

## What Is to Be Done for Migrant Domestic Workers?

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This piece appears in the book *Labour Migration in Hard Times*, B Ryan (ed), Institute of Employment Rights, 2013, <http://www.ier.org.uk/publications/labour-migration-hard-times-reforming-labour-market-regulation>

The position of migrant domestic workers is nowadays at the forefront of discussions on labour migration and regulation both at national level in many legal orders, and at international level in the context of the International Labour Organisation and the European human rights system. Domestic workers are mostly migrant women, who work in the privacy of the employers' home. Even though their work is invaluable in many households, it is systematically undervalued. It is well-documented that they are often employed in unfair conditions, which in extreme cases international bodies have even classified as 'modern slavery'. Their position is uniquely vulnerable, for they may be hidden from the authorities and other networks of support.

This chapter discusses the position of domestic workers. It first explains what domestic work is and what challenges it presents. The second part turns to the vulnerabilities of migrant domestic workers, which are created or reinforced through their exclusion or special treatment in law. I call this exclusion or special treatment 'the legislative precariousness of domestic workers' and examine it in the context of labour and immigration law. The third part focuses on the United Kingdom (UK) overseas domestic workers visa and argues that it risks breaching European human rights law, because it potentially leads to situations of modern slavery. Many aspects of the law must change for domestic work to be viewed as decent work, and the overseas domestic workers' visa is an area of priority.

### 1. The Role of Domestic Work and Migrant Domestic Workers

Domestic workers typically work in private homes, performing various household tasks, such as cleaning, cooking, gardening and caring for children or elderly people (the latter

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are also known as ‘care workers’). This type of work is gendered, and most of the time is done by women.<sup>1</sup> Domestic work is viewed as ‘women’s work’, and it is primarily migrant women from the developing world that move to affluent countries to do it, leaving their own families behind.<sup>2</sup> It is therefore also an illustration of the ‘feminisation of migration’.<sup>3</sup> According to some global ILO estimates, 87% of domestic workers worldwide are female,<sup>4</sup> while in some European countries about 90% of the domestic labour workforce is composed of women.<sup>5</sup> Domestic workers may be employees or independent contractors. They may be employed as live-in or live-out (full-time or part-time).

Migrant domestic workers are often preferred by the employers to the country’s nationals, particularly if they are live-in domestic workers. These migrant domestic workers sometimes arrive in a country independently, and only enter an employment relationship afterwards. Overseas domestic workers that migrate under specific immigration schemes, in turn, are a group of domestic workers who enter the country accompanying employers like businessmen, tourists, diplomats or expatriates. They are always live-in domestic workers. Figures from the UK for domestic workers arriving through this route show that between 2004 and 2009, there were about 15,000 domestic workers’ visas issued every year for those accompanying visitors, about 200-300 visas for those that accompanied diplomats, and about 1,500 visas for those accompanying other categories of employers.<sup>6</sup>

The positive effect of paid domestic work in contemporary society cannot be underestimated. With changes happening in the labour market, including the growth of the service economy, higher labour force participation by women, the sharing of household tasks by men, it has become clear that having domestic workers is beneficial for family members, the employers and the economy market as a whole. In today’s economic setting, domestic work is vital for the sustainability and functioning of the economy outside the household. Domestic labour can also be a desirable job for workers

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<sup>1</sup> This aspect of domestic labour is analysed in depth in B Anderson, *Doing the Dirty Work? The Global Politics of Domestic Labour*, Zed Books, 2000 (hereinafter cited as Anderson, *Doing the Dirty Work?*).

<sup>2</sup> B Ehrenreich, AR Hochschild, ‘Introduction’, in Ehrenreich and Hochschild (eds) *Global Woman*, Granta, 2003, p 1 at 3.

<sup>3</sup> AR Hochschild, ‘Love and Gold’, in *Global Woman*, as above, p 15 at 17.

<sup>4</sup> ILO Report of 2013, [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_173363.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf) p 21.

<sup>5</sup> As above, p 36.

<sup>6</sup> Source: UKBA. Figures provided by Damian Green, Immigration Minister at the time, written answer, 13 September 2010.

who are not highly skilled and might not easily be employable in other occupations. Overseas domestic workers may well prefer to accompany their employers for a period of time abroad, because they wish to retain their job, which they would otherwise lose with the departure of their employer.

Like other jobs, domestic work can be fulfilling: the worker develops a personal relationship of trust with the employer, sometimes to a higher degree than other jobs, and may feel highly valued for the services provided. This reality may explain why employers that build a relationship of trust with a domestic worker – particularly when it comes to carers for children or the elderly – may find it very hard to replace the worker. When it comes to employers that reside abroad, who visit the country for a short period of time, the ability to be accompanied by a carer for their children will seem essential precisely because of the highly personalized character of this relationship.

It is a well-established fact today that the particularities of domestic work set challenges too. Domestic workers are sometimes lawful migrants, but they are also often undocumented. Their undocumented status makes them more prone to abuse.<sup>7</sup> Migrant domestic workers are not familiar with the law or their rights as workers. In particular, they may lack the necessary language skills, so it will be harder for them to be informed about their rights. This will be even more acute for those overseas domestic workers who only stay in the country for a short period of time. Because of the location of this occupation, it is also hard for domestic workers to organize, for they will often have limited interaction with other domestic workers or networks of support.

