KALAYAAN

justice for migrant domestic workers

Wednesday, 03 March 2021

Independent Human Rights Act Review – Kalayaan Response

Kalayaan was established in 1987 and is the leading UK charity offering advice, advocacy and support services to migrant domestic workers. We are regulated by the Office of the Immigration Services Commissioner (OISC), SRA and BSB and authorised to provide immigration advice and services. We do not provide publicly funded advice. We receive grants and donations to fund our work.

Kalayaan is also a designated first responder to the National Referral Mechanism, the UK framework for identifying and supporting victims of modern slavery. By way of background, the client group we assist include men and women, who have come to the UK with an Overseas Domestic Worker (ODW) visa, as part of a private or diplomatic household. Unfortunately, those we assist are often victims of ill treatment and exploitation. It is common for us to hear accounts of people being forced to work excessively long hours, without proper breaks and with pay below the National Minimum Wage. Our clients are sometimes forcibly confined to their workplaces. They are not given enough food or even a proper place to rest or sleep. They are often subject to verbal and sometimes physical abuse. Our clients escape from their employers, sometimes before or after their visas expire, and then must contend with the hostile environment.

We note that the "Call for Evidence" has invited general views on the themes in question, as well as asking for views in response to specific detailed questions. We would like to submit our general views on the themes under consideration, bearing in mind the concerns of our client group. We note that the review is not considering the UK's membership of the Convention, as the review proceeds on the basis that the UK will remain a signatory to the Convention. The review has also made clear that they are not considering the substantive rights set out in the Convention. Kalayaan is of the view that our membership of the Convention and the substantive rights should remain unchanged because they provide all those within the UK fundamental protections.

The Human Rights Act 1998 was enacted to avoid time-consuming and expensive litigation in Strasbourg by providing a domestic source of remedy and redress. It enables domestic judges to consider Convention rights when considering legal issues and for the development of the common law on this subject. This is particularly significant for the poorer and more marginalised members of our society whose rights can be so easily infringed and for whom taking a case to Strasbourg may have been a step too daunting and difficult to take.

Theme 1 – General views on how the relationship between the domestic courts and the European Court of Human Rights (ECtHR)is currently working, including any strengths and weaknesses of the current approach and any recommendations for change. As noted in the ToR, under the HRA, domestic courts and tribunals are not bound by case law of the ECtHR, but are required by s.2 HRA to "take into account" that case law (in so far as relevant) when determining a question that has arisen in connection with a Convention right.

We are of the view that the requirement in s.2 HRA to "take into account" ECtHR jurisprudence is not onerous and does not require change. Domestic courts are not obliged to treat ECtHR jurisprudence as precedent, and so may depart from this jurisprudence in their own decision making.

A recent example of domestic courts taking into consideration ECtHR jurisprudence is the case of *MS (Pakistan) (Appellant) v Secretary of State for the Home Department (Respondent)*[1], which we think typifies the approach taken by the courts and the advantages of this.

MS (Pakistan) was decided in the Supreme Court. The court considered "*when will a decision to remove a person from the UK be contrary to section 6 of the Human Rights Act 1998 because it is incompatible with that person's rights under Article 4 of the European Convention on Human Rights ("ECHR")? Article 4.1 provides that "No-one shall be held in slavery or servitude" and article 4.2 that "No-one shall be required to perform forced or compulsory labour"".* Lady Hale noted that this case also raised the broader question of the relationship between the individual's rights under article 4 and the UK's obligations under the 2005 Council of Europe Convention on Action against Trafficking in Human Beings (ECAT). The Secretary of State had argued that the Court of Appeal had been correct to dismiss the appellant's appeal because the decision to remove him from the UK entailed no possible breach of article 4 of the ECHR. The positive obligations in article 4, followed the same pattern as the positive obligations in articles 2 and 3, and it was wrong to enlarge these by reference to the obligations in the ECAT.

Lady Hale states at paragraph 17 of her judgement that it was "*necessary to examine the relevant obligation contained in the ECAT and the Strasbourg jurisprudence relating to article 4 of the ECHR*". It is evident that the Strasbourg jurisprudence assists the Supreme Court with its decision making, as the scope of article 4 has previously been examined in the cases referred to (para 22-33). These cases highlight the broad spectrum of abuse and exploitation experienced by victims of trafficking but also consider the different approaches taken by the relevant country authorities, when attempting to fulfil their obligations. Reference is made to the *Siliadin v France* [2] the case that recognised that article 4 imposed, not only negative, but also positive obligations on the state. There is also the "leading case" on the relationship between the ECAT and article 4, *Rantsev v Cyprus and Russia*[3], where the court concluded that trafficking within the meaning of article 4(a) of the ECAT fell within the scope of article 4 of the ECHR. The effect being that the safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims and potential

[1] *[2020] UKSC 9*
[2] *(2006) 43 EHRR 16*
[3] *(2010) 51 EHRR 1*

victims, in criminal law, regulation of business and immigration rules. This case makes clear that there is a positive obligation to take operational measures to protect an individual. There is also a procedural obligation to investigate situations of potential trafficking, that does not depend on a complaint. Our understanding of the scope and practical effect of article 4 develops incrementally as different questions are being asked of the courts. Our domestic courts use this jurisprudence to consider the material issues, rather than considering article 4 in a vacuum. The Supreme Court then goes on to consider the relevance of these decisions to the case of the Appellant. The decisions of the ECtHR aid the court in developing its own understanding of the relationship between article 4 and the ECAT.

