Modern Slavery Bill
Report Stage Briefing – House of Lords

23rd and 25th February 2015

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations. ILPA is a member of the Refugee Children's Consortium and we refer you to the briefings of the Consortium, which we support.

This briefing covers the following amendments

- Amendment to Clause 1 in the name of Lord Hylton and New Clause after Clause 51 Lord Hylton, Baroness Royall of Blaisdon, The Lord Bishop of Carlisle and Baroness Hanham *Protection from Slavery for overseas domestic workers*
- Clause 47 and new Clause after Clause 47 Baroness Kennedy of the Shaws

ILPA also supports the new clause after Clause 10 in the names of Baroness Young of Hornsey, Baroness Hamwee and Baroness Butler Sloss *Civil remedies for victims of Modern Slavery* and the amendments to Clause 48 on advocates in the name of Lord McColl of Dulwich.

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CLAUSE 1 AND AFTER CLAUSE 51

Amendment to Clause 1 in the name of Lord Hylton and New Clause after Clause 51 Lord Hylton, Baroness Royall of Blaisdon, The Lord Bishop of Carlisle and Baroness Hanham Protection from Slavery for overseas domestic workers

Purpose of amendments

To Clause 1
Provides for regard to be had to work or services a person has been forced to perform in determining whether a person is being held in slavery or servitude or required to form forced or compulsory labour

New Clause after Clause 51
This amendment reintroduces some but not all of the protections against exploitation for migrant domestic workers removed on 6 April 2012 for those applying for leave to enter the UK on or after that date[1]. It provides for domestic workers to change employer and extend their leave. Where they have left a situation of slavery they are given a three-month breathing space in which to find a new position, a provision that resembles the breathing space given to international students to find a new course when they are the unwitting victims of the closure of educational institution.

An identical amendment to the new clause was tabled at Committee stage as amendment 94, when support for it from all sides of the House was overwhelming, see http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/141210-0001.htm

Briefing - Domestic worker visas

Before and after the changes to the Immigration Rules, to be granted permission to come to the UK as an overseas domestic worker in a private household, a person must be over 18 and under 65. He or she must have worked as a domestic worker in the home of the person who will be the employer in the UK for at least 12 month, must intend to travel to the UK with that same employer (or the employer's spouse, civil partner or child), intend to work full-time for the employer in that employer's household, and have no intention of working for anyone or anywhere else. He or she must be able to maintain and accommodate her/himself without recourse to public funds.

What changed in 2012 for those applying on or after that date was the domestic worker must now intend to leave the UK at the same time as the employer or after six months, whichever is the shorter period. The domestic worker is tied, bonded, to the employer. S/he is not permitted to bring dependants to the UK. There must be a written contract of employment between employer and domestic worker, providing that the domestic worker will be paid in accordance with the national minimum wage in the UK. Domestic workers entering after 6 April 2012 workers are not permitted to stay in the UK for any longer than six months.

In the House of Commons John Randall MP, the former Conservative Deputy Chief Whip responded to the Minister Karen Bradley MP's offer of an enquiry that he had "…met too many victims to be able to say that it is a matter for another day". Numerous reports have made the case against the current laws[2].

[1] Protections for domestic workers initially operated as concessions outside the immigration rules and were incorporated into the rules by Statement of Changes in Immigration Rules Cm 5597 of 22 August 2002. As of 5 April 2012 the rules on overseas domestic workers in private households were contained in paragraphs 159 to 159G of Statement of Changes in Immigration Rules HC 395.

[2] Report of the Joint Committee on the Draft Modern Slavery Bill, Session 2013-2014,HL Paper 166, HC 1019; Joint Committee on Human Rights, *Legislative Scrutiny: (1) Modern Slavery Bill and (2) Social Action, Responsibility and Heroism Bill*, Third Report of Session 2014-15, HL Paper 62, HC 779; Kalayaan *Still Enslaved: The Migrant Domestic Workers who are Trapped by the Immigration Rules* (Alison Harvey, Legal Director of ILPA, is a trustee of Kalayaan); Centre for Social Justice, *It Happens Here*; Andrew Boff, Conservative leader of the GLA, *Shadow City*. See also

[1] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Modern Slavery Bill and (2) Social Action, Responsibility and Heroism Bill*, Third Report of Session 2014-15, HL Paper 62, HC 779, paragraph 1.95. See also the Home Affairs Select Committee, *The Trade in Human Beings: Human Trafficking in the UK*, Sixth Report of Session 2008-2009, HC 23 Volume 1, 6 May 2009, p26.

