

VICTORY FOR DOMESTIC WORKERS IN DIPLOMATIC IMMUNITY CASE

The Supreme Court has today handed down its landmark judgment in *Basfar v Wong* [2022] UKSC 20, the latest challenge to a diplomat's defence of immunity from jurisdiction in a claim brought by his former domestic worker for unpaid wages and breaches of employment rights. The Supreme Court, by a majority of 3:2, has decided that exploitation amounting to modern slavery may amount to a 'commercial activity' in respect of which a diplomat employer could not claim immunity, because he had profited from his exploitation of her.

This case answers the question left open by the earlier decision of the Supreme Court in *Reyes v Al Malki* [2017] UKSC 61 where the Supreme Court held that diplomatic immunity for past acts continues only if those acts were carried out in the exercise of diplomatic functions for or on behalf of a sending state. Alleged maltreatment of a domestic worker could not be said to be done for or on behalf of the sending state. By the time that case reached the Court, the facts had changed: the employer had left his diplomatic post and no longer enjoyed diplomatic immunity, so the Court did not have to decide whether, if he had still been in post, the diplomat would have had immunity. The binding minority view of the Supreme Court expressed a clear view that he would, but the majority considered this to be very much in doubt.

In this case Ms Wong's employer is still in post and so the question of diplomatic immunity arose again. This time the debate centred on the meaning of 'commercial activity' in article 31(1)(c) of the Diplomatic Convention, which provides for an exception to immunity for '*an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions*'.

The majority (Lords Briggs, Leggatt and Stephens) held that hiring domestic help is incidental to the to the ordinary daily life of a diplomat and therefore falls within the rationale for immunity from civil jurisdiction of the receiving state. But the judges could not accept that keeping a domestic worker in circumstances where she was coerced and compelled into working against her will, was comparable to an ordinary employment relationship of a kind that is incidental to the daily life of a diplomat (and his family) in the receiving state [paras 43-51].

It was critical too that the diplomat had profited from exploiting Ms Wong by underpaying her or not paying her at all. Any profit element may make a particular activity commercial, taking it outside the scope of diplomatic immunity [para 52].

The Supreme Court decided the case on assumed facts, as there has been no trial yet of Ms Wong's claim. Where the defence of immunity from jurisdiction is raised in the future, it will be necessary to decide first whether the actions of the diplomat amounted to 'commercial activity'. The words 'relating to' in article 31(1)(c) require only that there should be a significant connection between the claim and the commercial activity of the diplomat and the enquiry should be limited to establishing those facts which need to be provided as ingredients of the cause of action [para 104].

Kalayaan is the leading NGO in the UK campaigning for the rights of domestic workers. We provided evidence and representations to the Supreme Court concerning the commercial aspects of trafficking, including the ways in which unscrupulous employers benefit financially from the coercive and exploitative treatment of their workers. Kalayaan's intervention in this appeal was funded by the Strategic Legal Fund and we were represented by Zubier Yazdani of Deighton Pierce Glynn who instructed Tom Hickman QC and Flora Robertson of Blackstone Chambers.

This ground breaking decision is a long overdue recognition that the defence of diplomatic immunity is unsustainable in cases of modern slavery. Kalayaan and others have argued this point for many years and the decision is to be welcomed as a valuable development in this area of law.

Kalayaan will continue to advise and assist domestic workers in bringing claims in respect of their employment rights in the courts. We remain concerned that some employers do not pay the compensation ordered by the courts to be paid to their former staff and that it is difficult and expensive for workers to take enforcement action against their former employers, so that many awards remain unpaid, as has happened to Ms Reyes from the earlier case.

This case has implications for jurisdictions all over the world, who will now have to consider the rights of more vulnerable workers, who allege that they are victims of modern slavery, forced labour or servitude, in cases where immunity is raised as a defence by diplomats. It sends a very clear message that the UK will not tolerate the egregious exploitation of domestic workers working in diplomatic households.

Alison Harvey, Chair of the Board of Trustees of Kalayaan, states:

"As the Supreme Court records, domestic workers in diplomatic households are especially vulnerable to abuse. Kalayaan, which has pursued the argument that trafficking is a commercial activity since Reyes five years ago, is hugely grateful to our legal team Tom Hickman QC and Flora Robertson instructed by Zubier Yazdani of Deighton Pierce Glynn for making our intervention possible in this case, which establishes that exploitation of domestic workers for profit falls within the commercial exception to diplomatic immunity. It will resonate internationally".

Notes for editors:

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

For further coverage and analysis of the judgments, please visit our News and Resources pages on our website.

Basfar v Wong [2022] UKSC 20

Lord Briggs and Lord Leggatt gave the majority judgment with which Lord Stephens agreed. Lord Hamblen and Lady Rose dissented on the meaning and scope of commercial activity in the context of modern slavery.

For further information contact:

Alex Millbrook: alex@kalayaan.org.uk

Zubier Yazdani, Partner, Deighton Pierce Glynn: ZYazdani@dpplaw.co.uk