# KALAYAAN

justice for migrant domestic workers

Friday, 18 June 2021

**Low Pay Commission - Consultation on April 2022 National Minimum Wage Rates – Kalayaan's 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 (NRM), 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. We provide a number of services including immigration advice, employment advice, assist with the retrieval of passports from former employers, provide English classes, help domestic workers to access legal advice from specialist advisers, as well as helping domestic workers access mainstream services including medical assistance and counselling.

Kalayaan runs weekly advice appointments for new and existing service users. We offer long term support to domestic workers long after they have fled abusive or exploitative employment. Kalayaan does not limit the length of time we provide support, which gives as an insight into the difficulties domestic workers experience whilst in the UK. An issue commonly reported and a feature in the majority of employment matters is the non-payment of wages or payments which are significantly lower than the national minimum wage (NMW).

We are making submissions in response to question 21 of this consultation:

**Live-in domestic workers**

**Under section 57(3) of the National Minimum Wage Regulations 2015, work done by a worker in relation to an employee's family household is exempt from the NMW if the worker lives with the employer and is treated as a member of the family. What evidence do you have on the use of this exemption? We are particularly interested in evidence on the characteristic of workers affected; and the prevalence of its use.**

***The National Minimum Wage Regulations 2015***

***Work does not include work relating to family household***

***57.****—(1) In these Regulations, "work" does not include any work done by a worker in relation to an employer's family household if the requirements in paragraphs (2) or (3) are met.*

*(2) The requirements are all of the following—*

*(a)the worker is a member of the employer's family;*

*(b)the worker resides in the family home of the employer;*

*(c)the worker shares in the tasks and activities of the family.*

*(3) The requirements are all of the following—*

*(a)the worker resides in the family home of the worker's employer;*

*(b)the worker is not a member of that family, but is treated as such, in particular as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities;*

*(c)the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, as respects the provision of the living accommodation or meals;*

*(d)if the work had been done by a member of the employer's family, it would not be treated as work or as performed under a worker's contract because the requirements in paragraph (2) would be met.*

## *Characteristics of workers affected*

It is important to note that the s.57(3) exemption was intended to encompass work done by family members or those who are treated as such, but in fact it is possible to use it more broadly, to include "Live-in domestic workers", which was perhaps not intended.

This exemption is not limited to migrant workers, however it is important to consider the impact on this group, as in our experience this exemption is used as a means to deprive live in migrant domestic workers of the minimum wage. As a consequence of the characteristics of migrant domestic workers, there is a power imbalance in the relationship with their employers which means that this exemption can be unfairly imposed upon them.

Kalayaan is able to provide some data with respect to the clients we assist. as when they register with us we document certain characteristics and information. Where we do not capture this data through the registration process, we are able to provide case studies.

*Gender*

The majority of domestic workers we assist are female. According to our records between 2016 to 2021 Kalayaan registered 410 clients. Of this number 23 were male and 384 were female, 3 clients did not have their gender recorded

*Migrants*

All Kalayaan clients are migrants. The majority of this group have come to the UK with a Domestic Worker visa. There are 4 types of visa that we encounter within our client group:

- The Migrant Domestic Worker visa issued prior to April 2012, which is renewed annually. After 5 years of continuous employment this can lead to a grant of indefinite leave to remain.
- The Overseas Domestic Worker in a private household visa, issued between 2012 to 2016, which was for a maximum 6-month period, without the possibility of renewal. This tied a worker to a particular employer.
- The current visa, which is the Overseas Domestic Worker in a private household visa issued from 2016, for a maximum of 6 months, with no option to extend. However this permits a change of employer.
- The current Tier 5 (Temporary Worker) International Agreement Worker visa for private workers in a diplomatic household. These visas can be issued for between 6 months to 2 years, and can be extended for a maximum of 5 years or length of the diplomat's posting, whichever is the shorter, provided the worker remains with the same employer. In this category workers who change employer can only stay in the UK for the duration of their current leave, generally 2 years.

The employers who bring migrant domestic workers to the UK, are usually of a different nationality to the worker themselves. The majority of workers registered with Kalayaan are nationals of the Philippines. Whilst the majority of employers were from the Middle East, with a number being British and Indian nationals.

*"Special Vulnerability"*

The "Independent Review of the Overseas Domestic Worker Visa", undertaken by James Ewins' dated 16 December 2015[1] ("the Ewins' Report"), identified a number of characteristics which were particular to this group. As a consequence of these characteristics he was the view that this group had a "special vulnerability" with respect to the risk of exploitation. Below we have summarised these characteristics (in italics), but in places have added Kalayaan's observations in relation to them (in non italics).

- *Predominant motivation/mentality is one of relative desperation as they are unable to find adequate (or any) work within their own community and country, and so have left to find work abroad in order to make remittances to pay general living costs, health and education costs of their relatives.*

[1] ODWV_Review_-_Final_Report__6_11_15_.pdf (publishing.service.gov.uk)