As to the words of the Minister, Baron Garden of Frognal at Committee, in the words of a "boiling" Baroness Royall of Blaisdon "I cannot believe the guff that the Minister has had to read out."[3] The Minister did not give the impression of convincing herself which makes it all the more unacceptable that the arguments were supposed to convince the House.

Safeguards mean that people do not get exploited in the first place. FALSE.

The "safeguards" on offer, according to the Minister:[4]

- *All individuals applying to come to the UK on an overseas domestic worker visa must also provide evidence with their application that they have agreed in writing the core terms and conditions of their employment in the UK*
- *Officials have been working on a revised template to try to ensure that both employers and employees have an opportunity to see what standards are expected on both sides*
- *….the Home Office has started a trial, through the Border Force, of handing personally to workers as they come in the form that tells them what their entitlements are. These forms are not just in English… ".*[5]

The Minister described helpline numbers that workers can phone. As debated at Committee stage, the safeguards do not work.[6] Those who attended the meeting convened by Baroness Cox in parliament at Committee stage, at which ILPA was represented, will have heard overseas domestic workers describe how they did not get documents supposed to tell them their rights or how, when they did and told the employer that the employer had promised to pay them or to give them a day off, they were laughed at by employers who pointed out that there was nothing the worker could do about it. Many had no phone. Those accounts reflect the experiences recounted to ILPA members working with those trying to escape domestic servitude.

Statements such as the Minister's

> *We are also seeking to make sure that all employers who come to work in this country are fully aware of the compliance which they should make for the people that they employ*

treat people who keep slaves as though they were employers with an interest in health and safety, employment and tax law.

Baroness Garden of Frognal was unconvinced by her own arguments

> *…. of course, I hear from around the Committee the concerns that these documents will not be adequately and legally kept to…*[7]

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the Home Affairs Select Committee, *The Trade in Human Beings: Human Trafficking in the UK*, Sixth Report of Session 2008-2009, HC 23.

[3] 10 December 2014, col 1870.

[4] Baroness Garden of Frognal, 10 December 2014, col 1866-1867.

[5] Baroness Garden of Frognal, 10 December 2014, col 1866-1867.

[6] HL Report, 10 December 2014, col 1861.

[7] 10 December 2014 col1866

> *I agree that it is possible that they* [forms handed out at port] *are snatched away by the employers and put in a passport...*[8]
>
> *… The power of the employer and the fact that people support family links back home make it extraordinarily difficult for people to complain about their employment….*[9]
>
> *"…that is a relationship of power to powerlessness. When it comes from that kind of relationship, particularly if there is a prospect of a family being left behind—say, in India—who will get a regular monthly pittance, what would a signature on a piece of paper really be worth?"* Lord Harris of Pentregarth [10]

We can persuade workers in the current system to seek help. FALSE

The Minister said

> "*…if a domestic worker who is a victim of trafficking leaves their employment and seeks assistance, we do not consider that to be an abuse of their visa, nor will they be criminalised for doing so."*[11]

Assuming (which is highly doubtful, see above) that the worker knows this, the major disincentive to coming forward may be the prospect of having to leave the UK. An analogy can be drawn with survivors of domestic violence. The Government provides a route for settlement to those who suffer domestic violence while in the UK on a spouse visa,[12] in the hope that this will be an incentive to people to leave the abusive relationship, not to stay in it because of fears about their immigration status. See the comments of Lord Harris of Pentregarth above. It would be nice to live in a world where no one is poor and powerless, where no one has such a paucity of options that exploitative and abusive work appeared to them the least bad option. But we do not.

The problem has not been proven to be other than tiny = the problem is tiny. FALSE

Baroness Gardner of Frognal

> " *Home Office internal management information suggests that between May 2009 and July 2014 there were 213 confirmed cases of trafficking for domestic servitude involving non-EU nationals. Of these, only 41 were linked to domestic worker visas…an average of 8 per year…before we made the changes to the visa rules and added new protections, there were 16 confirmed domestic servitude cases linked to these visas. So, far from a rise in servitude linked to overseas domestic worker visas, the numbers fell after 2011 and have been stable since.*[13]

At the risk of dignifying this with a detailed response:

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[8] Ibid. Col 1869.
[9] Ibid.
[10] Ibid.
[11] 10 December 2014 col 1867.
[12] HC 395 289A to 289C, see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/370924/20141106_immigration_rules_part_8_final.pdf (accessed 20 February 2015)
[13] HL Report 19 December 2014 Col 1868.

