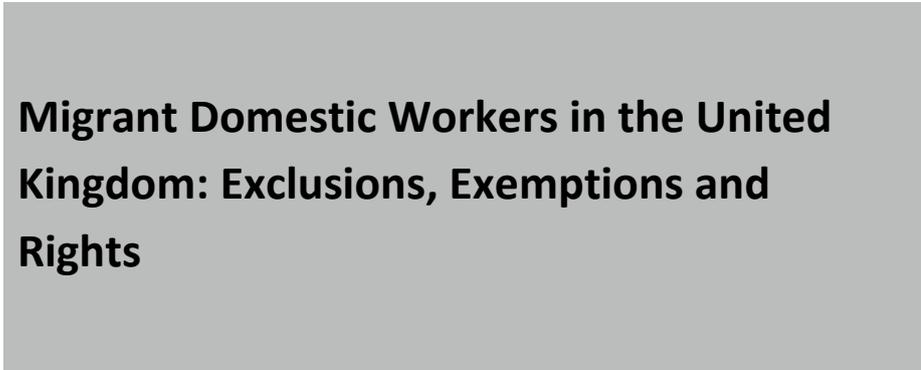
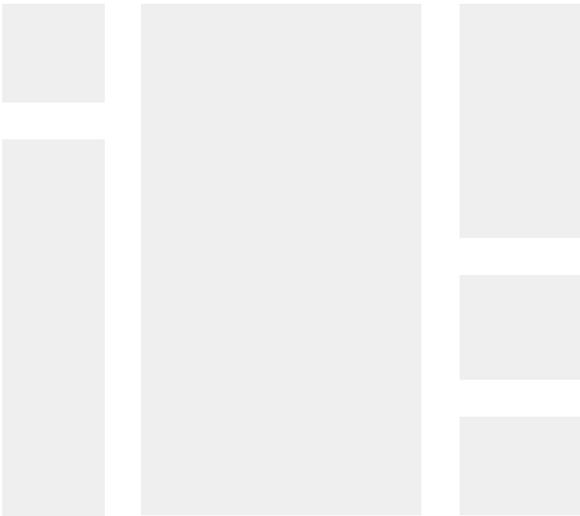




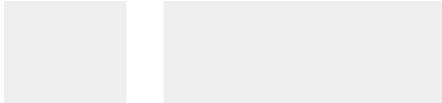
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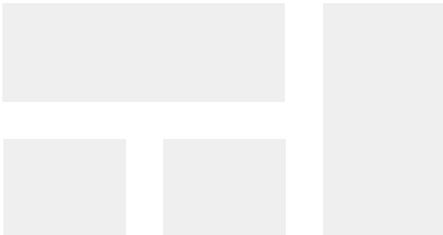
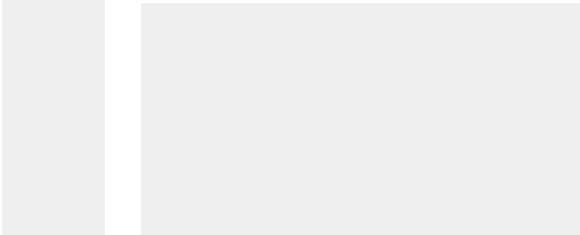
Migrant Domestic Workers in the United Kingdom: Exclusions, Exemptions and Rights



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MIGRANT DOMESTIC WORKERS IN THE UNITED KINGDOM: EXCLUSIONS, EXEMPTIONS AND RIGHTS

Siobhán Mullally and Clíodhna Murphy♦*

INTRODUCTION

Domestic work, the provision of caring work in the intimate, domestic sphere, is work that is predominantly undertaken by women and increasingly by women migrant workers.¹ The expected reduction in demand for paid domestic workers in Europe and elsewhere has not materialised leading some to ask whether the emergence of 'global care chains' should be assessed as a major defeat for the feminist movement or as 'unfinished business'.² Combined with the movement of women into paid employment, the retreat from welfare state supports in Europe and elsewhere has produced care economies that are increasingly reliant on the outsourcing of intimate, reproductive labour.³ Reproductive activities (i.e. labour activities needed to sustain the productive labour force, including cleaning, care taking of the elderly, children and other dependants) has become increasingly commodified,⁴ resulting in the employment of paid domestic workers in many households.⁵ A range of factors have contributed to the demand for domestic labour in the European context, including population ageing, changing household structures, increasing female participation in the labour market, difficulties in reconciling work and family responsibilities and the availability of a flexible, low cost, female (and mainly migrant) work force.⁶

Domestic workers enter employment relationships that are structured in gender, class and racial inequalities,⁷ inequalities that are frequently reinforced by immigration laws and policies. The 'decent work deficit' that has characterised domestic work includes low wages, volatile and unpredictable working hours, limited access to social security and an ambiguous employment status.⁸ More extreme types of exploitation and abuse to which domestic workers may be subjected include forced labour or trafficking. Human rights law has somewhat belatedly begun to address the structured inequalities and exclusions that structure the

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¹ Article 1 of the International Labour Organisation (ILO) Domestic Workers Convention defines domestic work as 'work performed in or for a household or households' and a domestic worker as 'any person engaged in domestic work within an employment relationship', excluding those who perform domestic work 'only occasionally or sporadically and not on an occupational basis'. Article 1, Convention Concerning Decent Work for Domestic Workers, International Labour Organisation, adopted at the 100th session of the International Labour Conference, Geneva, 2011.

² Lutz, "Gender in the Migratory Process" (2010) 36(10) *Journal of Ethnic and Migration Studies* 1647, at 1652.

³ Ibid., at 1654; Anderson, *Doing the Dirty Work? The Global Politics of Domestic Labour* (Zed Books, 2000).

⁴ Salazar Parrenas, "Migrant Filipina Domestic Workers and the International Division of Reproductive Labour" (2000) 14(4) *Gender & Society* 560-581.

⁵ Lutz, "At your Service Madam! The Globalization of Domestic Service" (2002) 70 *Feminist Review* 89. See also Galotti, "The Gender Dimension of Domestic Work in Western Europe", No. 96 International Migration Papers (International Labour Office, Geneva, 2009), in particular at 9-13.

⁶ Galotti, *ibid.*

⁷ Williams, "Migration and Care: Themes, Concepts and Challenges" (2010) 9(3) *Social Policy & Society* 385, at 387.

⁸ Tomei, "Decent Work for Domestic Workers: Reflections on Recent Approaches to Tackle Informality" (2011) 23 *Canadian Journal of Women & Law* 186, at 187. See also Da'Souza, "Moving Towards Decent Work for Domestic Workers: An Overview of the ILO's Work", Working Paper 2/2010 (ILO, 2010), at 19.

domain of domestic work. As in other areas of international law, it is primarily the moments of crisis – incidents of human trafficking, slavery or forced labour – that have captured the attention of human rights law. The ‘everyday’ of work-place exploitation, exclusion from the protections of employment law, social security and precarious migration status, have attracted less attention.

Recent standard setting initiatives have attempted to address this gap and have included the adoption of the landmark 2011 ILO Convention Concerning Decent Work for Domestic Workers,⁹ a General Recommendation from the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) on Women Migrant Workers¹⁰ and a General Comment from the UN Committee on Migrant Workers and their Families on Migrant Domestic Workers.¹¹ Against the background of this ‘justice cascade’,¹² however, migration laws continue to limit the cosmopolitan promise of human rights law. Migration status adds yet another axis of discrimination and constructed vulnerability to the status of domestic workers as domestic work is increasingly carried out by migrant women.¹³ States remain reluctant, however, to recognise this role or to acknowledge the ‘dissensus’ that arises between ‘border norms’ and human rights law.¹⁴

This article examines recent changes introduced in the Overseas Domestic Workers (ODW) visa regime in the United Kingdom and the politics and practice of human rights that has surrounded this change. The move towards a more precarious migration status for migrant domestic workers marks a rejection of the hard-won reforms secured through political activism over the last two decades. It also highlights the contingency and instability of political moments that secure progressive change and legal recognition of migrants’ human rights. The reforms to the ODW visa follow on from the UK Government’s failure to support the 2011 ILO Convention on Decent Work for Domestic Workers and its ambiguous commitment to the expansion of EU anti-trafficking legislation.¹⁵ These steps reflect a resistance on the part of the State to the ‘cascade’ of human rights standards that have sought to overcome the limits of migration status. The *Siliadin*¹⁶ and *Rantsev*¹⁷ cases before the European Court of Human Rights and the pending cases of *Kawogo*,¹⁸ *CN*¹⁹ and *O.G.O.*²⁰ have highlighted the nexus between immigration laws, migration status and vulnerability to exploitation, as have evolving international human rights standards and jurisprudence elsewhere.²¹ Limited access to secure migration status, however, remains the norm for many domestic workers. As the recent changes in the UK

⁹ Convention Concerning Decent Work for Domestic Workers, International Labour Organisation, adopted at the 100th session of the International Labour Conference, Geneva, 2011.

¹⁰ Committee for the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 26 on Women Migrant Workers, 5 December 2008, CEDAW/C/2009/WP.1/R (2008).

¹¹ Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No. 1 on Migrant Domestic Workers, 23 February 2011, CMW/C/GC/1 (2011).

¹² This term is borrowed from Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton & Co., 2011).

¹³ See Lutz, “Gender in the Migratory Process”, supra n.2, p. 1654; Anderson, *Doing the Dirty Work*, supra n.3.

¹⁴ The term ‘border norms’ is borrowed from Bosniak, L. (2006). *The citizen and the alien: dilemmas of contemporary membership*. Princeton, N.J., Princeton University Press

¹⁵ See: Statement to the House of Commons from Minister Damien Green, 22 March 2011, available at: <http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/eu-direct-human-trafficking-wms/> (last accessed 7 July 2012). The UK Government did not initially opt in to the proposed Directive.

¹⁶ *Siliadin v France* (2006) 43 EHRR 16.

¹⁷ *Rantsev v Cyprus and Russia*, Application No. 25965/04, Judgment of 7 January 2010.

¹⁸ *Kawogo v UK*, Application No. 56921/09 (pending judgment).

¹⁹ *CN v UK*, Application No. 4239/08 (pending judgment).

²⁰ *O.G.O. v United Kingdom*, Application no. 13950/12, lodged 8 March 2012

²¹ See, for example, Inter-American Court of Human Rights Advisory Opinion on the “Juridical Condition and Rights of the Undocumented Migrants” (Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003)).

reveal, states continue to resort to national laws to reinforce the 'deportability' and *precarité* of the migrant.²² In the face of this resistance, the limits and exclusions that remain permissible within the boundaries of human rights law continue to undermine its transformative potential.

It might be argued that such limits are intrinsic to the very project of human rights law. As Iris Young reminded us, the totalising movement always leaves 'a remainder'.²³ The question that arises then is whether human rights law provides a mechanism through which such exclusions and 'remainders' in the migration context can be resisted. Part One of this article examines the status of migrant domestic workers in the UK and traces the political developments that led to the introduction of the targeted ODW visa regime. Part Two discusses the recent immigration reforms introduced, the elimination of the ODW visa and the return to a highly precarious, temporary status for domestic workers. The Government's stated rationale for ending the ODW visa includes the prioritisation of 'highly skilled' migration and the need to tackle the abuse of migrant domestic workers. Underpinning this rationale, this article argues, is a refusal to categorise domestic work as work 'like any other' and a failure to acknowledge migrant domestic workers as rights holders rather than as object 'victim-subjects'.²⁴ Rather than addressing the potential for exploitation through the introduction and expansion of safe migration routes, the Government opted to restrict a migration pathway, drawing on gendered characterisations of domestic work as low skilled / unskilled and migrant domestic workers as victims in need of protection.