A key attribute of the domestic labour relationship is a special sense of intimacy that often characterises it. The domestic worker may seem like a family member – not a worker. This may appear to be a positive feature in an employment relationship. Yet this sense of intimacy can be false, because in reality the relationship between the domestic worker and the employer, who is a woman most of the times, is characterised by a difference of status that the latter is often keen to maintain.<sup>8</sup> Domestic labour also has a stigma attached to it, because it is the poorest and neediest workers who are engaged in

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<sup>7</sup> See the Report of the European Union Fundamental Rights Agency, 'Migrants in an Irregular Situation Employed in Domestic Work: Fundamental Rights Challenges for the European Union and its Member States', Publications Office of the European Union, 2011 (hereinafter cited as FRA Report).

<sup>8</sup> See B Anderson, 'A Very Private Business: Exploring the Demand for Migrant Domestic Workers', (2007) 14 *European Journal of Women's Studies* 247.

it, and due to the tasks required from the workers, which are gendered and undervalued.<sup>9</sup> Domestic workers are vulnerable, more than other workers, for social reasons (gender, race, migration and social class), psychological reasons (intimacy and stigma), and also economic reasons (low pay).

Most importantly for present purposes, domestic work is hard to regulate. It is invisible because it is performed away from the public eye, in the privacy of the employer's household. The location of domestic labour makes the workers more vulnerable to abuse by the employers, while being hidden from the authorities and the public.

Sadly examples of abuse of domestic workers are widespread, and there is important literature that documents and analyses them.<sup>10</sup> For instance, a recent report by Kalayaan, a non-governmental organisation working on migrant domestic workers in the UK, stated that in 2010, 60% of those who registered with it were not allowed out unaccompanied, 65% had their passport withheld, 54% suffered psychological abuse, 18% suffered physical abuse or assault, 3% were sexually abused, 26% did not receive adequate meals, and 49% did not have their own room. Their working conditions were exploitative: 67% worked seven days a week without time off, 58% had to be available 'on call' 24 hours, 48% worked at least 16 hours a day, and 56% received a weekly salary of £50 or less.<sup>11</sup>

## **2. The Legislative Precariousness of Domestic Workers**

The regulation of domestic labour sets challenges because of its invisibility and the stigma attached to it. The exploitation suffered by domestic workers highlights the urgency of the need for state intervention. What is particularly worrying, though, is that domestic labour suffers from a strong element of 'legislative precariousness'.<sup>12</sup> By this I mean the exclusion from or different treatment of domestic workers by the law. The sections that follow present several examples of the legislative precariousness of domestic workers, focusing on, first, labour law and, second, immigration law.<sup>13</sup>

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<sup>9</sup> M Nussbaum, *Sex and Social Justice*, OUP, 1999, p 282.

<sup>10</sup> See, for example, Anderson, *Doing the Dirty Work?*

<sup>11</sup> M Lalani, *Ending the Abuse*, Kalayaan, 2011, p 10.

<sup>12</sup> V Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor', (2012) 34 *Comparative Labor Law and Policy Journal* 912.

<sup>13</sup> Parts of the section on the legislative precariousness of domestic workers draw on my article 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour', above n 12.

## Labour law

In many jurisdictions, labour legislation on working conditions and union representation differentiates the treatment of domestic workers from other workers.<sup>14</sup> In the UK, for instance, domestic workers are exempted from legislation on working time, minimum wage, and health and safety. Regulation 19 of the Working Time Regulations excludes domestic workers in private homes from the majority of Regulations 4-8 on maximum weekly working time, maximum working time for young workers, length of night work, night work by young workers, and restrictions on the patterns of work when there is risk to the health and safety of a worker. In Greece, to give another example, domestic workers are excluded from legislation on maximum working time and overtime pay.<sup>15</sup> These examples are by no means exceptional. Exemptions from rules on maximum working time and overtime pay are found in almost half of the countries surveyed in a Report of the International Labour Organisation,<sup>16</sup> while at the same time the majority of the countries examined (83 per cent) do not impose a limit on night work of domestic workers.<sup>17</sup>

In the case of the minimum wage, the National Minimum Wage Regulations 1999 exempt from the scope of protection both family members and those living within the family household who are not family, but who work in the household or for the family business. The provisions have been interpreted as applying to domestic workers.<sup>18</sup> Canada, Finland, Japan and Switzerland offer further examples of such exclusion from minimum wage legislation.<sup>19</sup> In Greece, even though there are general national collective agreements covering all workers in all sectors, domestic workers are excluded from the national collective agreement on minimum wage. Greek law also excludes domestic workers from industrial accidents' legislation.<sup>20</sup> Similar exclusions are to be found in

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<sup>14</sup> See, for instance, JM Ramirez-Machado, 'Domestic Work, Conditions of Work and Employment', Conditions of Work and Employment Series No 7, ILO, 2003; CES-ETUC, 'Out of the Shadows - Organising and Protecting Domestic Workers in Europe: The Role of Trade Unions', 2005.