- Statistics on small numbers of coming forward/being discovered is compatible with a small problem or a large one. They prove nothing about the scale of the problem. All the qualitative evidence points to reasons why persons being exploited might not come forward and might not be identified.
- Figures on "confirmed cases" give no indication of the scale of the problem.
- No inference can be drawn from the relative proportions of those with a domestic worker visa and those with none. The Minister claimed that: *"The numbers that are coming forward appear to be stabilising"* but numbers are too small to be able to make assertions about trends. The Minister's assertion that numbers were stabilising "*because we are taking measures to try to ensure that the employers and the workers have a full view of their rights when they come here"* appears to be speculation with no evidential basis.

The Minister's figures tell us that:

- some migrant domestic workers are exploited.
- some migrant domestic workers are exploited outside the visa system and some within.

Again , the Minister did not convince herself:

> ***Lord Alton of Liverpool***. *…the figures that she has just given to the Committee are very dubious? …By definition, many of these will be people who are frightened out of their minds about going to any of the authorities. … Is this not just the tip of an iceberg? By ignoring it we are not going to help the situation at all…."*
>
> ***Baroness Garden of Frognal*** *I entirely accept what the noble Lord says; it may well be the tip of an iceberg…."I entirely accept the difficulty of identifying the people who are abused,…*[14]

The backdrop to the statistics game is that prior to 6 April 2012, the vast majority of domestic workers came in temporarily, with employers who had entered as visitors, and left with their employers. In 2009, for example, 13,175 domestic worker visas were granted for six months, and 1600 for 12 months. That ratio of just over eight to one reflects the overall c. 10 to 1 ratio during the period. Few domestic workers remained long enough to qualify to settle. In 2010 15,350 visas as domestic workers were issued and 1060 domestic workers were granted settlement.[15] Three hundred and ninety six domestic workers were granted settlement in 2006, 434 in 2007, 784 in 2008 and 845 in 2009, rising to 1060 in 2010.[16] The increase is in line with general spikes in applications for settlement and citizenship at the time, associated with anticipation of the coming into force of the "earned citizenship" provisions of the Borders, Citizenship and Immigration Act 2009.

To change would create an anomaly in the system FALSE

Baroness Garden of Frognal made the circular argument

> *"Allowing them to change employer is not compatible with the purpose of this particular visa."*

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[14] 1868.

[15] *Employment-related settlement, Tier 5 and overseas domestic workers*, Home Office June 2010 paragraphs 7.3 and 7.13, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269012/employment-related-consultation.pdf and *Control of immigration: Quarterly statistical summary, UK Quarter 4 2010, see* https://www.gov.uk/government/statistics/control-of-immigration-quarterly-statistical-summary-fourth-quarter-2010

[16] *Control of Immigration, op cit.,* paragraph 7.13.

She then argued

> *It would create an anomaly in the system if non-skilled, non-European Economic Area domestic workers could come to the UK with an employer and then change employer and stay here in a way that is denied to other non-skilled, non-EEA workers."*

The suggestion that persons should be left in situations of exploitation or at risk of these to maintain the integrity of a model is offensive. But it also posits a "high skilled permanent; low-skilled temporary" model that is a huge oversimplification of the current rules. In the high skilled category one finds the temporary intra-company transferees.[17] Private servants in diplomatic households may apply for settlement after five years[18]; this is not going to change as it is part of the UK's obligations under the Vienna Convention on Diplomatic Relations of 18 April 1961. Any person remaining lawfully for more than 10 years, highly skilled or not, may apply for settlement, this arises from the UK's obligations under Directive 2003/109/EC of 25 November 2003. The requirement for the domestic worker to have been with the employer for 12 months prior to entering the UK brings into play parallels with the family immigration rules where skills levels are not relevant. .

While the Minister cited figures that "Between 2009 and 2013, on average 5,600 overseas domestic workers in private households extended their visas annually, " she said nothing about how many extensions were made. The figures above on settlement are relevant; it is possible to settle after five years. The latest tables show that in 2012 a total of 1,256 people in all forms of "permit free employment" (of which domestic workers are a subset) settled. Given the points that the Minister was prepared to argue in the debate it comes as little surprise that she stated:

> "It is arguable that this temporary, non-economic route should not have preference over those who choose to follow the official routes into employment in this country."

Albeit that the description of the route as "non-economic" sits ill with her earlier arguments. But the domestic worker category is every bit as official as other worker categories under the rules and the workers work at the very least as hard.

The change would offer no greater protection. FALSE.