It is this refusal to extend human rights norms so as to expand access to secure migration routes that continues to limit the potential of human rights reforms. This continuing refusal is explored further in Part Three. The precariousness produced by the limited application of employment laws to domestic workers in the UK is analysed and the nexus between exploitation, abuse and migration status is examined through an analysis of selected case law before the Employment Tribunal in the UK, and at the European Court of Human Rights. The article concludes with an exploration of the emerging body of law on states' positive obligations in the migration context. The potential of human rights law to challenge the 'sovereignist territorial prerogatives' that continue to pervade the sphere of migration law is questioned.²⁵ As we shall see, resort to such prerogatives is frequently accompanied by the normative re-emergence of protective measures, particularly when state law engages with migrant women. In the context of the ODW visa debates, the protective impulse was deployed by the State to support the imposition of immigration restrictions. It did not, however, challenge the continuum of exploitation that defines the everyday sphere of domestic work.

1. FROM THE 'CONCESSION' TO THE OVERSEAS DOMESTIC WORKER VISA

As women have entered into the paid workforce in increasing numbers in many parts of the global North, the availability of citizens or legal residents willing to take on traditionally lower paid and more precarious domestic work has declined.²⁶ The demand for migrant domestic workers in a context where citizens and / or long term residents could compete in the market force for such work raises complex issues of 'race',

²² On the 'deportable alien', see Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press, 2012), at 111 *et seq.*

²³ Young, I. M. (1990). *Justice and the politics of difference*. Princeton, N.J., Princeton University Press. p.99

²⁴ See: Kapur, R. (2002). "The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International / Post-Colonial Feminist Legal Politics." *Harvard Human Rights Journal* 15.

²⁵ P S Berman *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press: 2012) p.128

²⁶ See, for example, Cox, "Exploring the Growth of Paid Domestic Labour: A Case Study of London" (2000) 85(3) *Geography* 241.

gender and class. As Anderson has noted, the ‘racial othering’ that takes place in the context of the employment of migrant domestic workers presents the gendered, racialised and classed hierarchies of domestic work as the inevitable consequences of differing employment patterns and choices.²⁷ The angst that might otherwise be felt by relying on domestic workers to discharge demanding care taking roles is partly deflected by such ‘othering’ processes. Immigration laws play a key role in reinforcing such processes by limiting the possibilities of exit and voice for domestic workers in precarious and often irregular situations. As labour rights activists have argued, such possibilities are critical to strengthening the bargaining positions of workers.

Despite the consistency of demand for domestic workers, labour migration policies continue to prioritise policies to attract ‘highly skilled’ migrant workers, limiting access to secure migration routes for domestic workers and increasing the precariousness of such work.²⁸

A. Limited recognition of domestic work: a concession

Until 1979, resident domestic workers in the UK came within the scope of the general work permit regime operating under the 1971 Immigration Act.²⁹ In 1980, when the issuing of work permits for ‘unskilled workers’ ended,³⁰ a limited exception was made for domestic workers who had worked for their employers for at least 12 months prior to coming to the UK.³¹ Given the important reproductive function carried out by domestic workers, allowing for such a concession was justified in the ‘national interest’ so as to ensure that productive, highly skilled migrants would continue to choose the UK as a preferred destination.³² (Many years later, a similar rationale was to surface in the case law of the Court of Justice of the European Union on the free movement rights of EU citizens and their third country national spouses.)³³ Under the concession scheme, employers were permitted to bring domestic workers into the UK either as a ‘visitor’ or as a ‘person named to work with a specified employer’.³⁴ A degree of confusion surrounding the appropriate immigration status to be granted was evident in the varying statuses granted to domestic workers on entry.³⁵ In general, however, it was presumed that the employment rights of domestic workers and their migration status were linked to their employer, increasing the potential for exploitation and abuse, despite the recognised ‘national interest’ served through their work.³⁶

²⁷ Anderson, “A Very Private Business: Exploring the Demand for Migrant Domestic Workers” (2007) 14(3) *European Journal of Women's Studies* 247.

²⁸ On the labour migration policies of EU Member States, see European Migration Network, “Satisfying Labour Demand Through Migration” (June 2011); on ‘the gap between demand and supply’ in the case of migrant domestic workers in Europe, see EU Fundamental Rights Agency, “Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States” (EU FRA, 2011), at 15 to 19.

²⁹ Statement of Immigration Rules for Control on Entry. EEC and Other Commonwealth Nationals. Laid before the Houses of Parliament on 25 January 1973 (HC 81). For a brief history of entry to the UK to work and the development of the work permit scheme, see Clayton, *Immigration and Asylum Law* (4th ed., Oxford University Press, 2010).

³⁰ Clayton, *ibid.* at 385.

³¹ Earl Ferrers (Minister of State, Home Office) HL Deb Written Answers, 24 July 1990.

³² Lord Reay, HL Deb col 1052 (28 November 1990).

³³ C-60/00 *Carpenter* [2002] ECR I-6279.

³⁴ See Anderson, *Doing the Dirty Work*, *supra* n.3, at 89.

³⁵ See Anderson, *ibid.* Section 3(1)(c) of the Immigration Act 1971.

³⁶ Anderson, *Britain's Secret Slaves* (1993). See also Anderson, *Doing the Dirty Work*, *supra* n.3, at 89.

B. Enacting rights in the ODW visa

In 1998, the newly elected Labour government announced a scheme to regularise the position of domestic workers who had entered under the concession scheme.³⁷ In 2002, the ODW visa scheme was introduced,³⁸ following an extensive advocacy campaign by migrant domestic workers' NGOs, including the Waling-Waling and Kalayaan associations.³⁹ Under the ODW visa scheme, migrant domestic workers were permitted to change employers, a key element of the campaign for reform. Employment protections were also recognised as applying to domestic work, and as with other categories of migrant workers, domestic workers' could apply to have their dependants join them in the UK.⁴⁰ The possibility of qualifying for indefinite leave to remain was also recognised, subject to meeting the generally applicable criteria such as passing the Life in the UK test and continuous employment.⁴¹ While these hurdles were not insignificant and could pose barriers to secure migration status,⁴² a route out of temporary residence was at least, in principle, available.

Labour market mobility for domestic workers on the ODW visa was, however, limited, as visa extensions were dependant on securing continuous employment in the domestic work sector,⁴³ thus limiting possibilities for moving out of a traditionally lower paid and under-valued employment sector. The eligibility criteria also limited the potential impact of the visa scheme; only domestic workers employed for one year or more in the house of their employer or a connected household, were eligible to apply. The requirement of no recourse to public funds meant that, in practice, many domestic workers had no option but to accept 'live-in' arrangements, thus exacerbating the isolated nature of the work and heightening risks of abuse. Thus, while the ODW visa provided important employment rights protections, it did not fully resolve the precarious status of migrant domestic workers.

In 2006, the Labour government proposed a new "Points Based System" of immigration,⁴⁴ as part of which it was proposed that domestic workers would receive six-month non-renewable business visitor visas only and lose the right to change employers.⁴⁵ Following an extensive campaign led by Kalayaan and other NGOs,⁴⁶ the Government agreed to postpone the introduction of changes to the ODW pending a review of the national anti-trafficking strategy.⁴⁷ The Government also affirmed their commitment to minimising risks of abuse or exploitation in any process of reform. In 2009, the House of Commons, Home Affairs Select

³⁷ See the announcement made by Mike O'Brien MP (Immigration Minister) on 23 July 1998 in response to a parliamentary question on the proposed changes to the arrangements for overseas domestic workers. HC Deb col 611W (23 July 1998).

³⁸ According to the Immigration Directorate's Instructions (Chapter 5, Section 12: Domestic Workers in Private Households, December 2006), the amended criteria were implemented administratively from 17 October 2001 before they were formally incorporated into the Immigration Rules on 18 September 2002 (HC 395 of 1994 as amended by Cm 5597 of 22 August 2002).

³⁹ Waling-Waling was established in 1984 and became a self-organised group with a membership of domestic workers. The supporters of the migrant domestic workers formed Kalayaan in 1987. The Commission for Filipino Migrant Workers (CFMW) was founded in 1979 and was also involved in campaigning.

⁴⁰ This was not set out in the Immigration Rules but was accepted practice.

⁴¹ Paragraph 159G of the Immigration Rules.

⁴² Kalayaan, Annual Report 2009-2010, at 15. See also Kalayaan, Annual Report 2010-2011, at 16.

⁴³ Paragraph 159EA of the Immigration Rules.

⁴⁴ See generally "A Points-Based System: Making Migration Work for Britain" (2006).

⁴⁵ The proposals were raised in a Westminster Hall debate on Migrant Domestic Workers. HC Deb cols 101-107WH (10 May 2006).

⁴⁶ Kalayaan and Oxfam, "The New Bonded Labour? The Impact of the Proposed Changes to the UK Immigration System on Migrant Domestic Workers" (Oxfam and Kalayaan, 2008). See also Campaign Statement of Kalayaan (January 2007).

⁴⁷ UK Border Agency, "Government response to the consultation on visitors" (June 2008).

Committee, in its Report on Human Trafficking in the UK, concluded that the retention of the existing ODW visa and the protections it offered was the single most important issue in preventing forced labour and trafficking of domestic workers.⁴⁸ Given the particular vulnerability of migrant domestic workers to abuse, the Committee argued that the preservation of the ODW regime would be necessary for much longer than the two year period proposed by Government.⁴⁹ In 2010, the United Nations Special Rapporteur on the Human Rights of Migrants specifically commended the effectiveness of visa protections for migrant domestic workers in the UK and recommended that its protections be extended to cover domestic workers in diplomatic households.⁵⁰

C. Reform: enacting exclusion

The issue of reform, delayed by the previous Labour government, came to the fore again in 2011. In June 2011, a consultation paper on overseas domestic workers published by the Liberal Democratic-Conservative coalition government proposed abolishing the special entry route for domestic workers, noting that the UK was 'more generous in its provision for ODWs than other EU countries.'⁵¹ This 'generosity' it seemed, was not to be commended. Documented abuses as well as levels of unemployment in the UK domestic labour market were appealed to as support for the case to abolish the ODW visa.⁵² Despite these views, however, in 2011 the new Coalition Government proposed abolishing the special ODW visa regime or significantly restricting its operation to a six-month non-renewable entry visa and removing the right to change employers (in effect, returning to the earlier Labour Government proposals).⁵³ The announcement of the proposed reforms coincided with the UK Government's decision to abstain from voting on the ILO Domestic Worker's Convention, a move that attracted significant criticism from domestic workers' advocates.⁵⁴

The stated rationale for the proposed reforms reveals the continuing characterisation of domestic work as low-skilled and of little economic value.⁵⁵ Migrant domestic workers, the Government argued, were 'generally doing low skilled work.' Continuing to allow 'unrestricted low skilled entry for an extended period' ran counter to the Government's policy of seeking to attract highly skilled migrants and limiting access to settlement routes.⁵⁶ This policy can also be seen to fit with broader trends at EU level to encourage and facilitate preferential immigration routes for 'highly qualified workers' and their family members.⁵⁷ The categorisation of skills levels in this context is potentially a highly gendered exercise. The stated concerns to protect demand-led labour migration ignore the continuing demand for domestic workers. The consultation paper pointed to the existence of the National Referral Mechanism as sufficient to identify victims of

⁴⁸ House of Commons, Home Affairs Select Committee, Sixth Report of Session 2008-2009, *The Trade in Human Beings: Human Trafficking in the UK*, HC 23-I, 14 May 2009, para. 59.

⁴⁹ *Ibid.*

⁵⁰ UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland*, 16 March 2010, A/HRC/14/30/Add.3, at 15 and 16, and recommendation at paragraph 76.

⁵¹ UK Border Agency, "Employment-Related Settlement, Tier-5 and Overseas Domestic Workers: A Consultation" (June 2011) (the "Consultation Paper"), at 30.

⁵² *Ibid.*

⁵³ *Ibid.*, at 13.

⁵⁴ See Williams, "Behind closed doors: the plight of the UK's domestic workers", *Guardian* online, 15 June 2011, available at <http://www.guardian.co.uk/lifeandstyle/the-womens-blog-with-jane-martinson/2011/jun/15/domestic-workers-uk-obstructive> [last accessed 5 June 2012].

⁵⁵ Consultation Paper, *supra* n.53, at 29.