- *Absence of informal safety net. As this group are not working within their home community, they do not have the safety net of friends, family and other social support networks to turn to for support or assistance.*
- *Socially excluded/marginalised. Migrant domestic workers are working in locations where culture and language are unfamiliar, which represents a significant barrier to wider social interaction.* It is easy to underestimate the impact of being in a place that is unfamiliar to you, but to give one recent example, when explaining to a client that she needed to register with a GP, the term "GP" had no meaning for her as the healthcare system in the Philippines is structured so differently, so the need to do this was lost on her. We had to explain how our health care system was structured and describe the role of the GP, for her to understand the importance of taking this step.
- *Long working hours limit the opportunities for the development of social/other connections/interactions in their local community. As a result they often lack knowledge of the wider network of support that might be available to them, should they want to seek assistance.*
- *No knowledge of their legal rights.* The Ewins' Report noted that "Information Sheets" intended to inform migrant domestic workers of their rights and sources of help were an important source of information, but not all migrant workers reported receiving them during the visa application process. Based on data from our client group we have found that these sheets are not always issued or when issued, some employers would remove them from the worker. This is an issue we highlighted in our report "Dignity, Not Destitution" published in 2019, which noted that most workers stated they did not have the Information Sheets. According to Kalayaan's data from 2016 to 2021, 29 of our clients reported receiving the Information Sheets, whilst 238 stated that they had not. Of concern is also the fact that the recent Information Sheet includes incorrect information regarding worker's rights. In the section titled "Your employment rights in the UK" details are given of the accommodation offset which is quoted as "£7 per day/£49 per week", however this was the rate in 2017, and has increased each year since then. The rate is currently £8.36 per day/£58.52 per week.[2] With respect to the National Referral Mechanism, the sheet states "If there are reasonable grounds to believe you are a victim of trafficking you can stay in the UK and carry on working as a domestic worker". However, this is only the case if you receive a positive reasonable grounds decision before your visa expires[3]. If you have become an overstayer, because your visa has expired by the time you have sought help, you will have lost the right to work.

  One of the key recommendations of the Ewins' report was for the introduction of "Information Meetings" on the basis "**overseas domestic workers must be given a real opportunity to receive information, advice and support concerning their rights while at work in the UK".** In the government's response to the Ewins' report dated 7 March 2016, Lord Bates stated "The Government will therefore implement the review's proposals for the introduction of information, advice and support meetings

[2] National Minimum Wage and Living Wage: accommodation - GOV.UK (www.gov.uk)
[3] The Immigration (Variation of Leave) Order 2016 (legislation.gov.uk)

for ODWs who are in the UK…". However, five years on the government has yet to do so.

The lack of information/intentional deprivation of information prevents migrant workers from understanding their rights in the UK, but also information regarding how they can seek assistance, placing this group at a significant disadvantage when dealing with their employers.

- *No public oversight or regulation of work because the sphere of work is private homes.* Domestic workers are explicitly excluded from a number of statutory provisions, which protect workers. We would draw your attention to the *Health and Safety at Work etc Act 1974* which contains the occupational health and safety duties normally imposed upon an employer. However s.51 of the same act, excludes an employer of "a domestic servant in a private household" from these duties. The Working Time Regulations limits the maximum hours that can be worked in a week to 48, however domestic servants in a private household are not subject to this limit[4]. Domestic workers regardless of nationality are deprived of these safeguarding measures, however the impact on migrant workers is compounded because of the other characteristics we have mentioned.
- *Dependency on their employer for their visa. Whether or not a migrant domestic worker will be granted leave to enter/remain rests on their employer's professed want/need of them*. This adds to the power imbalance in the employee/employer relationship.
- *They have no recourse to public funds.* This means that if a worker leaves their employer to escape abusive treatment, there is no financial safety net available to them in the interim, whilst they look for other work. This coupled with the absence of any social safety net, that friends and/ family could provide, leaves this group incredibly vulnerable. The Ewins' report noted that there was a "need to ensure that an abused overseas domestic worker perceives that fleeing from her situation is a viable proposition, not one that will result in homelessness and destitution". Again the author envisaged that the "information meetings" would address this issue, as a worker would be provided information about their right to change employer or information regarding sources of support, however as this recommendation has not been implemented, many workers are left with the dilemma, whether to accept their circumstances or face the risk of destitution.
- *Diplomatic immunity adds a layer of protection for employers* who fall within this category, as this deprives workers of a remedy against their employers whilst they are in the UK.

<u>*Other vulnerabilities*</u>

*Single parent/history of domestic violence*

Having analysed the registrations of one of Kalayaan's advisors within the space of a year (2020-2021), we found that 64% of this group were single parents and 15% of this group were

[4] The Working Time Regulations 1998 (legislation.gov.uk) Reg 19 of the Working Time Regulations

victims of domestic violence. Understandably a sole breadwinner is more fearful of losing their job, as they do not have the safety net of a second income. Arguably these characteristics mean this group are less likely to assert their rights and more risk averse.

*Education*

In our experience the majority of migrant domestic workers tend to be less well educated, even when considered within the context of their home countries. It is for this reason working abroad is incredibly attractive as it enables them to earn a salary (in theory) which would exceed anything they could hope to earn in their home country, based on their educational background. Arguably, this is a factor which means that they are less likely to assert their rights as they will be less confident when faced with an employer who is likely to be relatively speaking, better educated and more knowledgeable.

*Control*

Live in workers are subject to a significant level of control at the hands of their employers as a consequence of their employment conditions.

- *Power dynamic*. There is a clear imbalance in the power dynamic between live in workers and their employers. In part this is because the worker's place of work is their employer's household, a private sphere which is not subject to public scrutiny and very little regulation, making it harder for a worker to challenge conditions they would not ideally accept.
- *Migrant Domestic Workers are dependent on their employer for food and accommodation.*
- *Workers cannot take time off to suit their needs.* In Kalayaan's experience our clients often struggle to arrange appointments to seek advice during normal office hours, because they are not able to take time off when convenient to them, but are restricted by the employer's needs. This deprives them of the opportunity to access advice and information about their rights.