<sup>15</sup> See I Ληξουριώτης, *Ατομικές Συμβάσεις Εργασίας (Individual Employment Contracts)*, Νομική Βιβλιοθήκη, 2005, σελ 204-206; ΙΔ Κουκιάδης, *Εργατικό Δίκαιο – Ατομικές Εργασιακές Σχέσεις (Employment Law – Individual Employment Relations)*, Εκδόσεις Σάκκουλα, 1995, σελ 251 επ.

<sup>16</sup> See ILO Report 'Decent Work for Domestic Workers', p 49.

<sup>17</sup> ILO Report 'Decent Work for Domestic Workers', p 50.

<sup>18</sup> See *Julio & Others v Jose & Others*, UKEAT/0553/10/DM, UKEAT/0596/10/DM, UKEAT/0597/10/DM, UKEAT/0070/11/DM, UKEAT/0071/11/DM, 8-10 November 2011.

<sup>19</sup> See ILO Report 'Decent Work for Domestic Workers', p 40.

<sup>20</sup> There is critical academic literature on this. See, for instance, Μ Τσολάκη, "Συλλογικές Συμβάσεις Εργασίας – Διαιτητικές Αποφάσεις" ("Collective Labour Law and Arbitration"), Ι Ληξουριώτης (επ), *Εφαρμογές Εργατικού Δικαίου (Applications of Labour Law)*, Νομική Βιβλιοθήκη, 2008, σελ 778-779.

other countries too.<sup>21</sup>

Legislative precariousness is created not only through the exclusion of domestic workers from labour standards, but also through their exemption from, or special regulation of, monitoring through labour inspections. For this reason, the phenomenon described here can also be called ‘regulatory precariousness’, in order to capture the fact that it is not only the norms, but also their implementation that may be at issue.<sup>22</sup> Section 51 of the UK Health and Safety at Work Act 1974, which regulates working conditions, inspection and sanctions, excludes domestic workers from its scope altogether. In France, inspectors can monitor the working conditions of domestic workers, but only after a court order. In other countries, the law sets special conditions for inspectors to be able to visit the household, such as a request by one of the parties.<sup>23</sup> In many jurisdictions, it is clear that in the conflict between employers’ privacy and domestic workers’ decent working conditions, the former often prevails.

Further precariousness is created through the exemption of domestic workers from legislation on trade union representation. A particularly interesting example that reflects the complexities of domestic workers’ unionisation is the legislation of Ontario, Canada. Domestic workers’ trade union rights were at one point recognised in legislation, only to be removed a few years later by a conservative government.<sup>24</sup> This provides another example of the legislative precariousness of domestic workers, which is problematic, given that collective organisation could have crucial effects for workers who are migrant and work in a household, such as a feeling of membership and inclusion in society.<sup>25</sup>

In the context of the European Union, the Health and Safety Framework Directive 89/391/EEC provides that a worker is ‘any person employed by an employer, including trainees and apprentices but excluding domestic servants’.<sup>26</sup> As a result, all health and

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<sup>21</sup> For an overview of the exclusion of domestic workers from labour legislation see, for instance, ILO Report IV(1), ‘Decent Work for Domestic Workers’, International Labour Conference, 99th session, 2010.

<sup>22</sup> I am grateful to Bernard Ryan for this suggestion.

<sup>23</sup> As above, Ramirez-Machado, n 20, p 63.

<sup>24</sup> Ontario, s 3(a) of the Labour Relations Act 1995. See the discussion in J Fudge, ‘Little Victories and Big Defeats: The Rise and Fall of Collective Bargaining Rights for Domestic Workers in Ontario’, in *Not One of the Family: Migrant Domestic Workers in Canada*, Bakan, Stasiulis (eds), University of Toronto Press, 1997, p 119.

<sup>25</sup> See the case study presented in B Anderson, ‘Mobilizing Migrants, Making Citizens: Migrant Domestic Workers as Political Agents’, (2010) 33 *Ethnic and Racial Studies* 60.

<sup>26</sup> Framework Directive 89/391/EEC, article 3(a).

safety directives that followed the Framework Directive, as well as the Working Time Directive, exclude domestic workers. Domestic workers are not specifically mentioned in other directives, such as the part-time or fixed-term directives, but this does not mean that they cannot be excluded from protection in European Union countries, which will depend on whether they will be categorised as ‘workers’.