⁵⁶ *Ibid.*

⁵⁷ The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01), at para. 6.1.

trafficking and responding to abuses experienced by domestic workers. A route to settlement, such as that offered by the ODW visa, was not considered an appropriate response. The level of documented abuses of migrant domestic workers was presented, in itself, as a reason to cease the operation of the ODW visa. This argument, in particular, seems difficult to sustain given the acknowledged protections that it offered.⁵⁸ The constructed vulnerability of the migrant domestic worker is instrumentalised by the State to justify the imposition of further immigration restrictions. Again, we see the reluctance to acknowledge the nexus between access to safe migration routes and states' positive obligations to deter and prevent human rights abuses. It is noteworthy that the methodology adopted in assessing the financial impact of the proposed reforms was the subject of some controversy, with the independent Migration Advisory Committee commenting that a more qualitative cost-benefit analysis was required to fully capture the implications of the proposed changes.⁵⁹

The proposed reforms were strongly resisted by NGOs, who argued that the changes would remove crucial protections from migrant domestic workers and risk creating an underclass of workers susceptible to bonded labour and trafficking.⁶⁰ Central to the debates on the impact of reform proposals is the disputed role that immigration laws and policies are presumed to play.⁶¹ While advocates for the retention of the ODW visa regime highlighted immigration restrictions as likely to contribute to further abuse and exploitation of domestic workers, the Government's statements pointed to controls on immigration as essential to curbing abuse by unscrupulous employers.⁶² This framing of the function of immigration controls is clearly illustrated in *Kalayaan's* objections to the abolition or amendment of the ODW visa and the Government's stated reasoning for the strengthening of pre-entry requirements, *viz*, to minimise the possibility of abusive or exploitative employer relationships. A fundamental disagreement is evident on the potential role of expanded access to safe migration routes as a tool to prevent forced labour and exploitation and to reduce human trafficking. This disagreement reflects a continuing reluctance to recognise the scope and application of due diligence obligations in the field of migration law.

2. LAW REFORM: PRODUCING *PRECARITÉ*

Successive governments have attempted to delink immigration controls from the issue of human rights violations. In the House of Commons debates on the proposed reforms, MPs arguing in favour of the retention of the ODW visa emphasised the critical role played by the right to change employer in limiting the potential for exploitation. The proposed reforms, it was noted, would lead to an increase in abuse and illegality, and would 'dramatically increase the power that the employer has over the worker.'⁶³ Despite

⁵⁸ Consultation Paper, *supra* n.53, at 30.

⁵⁹ See Migration Advisory Committee, "Analysis of the Impacts of Migration" (January 2012), in particular at pages 8 to 10 and 97 to 100. The Home Office states on its website that "The Government is considering the implications of the MAC's recommendations and how best to reflect them in future impact assessments. In the meantime, readers should note the caveats to the current methodology that are presented in the MAC's report." Available at <http://www.homeoffice.gov.uk/publications/immigration/employment-related-settlement/> [last accessed 5 June 2012].

⁶⁰ Kalayaan Statement, "Government Proposes Return to Slavery for Migrant Domestic Workers in the UK" (2011). See also Kalayaan "Response to Consultation – questions on MDWs" (5 August 2011).

⁶¹ See "Consultation on Employment-Related Settlement, Tier 5 and Overseas Domestic Workers: (9 June 2-9 September 2011) Summary of the Findings from the Consultation" (Home Office, 2012).

⁶² Anderson, "Mobilizing migrants, making citizens: migrant domestic workers as political agents" (2010) 33(1) *Ethnic and Racial Studies* 60-74, at 70-73.

⁶³ HC Deb col 101WH (10 May 2006).

these arguments, the Government continued to refuse to recognise the links between migration routes, migration status and vulnerability to abuse. Immigration, in their view, was ‘not the way to deal with that.’⁶⁴

A series of changes to the Immigration Rules applicable to domestic workers came into effect on April 6th 2012.⁶⁵ Against the trend of expanding human rights norms for migrants, the reforms introduced significantly increase the precariousness of the migrant domestic worker’s position. Domestic workers will now be permitted to enter and stay for a maximum period of six months only.⁶⁶ Critically, the right to change employer is removed,⁶⁷ as is the possibility of sponsoring dependants or seeking longer term settlement in the UK.⁶⁸ In introducing these changes, the Government signalled its intention to align the domestic worker migration route with wider migration policies and to return it to its original purpose, ‘to allow visitors and diplomats to be accompanied by their domestic staff – not to provide permanent access to the UK for unskilled workers.’⁶⁹ Central to the Government’s position is the view that the domestic worker’s reproductive labour requires limited skills (if any), and is easily replaced. The intimate connections, relationships and caring skills involved in much of domestic work are denied, as are the wider protections afforded other workers, including some categories of migrant workers. The confinement to a temporary status facilitates further curbs on family migration, as the domestic worker is denied the possibility of bringing dependants with her. In the concern to limit family migration, the positioning of the migrant as worker only, rather than an embedded, relational subject of rights, is evident. Dauvergne argues that reducing migration to economic functions alone is part of a wider ‘othering’ process that serves ‘to facilitate migration law’s distinction between ‘us’ and ‘them’⁷⁰ As migrants are viewed increasingly as labour, as ‘ingredients in an economic process’,⁷¹ law’s capacity to fully engage with the migrant as an embedded, relational subject of rights, is limited. Human rights law seeks to move against this trend, but as the reforms in the UK reveal, significant hurdles remain in attempting to counter this ‘economic hegemony.’⁷²

A new provision introduced into the revised Immigration Rules, is the requirement to provide written terms and conditions of employment as part of the pre-entry application process, and to commit to complying with the terms of the National Minimum Wage Act 1998 and supporting Regulations.⁷³ The strengthening of pre-entry protections is a feature of the 2011 ILO Convention on Decent Work for Domestic Workers, which the Government refused to support in part because it was not, in its view, ‘the duty of a government to ensure that terms and conditions of employment were understood by workers.’⁷⁴ Given this refusal, it is unclear how effective pre-entry clearance measures will be in practice or whether there is any political will to monitor their impact on the prevention of abuse. A previous report of the House of Commons, Home Affairs Select Committee, on human trafficking in the UK, expressed scepticism as to the effectiveness of pre-departure

⁶⁴ Ibid.

⁶⁵ “Statement of Changes in Immigration Rules, Presented to Parliament Pursuant to Section 3(2) of the Immigration Act 1971” HC 1888 (15 March 2012).

⁶⁶ Paragraph 159A(iv) and 159B of the Immigration Rules.

⁶⁷ Paragraph 159E of the Immigration Rules provides: “An extension of stay as a domestic worker in a private household may be granted for a period of six months less the period already spent in the UK in this capacity.”

⁶⁸ Paragraph 159G(i) of the Immigration Rules.

⁶⁹ Home Office Announcement, “Immigration (Employment-related settlement, Overseas Domestic Workers, Tier 5 of the Points Based System and Visitors)”, 29 February 2012, at 2.

⁷⁰ See Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008), at 24

⁷¹ Ibid., at 25.

⁷² Ibid.

⁷³ Paragraph 159A(v) of the Immigration Rules.

⁷⁴ ILO Provisional Record, 100th Session 15 June 2011, Report of the Committee on Domestic Workers, para.895.

interviews with domestic workers in preventing abuse, noting that enforcement was patchy at best.⁷⁵ The ‘family member’ exemption from the operation of the minimum wage requirements, discussed below, continues to apply, however.⁷⁶ In any case, as was noted by domestic workers’ advocates, access to UK employment protections or remedies for failure to comply with minimum wage requirements, are greatly limited by the temporary – and tied - nature of the new visa arrangements. Given the very temporary nature of the immigration routes, it is likely that an increasing number of migrant domestic workers will find themselves in an irregular situation. As Noll has noted, in such cases human rights law provides little assistance.⁷⁷ The absence of a ‘firewall’ between employment, social security or other legal remedies and migration laws, ensures that the disciplinary and punitive reach of immigration controls function as limits to rights.

A. Domestic workers in diplomatic households: double jeopardy

Reflecting the contradictions, limits and continuing gendered character of international law, migrant domestic workers employed by diplomats or international civil servants are among the most ‘at risk’ categories of domestic workers. Two factors combine to create a specific protection gap for diplomatic domestic workers: the dependant nature of their migration status on the on-going employment relationship and the potential claim to diplomatic immunity of the employer under the 1961 Vienna Convention on Diplomatic Relations.⁷⁸ Paradoxically (or perhaps not), given that the employer is a representative of a State, or an employee of an international organisation, the structured inequalities of power and dependency for this category of migrant domestic workers are greater, adding significantly to their precarious status.

Unlike domestic workers under the previously existing ODW visa regime, migrant domestic workers employed in diplomatic households did not enjoy the right to change employer, for example; their migration status was tied directly to their employment with a named diplomatic or international civil servant.⁷⁹ In 2010, the UN Special Rapporteur on the Human Rights on Migrants, reporting on his mission to the UK, specifically recommended that the Government consider extending this right to domestic workers in diplomatic households as a safeguard against ‘abusive practices.’⁸⁰

The 1961 Vienna Convention on Diplomatic Relations, (incorporated into domestic law in the UK by the Diplomatic Privileges Act 1964),⁸¹ requires that States Parties facilitate the entry of diplomats’ domestic staff. As a State Party, the UK is required, therefore, to retain an entry route for domestic workers employed in diplomatic households. Currently domestic workers employed in diplomatic households fall under the provisions of the Tier 5 (Temporary Worker – international agreements) category of the points-based

⁷⁵ House of Commons, Home Affairs Select Committee, Sixth Report of Session 2008-2009, *The Trade in Human Beings: Human Trafficking in the UK*, HC 23-I, 14 May 2009, paras. 116-118.

⁷⁶ UK Border Agency, *Entry Clearance Guidance*, WRK2.1.9, available at <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/wrk2/wrk2-1/#header9> [last accessed 5 July 2012].

⁷⁷ Noll, “The Laws of Undocumented Migration” (2010) 12(2) *European Journal of Migration and Law* 143.

⁷⁸ Vienna Convention on Diplomatic Relations 1961, 500 UNTS 95. Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, *infra* n.180, at para. 57.

⁷⁹ Paragraph 155 of the Immigration Rules, which was deleted in 2008 (HC 1113, paragraph 39), provided that in order to extend their stay in the UK, such workers had to show that they were still engaged in the employment for which the entry clearance was granted.

⁸⁰ UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland*, *supra* n.52, para. 76(a).

⁸¹ Schedule 1 to the Diplomatic Privileges Act 1964 contains Articles from the 1961 Convention and Section 2 of the Diplomatic Privileges Act 1964 provides for the Articles of the 1961 Convention to have the force of law in the UK. The Articles to be found in Schedule 1 include Articles 31 and 39 (discussed further below).

immigration system. Domestic workers employed in diplomatic households were permitted to apply for 'indefinite leave to remain' in the UK after a five year period of residence, subject to satisfying the conditions set out in immigration rules including a requirement of continuous employment as a domestic worker.⁸² The decision to retain the settlement provisions for 'private servants in diplomatic households' following the introduction of the points-based immigration system in 2008 was taken, in part, to minimise risk of abuse or exploitation.⁸³

In 2010, the Immigration Minister, Phil Woolas, confirmed that the Government was considering extending the right to change employer in order to protect against abuse occurring in diplomatic households.⁸⁴ Despite the calls for reform and recognition of the heightened risks of abuse,⁸⁵ the consultation process launched in 2011 proposed restricting rather than extending the rights of domestic workers in diplomatic households. Specifically it was proposed that leave to remain would be limited to a 12 month period only, without a pathway to long-term settlement, and further that the right to sponsor dependants would be restricted.⁸⁶ Critics of the proposals noted the impracticability of these reforms, given the duration of diplomatic postings, and the likelihood that domestic workers would be pressurised by employers into over-staying their visa permissions, adding further to their precariousness.⁸⁷ Ultimately, pragmatism prevailed on the issue of length of stay. The reforms coming into effect in April 2012 tie the duration of the domestic worker's visa to the length of the diplomatic posting. The right to sponsor dependants is retained, reflecting the longer period of stay likely. However, the pathway to settlement is removed and the permission to work remains tied to the sponsoring diplomat or civil servant; the right to change employer is again denied.⁸⁸

The precarious position of the migrant domestic worker in a diplomatic household is further increased by the possibility of claims to diplomatic immunity, limiting access to an effective remedy where abuse or exploitation occurs. Questions may arise whether the employment relationship falls outside of the sphere of protected activity covering the 'official functions' of the diplomat, or whether the relationship and linked activities may be more properly classified as professional or commercial.⁸⁹ In the recent case of *Wokuri v Kassam*,⁹⁰ the scope of diplomatic immunity protection available to a former diplomat was considered. In this case, Ms Daphine Wokuri, employed as a chef and 'general domestic servant' by Ms Mumtaz Kassam, Deputy Head of the Ugandan High Commission in the UK, complained that she had not been provided with a copy of her contract of employment and⁹¹ had not been paid her salary in full. The High Court rejected a claim to residual immunity Kassam, concluding that the activity in question did not relate to the performance of her 'official functions' as a diplomat. In asserting her continuing immunity, Kassam had relied heavily on the

⁸² Paragraph 245ZS of the Immigration Rules.