*Contractual terms are often not adhered to*

Clients often report to Kalayaan that they are asked to work extra hours or do extra tasks, beyond the terms of contract for which they are not paid or given time off in lieu. They are asked to undertake tasks during their breaks, for example taking the dog for a walk during their lunch break, ironing in the evenings, taking care of a child whilst an employer goes out. Kalayaan has received reports that some employers believe that there is an unwritten or implied term that babysitting in the evening or even looking after children over a weekend comes 'free' with the employee. These requests can often be presented as requesting a "favour", however in reality this is depriving the worker of an opportunity to rest or use their own time autonomously. Other reports suggest that working hours tend to increase over time with no corresponding increase in remuneration. The power dynamic in such a working environment means that workers often find they are unable to say no when asked to provide extra assistance for fear of losing their job or damaging their relationship with their employer.

The reality for many workers, as reported to Kalayaan, is that they are not paid the amount stipulated in the visa application or the contract, they are required to labour for far longer hours and are not given breaks or even time off. Employers are known to produce false payslips or other evidence of payment. A more egregious example is the employer who pays the salary into a bank account in the worker's name but effectively controls the account by supervising the payment in of salary but also its subsequent withdrawal when part or even all of it is returned to the employer. An unscrupulous employer could easily provide the required declaration that the employer's work is not work within the meaning of s.57(3) and subsequently use that declaration to support a contention that he has at all times honoured the terms of the employment contract. These examples are given to illustrate the lengths that some employers will go to in order to defeat any claim by an employee for breach of contract or allegation of exploitation

*Nature of domestic work*

The nature of domestic work, which encompasses "house work" and caring responsibilities is viewed informally. Although this is the work that the domestic workers are being paid to undertake, the fact that this work is undertaken within a domestic and private setting and is often done on an unpaid basis within a family, appears to result in this work being undervalued and so is treated differently to work done within a public setting. This perception makes it more difficult for our clients to enforce their rights or to challenge conditions imposed on them. It is very common to hear from workers that they are initially employed to do house work and child care for one child, and that when another child is born, they are simply expected to accept the further work, even though this will lead to a significant increase in their workload in terms of more childcare, cleaning etc responsibilities. There is no discussion of an increase in pay or change of duties to ensure the volume of work undertaken does not change.

*Limitations of the Domestic Worker in a private household visa*

*Initial 6 month term*

Based on our clients' accounts we find that the effect of the six-month non-renewable visa, is that although in theory workers can change employer, in practice this is difficult as the period of employment is too short for a new employer to be interested in taking them on. We have to bear in mind that domestic workers are in a position of trust, working within the family home and/ taking care of loved ones, so employers want to select someone who will be available for a reasonable period of time. The Ewins' report considered evidence from employment agencies regarding the practicalities of finding a domestic worker a new employer. Agencies reported that "..placing them for short periods is impossible" because "the employer is necessarily taking a risk by employing an overseas domestic worker who had escaped from a previously abusive employer and therefore comes without any references". In light of this he recommended workers being able to extend their visa.

The Ewins report noted that the six month limit also resulted in an inability to "establish social networks and gain access to information, advice and support …" and this was " a recognised

factor in increased vulnerability to abuse." However, he envisaged that his recommendation for information meetings would remedy this. In practice, as already mentioned, although this recommendation was accepted by the government it has yet to be implemented, therefore the difficulties caused by the six-month visa, have not been addressed.

***CASE STUDY:***

C has brought a civil claim in the High Court against her former employer for breach of contract, breach of statutory duty, and personal injury arising from a course of conduct over 12 years whereby C was induced to come to the UK to work as a nanny/housekeeper for £40 per month (which was never paid). She also alleged that she worked long hours, was subject to violence, ill-treatment, threats, including cynically preying upon her cultural fears, humiliation and gross exploitation.

The employer (D) is defending the claim on the grounds that C came to the UK as a guest, was a member of the family, although there is no blood relationship between them (or was treated with respect like a member of the family). C merely assisted with child care and did de minimis amounts of housework. D denies C's claim to be an employee in its entirety.

In addition, there are parallel actions in that C's case was referred to the NRM and she is a recognised victim of trafficking, having been granted a positive conclusive grounds' decision. She has an outstanding claim for asylum in the UK.

While this is an unusual case, Kalayaan believes that it provides a useful example where the contention that a worker is a member of their family (or was treated as if they were a member of the family) is used to the detriment of vulnerable workers.

C is now in her late 50s. She comes for a poor rural background in West Africa. She has never been to school and is illiterate and innumerate. She was widowed in her early 30s and she comes from a society where widows are ostracised. She survived on a hand to mouth basis by growing crops to sell in the local market.

In 2003/2004 C was offered a job in the UK to look after the children of D and her partner, a professional couple.

C was promised £40 per month, which seemed like a good salary to her, and the prospect of a better future in the UK. C now admits that she had no idea what a reasonable salary should be or what her rights and responsibilities would be in the UK.

C probably entered the UK on a tourist visa as D instructed her to lie to the border officials in the UK that she was staying for two weeks, otherwise she would be returned immediately to her native country. Her new employer confiscated her passport on arrival in the UK.

D was married with two young children and later gave birth to a third. One of the children is disabled with complex needs.

C's working day commenced at 6 am when she would wake the eldest child to bathe and dress him. She would then wake the younger two children and do the same for them when they were young but as they grew older, they became more independent.

She would then prepare and cook breakfast for the family and take the younger children to school.

On her return, she would tidy, clean and do laundry and prepare lunch until it was time to collect the children from school when she would prepare and cook dinner and clean up for all the family.

She would hand wash clothes in cold water (as D wanted to save the expense of hot water) and clean up the disabled child who would often soil himself.

C asked for her salary many times but was either told that it was being kept safe for her for when she returned to her native country, or she was given excuses: for example, D did not have the cash on her; if there was a fire, C would lose all her money forever. She was also told that she should not complain about her salary because she was illiterate and had never been to school and that D already paid for her food, water and electricity. Over the course of over 12 years, she was given small a cash presents on two occasions by D.