Further evidence of exclusion of domestic workers from labour law can be found in the context of several International Labour Organisation instruments, which permit the exclusion of domestic workers from their scope through the so-called ‘flexibility clauses’.<sup>27</sup> These include the Protection of Wages Convention No 95 (1949), the Night Work Convention No 171 (1990), the Private Employment Agencies Convention No 181 (1997), and the Maternity Protection Convention No 183 (2000). The flexibility clauses can be used after consultation with organisations of workers and employers. States have a duty to make a declaration at the time of ratification of a Convention, explaining why they exclude categories of workers as well as what measures they take to protect them in the context of their reporting obligations.<sup>28</sup>

Crucially, in the 100<sup>th</sup> session of the International Labour Conference, in June 2011, the ILO adopted Convention No 189 and supplementing Recommendation No 201 regulating the terms and conditions of work for domestic workers.<sup>29</sup> This was a landmark moment for domestic workers whose participation in the paid labour market and specific working conditions were recognised for the first time in a holistic manner within a legal document. The Convention contains detailed provisions on the rights of domestic workers. It recognises that domestic work is undervalued and invisible and is mainly carried out by women and girls (Preamble). It defines ‘domestic work’ as work performed in or for a household, and a ‘domestic worker’ as any person performing domestic work in an employment relationship (Article 1). This results in the exclusion of those who do domestic work on a casual basis (something which is specifically mentioned in sub-section c of that Article). The Convention obliges contracting states to protect the Fundamental Principles and Rights at Work of the ILO (Article 3), namely the protection of freedom of association, including a right to collective bargaining, the

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<sup>27</sup> See the ILO Report ‘Decent Work for Domestic Workers’, p 20 ff.

<sup>28</sup> Article 22, ILO Constitution.

<sup>29</sup> For analysis of the Convention, see E Albin and V Mantouvalou, ‘The ILO Convention on Domestic Workers: From the Shadows to the Light’ (2012) 41 *Industrial Law Journal* 67.

elimination of forced labour, the abolition of child labour and the elimination of discrimination. It also states clearly that Member States shall take measures to ensure that domestic workers, like workers generally, enjoy fair terms of employment as well as decent working conditions (Article 6), enjoy minimum wage coverage (Article 11) and be paid directly in money (Article 12). There is a requirement that Member States set a minimum age for domestic workers (Article 4), ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence (Article 5), has the right to a safe and healthy work environment (Article 13), and of social security protection, especially in respect to maternity (Article 14).

Does the Convention address the legislative precariousness of domestic workers? Article 2 of the Convention states that it ‘applies to all domestic workers’. Yet it also permits exclusions: it, first, provides for a possibility to exclude categories of workers who are otherwise covered with at least equal protection. This does not seem problematic. However, the provision that follows states that further exclusions may apply to ‘limited categories of workers in respect of which special problems of a substantial nature arise’. It can fairly be assumed that one reason that led to the adoption of Convention 189 was the fact that many jurisdictions exclude domestic workers from protective laws. That this Convention, which has been specifically drafted to protect domestic workers and address their precariousness, permits the exclusion of some of them from its scope is, therefore, troubling.

### **Immigration law**

In addition to labour legislation that excludes domestic workers from its scope, immigration legislation creates further precariousness by treating migrant domestic workers differently to other migrant workers.

#### *The Overseas Domestic Worker Visa*

In the UK in the past when migrant domestic workers arrived lawfully in the country accompanying an employer, their visa status tied them to this employer. Their residency status was lawful for as long as the employer with whom they entered employed them, with the result that the employer gained important means to control them.<sup>30</sup> The wish of

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<sup>30</sup> B Anderson, ‘Migration, Immigration Controls and the Fashioning of Precarious Workers’, (2010) 24 *Work, Employment and Society* 300 at 310.



certain visitors coming into the UK to be accompanied by domestic workers, stemming from the personalized relationship developed between them and the workers, together with the wish of domestic workers to retain their job while their employers are abroad for a short period of time, explains why provision has been made for overseas domestic workers in the UK immigration system since 1990.

In parliamentary debates, the concession outside the standard immigration routes was described as a matter of national interest: 'Looking at our national interest, if wealthy investors, skilled workers and others with the potential to benefit our economy were unable to be accompanied by their domestic staff they might not come here at all but take their money and skills to other countries only too keen to welcome them.'<sup>31</sup> At the same time, when the concession outside the standard immigration routes was introduced for domestic workers from overseas, a humanitarian reason was also put forward: 'Domestic workers who were unable to accompany the household to the UK could well lose their jobs, their homes and their livelihoods.'<sup>32</sup>

This situation changed in 1998, with immigration rules allowing domestic workers to change employers (but not work sector). Under the visa regime of 1998, there were two types of overseas domestic worker visas: one for workers employed in private households, and another one for those employed in diplomatic households. A domestic worker who had been employed by her or his employer for at least one year abroad could accompany a foreign national who entered the country for a period of 12 months. After five years, the worker could apply for settlement. Even though the domestic worker had entered the country with a specific employer, she was not tied to this employer; she could change employer but not work sector. The Draft International Labour Organisation Multilateral Framework on Labour Migration of 2005<sup>33</sup> and the UN Special Rapporteur on the Human Rights of Migrants cited the overseas domestic worker visa as best practice.<sup>34</sup> Domestically, it was viewed as an important safeguard against trafficking in human beings.<sup>35</sup> If domestic workers were ill-treated by the employer with whom they entered the country, they could move to another employer.

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<sup>31</sup> Lord Reay, 28 November 1990, Hansard Col. 1052.

<sup>32</sup> Ibid.

<sup>33</sup> Draft ILO Multilateral Framework on Labour Migration, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb295/pdf/tmmflm-1.pdf>, para 82.

<sup>34</sup> See <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=4c0623e92>, paras 60-61.