⁸³ "Private servants in diplomatic households: Tier 5: Temporary Workers – International Agreement" (Administrative Instruction, 2008) (Instruction available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/workingintheuk/admininstructionprivateservants> [last accessed 5 June 2012]).

⁸⁴ HC Deb col 272WH (17 March 2010).

⁸⁵ HL Deb col WA79 (26 April 2011).

⁸⁶ Consultation Paper, supra n.53, at 13.

⁸⁷ Kalayaan "Response to Consultation – questions on MDWs" (5 August 2011), at 20.

⁸⁸ Announcement, supra n.71, at 2. Paragraph 245ZR(d) of the Immigration Rules.

⁸⁹ Shaw, *International Law* (Cambridge University Press, 6th ed., 2008), at 767. *Tabion v Mufti* 73 F.3d 535 and Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford University Press, 3rd ed., 2008), at 301. See also *De Andrade v De Andrade* 118 ILR, pp 299, 306-307, noting that the purchase by a diplomat of the home unit as an investment was not a commercial activity within the meaning of the provision.

⁹⁰ [2012] EWHC 105 (Ch).

⁹¹ *Ibid.*, para. 13

case of *Tabion v Mufti*, a 1996 decision of the United States Court of Appeals, 4th Circuit,⁹² in which the Court found that, ‘day-to-day living services such as dry cleaning or domestic help’ were ‘incidental to daily life’, and any disputes arising from the provision of such services therefore fell within the scope of diplomatic immunity.⁹³ The High Court distinguished *Tabion* as it concerned the scope of immunity to be afforded a sitting diplomat and the proper interpretation to be given to the exception for ‘commercial activity’. The residual immunity to be afforded a former diplomat, the Court noted, was less.

The abuse of domestic workers in diplomatic households has continued to attract the attention of advocacy groups and UN human rights bodies. Despite the concerns raised, however, as recent developments in the UK indicate, states remain reluctant to respond to this constructed vulnerability through the provision of more secure migration routes. A recent report from the German Institute of Human Rights on domestic workers in diplomatic households highlighted the continuing obstacles to legal remedies raised by diplomatic immunity claims.⁹⁴ Domestic workers in diplomatic households face a double jeopardy risk, as domestic workers and as rights holders likely to be faced with immunity claims. The public/private divide in such cases strikes twice.⁹⁵

3. INTIMATE LABOUR, EXCLUSIONARY LAWS: ‘UNFINISHED BUSINESS’

For some, the movement to establish decent work standards for domestic work is doomed to failure, given the historical legacy of low status, low pay and exploitation, associated with such work. Legal reforms, it is argued, cannot fully account for the wider ‘realm of indignities’ experienced by domestic workers, or the dynamics of power played out on ‘concrete historicised bodies’ that are gendered, raced and classed.⁹⁶ As Williams notes, migrant domestic workers are situated in the isolating and devalued ‘privatised economy of household labour,’ where highly personalised and emotionally exacting work is undertaken in situations that are ‘heavy with the histories of racialised subordination.’⁹⁷ Lack of enforcement, even in jurisdictions where domestic work falls within the scope of employment law, restricts the potential for human rights norms to disturb the ongoing reproduction of such histories.⁹⁸

⁹² 73 F.3d 535

⁹³ *Ibid.*

⁹⁴ Angelica Kartusch/German Human Rights Institute, “Domestic Workers in Diplomats’ Households: Rights Violations and Access to Justice in the Context of Diplomatic Immunity” (2011).

⁹⁵ An emerging issue signalled by the Fundamental Rights Agency is the use of au-pair recruitment pathways to facilitate employment of migrant domestic workers. In Denmark, for example, the largest group of ‘au pairs’ are from the Philippines. Danish Centre Against Human Trafficking, “Au pair and trafficked? – Recruitment, residence in Denmark and dreams for the future, A qualitative study of the prevalence and risk of human trafficking in the situations and experiences of a group of au pairs in Denmark” (2010). In such cases, the intersections of gender, ethnicity, age and migration status can play a role in determining the rights enjoyed by such workers. Again, the expansion of such recruitment highlights the continuing care deficits in many parts of Europe and the contracting out by family units of such care in the absence of adequate welfare state supports. In the UK, the targeted au-pair visa scheme has recently been replaced by a youth mobility scheme available only to selected nationalities and without rights to family unity or longer term settlement. See UK Border Agency, “Tier 5 of the Points-Based System (Youth Mobility Scheme): Policy Guidance” (to be used for applications on or after 6 April 2012) and paragraphs 245ZI to 245ZL of the Immigration Rules.

⁹⁶ Blackett, “Introduction: Regulating Decent Work for Domestic Workers” (2011) 23 *Canadian Journal of Women & Law* 1, at 43, citing Gutierrez-Rodriguez, *Migration, Domestic Work and Affect: A Decolonial Approach on Value and the Feminization of Labor* (Routledge, 2010), at 6.

⁹⁷ Williams, *supra* n.7, at 386.

⁹⁸ Shireen Ally, “On Laws, Rights and Conventions: A Provocation”, as part of Helen Schwenken, Elisabeth Prügl, Helen Schwenken, Rebeca Pabon, Claire Hobden & Shireen Ally “Conversations” (2011) 13(3) *International Feminist Journal of Politics* 437, at 457.

The movement of migrant domestic workers across multiple jurisdictional boundaries, between states as well as from the 'public' domain into the 'private' domain of the home, is central to the constructed vulnerability of the domestic worker.⁹⁹ Law plays a dual role here, jealously guarding the public borders of the State through immigration laws while at the same time 'reifying the private borders of the home'.¹⁰⁰ This reification (and exclusion) of the household was one of the key issues that emerged in debates leading up to the adoption of the ILO Convention on Decent Work for Domestic Workers. The Special Rapporteur on the Human Rights of Migrants has pointed out that 'the lack of watchdog mechanisms and inadequate monitoring by the Government in the country of destination, the recruiting agencies and even consulates, mean that migrant domestic workers are cut off and abuses remain unseen.'¹⁰¹ Against this background, the expansion of decent work standards to domestic work, though an imperfect remedy, can potentially provide a corrective to the 'abstract articulations' (and applications) of rights that have traditionally overlooked everyday exploitation in the domestic sphere.¹⁰²

A. The ILO Convention on Decent Work for Domestic Workers: beyond 'noblesse oblige'

The 2011 ILO Convention on Decent Work for Domestic Workers is the first dedicated international instrument to address the specificity of domestic work. As the ILO Report that preceded the Convention notes, it is intended to mark a transition from paternalistic conceptions of 'good employers acting out of a sense of *noblesse oblige*', to respect for domestic workers' labour rights.¹⁰³ The Convention seeks to extend core labour rights concerning fair terms of employment and decent working conditions to the realm of domestic work. States are required to ensure that domestic workers enjoy equality with other workers regarding working time,¹⁰⁴ entitlements to minimum wage,¹⁰⁵ healthy and safe working conditions,¹⁰⁶ and social security protection (including maternity).¹⁰⁷ It also requires states to introduce measures providing for the regulation of employment agencies¹⁰⁸ and for effective and accessible dispute resolution mechanisms for domestic workers.¹⁰⁹ The only specific provisions relating to migration are found in Article 8, which requires States Parties to ensure that written job offers or contracts of employment are provided to domestic workers prior to their departure. The conditions under which migrant domestic workers are entitled to repatriation following the expiry or termination of their contract of employment are also to be specified pre-departure.

Prior to the final adoption of the Convention, the UK Government had signalled its commitment to a 'workable convention' that could be ratified by as many states as possible and would protect 'vulnerable

⁹⁹ Fudge, "Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada" (2011) 23 *Canadian Journal of Women & Law* 235.

¹⁰⁰ Fudge, *ibid.*, at 243, referencing the work of Blackett, "Promoting Domestic Workers: Human Dignity through Specific Regulation", in Fauve-Chamoux (ed.), *Domestic Service and the Formation of European Identity: Understanding the Globalization of Domestic Work, 16th-21st Centuries* (Peter Land, 2005).

¹⁰¹ Report of the Special Rapporteur on the Human Rights of Migrants, Commission on Human Rights, sixtieth session E/CN.4/2004/76 (January 2004).

¹⁰² Blackett, "Introduction: Regulating Decent Work for Domestic Workers" (2011) 23 *Canadian Journal of Women & Law*, at 44, citing Blackett, "Situated Reflections on International Labour Law, Capabilities, and Decent Work: The Case of Centre Maraîcher Eugène Guinois" (2007) hors série, *Revue québécoise de droit international* 223 at 242.

¹⁰³ International Labour Conference, 99th session 2010, Report on Decent Work for Domestic Workers (Report IV(1)), at 13.

¹⁰⁴ Article 10.

¹⁰⁵ Article 11.

¹⁰⁶ Article 13.

¹⁰⁷ Article 14.

¹⁰⁸ Article 15(a).

¹⁰⁹ Article 16.

domestic workers worldwide'.¹¹⁰ Despite this commitment, the UK government was one of eight states to abstain from the final vote on the Convention.¹¹¹ Ultimately, the Government concluded that the Convention failed to acknowledge the specificity of domestic work or the particular difficulties concerning the application of labour rights in the domestic household. It was not 'appropriate or practical', they argued, to extend criminal, health and safety laws, including inspections, to private households employing domestic workers. Elderly individuals employing carers, they argued, should not be held to the same standards as large corporations.¹¹² Speaking in the House of Commons, Minister for Employment Relations, Ed Davey, commented that the 'main sticking point' for the Government was the potential application of health and safety legislation to private homes.¹¹³ Such a legislative disincentive to employment of domestic workers could, he argued, force elderly or disabled individuals into residential homes thereby undermining Government policy to support independent living through direct payments to those determined to be in need of care supports.¹¹⁴

The shift towards direct cash payments has been a key feature of social care policy in the UK over the last decade, facilitating a trend towards outsourcing of care work to private actors including migrant women. Direct payments in the social care system are cash payments given to service users in lieu of community care services¹¹⁵ and are presented as facilitating greater choice and independence in sourcing care supports.¹¹⁶ A system of direct payments has been in place since 1996,¹¹⁷ premised on an increasing trend towards 'personalisation' of care, including through allocation of personal budgets and direct payments.¹¹⁸ Williams argues that direct cash payments of this kind have encouraged the development of a particular form of care or domestic help: home-based, often low-paid, commodified, and generally accessed privately through the market.¹¹⁹ The trend towards outsourcing of care, she notes, has expanded employment opportunities for newly arrived migrant women workers, creating yet another link in a wider transnational political economy of care.¹²⁰ At the same time, however, the employer-driven nature of the market for care workers contributes to the vulnerability and potential for exploitation of migrant domestic workers.¹²¹ In refusing to support the expansion of decent work standards to domestic workers, the Government was concerned to protect its own care and welfare policies, as well as to shield employers in the domestic sphere from, what it argued, were unnecessary and burdensome regulatory obligations.

¹¹⁰ HC Deb col WA 469W (23 May 2011).