If domestic courts were of the view that Strasbourg jurisprudence was wrong, they could decide on a different approach. There are numerous examples of UK courts in recent years disagreeing with Strasbourg. We refer you to *R (Kaiyam) v Secretary of State for Justice*[4] where the Supreme Court discarded Strasbourg's "over-expanded and inappropriate" position in favour of the comparatively "satisfactory" position in domestic law.

The requirement in s.2 HRA to "take into account" ECtHR jurisprudence means that domestic courts can ensure that UK law develops in line with other jurisdictions who are signatories to the ECHR and the ECAT. This consistency in approach is particularly important with respect to the articles offering protection.

Strasbourg jurisprudence provides the Appellant with an understanding of how the courts could approach their case, but ultimately domestic courts decide its relevance.

It is also important to remember that domestic courts have always considered decisions made in other jurisdictions as a comparative aid, so the requirement to "take into account" ECtHR jurisprudence should be viewed as a continuation of this practice.

We are of the view that the requirement in s.2 HRA for domestic courts to "take into account" ECtHR jurisprudence has not distorted or increased the influence of European courts in the decision making of our domestic courts, as even without such a requirement the courts already had this tradition. In our view the requirement simply makes clear to litigants that this will take place.

Theme Two – The impact of the HRA on the relationship between the judiciary, the executive and the legislature. Whether courts have been drawn unduly into matters of policy?

Section 3 of the 1998 Act requires primary and secondary legislation to be read and given effect in a way that is compatible with the rights established under the European Convention on Human Rights. It does not place the judiciary above the legislature or the executive but expressly states that the obligation does not affect the validity, continuing operation or enforcement of any incompatible legislation whether primary or secondary. In other words, the 1998 Act preserves the balance of power between Parliament, the executive and the judiciary.

[4] [2014] UKSC 66; [2015] A.C. 1344

Furthermore, section 4(6) of the Act states that a declaration of incompatibility (a) does not affect the validity, continuing operation or enforcement of the provision in which it is given and (b) is not binding on the parties. The sovereignty of Parliament or even the power of the executive are not usurped or even undermined by a judicial declaration of incompatibility. If a declaration of incompatibility is made, the courts are in effect in an advisory position. It is for the executive with or without Parliament to take remedial action in accordance with section 10 of the Act.

While individuals can approach their Member of Parliament, can petition government with grievances and calls for change or improvement, or hold the government accountable at the ballot box, these are not options for all members of our society, particularly those from poorer or more disadvantaged backgrounds or some from overseas. The taking of legal action can enable an individual to seek redress within a reasonable time frame and in a way that is more readily understandable and intelligible than alternative, seemingly intangible, political action.

Litigation offers the opportunity to consider in depth the facts of an individual case, which can in turn shed light on wider issues of principle or policy that may have implications or consequences for a particular group or even for society as a whole. Judicial scrutiny plays a significant role in the balance of power within our constitutional and political life and remains a powerful way to ensure that the executive and administration remain accountable. While the courts have been asked to consider the interpretation and effect of government policy, our experience indicates that judges are all too conscious that policy remains the responsibility of government and Parliament, as was stated recently in *PK (Ghana) v SSHD* [5]where the Secretary of State's policy on the grant of discretionary leave on the grounds of personal circumstances was held to be unlawful and in breach of the UK's international obligations under the Council of Europe Convention on Action against Trafficking in Human Beings 2005, (the Trafficking Convention) for applying too high a threshold for eligibility and in *EOG v SSHD* [6]where Mostyn J found that there was an unlawful lacuna in the existing policy inasmuch as it fails to implement the obligation in Article 10.2 of the Trafficking Convention. The judge specifically stated*: 'The defendant must formulate a policy that grants such persons interim discretionary leave on such terms and conditions as are appropriate both to their existing leave positions and to the likely delay that they will face. It is not for me to prescribe what such terms and conditions should be.'*

A recent example of a case which may be viewed as the court being drawn into consider government policy would be the challenge brought to the governments "No Recourse to Public Funds" (NRPF) condition imposed on migrants, however when one considers the judgment carefully, again we see the court is careful not to exceed the limits of its role.