<sup>35</sup> Home Affairs Committee, *The Trade in Human Beings: Human Trafficking in the UK*, Sixth Report of Session 2008-2009, Volume I, 9 June 2011.

The ability to change employer was an important safeguard for overseas domestic workers that would otherwise be totally dependent on the employer with whom they entered the country.

In 2012, however, the Government decided to reintroduce a very restrictive visa regime, which does not permit domestic workers to change employer, despite strong opposition voiced by domestic workers themselves, and organisations, such as Kalayaan and Anti-Slavery International. The terms of the amended overseas domestic worker visa indicate that humanitarian considerations are certainly not the primary concerns that underlie this regime. This change occurred against the background of the so-called Points-Based-System (PBS). Under this system, the policy is to not grant visas to low-skilled migrants, so that domestic workers – typically low-skilled workers – did not fit.<sup>36</sup> Under the new regime, which has been in place for more than one year at the time of writing, when migrant domestic workers arrive lawfully in the country accompanying an employer, their visa status ties them to this employer.<sup>37</sup> Their residency status is lawful for as long as the employer with whom they entered employs them, to a maximum of 6 months, gaining in this way important means to control them.<sup>38</sup>

When the new regime was introduced, the Government acknowledged, in reference to the previous route, that ‘the [overseas domestic worker] routes can at times result in the import of abusive employer/employee relationships to the UK’.<sup>39</sup> For this reason, it included some safeguards: that the employment relationship pre-exists at least 12 months before entry into the UK; that there is strong evidence for the existence of the relationship; that written terms and conditions are agreed between the employer and the worker before entry in the UK; that information is given by UK authorities to the workers before they arrive on their rights and avenues for help, while they are in the UK.<sup>40</sup>

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<sup>36</sup> Anderson, *Us and Them*, 2013, p 175.

<sup>37</sup> See Immigration Rules, 159A-159H, available at <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part5/>.

<sup>38</sup> B Anderson, ‘Migration, Immigration Controls and the Fashioning of Precarious Workers’, (2010) 24 *Work, Employment and Society* 300 at 310. See also Anderson, *Doing the Dirty Work?*, p 88 ff.

<sup>39</sup> Statement by Home Secretary Teresa May, Written Ministerial Statements, 29 February 2012, Column 35WS.

<sup>40</sup> Home Office, Statement of Intent: Changes to Tier 1, Tier 2 and Tier 5 of the Points Based System; Overseas Domestic Workers; and Visitors, February 2012, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117953/tiers125-pbs-overseas-soi.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117953/tiers125-pbs-overseas-soi.pdf)

However, according to an important recent report of the Centre for Social Justice, entitled *It Happens Here*, even though the information safeguard exists on paper, the Government has not taken sufficient steps to implement it in practice. The information letter is not issued in many cases, and contains no information on possible grave abuse of labour rights. It also says very little about workers' rights in the UK and no further guidance on where information can be found.<sup>41</sup> The Centre for Social Justice uses by way of an example the statement that the letter refers to the 'ACAS helpline', without even explaining what ACAS stands for or what it can offer.

At the time of writing, just over a year after the new visa entered into force, the indications are that a category of workers, which has traditionally been vulnerable and invisible to the authorities, has been rendered even more precarious because of the new visa regime. Kalayaan published statistics on the immigration rules in May 2013.<sup>42</sup> These showed that workers registered with Kalayaan who entered the UK on the new visa regime reported significantly worse treatment than those that were not tied to the employer, during the same period of time but under the previous regime. More precisely, they found that: 'all the workers on the tied visa reported that they were paid less than £100/week, as opposed to 60% of those on the original visa; 62% of those on the tied visa were paid no salary at all, compared with 14% on the original visa; 85% did not have their own room so slept with the children or in the kitchen or lounge compared with 31% on the original visa.' Further issues raised by Kalayaan are that a worryingly low number of workers under this visa regime contacted the organization, and that workers employed under this regime do not easily go to the police for fear of removal. An additional concern is that some of these workers may remain in the country with their employers without a visa, after it expires, or change employers unlawfully, with all the implications that illegality has.<sup>43</sup> The danger is that domestic workers who have arrived in the UK under the new visa regime and whose employment relationship is abusive will either suffer in silence, or escape and remain in the country illegally. The Centre for Social Justice also emphasised that changes to the domestic worker visa were based on

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<sup>41</sup> Centre for Social Justice, 'It Happens Here', March 2013, available at [http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ\\_Slavery\\_Full\\_Report\\_WEB\(5\).pdf](http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ_Slavery_Full_Report_WEB(5).pdf) p 94. Hereinafter cited as 'It Happens Here'.