¹¹¹ The other states which abstained from the vote were El Salvador, Malaysia, Panama, Singapore, Thailand, the Czech Republic and Sudan. See Fiona MacTaggart MP HC Deb col 269WH (29 June 2011).

¹¹² As quoted by Fiona MacTaggart MP: HC Deb cols 269-293WH (29 June 2011).

¹¹³ HC Deb cols 288-289 (Ed Davey MP) (29 June 2011).

¹¹⁴ *Ibid.*

¹¹⁵ See Regulations 7 and 8 of the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 (No. 1887 of 2009).

¹¹⁶ "Guidance on direct payments for community care, services for carers and children's services" (Department of Health, 2009), at 8.

¹¹⁷ Direct payments were introduced in relation to social care services for adults through the Community Care (Direct Payments) Act 1996. This Act was repealed (in relation to England) by the Health and Social Care Act 2001 and direct payments are now governed by that Act and the Children Act 1989. From April 2003, councils were required to offer direct payments to certain persons in order to enable them to obtain for themselves the services that they were assessed as needing (Community Care, Services for Carers and Children's Services (Direct Payments) Guidance (2003).

¹¹⁸ "A vision for adult social care: Capable communities and active citizens" (Department of Health, November 2010), at 8.

¹¹⁹ Williams, "Markets and Migrants in the Care Economy" (2011) 47 *Soundings* 22, at 25

¹²⁰ *Ibid.*

¹²¹ Gordolan and Lalani, "Care and Immigration: Migrant Care Workers in Private Households" (Kalayaan, September 2009), at 39.

The claimed specificity of domestic work, as work that takes place in the domestic household, was also central to the Government's decision not to support the ILO Convention. Echoing sentiments expressed in earlier eras in the context of debates on domestic violence, the Minister for Employment Relations, questioned why the Government would wish to pass 'quite an intrusive law',¹²² one that would give to health and safety inspectors a 'new right to visit millions of homes?' The evidence of the need for such a change, he argued, was weak – households being 'low risk in health and safety terms.'¹²³ The previous Government had balked at taking such a measure and had continued to uphold the exemptions applicable to domestic households from the operation of the 1974 Health and Safety Act.¹²⁴ The increased vulnerability of domestic workers, the Minister argued, arose not from health and safety concerns but rather from the actions of individual employers that were already covered in other legislation.

Contrary to this assertion, however, several legislative exemptions relating to domestic work continue to provide a protective shield to unscrupulous employers. Domestic workers in the UK are excluded from certain aspects of the regulation of working time under the Working Time Regulations 1998, for example.¹²⁵ Deductions may be made from the minimum wage payment if accommodation is provided,¹²⁶ effectively allowing for payments 'in kind' for the live-in domestic worker.¹²⁷ Perhaps one of the most striking of these exemptions has been that provided by Regulation 2(2) of the National Minimum Wage Regulations, which allows for payments less than the national minimum wage where a domestic worker is treated as 'one of the family'.¹²⁸ Being treated as a family member allows for further distancing from the usual decent work standards that apply to other kinds of workers, not employed in domestic work.¹²⁹

Three recent cases before the Employment Appeals Tribunal highlight the difficulties that arise when the family member exemption is applied.¹³⁰ In each case, the remuneration received by the domestic worker was less than the national minimum wage entitlement. The core issue before the Tribunal centred on whether or not the workers were treated as 'one of the family' particularly with regard to the sharing of household tasks and leisure time. As we shall see, where the work done could be characterised as similar to the everyday of intimate domestic life, it was removed from the scope of employment law protections reserved for the public domain.

¹²² HC Deb 29 June 2011 cols 269-293WH.

¹²³ Ibid.

¹²⁴ See Section 51 of the Health and Safety Act 1974.

¹²⁵ Regulation 19, Working Time Regulations 1998 (No. 1833 of 1998), which provides that Regulations 4(1) and (2), 6(1), (2) and (7), 7(1), (2) and (6) and 8 do not apply in relation to a worker employed as a domestic servant in a private household. These Regulations cover the maximum weekly working time, length of night work, health assessment and transfer of night workers to day work, and weekly rest period.

¹²⁶ Regulations 36 and 37 of the Minimum Wage Regulations 1999 (No. 584 of 1999).

¹²⁷ Report on Decent Work for Domestic Workers (Report IV(1)), supra n.107, at 7.

¹²⁸ Regulation 2(2) provides that "work" for the purposes of the Regulations does not include work relating to the employer's household done by a worker where: (i) the worker resides in the family home of the employer for whom he works, (ii) that the worker is not a member of that family, but is treated as such, in particular as regards to the provision of accommodation and meals and the sharing of tasks and leisure activities; (iii) that the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, in respect of the provision of the living accommodation or meals; and (iv) that, had the work been done by a member of the employer's family, it would not be treated as being performed under a worker's contract or as being work because the conditions in sub-paragraph (b) would be satisfied.

¹²⁹ Kalayaan/Lalani, "Ending the Abuse: Policies that Work to Protect Migrant Workers" (May 2011), at 22.

¹³⁰ Appeal No. UKEAT/0553/10/DM, Judgment of 8 December 2011 ("EAT judgment").

B. Just like one of the family: enacting exclusions

In *Ms Julio v Ms Jose*, the claimant, an Angolan national, was employed for a six-year period from 2003 to 2009. There was an oral agreement between the parties that Ms Julio would be paid £800 net per month and that her accommodation, meals and a return air-ticket to Angola each year would also be provided. Ms Julio was required to work six days a week and carry out basic household cleaning tasks as well as caring for two children, one of whom was diagnosed with autism. Although the Tribunal accepted Ms Julio's evidence that she was not at any time paid the agreed sum of £800 per month,¹³¹ it did find that Ms Julio was treated as 'a member of the family, in particular as regards to the provision of accommodation of meals and the sharing of tasks and leisure activities', and that a 'good relationship' between the parties had existed for most of the period of employment.¹³² The exemption from payment of the minimum wage therefore was found to be applicable.

In the second case, *Ms Nambalat v Mr Taher and Mrs Tayeb*, the claimant and respondents were both Indian nationals. The claimant was employed as a live-in housekeeper. Her duties included housework and childcare. It was agreed she would be paid £180 per week (to work six days a week) and that she would be provided with her own bedroom and meals. There were distinct 'phases' of the employment relationship, during which Ms Nambalat's work duties varied widely. Despite these variations, the Tribunal concluded that the conditions set out in Regulation 2(2) applied and that Ms Nambalat's work included sharing the tasks and activities of the family. The entitlement to the national minimum wage did not, therefore, apply.¹³³ Finally, in *Ms Udin v Mr and Mrs Chamsi-Pasha*, the claimant, an Indonesian national, had worked as a domestic worker in the household of the respondents for six years. The Employment Tribunal had found that meals were shared (even though they were rarely taken together), there was a sharing of routine household tasks and that Ms Salim Udin was involved in leisure activities of the family.¹³⁴ However, in this case, the nature of the accommodation provided varied over the six year period. Initially, the family lived in a large apartment and Ms Udin was given her own bedroom. During this period, the Employment Tribunal unanimously found that the conditions of Regulation 2(2) were satisfied. However, from 2007, the family encountered financial difficulties and 'downsized' to smaller apartments twice. Ms Udin was required to share a small room with two children and at another time slept on a mattress on the floor of a dining room. A majority of the Tribunal found that during these periods Ms Udin could not be regarded as having been treated as a member of the family. She was therefore entitled to a remedy for the unauthorised deductions from her wages for those periods only.¹³⁵ Greater protection of rights was ensured when Ms Udin was not just 'one of the family'.

On appeal, each of the claimants argued that the Employment Tribunal had erred in law in its interpretation of Regulation 2(2).¹³⁶ The narrowest possible interpretation, the appellants argued, should be given to this exemption so as to ensure consistency with the statutory language and to comply with the public policy good of eliminating gender and racial discrimination, given that the majority of domestic workers were women from minority ethnic communities.¹³⁷ It was also argued that a narrow interpretation was necessary to meet the State's positive obligations under Article 4 ECHR, in line with the judgement of European Court of Human

¹³¹ EAT judgment, para. 19, quoting from the Tribunal's decision.

¹³² EAT judgment, para. 21, quoting from the Tribunal's decision.

¹³³ EAT judgment, para. 32, quoting from the Tribunal's decision.

¹³⁴ EAT judgment, para. 38, quoting from the Tribunal's decision.

¹³⁵ *Ibid.*

¹³⁶ EAT judgment, para. 39.

¹³⁷ EAT judgment, para. 39 and 40.

Rights in *Siliadin v France*.¹³⁸ Although the Employment Appeals Tribunal (EAT) did not specifically comment on these arguments, it did agree that a narrow interpretation must be given to the family member exemption. It rejected the argument, however, that an equivalence of tasks performed by the worker and the employer must exist in order to bring the work within the scope of the exemption. Regulation 2(2) did not require that the worker shared all meals, tasks and leisure activities with the family; it required only that she is treated as 'a member of the family in those particular respects.'¹³⁹ Other matters including the dignity with which the domestic worker is treated, the degree of privacy and autonomy afforded and the extent to which, if at all, exploitation occurs, were also relevant and could be considered in applying the family member test.¹⁴⁰ The core question is whether the worker is 'integrated into the family'.¹⁴¹ If the answer is yes, then the limits of human rights protections appear to be reached.

In each of the three cases before it, the EAT concluded that the family member exemption applied and the domestic workers could not claim entitlement to payment of the minimum wage.¹⁴² In relation to Ms Udin, the EAT over-turned the majority finding of the Employment Tribunal, concluding that in the overall context of the family's circumstances, the changing sleeping arrangements did not result in Ms Udin ceasing to be treated as a member of the family.¹⁴³ Whether or not 'integration into the family' ensures greater protection of rights is an open question.¹⁴⁴ That 'integration' could trigger an exemption from a core labour protection such as entitlement to payment of the national minimum wage reveals the continuing reluctance, as the European Court of Human Rights has noted, to apply human rights norms 'within personal relationships or closed circuits'.¹⁴⁵

Until recently, the UK Border Agency's Instructions to entry clearance officers noted that non-payment of the national minimum wage was not a valid reason for a refusal to issue an ODW visa. The House of Commons Home Affairs Select Committee in its Report on Human Trafficking in the UK criticised this practice, commenting that it 'makes a mockery of the concept of a legal minimum wage.'¹⁴⁶ Recent changes to the Immigration Rules introduced in April 2012 partly address this criticism. Applicants for an ODW visa now have to demonstrate that the employer has agreed to pay the minimum wage in accordance with the National Minimum Wage Regulations.¹⁴⁷ The family member exemption will continue to apply, however. Continuing to apply such an exemption gives legal standing to the paradox inherent in many domestic work employment relationships. Employers delegate intimate reproductive labour to domestic workers and expect unconditional availability and care, while remaining unwilling to comply with decent work legal norms.¹⁴⁸ The terms on which much intimate labour in the domestic sphere is carried out by family members (usually wives,

¹³⁸ (2006) 43 EHRR 16. EAT judgment, para. 41. Further cases on Article 4 are now pending before the Court, and also involve alleged violations of article 4 in the context of domestic service. See: *Kawogo v United Kingdom* (Application no. 56921/09); *Milanova and Others v. Italy and Bulgaria* (Application no. 40020/03); *C. N. v. United Kingdom* (Application no. 4239/08).

¹³⁹ EAT judgment, para. 46.

¹⁴⁰ *Ibid.*

¹⁴¹ EAT judgment, para. 45.

¹⁴² EAT judgment, para. 58.

¹⁴³ EAT judgment, para. 57.

¹⁴⁴ Anderson, "What's in a name? Immigration controls and subjectivities: The case of au pairs and domestic worker visa holders in the UK" (2009) 29(1) *Subjectivity* 407, at 415.

¹⁴⁵ *Opuz v Turkey*, Application no. 33401/02, Judgment of 9 June 2009, para. 132.

¹⁴⁶ House of Commons, Home Affairs Select Committee, Sixth Report of Session 2008-2009, *The Trade in Human Beings: Human Trafficking in the UK*, HC 23-I, 14 May 2009, at para. 53.

¹⁴⁷ Paragraph 159A(v) of the Immigration Rules.