C's employer never gave her appropriate clothes for the British climate. C was given clothes and shoes by a charity shop, when it became clear that she did not have any money and was ill-clad for the winter.

The family attended church regularly, but C was never allowed to make friends and D would intervene if C started to chatting to other members of the congregation. She was specifically instructed not to talk to the pastor or other members of the congregation.

C stated that she wanted to leave because of the failure to pay her salary, the way she was treated and because she witnessed domestic violence, which scared her. At such times, she was often intimidated and threatened by both D and D's husbands: they would tell her that the police would catch her if she ran away and would return her to her native country. D would also call her names, such as 'silly' and 'stupid' but after an argument, D would 'pet' her and tell her how valued and appreciated she was. (This is another device used by traffickers/exploitative employers to bend workers to their will, similar to Stockholm syndrome.)

Eventually C could tolerate no more and managed to escape with the assistance of another member of the community.

These have been difficult and protracted civil proceedings, including allegations of intimidation by the employer of witnesses.

C has been severely affected by her experience with this employer and displayed multiple signs of PTSD after her escape. She has had some therapy to overcome her experiences and to rebuild her life. She also has health problems, which may have been exacerbated by the lack of medical advice over the years.

Despite a lengthy police investigation, the police have decided not to charge the employer with trafficking or modern slavery offences, partly because the complexity of the relationships between the defendant and the potential prosecution witnesses, as well as a lack of witnesses to prove C's claim beyond reasonable doubt, this is a high legal threshold in criminal

proceedings. But it should not be assumed that the failure to prosecute means that the case was weak: on te contrary, in the writer's opinion, the indicators of trafficking in C's case were strong and indeed the civil claim proceeded on the basis of there being enough evidence on the balance of probabilities to support C's claim.

The writer understands that the parties are negotiating a possible settlement of the civil claim. While this cannot be taken as an admission by the employer of C's claim, it is still possible to make deductions and draw lessons from C's experience.

*Lessons to be learned from case study:*

*Litigation vulnerability:*

This employer has behaved particularly badly throughout this litigation. She has indulged in repeated intimidation of witnesses in attempts to force C into giving up her claim. The defence that C is a member of her family appears to be part of a cynical attempt to defeat C's claim and could be interpreted as part of the continuum of C's exploitation. The absolute nature of this defence has been upsetting for C, who is already vulnerable and fragile from her experiences. The case has already lasted for over 4 years and while she has a positive conclusive grounds' decision, C's status is still uncertain. C cannot understand why her former employer has taken the position she has and it would appear that C's recovery from her experiences has been hindered while the case continues. C remains anxious and fearful about the case and her future and it is difficult for her to move on and rebuild a life as long as these proceedings continue.

The employer has used the family member exemption as a shield or defence to deny any liability to pay C her due salary on facts which are strongly indicative that C is a victim of modern slavery offences, as has been confirmed by the positive conclusive grounds' decision.

It seems particularly galling that this defence has been deployed, when considering the facts of C's case: D worked full-time, C did all the housework, childcare, cooking and laundry, so that her role cannot be seen as anything other than one of a housekeeper and nanny. The details of the exploitation and harsh treatment meted out to C (for example: being required to handwash in cold water to save money), the evidence of control, intimidation and threats are strongly suggestive of an abusive and exploitative relationship, not one of a family or quasi-family member.

While the employer has not specifically pleaded s.57(3) of the 2015 Regulations as a defence, this case still provides a useful example of an employer who is attempting to evade her obligations to an employee by suggesting that she is a member of the family. The case still provides an insight into the ways in which unscrupulous and exploitative employers may try to cover up the true nature of the relationship with an employee and their consequent legal obligations.

This is a difficult defence to counter because the findings and judgment of a court are likely to depend on the credibility of the witnesses. This is particularly difficult for witnesses where there is an imbalance of power or where an employer is likely to have greater confidence than the worker and possibly greater firepower, as well of course UK based associates to act as

witnesses and give evidence whereas C has none. Court proceedings are stressful for litigants and the imbalance of power is likely to add to that stress. It is also possible that a court hearing or trial is the first time the parties have met since the termination of a relationship which may have been difficult, and possibly even violent. The deployment of a defence based on s.57(3) of the 2015 Regulations may be just another part of the exploitation of a worker and provides yet another source of stress and anxiety.

These factors may have a profound effect on a worker's ability to give the best evidence and in some cases may even force the worker to give up her claim altogether.

*Personal vulnerability*

The family member exemption can be used against a vulnerable worker such as C, who was socially and linguistically isolated, came from a poor background where her future was bleak, lacked knowledge of her legal rights and was unfamiliar with the UK legal system, largely because of the controlling measures used by D, to create a pernicious dependency. Kalayaan's work is solely with migrant domestic workers but there are many forms of vulnerability and it is not far-fetched to suggest that workers, who are nationals or with settled status but who have troubled personal histories, low educational attainment or poor mental health may be subject to exploitation and abuse in a domestic setting, and where the family member exemption could be used to defeat a claim for those workers' proper employment rights.

As has been mentioned above, the majority of Kalayaan's clients do not receive the Information Sheets, despite this having been government policy since 2006, and workers remain unaware of their right to the NMW or places where they might seek advice or help, for example, and means that employers can get away with breaches of contract and conduct amounting to fraudulent misrepresentation for years with impunity.

Even though the Modern Slavery Act 2015 and the Immigration Rules now require an Immigration Officer (when granting applications to leave or enter) to be satisfied that the employer will pay at least the national minimum wage or require an employer to declare that the domestic worker's employment does not constitute 'work' within the meaning of s.57(3) of the 2015 Regulations,[5] Kalayaan's experience is that such a declaration is not requested in every application for renewal of leave and, in any event, workers frequently report that their employers have misrepresented the true position on the application forms in order to secure the visa or further leave to remain. This is often achieved without the worker's knowledge or in circumstances where the worker is impelled not to object.