<sup>42</sup> Kalayaan, 'Slavery by Another Name: The Tied Migrant Domestic Worker Visa', available at <http://kalayaan.org.uk/documents/Slavery%20by%20a%20new%20name-%20Briefing%207.5.13.pdf>

<sup>43</sup> See earlier discussion.

the assumption that the new regime would reduce the number of domestic workers travelling to the UK, but this is unrealistic. In fact ‘evidence taken by the CSJ has suggested that domestic workers will simply be brought over by other means, legal and illegal’.<sup>44</sup>

It was earlier said that the law in general creates legislative precariousness for domestic workers. It excludes them from much labour protective legislation, both because it is practically difficult to regulate this work sector, and because domestic work, being women’s work mostly in the past, is undervalued. The overseas domestic worker visa regime takes the legislative precariousness of domestic workers to an extreme. It objectifies domestic workers, treating them as a piece of the employers’ movable household, which can be brought into the country and can be treated by them according to their whims, without any accountability.

#### *Diplomatic immunity*

In addition, the law on migrant domestic workers who accompany foreign diplomats creates a most dramatic expression of legislative precariousness. Even though this may appear secondary from an immigration law perspective, the abuse by their employers is grave and well-documented in the media,<sup>45</sup> so it is worth emphasizing that the law recognizes wide immunity from civil and criminal jurisdiction in the receiving state. Article 31 of the Vienna Convention on Diplomatic Relations (1961) states that diplomats enjoy immunity from criminal and many cases of civil jurisdiction. In the UK, the legislation that incorporates these immunities is the State Immunity Act 1978, which provides for general state immunity from jurisdiction, includes certain exceptions, and makes special mention of employment disputes.<sup>46</sup> Immunity from the general criminal law is different to immunity from employment law and its enforcement. Each is objectionable for different reasons. Criminal immunity potentially leads to complete impunity for grave crimes, which brings to the forefront another serious example of legislative precariousness. This explains why the Parliamentary Assembly of the Council of Europe in its Recommendation 1523(2001) requested the amendment of the Vienna

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<sup>44</sup> ‘It Happens Here’, p 93.

<sup>45</sup> For an example see BBC, Radio 4 programme on ‘Domestic Servitude’, 22 June 2010. See also the campaign on this issue of the NGO Kalayaan, at <http://www.kalayaan.org.uk/>.

<sup>46</sup> See ss 4 and 16 of the State Immunity Act 1978.

Convention so as to exclude all offences committed in private life.<sup>47</sup> A resolution of the European Parliament, in turn, invited member states to connect the visas of domestic workers who work for diplomats to a minimum level of working conditions.<sup>48</sup>

Martin Saler MP emphasized the gravity of this problem of diplomatic immunity in a parliamentary debate in 2010, citing examples of both criminal and employment law claims:

‘The title of this debate refers to visa rights for migrant domestic workers, but it will become apparent that what we are actually discussing is a secret slavery taking place a stone’s throw away from this building. For the most abused groups of vulnerable workers, the dark ages are still happening, just around the corner from this mother of Parliaments. It is a scar on this country that such things occur within our borders; it is certainly a scar on the conscience of the diplomatic missions that use diplomatic immunity and their privileged position to treat fellow human beings in the most appalling, disgusting, dehumanising and disgraceful manner. It must stop.’<sup>49</sup>

In a 2012 High Court case that involved a domestic worker who claimed, in essence, that her salary had not been paid in full by her employer, it was held that while diplomats may have immunity even when they move to a new post, a former diplomat will not necessarily enjoy immunity for employment law claims brought by a domestic worker.<sup>50</sup> Before this case was decided, there had been no relevant authorities in the UK. Similar developments in the United States may reflect a change in the approach of the courts to the diplomatic immunity defence in cases of abuse of domestic workers.<sup>51</sup>

#### *Undocumented status*

Domestic workers are sometimes irregular residents in a country. They may have entered with no visa, or on a tourist visa or temporary work permit, which they overstay. Immigration law permits their removal, since their status in the country is unlawful. Due to the fear of removal, domestic workers often wish to remain invisible to the authorities.

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<sup>47</sup> Council of Europe, Parliamentary Assembly, Recommendation 1523(2001), para 10(iv).

<sup>48</sup> European Parliament, Resolution, entitled ‘Regulating Domestic Work’, 30 November 2000.

<sup>49</sup> Martin Salter MP, Hansard, 17 Mar 2010: Column 251WH.

<sup>50</sup> *Wokuri v Kassam*, [2012] EWHC 105 (Ch), para 25.

<sup>51</sup> See *Swarna v Al Awadi*, 622 F.3d 123, 144 (2<sup>d</sup> cir.2010).

Their desire to remain invisible makes them vulnerable to abuse. But the anxiety of removal is not the only implication of the irregular status of a migrant worker. This status has implications for employment rights too, with rules of employment law creating further precariousness. In the UK, for example, the employment contract of an unlawful resident is considered to be illegal.<sup>52</sup> Workers whose contract is illegal have very limited rights. The problem was illustrated in a case of the employment appeal tribunal (EAT),<sup>53</sup> where a migrant domestic worker, Ms Hounnga, who overstayed her tourist visa and kept on working as a domestic worker, was seriously ill-treated and eventually dismissed. Because of her irregular status in the UK, the EAT ruled that the employment contract was illegal, so her claims for unfair dismissal, breach of contract, unpaid wages and holiday pay could not be enforced. The EAT repeated a statement from past rulings, according to which ‘the courts exist to enforce the law, not to enforce illegality’.<sup>54</sup> On the view of the EAT, Ms Hounnga never had the right to work, so she could not claim loss of earnings because of her discriminatory dismissal. Only her discrimination claim was allowed, as it did not depend on a valid contract of employment. Yet the Court of Appeal was not willing to accept that even the discrimination claim should be allowed, as she had been fully aware of the illegality.<sup>55</sup>