¹⁴⁸ Tomei, *supra* n.8, at 188.

mothers or grandmothers), continue to define the expectations surrounding the employment of domestic workers. Law reform has failed to significantly disrupt this continuum of exploitation.

C. Litigating forced labour and the ECHR

As noted earlier, the everyday exploitation of domestic work has not usually captured the attention of human rights law. Rather, it is moments of crisis and extremes of abuse that have provoked responses (often tentative) from the institutions and processes of human rights law. Forced labour is one such moment of crisis, and as the cases above demonstrate, distinguishing domestic work and forced labour is one that has proven difficult for judicial bodies and legislatures. Section 71 of the Coroners and Justice Act 2009 introduced into UK domestic law the offence of holding another person in slavery or servitude or requiring them to perform forced or compulsory labour. The introduction of this offence sought to remedy the gap in the domestic legislative framework, in cases where trafficking had not occurred or the trafficking element could not be proven to a criminal standard.¹⁴⁹ As several commentators have noted, demonstrating the required element of coercion is likely to be a significant challenge in prosecuting cases under the Act.¹⁵⁰

A series of cases currently pending against the UK at the European Court of Human Rights highlight the inadequacies of the legal framework in place prior to the adoption of the 2009 Act and the challenges of enforcement of forced labour prohibitions at domestic levels, particular in a migration context. The first case, *Kawogo v UK*,¹⁵¹ concerns a Tanzanian applicant, Elizabeth Kawogo who was brought to the UK on a domestic worker visa by her employer, a British citizen resident in Tanzania. She was subsequently left in the UK with her employers' elderly parents, Mr and Mrs Dhanji and was required to carry out domestic work and personal care tasks for them. Her passport was taken from her and she was not permitted to leave the house except to attend church. She worked seven days a week from 7am to 10.30pm and was obliged to sleep on a mattress on the kitchen floor. She did not receive any payment for her work.¹⁵² After almost one year of living in these conditions, Elizabeth Kawogo escaped with the help of a friend that she had met at her church. She reported her experiences to the police but was initially informed that it was a civil matter, not criminal. Subsequently following a further complaint specifically referencing the State's obligations under Article 4 ECHR, a criminal investigation was commenced. It was later dropped, however, on the grounds that the cross border element required for offences under the Asylum and Immigration (Treatment of Claimants) Act 2004 could not be demonstrated and that there was insufficient evidence to suggest any criminality on the part of Ms Kawogo's employers.¹⁵³

Elizabeth Kawogo's complaint to the Employment Tribunal was successful.¹⁵⁴ The Tribunal found her assertion that she had been treated as a slave to be 'an uncomfortable but fairly apt description'. She had been 'extremely poorly treated' and was 'exceptionally vulnerable by reason of her age, background, language and immigration status.'¹⁵⁵ They also found that she had been the victim of direct race discrimination; her ethnicity was one of the reasons, they concluded, why her employers had abused her

¹⁴⁹ Crown Prosecution Service, Legal Guidance, "Slavery, Servitude and Forced or Compulsory Labour", available at http://www.cps.gov.uk/legal/s_to_u/slavery_servitude_and_forced_or_compulsory_labour/ [last accessed 5 June 2012].

¹⁵⁰ Virginia Mantouvalou, "Modern Slavery: The UK Response" (2010) 39 (4) *Industrial Law Journal* 425, at 428.

¹⁵¹ Application No. 56921/09.

¹⁵² See Application No. 56921/09, Statement of Facts 23 June 2010, para. 2.

¹⁵³ See Application No. 56921/09, Statement of Facts 23 June 2010, para. 8.

¹⁵⁴ See Application No. 56921/09, Statement of Facts 23 June 2010, para. 7, reporting on Employment Tribunal decision of 2 September 2008.

¹⁵⁵ *Ibid.*

position.¹⁵⁶ The Tribunal ordered Kawogo's employers to pay damages for unpaid wages, holiday pay, failure to provide employment particulars and failure to comply with the statutory grievance procedure.¹⁵⁷ Kawogo has also pursued her claim before the European Court of Human Rights. Drawing on *Siliadin* and Article 4, she has complained that she was subjected to domestic forced labour in the UK, which the authorities failed to adequately investigate and prosecute as a criminal offence and in respect of which, they failed to provide adequate remedies. She also complains that no effective remedy was available to her contrary to Article 13 ECHR.¹⁵⁸ At the time of writing, the case is still pending.¹⁵⁹

The second case pending before the European Court of Human Rights, *CN v UK*,¹⁶⁰ concerns a Ugandan applicant who had come to the UK with the assistance of a relative, to escape physical and sexual violence that she had experienced in Uganda. On arrival in the UK, her passport was taken from her and she was forced to work as a carer for an elderly couple. She received little or no wages and limited time off from her work. Having managed to escape from her relative's house, she sought asylum but was refused. As in *Kawogo*, her complaints to the police concerning the exploitation that she was subjected to did not yield any criminal proceedings. As her case was deemed not to meet the requirements for an offence of trafficking, she was informed that there was no offence in English criminal law applicable to her situation. In her application to the European Court of Human Rights she has complained that the failure to penalise forced labour and servitude breached the State's positive obligations under Article 4 and Article 8.

A third case, *O.G.O.* concerns a victim of human trafficking, forced into domestic servitude at a young age, in her country of origin, Nigeria, and subsequently trafficked to the UK. The case raises questions as to whether her removal, following a refusal of her application for asylum, would breach the UK's positive obligations under Article 4, to investigate and prosecute crimes of trafficking. The Statement of Questions to the Parties to the case also raises the question of whether the applicant would be exposed to a risk of re-trafficking, contrary to Article 4, if she is removed to Nigeria.¹⁶¹ The applicant has also claimed that the State acted in violation of her right to an effective remedy, read in conjunction with articles 3, 4, and 8, because of its failure to identify her as a victim of trafficking.¹⁶²

Each of these cases highlight the constructed vulnerability of migrant domestic workers arising from the application of exclusionary legal norms, which both hinder possibilities for collective organising and limit effective access to legal remedies.¹⁶³ For irregular migrants, or migrant domestic workers whose visas are tied to a particular employer, avenues for redress or escape become even more limited. The introduction of the forced labour offence goes some way towards meeting the State's obligations under Article 4 ECHR. It does not address, however, the broader questions of monitoring, enforcement and access to safer migration routes.

¹⁵⁶ *Ibid.*

¹⁵⁷ At the time of submission of Kawogo's complaint to the European Court of Human Rights the award had still not been paid and it was believed that her employers had left the UK.

¹⁵⁸ Application No. 56921/09, Statement of Facts 23 June 2010, under heading of "Complaints".

¹⁵⁹ Written comments have been submitted to the court by the Helsinki Foundation for Human Rights together with the La Strada Foundation against Trafficking in Persons and Slavery, Poland (20 November 2010); Interights; and the AIRE Centre together with Kalayaan (13 December 2010).

¹⁶⁰ Application No. 4239/08, Statement of Facts.

¹⁶¹ See: *O.G.O. v United Kingdom supra* n.20.

¹⁶² *Ibid.* p.10

¹⁶³ Report of Special Rapporteur on Contemporary Forms of Slavery, including its causes and consequences, *supra* n.180, at para. 17.

In *Siliadin v France*, the European Court of Human Rights recognised for the first time that Article 4 ECHR could give rise to positive obligations for states.¹⁶⁴ In *Siliadin*, a Togolese domestic worker, Siwa-Akofa Siliadin, complained that French criminal law 'did not afford her sufficient and effective protection against the 'servitude' in which she had been held, or at the very least against the 'forced and compulsory' labour which she had been required to perform.'¹⁶⁵ The Court concluded that Siliadin, who was 15 years old when she was brought to France on a tourist visa, had been held in servitude within the meaning of Article 4 of the ECHR and that she had also been subjected to forced labour.¹⁶⁶ The State's failure to put in place effective criminal sanctions, the Court held, breached its positive obligations under Article 4.

A key question that had arisen in the *Siliadin* case in the domestic legal proceedings was the question of how to demarcate the boundaries of everyday intimate labour in the domestic sphere from working conditions that would amount to a breach of Article 4. As noted earlier, it is a question that troubled the Employment Tribunal in the UK in the context of the family member exclusion from minimum wage entitlements. In domestic legal proceedings, the French Civil Court of Appeal, in concluding that exploitation had taken place, was anxious to clarify that *Siliadin* was not a member of the family and was not treated as such.¹⁶⁷ The public tests of rights compliance could, therefore, kick in. In contrast (or perhaps not), the Court found that *Siliadin* had not been subject to working conditions that were 'incompatible with human dignity', these conditions 'being the lot of many mothers'.¹⁶⁸ The presumption that the usual standards of human dignity could not apply, served to distinguish domestic work as 'work like no other'.

In the recent case of *Osman v Denmark*,¹⁶⁹ the Court was required to distinguish between caring work provided by a minor in a family context and the boundaries of human trafficking. The case concerned a young Somali national who had lived from the age of seven in Denmark. When she was 15, her father brought her to Kenya (with her mother's permission), for what was presumed to be a short family visit. She was subsequently left by her father at the Hagadera refugee camp to provide on-going 24-hour care to her ailing paternal grandmother. After two years, she left the camp and sought to return to Denmark to join her mother and siblings. The Danish authorities refused to re-instate her residence status, however. The Court found that this refusal constituted an interference with both her rights to private and to family life and that it was not proportionate to the aim pursued.¹⁷⁰ The AIRE centre representing the applicant had sought to argue that Osman had been subject to intra-familial human trafficking and that the State had failed in its obligation to investigate and prosecute the offence of trafficking.¹⁷¹ The Danish authorities had a duty, they argued, to look beyond the exercise of parental authority in order to protect the child's best interest.¹⁷² The Court rejected this argument, noting that the applicant had not at any time complained of trafficking to the Danish authorities. The Court also, however, sought to distinguish the work done as part of everyday family life, from the exploitation that constitutes an element of human trafficking offences. Specifically it noted that, '... the exercise of parental rights constitutes a fundamental element of family life, and that the care and upbringing of children normally and necessarily require that the parents [...] impose, or authorise others to impose,

¹⁶⁴ (2006) 43 EHRR 16. EAT judgment, para. 41.

¹⁶⁵ *Siliadin*, *ibid.* at para. 3.

¹⁶⁶ *Ibid.* at paras. 121, 122 and 129.

¹⁶⁷ See generally, Sarah van Walsum, "Labour, Legality and Shifts in the Public/Private divide" (Paper presented at Seminar on Gender, Migration and Human Rights, EUJ Florence, 18-20 June 2012) at9 (copy on file with the authors).

¹⁶⁸ *Siliadin*, at para. 44.

¹⁶⁹ *Osman v Denmark*, Application No. 38058/09, Judgment of 14 June 2011.

¹⁷⁰ *Ibid.*, in particular at paras 51 to 77.

¹⁷¹ *Ibid.*, at paras 46 and 62.

¹⁷² *Ibid.*, at para. 63.

various restrictions on the child's liberty.¹⁷³ Interestingly, in finding against Denmark for refusing to reinstate the applicant's residence permit, the Court noted that 'in respecting parental rights, the authorities cannot ignore the child's interest including its own right to respect for private and family life.'¹⁷⁴ The assertion of the child's interests in the context of the alleged intra-familial trafficking did not trump the Court's deference to parental authority, however.

The case is a difficult one, taking place as it does against a background of increasing scrutiny by many European states of the normativity of migrant family life. This scrutiny has been accompanied by an expansion of the human trafficking framework, with all the attendant problems of potential over-reach of the criminal law. The cases discussed above each involved the actions of non-citizen employers. Given the UK Government's assertion that it is the actions of unscrupulous employers that leads to the abuse of domestic workers, it is not difficult to see how the application of law's sanctions in such cases could add further to the tainting of migrant family life and to the increasing criminalisation of immigrants. It is not that such exploitation should not be subject to sanction by the State or by human rights bodies. Confining the debate to the actions of individual employers, however, absolves the State from its responsibility to acknowledge the nexus between migration status, exploitation and the production of *precarité*.

