

Supreme Court allows appeal for trafficked domestic worker on Anti Slavery Day 2017

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Kalayaan is delighted that on Anti Slavery Day 2017, the Supreme Court has handed down judgments in two cases in which domestic workers in diplomatic households challenged the immunity of their employers and that the domestic workers have won in both cases.

Ms Reyes, a claimed victim of trafficking who had been exploited in domestic servitude, brought a claim before the Employment Tribunal against the Saudi Arabian diplomat and his wife who had employed her. She claimed she had suffered racial discrimination, harassment and had not been paid the National Living Wage. The Employment Appeal Tribunal and Court of Appeal upheld the defence of immunity raised by her employers and refused her claims.

In its judgment, the Supreme Court allowed the appeal on the basis that Mr and Mrs Al-Malaki are no longer shielded by immunity because his posting in the UK finished, the employment of Ms Reyes was not in the course of his official functions and, as such, no residual immunity could apply.

Although it was not necessary to decide the case, the majority of the Court (Lord Wilson, Lady Hale and Lord Clarke) expressed the view that the law has developed since the 1961 Vienna Convention on Diplomatic relations, so that today human trafficking should be regarded as a 'commercial activity' outwith diplomatic immunity, when it comes to challenges in the civil courts, even while the diplomat is in post.

Kalayaan intervened in proceedings in the Court of Appeal and the Supreme Court and provided the court with evidence to demonstrate that trafficking in human beings is inherently commercial and that it is outside a diplomat's official functions.

Consistent with the internationally accepted definition of trafficking in human beings, Kalayaan argued that all persons who knowingly engage in trafficking, from *recruiting* a domestic worker through to the *acquisition* and *receipt* of a person are treated in law and policy as equally engaged and complicit in the activity.

Kalayaan provided valuable evidence to the Court setting out how all the links in the chain of the illicit trade of human trafficking fuel the exploitation of people such as Ms Reyes. The Court specifically referred to Kalayaan's evidence on how diplomatic agents can exploit their domestic workers with impunity relying on their diplomatic immunity.

Meanwhile in the case of Benkarabouche, Ms Benkarabouche was employed in the Sudanese embassy in London as a member of the domestic staff, Ms Janah in the Libyan Embassy. Following dismissal, they issued claims in the Employment Tribunal but the States of Libya and Sudan claimed immunity. The Supreme Court upheld the judgment of the Court of Appeal that State immunity did not stop Ms Benkarabouche and Ms Janah bringing claims. Insofar as the State Immunity Act 1978 said that it did, it was incompatible with their right to a fair trial under Article 6 of the European Convention on Human Rights and their employment law rights derived from EU law.

Avril Sharp, Policy Officer for Kalayaan says:

These cases were about access to justice for domestic workers, including those who had been trafficked to the UK and exploited in domestic servitude and forced labour. Human trafficking and modern slavery are grave human rights violations. We are very encouraged by Lord Wilson's comments that "the relevant "activity" is not just the so-called employment but the trafficking; the employer of the migrant is an integral part of the chain" and that exploitation drives the entire exercise from recruitment onwards.

Kalayaan will continue to support domestic workers and assist them to bring cases before the employment tribunal to ensure their employers are held to account. Diplomatic immunity should not act as a bar to enforcing rights and is at odds with the UK's stated aims of combatting and preventing modern slavery. We hope that when the case is remitted to the Employment Tribunal Ms Reyes will finally be able to achieve justice.

Zubier Yazdani, partner at Deighton Pierce Glynn who represented Kalayaan in Reyes says:

These successful appeals represent a significant inroad into chipping away at the veil of immunity that has so far shielded diplomats who have trafficked their domestic workers.

The Court in Reyes held that employing a domestic worker to perform the kind of work that Ms Reyes did was not within a diplomat's official functions and that therefore Mr and Mrs Al-Malki could not claim immunity once Mr Al-Malki had left his diplomatic post.

The binding part of the decision did not confront whether the trafficking of a worker by a diplomat was a commercial activity.

Lord Wilson, Lady Hale and Lord Clarke expressed the view that that there were good reasons why domestic workers in Ms Reyes' position should be given a remedy. As Lord Wilson stated,

'.. it would be a strong thing for this court to diverge from the US jurisprudence and to adopt the robust interpretation of article 31(1) for which Ms Reyes contends. On the other hand it is difficult for this court to forsake what it perceives to be a legally respectable solution and instead to favour a conclusion that its system cannot provide redress for an apparently serious case of domestic servitude here in our capital city.'

The Supreme Court has left the door open for another case to revisit the issue.

Notes for editors

Kalayaan is a registered charity established in 1987. Kalayaan is the leading UK charity providing advice, advocacy and support to migrant domestic workers. Kalayaan is a UK designated First Responder to the National Referral Mechanism, the UK framework for identifying and supporting victims of trafficking.

Article 39(2) of the Vienna Convention on Diplomatic Relations states that immunity normally ceases when the diplomat leaves the country or on expiry of a reasonable period in which to do so. Acts performed in the exercise of his functions as a member of the mission will continue to be shielded by immunity.

Lord Sumption gives the leading judgment, but Lord Wilson, Lady Hale and Lord Clarke, thus the majority of the Court, do not agree with him on the question of whether trafficking is a commercial activity. In the end, the case did not turn on this, because it was decided on the basis that because Mr Al-Maliki was no longer in post, he no longer enjoyed immunity for actions outside his diplomatic functions.

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