The Minister said

> The ability to change employer does not necessarily protect against exploitation… Indeed, the long-term nature of employment and an ability to extend visas can, in some cases, facilitate abuse. It therefore would not necessarily provide protection against trafficking and other exploitation.

The fallacy on which the Minister's argument is based was exposed in the debates:

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[17] HC 395, paragraphs 245G to 245GF, see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/370915/20141106_immigration_rules_part_6a_final.pdf .

[18] HC 395 paragraph 154 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/370911/20141106_immigration_rules_art_5v2.pdf and paragraph 245ZS https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/370915/20141106_immigration_rules_part_6a_final.pdf (both accessed 20 February 2014).

> **Baroness Lister of Burtersett:** Could the Minister explain how it would make abuse more, rather than less, likely if they have the power to make that choice? I did not quite follow the argument.
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> **Baroness Garden of Frognal:** If they had power to extend their visas indefinitely then the employer could keep them in the country indefinitely.
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> **Baroness Lister of Burtersett:** I thought the argument was that they had the power to change their employer. How does that make them more likely to be abused….[19]

The Minister said

> "If noble Lords …do have clear *suggestions as to how the Government could do more to help the situation…then we are more than ready to listen to them*

But report after report, MP after MP, peer after peer, have said the same thing. In the words of the Joint Committee on the Draft Modern Slavery Bill:

> *In the case of the domestic worker's visa, policy changes have unintentionally strengthened the hand of the slave master against the victim of slavery. The moral case for revisiting this issue is urgent and overwhelming. Protecting these victims does not require primary legislation and we call on the Government to take immediate action' [18] .*
>
> *Tying migrant domestic workers to their employer institutionalises their abuse; it is slavery and is therefore incongruous with our aim to act decisively to protect the victims of modern slavery. [20]*

Now is not the time for more listening. Now is the time for action.

Amendments to Clause 27 and new Clause after Clause 47 Baroness Kennedy of the Shaws: Legal Aid

Purpose of the amendments

The amendment to Clause 47 would ensure that legal aid could be provided to a person before an application had been made to the competent authority or before the competent authority had reached its decision that there are reasonable grounds to believe that the person is a victim of slavery, servitude forced or compulsory labour. Legal Aid could be provided if the legal representative reasonably believed that the standardised indicators of slavery, servitude, forced or compulsory labour, as set out on the National Referral Mechanism referral form, were met.

The new clause after clause 47 would have an identical effect, but for trafficked persons.

Briefing

> *We recommend that the opportunity should be taken in this Bill to amend the Legal Aid, Sentencing and Punishment of Offenders Act to ensure that legal aid is available in relation to*

[19] 10 December 2014, cols 1869-1870.
[20] Paragraph 5, Introduction, *Report of the Joint Committee on the Draft Modern Slavery Bill*, Session 2013-2014,HL Paper 166, HC 1019.

> *immigration issues prior to referral or decision by the National Referral Mechanism"* Joint Committee on Human Rights, 13 November 2014[21]

With the coming into force of the Legal Aid Sentencing and Punishment of Offenders Act 2012 in April 2013, legal aid was removed from all immigration cases, with only narrow exceptions. While one of those exceptions is ostensibly for trafficked persons[22], and the Modern Slavery Bill reproduces this for victims of slavery or forced and compulsory labour, this only applies to those who have successfully navigated the (unsatisfactory) National Referral Mechanism[23]. A positive "reasonable grounds" decision under the National Referral Mechanism should not be the gateway to legal aid. Firstly, not everyone approaches the National Referral Mechanism[24], for a variety of reasons. Indeed it may not be in their best interests to do so because this risks the person being detained and removed from the jurisdiction by UK Visas and Immigration, who administer the National Referral Mechanism for non-European Nationals. Secondly, without the assistance of legal representations, a person is less likely to be identified correctly by the decision-maker. Even if a person does manage to navigate the National Referral Mechanism successfully, alone, by the time the reasonable grounds decision has been made they may have missed important deadlines for their immigration case.

Many trafficked and enslaved persons do not have lawful immigration status in the UK as a result of their exploitation. They require legal aid for advice on their options and to assist them in regularising their status, if appropriate. It is the Government's intention to ensure that this group is provided with legal aid[25]. However the way in which this has been done has left trafficked persons in a Catch 22 situation: the individual is not identified as trafficked or enslaved because s/he is unrepresented, and because s/he is not identified as trafficked or enslaved, cannot get representation.