4. THE MIGRATION NEXUS: A 'NET OF DEPENDENCY'

As noted above, in more extreme cases, domestic workers may be subject to forced labour, slavery or servitude. Migrant domestic workers, particularly those in an irregular situation, are especially vulnerable to such risks. The UN Special Rapporteur on Contemporary Forms of Slavery, in her 2010 report to the Human Rights Council, identified a 'net of dependency factors' that prevent domestic workers from leaving situations of exploitation, many of which include constructed vulnerabilities linked to migration status.¹⁷⁵ The exploitation of migrant domestic workers is often presented by states as the action of an aberrant and abusive individual employer. The role played by migration law in creating the conditions within which such exploitation occurs and often goes unchecked, is not acknowledged. Not only does migration law reinforce the unequal power relations between migrant domestic workers and their employers, it also provides unscrupulous employers with mechanisms of control that they might not otherwise have.¹⁷⁶

The UN Committee on Migrant Workers in its General Comment on migrant domestic workers outlines the specific role that immigration law plays in the production of vulnerability.¹⁷⁷ Overly restrictive immigration laws, the Committee notes, lead to higher numbers of migrant domestic workers who are undocumented or in an irregular situation, and thus particularly vulnerable to human rights violations.¹⁷⁸ Similar vulnerabilities arise where migration laws tie a worker's migration status to the continued sponsorship of a particular employer, with the result that domestic workers may risk deportation if they leave an abusive employment relationship.¹⁷⁹ Migration status and immigration laws may also limit access to and the effective exercise of human rights, including rights to family reunification. Where visa or work permit permissions impose limits

¹⁷³ *Ibid.*, at para. 64.

¹⁷⁴ *Ibid.*, at para. 73.

¹⁷⁵ Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinia, UN Doc A/HRC/15/20 (18 January 2010), at para. 47.

¹⁷⁶ Anderson, "Migration, Immigration Controls and the Fashioning of Precarious Workers" (2010) 24(2) *Work, Employment & Society* 300-317, at 312.

¹⁷⁷ UN Committee on Migrant Workers, General Comment No. 1, at para.s 21, 22 and 27 in particular.

¹⁷⁸ UN Committee on Migrant Workers, General Comment No. 1, at para. 21

¹⁷⁹ UN Committee on Migrant Workers, General Comment No. 1, at para. 21.

on access to public funds, rights to education, healthcare and housing remain illusory.¹⁸⁰ The difficulties that arise in accessing legal remedies, even where available, is specifically highlighted by the CEDAW Committee, which has noted that migrant domestic workers are ‘scarcely ever out of sight of their employers’ and so may face difficulties even registering with their embassies or filing complaints.¹⁸¹ The role played by migration law in limiting access to rights protections is not of course unique to the sphere of domestic work.¹⁸² The difficulties encountered by domestic workers are exacerbated, however, by their positioning at the intersections of many overlapping axes of discrimination and the constructed invisibility and isolation of their work.¹⁸³

A. The migration nexus and positive obligations

In *Siliadin*, the European Court of Human Rights recognised states’ positive obligations in the context of Article 4. It failed, however, to recognise that such obligations could extend to regularisation of a victim’s migration status and to positive obligations of rehabilitation.¹⁸⁴ The nexus between migration routes and states’ positive obligations of prevention and protection were recognised in *Rantsev v Cyprus and Russia*,¹⁸⁵ a case involving trafficking for the purposes of sexual exploitation. Specifically the Court found that Article 4 requires Member States to put in place adequate measures to regulate businesses used as a cover for human trafficking and to ensure that domestic legislation provides ‘practical and effective protection of the rights of victims and potential victims of trafficking.’¹⁸⁶ In *Rantsev*, the inconsistencies in the Cypriot Government position became evident. The Government had earlier introduced a range of anti-trafficking measures including a national action plan to combat trafficking, while at the same time maintaining a widely criticised cabaret artiste visa scheme.¹⁸⁷ The European Court of Human Rights commented that it had ‘no doubt’ that the Cypriot authorities were aware that the visa scheme was being used by traffickers for the purposes of sexual exploitation.¹⁸⁸ Ultimately, the Court concluded that the Cypriot Government had failed to meet its positive obligations under the Convention by not regulating the ‘cabaret artiste’ industry, maintaining a visa regime for cabaret artistes that did not provide effective protection against trafficking and failing to carry out an effective investigation into the death of Oxana Rantsev.¹⁸⁹ On this reading of Article 4, destination states

¹⁸⁰ See generally, Spencer and Pobjoy, “The Relationship between Immigration Status and Rights in the UK: Exploring the Rationale”, Centre on Migration, Society and Policy Working Paper No. 86 (University of Oxford, 2011).

¹⁸¹ Committee for the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 26 on Women Migrant Workers, at para. 21.

¹⁸² Anderson, “Migration, Immigration Controls and the Fashioning of Precarious Workers”, supra n.181, at 303.

¹⁸³ See written comments submitted by Interights to the European Court of Human Rights (pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court) in *Kawogo v UK*, at para. 18.

¹⁸⁴ For a detailed analysis of the case, including the court’s finding that the state had breached its positive obligation to provide specific and effective protection against violations of the European Convention on Human Rights, see Cullen, “Siliadin v. France: Positive Obligations Under Article 4 of the European Convention on Human Rights” (2006) 6 *Human Rights Law Review* 585.

¹⁸⁵ Application no. 25965/04, Judgment of 7 January 2010.

¹⁸⁶ *Ibid.* at para. 284.

¹⁸⁷ The position of the Cypriot Government had been subject to detailed criticism by the Council of Europe Commissioner for Human Rights, see: Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to the Republic of Cyprus on 7-10 July 2008, Strasbourg, 12 December 2008, CommDH (2008) 36 at paras. 32-53.

¹⁸⁸ *Supra* n.190, para. 294.

¹⁸⁹ Concerning Cyprus, the Court found, had violated its procedural obligations under Article 2 ECHR, ‘because of the failure to conduct an effective investigation into Ms Rantseva’s death’ (paras. 241-242). The Court, in a novel interpretation of the Convention, found that the corollary of the duty to secure evidence from other relevant countries during an investigation, had as a corollary that such countries should, within their means and competence render such assistance if requested. The procedural obligations under Article 2 included therefore a duty of transnational cooperation and investigation.

such as the UK may be complicit in breaches of the Convention by continuing to operate immigration schemes that significantly increase the vulnerability of migrant domestic workers.¹⁹⁰

This nexus is recognised in CEDAW's General Recommendation no. 26 on Women Migrant Workers, which notes that while States Parties are entitled to control their borders and regulate migration, they must do so 'in full compliance' with their international obligations. Those obligations include, 'the promotion of safe migration procedures and the obligation to respect, protect and fulfil the human rights of women throughout the migration cycle.'¹⁹¹ The Migrant Workers Committee, in its General Comment on Migrant Domestic Workers, specifically addresses states' obligations to ensure access to regular migration status and safe migration routes,¹⁹² and points to the increased vulnerability of domestic workers who are dependent on the sponsorship of a specific employer for the continuing legality of their presence. Any such arrangement, the Committee notes, can 'unduly restrict' liberty of movement and increase exploitation and abuse, 'including in conditions of forced labour or servitude.'¹⁹³

Although the UK is not a party to the Convention on Migrant Workers¹⁹⁴ (following the position taken by other EU Member States), the obligations of effective deterrence that arise from forced labour and trafficking prohibitions are enshrined in several international and regional instruments, including CEDAW,¹⁹⁵ the International Covenant on Civil and Political Rights,¹⁹⁶ the Palermo Protocol,¹⁹⁷ and the Council of Europe Convention on Action Against Trafficking.¹⁹⁸ The European Court of Human Rights has repeatedly recognised that a state's positive obligations under the Convention go beyond the imposition of criminal sanctions and include policing and operative measures. Such obligations have been recognised, in particular, in the context of domestic violence. Human rights law's engagement with domestic violence shares key features with the everyday exploitation experienced by domestic workers. In common is a reluctance to intervene in family relationships, or 'family-like relationships'. It is moments of crisis only – most likely of extreme physical abuse - that are likely to trigger the application of human rights norms. Fitting states' positive obligations to prevent domestic violence into human rights law, has been a slow and painful process, but one that has gained some momentum in recent times.

Developing obligations of due diligence at regional and international level have highlighted the nexus between states' positive obligations of prevention and non-discrimination norms. In *Opuz v Turkey*, the European Court of Human Rights, for the first time in Strasbourg case-law, linked states' obligations to combat domestic violence to Article 14 ECHR non-discrimination requirements.¹⁹⁹ The *Jessica Lenahan* case before the Inter-American Court of Human Rights,²⁰⁰ the *Campo Algodero* case²⁰¹ and others, similarly point to the non-discrimination nexus. Given that the majority of domestic workers are women and many are

¹⁹⁰ Ibid. at para. 495.

¹⁹¹ Committee for the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 26 on Women Migrant Workers, at para. 3.

¹⁹² Ibid. at para. 51.

¹⁹³ Ibid.

¹⁹⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, 2220 UNTS 3.

¹⁹⁵ Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13.

¹⁹⁶ International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

¹⁹⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000).

¹⁹⁸ Council of Europe Convention on Action against Trafficking in Human Beings 2005, 197 CETS.

¹⁹⁹ Application No. 33401/02, Judgment of 9 June 2009.

²⁰⁰ *Jessica Lenahan (Gonzales) v. United States*, Inter-American Court on Human Rights, Judgment of 21 July 2011.

²⁰¹ *Gonzalez ("Cotton Fields") v Mexico*, Inter-American Court on Human Rights, Judgment of 16 November 2009.

immigrants, a similar nexus between migration law, positive obligations and non-discrimination norms arises. Making the discrimination claim, within the limits of current anti-discrimination law frameworks is not an easy one, however, and faces many obstacles.

B. Intersectionality and non-discrimination norms

As Crenshaw has noted, ‘the intersections of racism and sexism [...] cannot be captured wholly by looking at the race or gender dimensions separately.’²⁰² Addressing the intersections of both expands the possibilities of human rights law’s potential to address discrimination. Migration status, however, is often excluded from the scope of race discrimination prohibitions and is frequently ignored in analyses of discrimination that adopt a ‘nationally insular approach’.²⁰³ Notably, the reluctance to extend non-discrimination norms to the migration context is evident even in the Migrant Workers Convention, which does not include migration status in the list of non-discrimination prohibitions. In the practice of UN human rights treaty bodies, including the Migrant Workers Committee, however, the significance of migration status as relevant to questions of racial and gender discrimination is increasingly probed, despite apparent textual exclusions from the treaty standards themselves.²⁰⁴ As Bosniak notes, the category of immigration status is appearing with more frequency in various ‘catalogues of subordination axes’.²⁰⁵ In the ECHR context, the potential of Article 14 to address the intersections of gender and race discrimination remains to be realised. The gradual expansion of indirect discrimination prohibitions suggests possible strategies for such challenges.²⁰⁶ The Advisory Opinion of the Inter-American Court on the application of non-discrimination and equality norms to Undocumented Migrants points to the cosmopolitan promise that underpins human rights standards. Fitting into the discrimination paradigm is not without its difficulties, however, and is a strategy that brings many pitfalls, particularly when required to identify an appropriate comparator.²⁰⁷

Given the high levels of irregularity and undeclared work in the domestic work sector, a key issue at the intersections of migration, gender and ‘race’ is the application and enforcement of labour protections (including non-discrimination norms) to migrant domestic workers in irregular situations. In the UK, as such workers are employed under an ‘illegal’ contract of employment, the generally applicable protections of employment legislation are presumed not to apply, especially where the worker was aware of and ‘took an active part in’ the illegality.²⁰⁸ In the Employment Appeals Tribunal decision in *Zarkasi v Anindita*,²⁰⁹ for example, the claimant was recruited from Indonesia to take up a position as a domestic worker for a family in the UK. She entered the UK using an identity card, passport and visa obtained using a false identity.²¹⁰ When she later sought to bring proceedings for non-compliance with employment legislation against her employer, it was held that she had voluntarily participated in an unlawful contract, which was unenforceable, as were any statutory rights dependent on it.²¹¹ The Tribunal arrived at this conclusion despite its finding that

²⁰² Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color”, (1991) 43(6) *Stanford Law Review* 1241, at 1241

²⁰³ Bosniak, *The Citizen and The Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006), at 144, n.23.