Many workers report being underpaid, with some receiving less than half the NMW. This is not to say that their employers are using the family worker exemption but that the risk is that this provision could be used either in general discussion about the terms of the employment relationship or in any subsequent litigation for underpayment of wages.

[5] https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual/nmwm05180

This view is fuelled by workers' reporting that employers talk in terms of the worker being 'like one of the family' but later reporting that working conditions, that start out as reasonable, have over time, become more onerous and harsh, often in terms of hours worked and rates of pay. These workers are less likely to complain because of the vulnerabilities that are explained elsewhere in this submission. Kalayaan is also aware of a report of at least one employer who purported to defend her failure to pay the NMW by saying that at least employment with her did not involve physical violence.

The family member exemption in s.57(3) of the 2015 Regulations provides a green light or at least an opportunity for an employer to deny a domestic worker her proper entitlement to wages in circumstances where a worker who is circumstantially or situationally vulnerable and as a result is either unable or is reluctant to counter such a defence. Kalayaan is concerned that the retention of the exemption in s.57(3) of the 2015 Regulations can be used too easily to access cheap labour but is also exploitative and demeaning of the work done by domestic workers.

***Wider implications of the family worker exemption***

As set out in the above section on 'characteristics of workers affected,' domestic workers are overwhelmingly women and are frequently international migrants. It is our view that the 'family worker' exemption and its potential to apply to domestic workers relies on and perpetuates the devaluation of domestic work and facilitates exploitation in the sector. This section sets out how the exemption, though not expressly intended as such, has been applied in practice to domestic workers. It then addresses the significance of 2020 Employment Tribunal judgment *Puthenveettil v Alexander,*[6] which found the exemption to be unlawful and indirectly discriminatory on grounds of sex. It also outlines human rights provisions that are contrary to the exclusion of domestic workers from minimum wage payments, in support of our view that the LPC should recommend an end to the exemption.

Various accounts of domestic labour have noticed the conceptualisation of domestic workers as akin to members of the employer's family.[7] This understanding tends to mask deeply unequal relationships and relies on the devaluation of domestic work and its conflation with work that would otherwise be provided for free by women in the family.[8] It is therefore striking that the 'family worker' exemption under section 57(3) of the National Minimum

[6] *Puthenveettil v Alexander & George & Secretary of State for Business, Energy and Industrial Strategy - Case Number 2361118/2013 - judgment of 15 December 2020* (Employment Tribunal).

[7] See e.g. Einat Albin and Virginia Mantouvalou, 'The ILO Convention on Domestic Workers: From the Shadows to the Light' (2012) 41 Industrial Law Journal 67, 68; Maria Kontos, 'Negotiating the Social Citizenship Rights of Migrant Domestic Workers: The Right to Family Reunification and a Family Life in Policies and Debates' (2013) 39 Journal of Ethnic and Migration Studies 409, 410.

[8] Einat Albin, 'From "Domestic Servant" to "Domestic Worker"' in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the legal boundaries of work regulation* (Hart 2012) 234; Rosie Cox, 'Gendered Work and Migration Regimes' in Liam Leonard (ed), *Transnational migration, gender and rights* (Emerald 2012) 45–6.

Wage Regulations, reproduced at the start of our submissions, relies on the idea of workers being 'treated as a member of the family' to deny their entitlement to the minimum wage.

Parliamentary debates show that the 'family worker' exemption was envisaged as applying to 'au pairs,' who were conceptualised as young, unmarried and without dependents, having come to the UK for cultural reasons and working no more than five hours per day, and treated as part of the employer's family.[9] Particularly given the deregulation of the au pair sector since 2008, this conception of the au pair is often inaccurate even in relation to that sector. It is even more clearly at odds with the situation of migrant domestic workers like those that Kalayaan assists. These individuals generally work long hours providing services such as cooking, cleaning and care for the families that employ them and use their wages to support their own families overseas.

Despite the 'family worker' exemption not being explicitly intended to apply to migrant domestic workers, their employers have often sought to rely on it to deny payment of the minimum wage, sometimes with success. It is important to acknowledge that many domestic workers will not be in a position to challenge its application to them through legal proceedings for various reasons, which relate to the issues set out in the above section 'characteristics of workers affected.' For example, these workers may lack an awareness of their rights, especially given that information leaflets are not consistently being provided to workers, and that the government has failed to implement information meetings, as set out above. Domestic workers may also lack access to legal advice, and the short-term nature of the Overseas Domestic Worker (ODW) visa, which is limited to a non-renewable six-month period as discussed above, also makes challenges much more difficult.

Even where domestic workers have challenged the application of the family worker exemption in legal proceedings, they have not always been successful, which demonstrates its damaging effect on the sector. A notable example of the family worker exemption being applied to domestic workers is the Employment Appeal (EAT) decision in *Jose v Julio* in the Employment Appeal Tribunal, which involved claims by three domestic workers against their respective former employers.[10] The claimants in this case raised a number of issues including working long hours and lack of privacy within the employers' home, and none were anything like the idealised 'au pair' the forms the basis for the family worker exemption, yet the exemption was found to apply to all three.

