overlapping jurisdictions of existing enforcement agencies as well as to avoid rejecting refusal in the investigation. With the establishment of a specialized agency, it will make matters pertaining to ATIPSOM's enforcement more systematic and effective.

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