The Government's review of the National Referral Mechanism said

> *6.3.11 The proposed changes to the National Referral Mechanism require consideration of provision of legal advice on referral rather than at reasonable grounds decision. Access to legal aid is available for asylum seekers on application for asylum and as a result human trafficking victims may claim asylum as a way of obtaining early legal aid. There is unlikely to be a huge increase in the cost of legal aid because a large majority of non-EEA victims are already claiming it through the asylum process.*

Entitlement to legal aid could be triggered by an assessment that the standardised indicators of trafficking or enslavement as per the National Referral Mechanism referral form are met. Such an assessment could be evidenced by a referral into the National Referral Mechanism or, where the person was receiving advice prior to a referral being made (for example the advice that

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[21] Legislative Scrutiny: (1) Modern Slavery Bill & (2) Social Action, Responsibility and Heroism Bill, HL Paper 62 HC 779 http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/62/6202.htm

[22] Section 32 of Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012

[23] See ILPA's evidence to the National Referral Mechanism Review: http://www.ilpa.org.uk/resource/29120/ilpa-submission-to-the-review-of-the-national-referral-mechanism-endorsed-by-the-anti-trafficking-le

[24]Under-reporting is a huge problem. In 2012, around two-thirds of trafficking victims identified by the Serious Organised Crime Agency (SOCA) had not been referred to the National Referral Mechanism: see SOCA, *A Strategic Assessment on the Nature and Scale of Human Trafficking in 2012*, August 2013, p6 (paragraph 8) available at: http://www.nationalcrimeagency.gov.uk/publications/15-ukhtc-strategic-assesssment-on-human-trafficking-in-2012/file

[25] Letter from Lord Bates to Peers, Annex A, 25 November 2014

persuades him/her to present to the authorities), by the legal aid –funded lawyer making an assessment that the indicators have been met. The check on the assessment made by the lawyer would be the merits test for legal aid for it is ultimately the Legal Aid Agency that assesses that a lawyer was correct to identify that a person is eligible for legal aid. If the Legal Aid Agency concluded that the representative's belief that the standardised indicators of trafficking or enslavement as per the National Referral Mechanism referral form were met was not reasonable, payment would not be made.

Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, advice and assistance can be given about making a claim for asylum but the Immigration Specification in the Legal Aid contract limits the costs that can be claimed to £100 if an asylum claim is never actually made. The same approach could be taken in these cases, if the person does not make an application for leave to enter or remain then a limit could be placed on the sum to be paid for legal advice and assistance.

Numbers are small. *British and Irish trafficked and enslaved persons will not need immigration advice.* As identified in the passage quoted above from the National Referral Mechanism report, in very many cases of trafficked and enslaved persons from overseas it will be proper to identify whether they have a claim for asylum and to make such a claim, and legal aid is already available for this.

As identified in the final report of the review of the National Referral Mechanism[26] not everyone will consent to entering the National Referral Mechanism. A person who fears being forced to leave the UK may consider that their current situation of exploitation is the least bad option open to them and want to stay as far away from the authorities as possible. With advice on their immigration position and a realistic assessment of their chances of regularising the stay in the UK, trafficked and enslaved persons may conclude that engaging with both the immigration authorities and with the National Referral Mechanism is rational and appropriate. This advice cannot be given by a person who is not a solicitor, barrister, legal executive or regulated by the Office of the Immigration Services Commissioner because for other persons to give legal advice on immigration in the course of a business whether or not for profit is a criminal offence.[27] Generalist help and advice cannot fill the gap.

Advice and representation may also help to ensure that all relevant testimony and information is put before the immigration authorities and very often this information will also be made available to the "competent authority" for the purposes of its assessment. These issues were discussed by the Court of Appeal in its judgment on exceptional funding for legal aid in Gudanaviciene et ors v SSHD [2014] EWCA 1622 at paragraphs 116 to 124. At paragraph 123 the court said

> *There is force in the argument that without legal advice some (perhaps many) potential V*[ictims] *O*[f] *T*[rafficking] *will keep away from the N*[ational] *R*[eferral] *M*[echanism] *process when they would otherwise have entered it.*

By the same token, we suggest, they are likely to keep away from making immigration applications to regularise their stay.

[26] *Op.cit* at 4.2.9
[27] Immigration and Asylum Act 1999, part V.

The earlier provision of legal aid asked for in the final report of the National Referral Mechanism should form part of the pilot. It is important that the opportunity be taken to pilot provision of legal advice and representation not only on referral into the National Referral Mechanism but before it, so that the pilot can assess whether this assists persons to come forward.