Counsel for Ms Jose and Ms Nambalat submitted that, when determining the question of whether household tasks were shared for the purpose of the exemption, it was necessary to consider the work the claimant was employed to do and / or did.[11] The EAT rejected this, holding that work completed under the worker's contract was not relevant to the question of

[9] Margaret Hodge, HC Deb 25 February 1999, vol 326 col 634-5.
[10] *Julio & Others v Jose & Others* [2012] ICR 487 (EAT).
[11] ibid [44].

whether tasks were shared.[12] The finding strongly reflects how household labour can be viewed as less than work when applying the family worker exemption: regardless of the number of hours completed under the worker's contract, if certain household tasks outside this are found to be shared with the employing family, this allows the worker to be considered as a family member.

The EAT judgment shows how little autonomy the domestic worker has over their own classification in this system. For example, it referred to the Employment Tribunal having seen photographs of Ms Jose on holiday with the employer and her children in Angola as showing a 'close relationship' between them and its conclusion that 'other than in relation to wages and holiday entitlement' there had been 'no exploitation'.[13] This demonstrates reliance on the supposedly family-like relationship to justify a reality of exploitation. Also notable is the EAT's finding that a worker need only be invited to take part in such activities, and not necessarily actually do so, to be classified as akin to a family member. Indeed, the EAT found that Ms Udin declining invitations reinforced the case that was treated as a family member.[14]

Following an appeal by two of the Claimants, the Court of Appeal judgment in *Nambalat v Taher* refused to accept that a 'broad equivalence' of work done between the worker and family members was needed, since, '[a] person receiving free accommodation and meals may be expected to perform more household duties for the family than other family members.'[15] The Court of Appeal accepted that there would be cases 'where the demands on the worker are so onerous and extensive as to be inconsistent with the worker being treated as a member of the family.'[16] Yet it held that no such abuse of the exemption took place on the facts, despite the Claimants working long hours and living in poor conditions. It found that it had been appropriate to focus on Ms Nambalat spending time with the employers' children 'beyond the scope of her duties' when determining whether she was treated as a family member.[17] This again shows how the work is devalued and constructed as distinct from 'real' work, as normally an employee performing additional labour beyond their contracted tasks would not amount to a justification for reducing their pay.

As long as the family worker exemption is in place, we consider that the potential remains for it to be applied to domestic workers as it was in *Nambalat v Taher.* While domestic workers have successfully challenged the exemption's application in a number of cases both at Employment Tribunal and appellate level, these cases often involve a level of abuse that goes beyond long hours and low pay, with indicators of trafficking, servitude and / or forced labour often present. For example, *Onu v Akwiwu* involved abuse and threats by the employers, including to report the claimant to immigration authorities and police, as well as restrictions

[12] ibid [45].
[13] ibid [18-21].
[14] ibid [38].
[15] *Nambalat v Taher and another Chamsi-Pasha and others v Udin* 2013 ICR 1024 (CA) [42].
[16] ibid [47].
[17] ibid [19-20].

on movement, which were held to undermine the case that the worker was treated as a family member.[18] In *Asuquo v Gbaja,* the Claimant was subject to a violent physical attack as well as previous verbal and physical attacks and was not allowed to leave the house without permission.[19] In *Awan v Shariff* the Claimant slept in a bunkbed in a son's bedroom, had her passport kept by the respondents, ate separately from the family and could not leave the flat voluntarily, such that she was found to be in a situation of servitude.[20]

Therefore, these successful challenges to the application of the family worker exemption turned on specific factual circumstances, and would not necessarily assist a domestic worker who was 'only' working long hours for below minimum wage pay without *also* being subject to additional factors such as restrictions on movement or physical abuse. Likewise, several successful challenges have relied on evidence from a compelling independent witness supporting the Claimant's account of abuse.[21] This will not always be viable for various reasons, including the 'behind closed doors' nature of the domestic work employment relationship or a lack of willingness by witnesses. It should not be necessary for a domestic worker to prove exceptional abuse, and / or to have an independent witness to support their account of such incidents, in order to be entitled to something as basic as the minimum wage. Even in cases where the Claimant is ultimately successful in court, the attempt to apply the exemption to them creates an extra hurdle, as they have to give evidence to dispel the view that they were 'treated as a member of the family.'

The recently decided Employment Tribunal case *Puthenveettil v Alexander*[22] is important as a broader challenge to the family worker exemption, finding that the exemption is unlawful and indirectly discriminatory based on sex. The case involved a Claimant who had arrived in the UK in 2005, working as a live-in domestic worker from 2005 until her resignation in 2013 and being paid significantly below minimum wage.[23] When the Respondents used the family worker exemption to contest her claim for unlawful deduction of wages, the Claimant argued that the exemption amounted to indirect discrimination, contrary to Equality Act 2010 s19, on the grounds of sex, and under corresponding EU law relating to equal pay for male and female workers for equal work or work of equal value.[24] The Claimant was unsuccessful at

[18] *Ms P Onu v Mr O Akwiwu & Mrs E Akwiwu - Case No 3303543/2010 · 3300119/2011 - judgment of 16 September 2011* (Employment Tribunal) [35, 84, 131].
[19] *Miss P Asuquo v Mrs Kenny Gbaja - case no 3200383/2008 - judgment of 2 January 2009* (Employment Tribunal) [74-79].
[20] *Hasna Awan v Rosita Shariff & Noah Salleh - case 3302769/07- judgment of 20 May 2009* (Employment Tribunal) [17-24].
[21] *Asuquo v Gbaja (ET)* (n 14) [47]; *Ms Folashede Taiwo v Mr Joshua Olaigbe and Mrs Sara Olaigbe - Case No 2350075/2011 - judgment of 16 January 2012* (Employment Tribunal) [9.72]; *Onu v Akwiwu (ET)* (n 13) [15].
[22] *Puthenveettil v Alexander* (n 1).
[23] *Puthenveettil v Alexander & George - Case Number 2361118/2013 - judgment of 3 February 2017* (Employment Tribunal) Findings of Fact [1, 37-49] .
[24] Including Art 157 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326.

first instance and on a request for reconsideration in the Employment Tribunal in 2017[25] but was successful in her appeal to the Employment Appeal Tribunal in 2018,[26] leading to a remitted hearing that eventually took place in July 2020. The fact that it took several years and a number of steps in the litigation is an example of the significant extra hurdle that the family worker exemption creates.