²⁰⁴ Committee for the Elimination of All Forms of Racial Discrimination, General Recommendation No. 30 on Discrimination against Non-Citizens, 10 January 2004.

²⁰⁵ Bosniak, *supra* n.208, at 11.

²⁰⁶ *D.H. and Others v. the Czech Republic* Application no. 57325/00, 7 February 2006

²⁰⁷ Edwards, *Violence Against Women Under International Human Rights Law* (Cambridge University Press, 2010), in particular at Chapter 4, “Equality and Non-Discrimination on the Basis of Sex”, at 140.

²⁰⁸ *Zarkasi v Anindita*, Employment Appeal Tribunal, 18 January 2012.

²⁰⁹ Appeal No. UKEAT/0400/11/JOJ, Decision of EAT of 18 January 2012.

²¹⁰ EAT decision, para.5, quoting ET decision at para. 108.

²¹¹ EAT decision para. [], quoting ET decision at para. [].

the claimant was ‘in general terms ... exploited. She was young, relatively poorly educated and vulnerable in a foreign country in which she had no right to be, let alone to work.’²¹² The EAT endorsed the Tribunal’s decision, including its rejection of the claimant’s submission that the tribunal should have taken her claim to be a victim of human trafficking into account before determining that the contract of employment that she had made could not be enforced because to rely upon it would be to rely upon a contract rendered illegal by law.²¹³ The EAT agreed with the Employment Tribunal that it was not required to consider whether the claimant was trafficked or whether the Council of Europe Convention Against Trafficking in Human Beings applied.²¹⁴ Similarly, the EAT found that the Tribunal had not erred in law in failing to consider Article 4 of the ECHR in making its decision.²¹⁵ The irregularity of the claimant’s position, and her ‘voluntary’ participation in the initial immigration fraud excluded the possibility of her enactment of rights. In this context, not only does the absence of a ‘firewall’ between immigration controls and labour rights protections produce a ‘chilling effect’ on possible claimants coming forward, the application of this common law rule effectively excludes the exercise of such rights.

This restrictive approach has also been applied in to claims of discrimination. In *Hounga v Allen*,²¹⁶ the Court of Appeal held that the applicant, a Nigerian national employed as an au pair, could not bring a racial discrimination claim against her employers, as she was knowingly working illegally in the UK. Although the Court accepted the findings of the Employment Tribunal that she had suffered ill-treatment, including physical abuse in the course of her employment,²¹⁷ and accepted that she was in a vulnerable position, they found that she was precluded from bringing forward a claim that was ‘clearly connected or inextricably bound up or linked with her own illegal conduct’.²¹⁸ Her earlier claims of unfair dismissal, unpaid wages and holiday pay, had been dismissed as she had no lawful contract of employment. Her race discrimination claim however, was not dependant on there being a valid and legal contract of employment. Nonetheless, the Court refused to ‘condone’ the illegality of her presence and her work.

It is worth noting that the position of au-pairs working in domestic households remains an ambiguous one. In the UK, significant numbers of *au-pairs* remain unregistered.²¹⁹ The au-pair route to recruitment of domestic workers, very much the preserve of settled middle-class families, raises questions as to how gender, ‘race’, age and uncertain migration status, may intersect both to heighten the potential for exploitation and to limit the likelihood of external scrutiny of the employment relationship. As Anderson has noted, it’s all in the name.²²⁰ An emerging issue signalled by the EU Fundamental Rights Agency is the use of au-pair recruitment pathways to facilitate employment of migrant domestic workers.²²¹ Again, the expansion of such recruitment highlights the continuing care deficits in many parts of Europe and the contracting out by family units of such care in the absence of adequate welfare state supports. In the UK, the targeted au-pair visa scheme has recently been replaced by a youth mobility scheme available only to selected nationalities and without rights to family unity or to longer term settlement.²²² The willingness of states to enact exclusions

²¹² EAT decision, para. 7, quoting ET decision at para. 127.

²¹³ EAT decision, paras 27-35.

²¹⁴ EAT decision, para. 31.

²¹⁵ EAT decision, para. 35.

²¹⁶ [2012] EWCA Civ 609.

²¹⁷ *Ibid.*, para. 35.

²¹⁸ *Ibid.*, para. 61.

²¹⁹ Williams, F. (2012 in press) ‘Converging Variations in Migrant Care Work in Europe’ in D. Brennan & Williams, F. (eds.) ‘Care Markets and Migration in a Globalising World’, *Journal of European Social Policy*, Vol. 20, no.4 (copy on file).

²²⁰ *Supra* n. 148.

²²¹ EU Fundamental Rights Agency, *supra* n.30, at 19.

²²² See UK Border Agency, “Tier 5 of the Points-Based System (Youth Mobility Scheme): Policy Guidance” (to be used for applications on or after 6 April 2012) and paragraphs 245Z1 to 245ZL of the Immigration Rules.

and exceptions from generally applicable work place norms was evident also in negotiations on the 2011 ILO Convention on Decent Work for Domestic Workers. Significant differences emerged in the drafting process of the ILO Convention on the categorisation of au-pairs as domestic workers, with several participants, including the EU and some NGO representatives, taking the position that au-pairs should be excluded from the scope of the Convention.²²³ Ultimately, the wording of Articles 1 and 2 of the Convention leave it open to States Parties to choose to exclude the category of au-pairs from the Convention's scope, revealing yet again the willingness of States to contract out of decent work standards.²²⁴

C. The 'deportable' alien: denying the nexus

Migrant domestic workers fall at the intersections of many overlapping axes of discrimination. Migration status plays a significant role in determining the precariousness of the domestic worker's position and in constructing vulnerability. This constructed vulnerability in turn allows states to expand the scope of immigration controls and to enact exclusions from the scope of human rights law.

Claiming rights through human rights litigation in domestic and international courts can lead to the creation of what de Sousa Santos has described as 'contact zones', in which an 'alternative legality' is presented, drawing on the cosmopolitan promise of human rights norms.²²⁵ The claims presented reveal the potential to position domestic work firmly within the world of work, and highlight the injustice of failing to apply generally applicable workplace and human rights norms. The obstacles to presenting such cases and claims are many, however, particularly for migrant domestic workers whose status may be tied to that of their employer, their presence within the territory of the State dependant on the goodwill of an unscrupulous employer, or perhaps irregular / illegal. The isolated and privatised nature of domestic work also limits the emergence of 'contact zones' within which alternative legalities may be presented. Migration laws create further barriers, given the absence of a firewall between the punitive and disciplinary functions of immigration controls and the operation of employment, social security or wider human rights protections.

The links between limited opportunities for legal migration for domestic workers and the high level of irregularity in the sector have been emphasised by the EU Fundamental Rights Agency, amongst others.²²⁶ Irregularity, as they note, leads to high levels of insecurity, producing susceptibility to exploitation and difficulties in accessing rights protections.²²⁷ The cases discussed above before domestic courts and at the European Court of Human Rights, bring into stark relief the continuing significance of migration status to the effective enjoyment of human rights, including the right to be free from discrimination and exploitation at work. The nexus between access to safe migration routes, obligations of due diligence and compliance with human rights standards is rarely acknowledged by states, however. Neither are the wider policy challenges

²²³ See ILO Report of the Committee on Domestic Workers", Provisional Record No. 12, International Labour Conference, 99th Session, (Geneva, 2010), at 27-33; see also RESPECT Network, "Introduction and Key Recommendations for an ILO Convention on Domestic Work" (May 2009) Amsterdam: Briefing Paper, Recommendation 4.

²²⁴ See Mullally and Kenny, "The ILO Convention and Recommendation on Decent Work for Domestic Workers" UCC Centre for Criminal Justice and Human Rights Working Paper (April 2012), at 23 to 24.

²²⁵ De Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press, 2002), p.472

²²⁶ EU Fundamental Rights Agency, *supra* n.30, at 19, also Council of Europe Parliamentary Assembly Committee on Migration, Refugees and Population, Report on "Protecting Migrant Women in the Labour Market" (Doc. 12549, 24 March 2011), at para. 23. See also Migrant Rights Centre of Ireland, "Profile Report on Undocumented Migrants in Ireland" (MRCI, 2011). Domestic work was the second largest job sector for undocumented migrants surveyed.

²²⁷ EU Fundamental Rights Agency, *supra* n.30, at 19. See also Norbert Cyrus: Being Illegal in Europe: Strategies and Policies for Fairer Treatment of Migrant Domestic Workers, in Lutz (ed.) *Migration and Domestic Work: A European Perspective on a Global Theme* (Ashgate, 2008).

of opening borders and increasing migration opportunities. In response to concerns of abuse and exploitation of migrant domestic workers, it is open to states to respond by expanding immigration controls. As Dauvergne notes, 'Once an argument is shifted to the terrain of rights, the right of the nation to shut its borders tends to overshadow the rights claims of individuals.'²²⁸ The 'deportability' of the alien persists as a constant threat to the claiming and enjoyment of rights.

5. CONCLUDING REMARKS

The recent changes introduced in the ODW visa regime in the UK reveal the continuing willingness of states to limit migration options for domestic workers. Against the background of such resistance from states, the potential of human rights law to provide an effective bulwark against exclusion in the migration context must be questioned. Borders proliferate the texts of human rights law, however, such that humanity or the sometimes referenced 'law of humanity' is neither necessary nor sufficient for the enforcement of rights. De Sousa Santos has argued that exclusion rather than exploitation has become as the central mechanism of disenfranchisement from law's protections. His comment appears particularly relevant to migrant domestic workers. Exclusions and exemptions that operate in employment laws, in laws and policies on access to social security, in immigration and citizenship laws and in the scope of diplomatic immunity protections, reinforce the invisibility and vulnerability of domestic workers. These exclusions take the form and shape of de-juridifications that seek to limit the application of transformative norms to domestic work.²²⁹

Assessing the process of law reform in the UK law, it might be argued that the position from 1998 to 2012 was an anomaly of sorts, the product of a short-lived 'political moment' and a powerful advocacy campaign that successfully enacted domestic workers' rights.²³⁰ The ODW visa, though imperfect, provided a better 'place in the world'²³¹ for migrant domestic workers – a route to settlement, the possibility of changing employers and of sponsoring family dependants. The reforms introduced in 2012 have removed these possibilities, returning migrant domestic workers again to a deeply unequal employment relationship and a precarious migration status. Is the status of the migrant domestic worker diminished then to that of 'bare life'? As yet, it is unclear whether human rights law can effectively resist such processes of exclusion or whether the deployment of law continuously reproduces 'categories of illegal at its boundaries',²³² limiting the transformative promise of human rights norms.

Human rights law, if recognising the nexus between migration status, access to safe migration routes and the enjoyment of rights, has the potential to be transformative. States continue to resist this potential, however. The process of enacting rights, in courts and through political activism, is a difficult one. Reforms secured are contingent and reversible, as the story of the ODW visa reveals. In the context of migrant domestic workers in the UK, the shutting down of a migration pathway reflects the potential for a coercive exercise of state power that reverses the progressive changes secured through sustained political activism. Such reversals, however, may yet be challenged, at which point the inescapable nexus between the state's migration laws and human rights violations cannot be denied. Rights talk may then 'speak back' to the exclusions enacted through migration law. If this process of speaking back is to be a meaningful one,

²²⁸ Dauvergne, *supra* n.72, at 27.

²²⁹ See generally, Blackett, "Introduction: Regulating Decent Work for Domestic Workers", *supra* n.100.

²³⁰ Ranci re, *Disagreement: Politics and Philosophy* (University of Minnesota Press, 2004).

²³¹ Arendt, *The Origins of Totalitarianism* (Andre Deutsch,1986), at 296 to 297.

²³² Dauvergne, *supra* n.72, at 37.

however, states must become accountable for the migration policies chosen, that impact so heavily on the enjoyment of rights.