### **3. Morally Unacceptable and Legally Problematic**

Many aspects of the legislative precariousness of domestic workers may be problematic and incompatible with human rights law.<sup>56</sup> This section will focus on the overseas domestic workers visa regime. It has to be noted that the UK example on this issue is not unprecedented. Israel, for instance, had in the past a similar regime for guest workers, which did not permit them to change employer. However, the High Court of Israel ruled it incompatible with human dignity under the Israeli Constitution.<sup>57</sup> Similarly, this section argues that the UK overseas domestic worker visa regime is morally unacceptable, and can be legally problematic, as it may breach European human rights law. That states have the power to control who enters their territory, and that they can

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<sup>52</sup> See A Bogg, in this volume.

<sup>53</sup> *Allen (née Aboyade-Cole) v Hounnga*, UKEAT/0326/10/LA.

<sup>54</sup> As above, para 37.

<sup>55</sup> *Hounnga v Allen* [2012] EWCA Civ 609. At the time of writing, the case is under appeal before the Supreme Court.

<sup>56</sup> See V Mantouvalou, ‘Human Rights for Precarious Workers’, above n 12.

<sup>57</sup> HCJ 4542/02 *Kav LaOved v Gov’t of Israel* 3 [2006] (Isr.), mentioned in H Shamir, ‘What’s the Border Have to Do with It? How Immigration Regimes Affect Familial Care Provisions – A Comparative Analysis’, (2011) 19 *Journal of Gender, Social Policy and the Law* 601 at 636.

plan and implement their own immigration policy, are principles generally accepted in international law, in theoretical literature and in human rights law. While states can legitimately restrict the length of stay of migrant workers, other restrictions on their visa regime may be problematic, and can lead to situations that have been described as ‘modern slavery’.

In academic literature and policy reports, the UK approach to domestic workers’ visas has often been described as risking slavery. Bridget Anderson argued that the visa concession leads to modern slavery, as early as 1993.<sup>58</sup> Similarly, the Centre for Social Justice in its 2013 Report, said that the new visa for domestic workers can be linked to modern slavery: ‘This [visa regime] presents serious risks that the informal and unregulated nature of this form of work will increase, disempowering workers through restricting their freedom to leave an abusive employer and fostering increased cases of modern slavery’.<sup>59</sup>

Indeed, looking at the European Convention on Human Rights (ECHR), a traditional liberal human rights document, it is fair to say that the overseas visa regime is arguably incompatible with it. The Convention, of course, contains only key civil and political rights. It is not, primarily, about workers’ rights; or specifically about women’s rights. It contains no rights to a minimum wage, maximum working time, health and safe working conditions – the protection of which is wanting in the case of domestic workers, as was said earlier on. It is the role of the European Social Charter to address this type of labour rights of domestic workers.<sup>60</sup>

Yet the European Court of Human Rights (ECtHR) has developed important labour rights jurisprudence in recent years.<sup>61</sup> It has also examined the problems in the protection of domestic workers, and has at times classified their treatment as a breach of article 4 of the Convention. The provision prohibits slavery, servitude, forced and compulsory labour. The first case that dealt with the issue is the landmark *Siliadin v France*,<sup>62</sup> which involved a young woman from Togo that was brought to France in order to work and be

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<sup>58</sup> B Anderson, *Britain’s Secret Slaves*, Anti-Slavery International, 1993.

<sup>59</sup> ‘It Happens Here’, pp 92-93.

<sup>60</sup> See V Mantouvalou, ‘Human Rights for Precarious Workers’, above n 12.

<sup>61</sup> KD Ewing and J Hendy, ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39 *Industrial Law Journal* 2; V Mantouvalou, ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’ (2013) 13 *Human Rights Law Review*.

<sup>62</sup> *Siliadin v France*, App No 73316/01, Judgment of 26 July 2005.

educated, but was kept at home instead to work as a live-in domestic worker. In *Siliadin*, the Court explained that her situation is not ‘slavery’, because the employer did not exercise a right of legal ownership over the worker. Slavery and legal ownership go hand in hand, according to this judgment. Yet the ECtHR classified it as ‘servitude’, which is still in the scope of article 4. On servitude, it said that ‘what is prohibited is a “particularly serious form of denial of freedom” [...] It includes, “in addition to the obligation to perform certain services for others ... the obligation for the ‘serf’ to live on another person’s property and the impossibility of altering his condition”.’<sup>63</sup> Being a minor at the time, Siliadin had to work almost fifteen hours a day, seven days per week. She had not chosen to work for her employers, she had no resources, was isolated, had no money to move elsewhere, and ‘was entirely at [the employers’] mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.’<sup>64</sup> The restriction of her freedom was such that the Court was prepared to classify it as servitude, finding for the first time in its history that there was a breach of article 4 of the Convention.