In the remitted hearing, the Respondent employers did not concede that the majority of workers impacted by the exemption are women. The Claimant therefore had to bring substantial evidence in support of this fact, including witness statements, analysis of job advertisements, breakdown of referrals to the National Referral Mechanism (NRM) that deals with potential victims of trafficking and modern slavery, and statistics of registration at Kalayaan and on ODW visas issued. The Employment Tribunal accepted that women are disproportionately affected, placing them at the particular disadvantage of not being paid the minimum wage.[27] The tribunal confirmed that this disadvantage could not be offset by payment in kind such as the provision of food and accommodation, noting the ILO's findings that '[e]xcessive deductions can… greatly reduce the already low amount of wages that is paid in money, and hence undermine domestic workers' economic independence.'[28] It held that there was evidence to show 'the substantial detriment experienced by significant sections of those covered by the exemption.'[29]

The ET went on to determine that the disadvantage caused to women could not be justified as a proportionate means of achieving a legitimate aim. The potential aims were based on suggestions that the Secretary of State for Business, Energy and Industrial Strategy (SOSBEIS) made while it was a party to the case between June 2018 and January 2019. The first suggested aim was to reflect 'the unusual working relationship which exists when a live-in worker is or is treated as a member of the family,' which the tribunal dismissed as failing to show a real need.[30] The second suggested aim, support for working families, was held to be as capable of supporting a legitimate aim but failed the proportionality test given the lack of evidence about this having been adopted as an aim, let alone to show that it was proportionate given its very serious impact. [31] Further, the tribunal held that the government could have adopted a less discriminatory way to meet these social policy objectives, and had missed number of opportunities to clarify the policy and its objectives, including after Low Pay Commission reports in 2014 and 2015 that raised concerns about the exemption.[32]

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[25] *Puthenveettil v Alexander 2017* (n 18); *Puthenveettil v Alexander & George - Case Number 2361118/2013 - judgment on application for reconsideration - 4 May 2017* (Employment Tribunal).
[26] *Puthenveettil v Alexander and Secretary of State for BEI* (2018) 1 WLUK 549 (EAT).
[27] *Puthenveettil v Alexander* (n 1) [44-46, 55].
[28] ibid [58].
[29] ibid [68].
[30] ibid [76, 85].
[31] ibid [88-98].
[32] ibid [99-100].

Since the *Puthenveettil* judgment, we are not aware of any new evidence put forward that would provide further justification for the *prima facie* discriminatory impact of the family worker exemption. The tribunal in *Puthenveettil* acknowledged the difficulty in justifying the denial of basic rights to one group of women, domestic workers, in the interests of another group of women and / or of working families. We consider that there is no prospect of an impact as severe as the denial of minimum wage being justifiable on this basis.

While *Puthenveettil* is a clear criticism of the family worker exemption in its application to domestic workers, as a first instance tribunal judgment it is not formally binding on future courts and tribunals. We therefore consider it crucial to make legislative changes to provide clarity on domestic workers' entitlement to the national minimum wage and to ensure that employers cannot rely on the exemption to deny this and / or complicate and lengthen legal proceedings in future.

In addition to the domestic and EU law grounds that were relied on in *Puthenveettil,* we consider that the family worker exemption is contrary to certain provisions of international and regional human rights law. Article 7 of the International Covenant on Economic, Social and Cultural Rights,[33] which the UK ratified in 1976, provides that:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

As the findings in *Puthenveettil* showed, the family worker exemption undermines the principles of equal pay for equal work by allowing the payment of wages below minimum wage to a group of workers that are overwhelmingly women. Further detail on the ICESCR requirements is provided in General Comment 23 of the UN Committee on Economic, Social and Cultural Rights, which provides that, where minimum wages are set at industry level, 'the work performed in sectors predominantly employing women, minorities or foreign workers should not be undervalued compared with work in sectors predominantly employing men or nationals.'[34] This document also refers to the undervaluation of domestic work and to domestic workers' rights to a series of favourable conditions including 'minimum wage coverage where this exists.' [35] We consider that this comment amounts to a direct stipulation

[33] United Nations, 'International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966); 993 UNTS 3 (16/12/1996)'.
[34] UNCESCR, 'General Comment No. 23 on the Right to Just and Favourable Conditions of Work (Art. 7 of the Covenant), 27 April 2016, E/C.12/GC/23' [23].
[35] ibid [47f].

against provisions like the family worker exemption, which undermine the entitlement to the minimum wage across the domestic work sector.

Article 4(3) of the European Social Charter, ratified by the UK in 1961, likewise provides for 'the right of men and women to equal pay for work of equal value.'[36] Furthermore, the European Committee on Social Rights, which interprets the ESC, requires states to adopt and implement specific legal measures to protect domestic workers from forced labour and exploitation given the risks of its occurrence in the domestic environment.[37] This includes monitoring of relevant legislation on pay and hours worked to identify or prevent exploitation in the domestic work sector,[38] and highlighting concerns about payment in kind as risking turning into an abusive practice.[39] We consider that systemic violations of basic rights such as payment of the minimum wage facilitate exploitation, including trafficking and modern slavery, since they deprive domestic workers of clearly defined entitlements that they can rely on in their relations with employers.