The effect of the NRPF condition is to make the person on whom it is imposed, ineligible for almost all benefits paid from public funds, including those intended to maintain the basic welfare of children. The Home Office official responsible for the NRPF policy described the imposition of this condition as part of a "package of reforms… aimed at reducing burdens on

[5] *[2018] EWCA (Civ) 98*
[6] *[2020] EWHC 3310*

the taxpayer, promoting integration and tackling abuse", which the official said was "consistent with the position elsewhere in the Immigration Rules that migration to the UK should ordinarily be on a self-sufficient basis." Arguably, the imposition of this condition was part of the government's efforts to create a "Hostile environment", which is intended to make the life of migrants in the UK difficult, to discourage migration or encourage people to leave, as the NRPF condition denies access to a basic financial safety net which prevents people from becoming destitute. The effect of this condition on the Kalayaan client group is to leave them more vulnerable.

In the case of *R (W, A Child by his Litigation Friend J) v Secretary of State for the Home Department*[7]. The Claimant was a British national. His mother was granted leave to remain (LTR) in the UK on the "10-year route to settlement" in 2013, which involves sequential grant of LTR. Normally, such grants are made subject to a condition that the applicant have NRPF. The Claimants mother had collated evidence to show that she would be destitute if the NRPF condition was imposed, nonetheless the condition was imposed. A judicial review claim was filed challenging the imposition of the condition, but also the legal regime under which the condition of NRPF was imposed. There were a number of grounds of challenge, which included a ground that argued that the NRPF regime was contrary to Article 14 read with Article 8 and failed to ensure that imposing the NPRF condition would not result in inhuman treatment contrary to Article 3 ECHR, and so contrary to s.6 of the Human Rights Act. The judgement provides an interesting insight into the limits of the court's role, how the courts approach such challenges and the law they consider relevant.

Addressing the limit of the court's role in such challenges, at paragraph 34 of the judgement the court states "*The expenditure of public funds with a view to avoiding destitution is, under our constitution, a matter for Parliament. The main function of the courts is to construe and apply the law that Parliament enacts."* This of course is because of Parliamentary Sovereignty.

However, when construing the law the courts must consider the wording of legislation and guidance. At paragraph 36 of the judgement the court noted that the "principle of legality". Lord Hoffmann in *R v Secretary of State for the Home Department ex p Simms [2000] 2 AC 115, at 131* explained that this principle means "*that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."* This principle makes it clear Parliament can pass any legislation it chooses; however fundamental rights cannot be overridden as a result of an unintended/unforeseen consequence of the wording used. Parliament must be accountable for the consequences of its legislation.

In this case the Secretary of State conceded that the Immigration Rules and Instruction could and should be read compatibly with Article 3 of the Human Rights act, applying the interpretive obligations in s.3 of the HRA. This concession is not imposed on government by

[7] *[2020] EWHC 1299 Admin*

the court but accepted by the Secretary of State as the correct approach to be taken. The legal obligations as a consequence of this concession are then considered. At paragraph 61 of the judgment, it is noted that these obligations "would follow at common law, even in the absence of Article 3."

The judgment does not bring an end to the NRPF regime, rather it declares that the regime is, to an extent, unlawful because the relevant Immigration Rules and guidance do not adequately reflect or give effect to the Secretary of State's obligations under Article 3 ECHR. The court states "We do not consider it necessary or appropriate to go further and make an order precluding the imposition of NRPF conditions…" It is left to government to remedy the issue. The court does not consider the rights and wrongs of such a condition in principle.

In this case, it is interesting to see reference made to common law principles which overlap with the HRA to offer people protection. At paragraph 35 reference is made to the "law of humanity", which in *Reg v Inhabitants of Eastbourne* [8]was considered with respect to the plight of poor foreigners. Although there was no obligation in statute to maintain this group, it was decided that the "law of humanity…obliges us to... save them from starving". It is evident that even in the absence of the HRA, the court would still be able to consider such a challenge. However, an important advantage to the Human Rights Act is that the wording of the substantive articles means it is much easier for a lay person to understand the rights they have.

When one examines how such challenges are approached by the courts, we are of the view that it is a mischaracterisation to say that the courts are being "drawn unduly into matters of policy".

Attempts to limit the scope of what domestic courts are permitted to consider in a bid to prevent the courts from being "drawn unduly into matters of policy" would be a cause for grave concern. Such efforts would deny our clients a remedy if the government does breach their human rights. When one considers how fundamental the rights enshrined in the Human Rights Act are, to deprive people of a remedy for a breach would be a chilling development.

We do not believe that there is any need to amend, still less repeal, section 3 of the Act and we would be concerned if any such amendment or repeal of section 3 had retrospective effect. This would have profound consequences for, for example, individuals who had been granted leave to remain for medical reasons and who were undergoing medical treatment or therapy and for those on the route to indefinite leave to remain based on the right to family or private life, who still require limited leave to remain before they achieve the qualifying period to apply for indefinite leave to remain and, later, naturalization. An amendment which operated retroactively could adversely impact the lives of those who have a reasonable belief or expectation that their rights are protected and that they will be allowed to remain and build a life in the UK. Changes to section 3 would create uncertainty and anxiety not just for the individuals concerned, many of whom are vulnerable as survivors of trafficking and

[8] (1803) 3 East 103, 107

modern slavery offences, but also for their families and, in particular, their children, many of whom will be British citizens.