Yet more to the point here is a judgment that did not involve domestic workers, but a victim of sex trafficking the case *Rantsev v Cyprus and Russia*.<sup>65</sup> This is an example of a restrictive immigration regime that was ruled to violate the Convention. The case examined the so-called ‘artiste visa’ regime in Cyprus, where the term ‘cabaret artiste’ is a known euphemism for ‘prostitute’. An ‘artiste’ was defined in Cypriot legislation as ‘any alien who wishes to enter Cyprus in order to work in a cabaret, musical-dancing place or other night entertainment place and has attained the age of 18 years’.<sup>66</sup> Under this scheme, Ms Rantseva received a temporary work and residence permit. Having worked at a cabaret for 3 days, she escaped from her employer, only to be captured soon after and be taken to the police. Since her immigration status was not irregular, the police returned her to her employer who then detained her. Ms Rantseva was later found dead, apparently as she sought to escape.

In the judgment of the Court, the Cyprus immigration policy framework was found to breach article 4. Of special concern was the fact that cabaret managers made an

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<sup>63</sup> *Siliadin*, para 123.

<sup>64</sup> *Siliadin*, para 126.

<sup>65</sup> *Rantsev v Cyprus and Russia*, App. No. 25965/04, Judgment of 7 January 2010.

<sup>66</sup> *Rantsev*, para 113.



application for an entry permit for the artiste and were required to place financial guarantees, in a way that rendered the migrant dependent on her employer or agent. This was particularly pertinent given the context of the known trafficking risks: this artiste visa scheme made individuals vulnerable to traffickers, as both the Council of Europe Human Rights Commissioner and the Cypriot Ombudsman had previously stressed.<sup>67</sup> In addition, the Court found that an obligation upon an employer to inform the authorities if an artiste leaves her employment is a legitimate means to the end of monitoring compliance with immigration law. However, it is only the authorities that should take steps for non-compliance, and monitoring compliance cannot be the duty of the manager. This is why the Court was particularly troubled by the practice of asking cabaret owners and managers to lodge a bank guarantee to be used to cover artistes that they employed.

It may be said here that the visa regime in *Rantsev* was more restrictive than the overseas domestic worker visa.<sup>68</sup> Yet this does not mean that the Court will not be willing to extend the principles in order to cover the overseas domestic worker visa, if the circumstances of a case indicate a breach of article 4. The ECtHR showed in *Siliadin*, and more recently in *CN v UK*,<sup>69</sup> that it is sensitive to the particularities of domestic labour, and the special vulnerability that this group of workers face. It is therefore possible that a very restrictive visa regime, which creates strong ties between the domestic worker and the employer, giving the latter the opportunity to exercise unique control over the worker, may be found to violate the Convention.

#### **4. Conclusion: What is the Alternative?**

This piece has argued that the intersection of different aspects of legislative precariousness suffered by domestic workers places them in a uniquely vulnerable position, and may lead to a breach of human rights law. It can be said with certainty that the various exclusions have different rationales. They attempt to maintain low costs for employers, for example, and avoid complexities in monitoring domestic labour by the state, which could also be costly. The exclusions may be explained, but they cannot be justified under human rights law.

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<sup>67</sup> *Rantsev*, paras 89, 91, 94, 100.

<sup>68</sup> I am grateful to Judy Fudge for raising this point.

<sup>69</sup> *CN v United Kingdom*, App No 4239/08, Judgment of 13 November 2012.

In the discussions leading to the adoption of the ILO Convention on Domestic Workers, a key slogan was that domestic work is ‘work like any other, work like no other’. The highly personalized relationship, and the fact that the worker is hidden, employed in the privacy of the employer’s home, are only two elements that show that this is indeed a job like no other, which requires special treatment by the law. Yet it is important that it is regulated. The legislative precariousness of domestic workers that this piece presented must be addressed. Domestic labour must be treated like work like any other, in the sense that domestic workers are, above all workers, and must enjoy workers’ rights, like all workers.<sup>70</sup>

It follows that the visa for overseas domestic workers is a visa like no other, and must be treated as such. Key organisations working on domestic workers’ rights and human trafficking, like the Centre for Social Justice, Kalayaan and Justice for Domestic Workers, recommend that the 1998 visa regime be re-instated. The current regime disadvantages domestic workers greatly, and places them in a position of unique vulnerability that may in certain circumstances lead to slavery, servitude, forced and compulsory labour. This is incompatible with fundamental principles of liberal states and key human rights legislation. The Centre for Social Justice emphasised that with the changes to the domestic workers visa, ‘[a]n already hidden workforce is at risk of becoming invisible’.<sup>71</sup> The 2013 Report of Kalayaan on the new visa emphasizes the problem. Under the current UK immigration regime, domestic workers are made to suffer in silence or turn to illegality, with all the devastating consequences that this has in law. This problem must be addressed, so that the treatment of migrant domestic workers is compatible with key liberal values of freedom, as well as fundamental human rights.

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<sup>70</sup> See V Mantouvalou, ‘Are Labour Rights Human Rights?’, (2012) 3 *European Labour Law Journal* 151.

<sup>71</sup> ‘It Happens Here’, p 93.