The family worker exemption has in practice created a situation where domestic workers must first show a pronounced form of exploitation such as forced labour has taken place before being able to establish their basic entitlement to the minimum wage. We consider that the reverse should be true: the minimum wage must be an entitlement available to all domestic workers, thus allowing comprehensive protection and reducing the risks of exploitation and modern slavery. As *Puthenveettil* has established, the family worker exemption creates an unjustifiable disadvantage that that primarily affects women and which cannot be justified as proportionate to a legitimate aim. We consider this important judgment must be followed through by repealing the family worker exemption and ensuring minimum wage coverage for all domestic workers.

**Conclusion**

For many workers, the overwhelming economic need to continue to support themselves and their families may well trump their ability to take action against former employers. Workers understand litigation risk, are aware that they will need to take time off from work to prepare and attend their cases and are also aware that a new employer may not be particularly sympathetic to time off during the working week, especially if the current job involves looking after children or the elderly or other vulnerable persons. It is difficult to find practitioners who can provide advice and representation in this field and the limited availability of pro bono help make it difficult for some workers to seek advice. The result is that many workers would prefer to prioritise their families and their current work and 'put the previous job down to experience'. This attitude reflects the reality of working life for many workers but also mirrors the inequality of bargaining power between employers and workers in the latter's difficulties in asking for time off to pursue their legal rights and is also reflective of the impact of coercive

[36] Council of Europe, 'European Social Charter, 18 October 1961, ETS 35'.
[37] ECSR, 'Conclusions 2008, Statement of Interpretation on Article 1§2'.
[38] European Committee of Social Rights, 'Conclusions 2020 - Article 1, Right to Work' - Andorra.
[39] ibid - Montenegro.

controlling behaviour that characterises the employment of many of our clients, which erodes their sense of self-worth and confidence to enable them to pluck up the courage to ask for time off.

*Economic vulnerability*

As explained earlier, there should be no comparison between the work done by domestic workers and that of au pairs. The essential characteristic of the au pair experience should be the prospect of cultural and educational experience, (although some au pairs have reported working conditions that are similar to that of domestic workers). This experience is a far cry from that of domestic workers and indeed the expectations of their employers.

There is evidence that au pairs endured more severe exploitation during an economic downturn in terms of hours worked and pay rates.

Kalayaan would also suggest that the Covid-19 pandemic has shone a harsh light into the reality of the UK's social care system. It is possible, if not likely, that many families may be seeking care options for the elderly and vulnerable that do not involve moving into a care home. Furthermore, the cost of such social care is beyond the means of many and while it is well known that many family members act as unpaid carers for their loved ones, others may seek help that enables their vulnerable family member to remain living in their home for as long as possible.

It is possible, therefore, that workers who accept such jobs, may find themselves having to counter a suggestion that they are being treated as family members and therefore are not entitled to the NMW, despite the multi-skilled nature of their work that is also generally regarded as challenging and physically and emotionally taxing. As is argued earlier, this is an example of how such work is devalued, yet families will be looking for the levels and standards of care that are provided in care and nursing homes.

Some migrant domestic workers, despite being professionally qualified as nurses, teachers or other professionals in their home country, migrate abroad for work because of lack of reasonable economic opportunities in their native country and bring their professional training and skills to jobs for which they are more than qualified and to deny such workers even the basic minimum wage seems even more demeaning, if not insulting.

*Distortion of market place*

Kalayaan believes that the effect of having a group of workers, who are paid less than the NMW, would have a potential distorting effect on the market place and in effect drive down wages. These are personal relationships, workers often find jobs through word of mouth via their employers' network, employers talk and exchange information. It is in such ways that erroneous views about the nature of the employer/employee relationship and the correct rate of pay for a domestic worker develop and spread. Unless a worker is prepared to challenge this view (and we have already mentioned that many workers do not, for a variety of reasons) this distortion and abuse remains unchecked and uncorrected.

**Recommendations**

Kalayaan would like to make some recommendations in light of our response:

1. Firstly, in our opinion Section 57(3) of the National Minimum Wage Regulations 2015 should be repealed. This exemption, is potentially applicable to all live in workers. The existence of this exemption undermines the rationale for having a NMW, as it deprives workers of protection. Migrant workers are particularly vulnerable to exploitation, through the misuse of this exemption, in light of the characteristics we have identified. There is no need for this exemption to exist, as all work should be valued equally and paid for fairly. The existence of the exemption creates a lacuna for employers to exploit and places an unfair burden on workers to overcome when seeking to protect their rights.

If the government chose not to repeal this section, a whole suite of measures would need to be introduced to counter its effect and safeguard workers. These measures would include changes to the immigration processes, to the immigration rules, employment law and the scope of legal aid, which we do not envisage happening. We base our reservations on the government's failure to implement all of the accepted proposals of the Ewins Report, as evidence of a lack of momentum and interest in this area.

If the exemption were to remain in place, the steps needed in order to lessen the potential for exploitation would include:

2. Restricting its use to strictly delineated situations of au pairs completing limited amounts of work
3. UKVI ensuring that "Information Sheets" are correct and issued directly to worker each time a visa is issued
4. The recommendation for "Information Meetings" to be implemented
5. The UKVI contract template should require that employers confirm that s57(3) will not be relied upon, or, if it will be, to be explicit about the fact that they are subjecting the employee to an exemption, which means they will be paid less than the national minimum wage
6. LASPO 2012 should be amended to bring employment law cases, challenging the use of this exemption, within the scope of legal aid.
7. Time limits in the Employment Tribunal should not apply to cases relying on this exemption

We are cognisant of the fact that these recommendations would be onerous to implement and enforce, and the risk of exploitation would remain, and so for this reason we reiterate that our preferred solution is the removal of the exemption, as this is the most effective and straightforward way to address the issues we have sought to highlight.