Domestic workers: Alison Harvey for Kalayaan Annual General Meeting 6 November 2016

What happened this year?

Parliamentary debates during the passage of the Modern Slavery Act 2015 highlighted that changes to the Overseas Domestic Worker visa system made in 2012 had increased workers' vulnerability to trafficking and slavery by removing the right to change employer and extending periods of leave. These concerns prompted the Government to commission an independent review of the Overseas Domestic Worker regime. On 15 December 2015 the government published the review of the man they had commissioned to undertake the review: James Ewins (now QC) on overseas domestic workers.[1]

The two key recommendations of the Ewins' report were that overseas domestic workers be allowed to change employer and that that overseas domestic workers in private households should be allowed to apply for annual visa extensions so of up to two and a half years (private servants in diplomatic households can stay for up to five years, or the length of their employers' posting, whichever is the shorter.

The government did not implement Mr Ewins' recommendations, despite being put under considerable pressure to do so by the House of Lords and by some MPs in the House of Commons. Instead, in April 2016, the government changed the immigration rules to allow all domestic workers in private households to change employer, but only within the currency of the six-month visa, so that they can still only remain in the UK for the same maximum of six months. The worker does not need to show that they have been the victim of any abuse; they can simply decide to go and work for someone else.

At the same time the government gave private servants in diplomatic households a right to change employer. They were however only allowed to stay with the new employer for a maximum of six months, or until their leave ends, whichever is the shorter, so for most this represented a cut in the time for which they can stay in the UK. The good news is that from 24 November 2016 that is changing and domestic workers in diplomatic households who change employer will be able to work for the rest of their period of leave.[2]

Meanwhile, the government will allow those domestic workers, whether in a private or a diplomatic household, who have a been found to be victims of trafficking or slavery (a positive conclusive grounds decision under the national referral mechanism) to apply to stay in the UK for up to two years (previously they could only stay for six months). During this period, they can work, but cannot have 'recourse to public funds': any State benefits or housing.

Applications have to be made within 28 days of getting the positive 'conclusive grounds' decision or, if another type of application is pending, within 28 days of the decision on that application, so it makes sense if this is something people have discussed with their lawyers beforehand. They can work as domestic workers in private or diplomatic households. From 24 November not

[1] https://www.gov.uk/government/publications/overseas-domestic-workers-visa-independent-review
[2] Statement of changes in Immigration Rules HC 877.

only those currently working as domestic workers or with leave in this category (which they are applying to extend) can apply but also those who had been domestic workers and were then given leave outside the immigration rules as a survivor of trafficking or slavery will be able to apply for this two year grant of leave.

This right is in addition to the right of any domestic worker who is found to have been enslaved or trafficked to apply for leave as a trafficked person which, if granted, permits them to work in any job (including as a domestic worker) and does permit them to have recourse to public funds. Such leave is normally granted for between 12 and 30 months.

Mr Ewin's made a number of other recommendations concerning information, advice and support meetings and the government broadly accepted these. The aim is better provision of better information to domestic workers, including through face to face meetings. The government is piloting a system where workers can be required to attend an interview as part of the application process.

There is now a form (Appendix 7 immigration rules) that workers and their employers are required to sign setting out the terms and conditions of employment required for overseas domestic workers in private households in the UK, in particular payment of the national minimum wage. It is not very different from what existed before.

The government intends that workers should be required to attend a meeting shortly after their arrival in the UK at which they will be told about their rights. The Government wishes to introduce a system under which employers who wish to bring domestic workers to the UK will need to be registered with UK Visas and Immigration. If they fail to comply with their obligations, they will be removed from the register and will no longer be able to bring in workers in future. It is unclear that this requirement can be applied to workers in diplomatic households, given that employers' rights to bring them in stem from an international agreement, the Vienna Convention on Diplomatic Relations, but we wait to see the detail of the government's proposals. An employer will either already be on the register when s/he applies to bring in a particular worker, or will be making an application to bring in that worker. Whether this results in a system of any quality control depends upon how easy it is to get on the register.

Last week, on 3 November 2016, the government announced further changes to the immigration rules.[3] For the first time in many years it has made some changes which will affect the position of those who entered before April 2012 and have not yet applied for settlement.

One of the changes affects all workers in private households. The Immigration Rules are amended with effect from 24 November 2016 to remove the upper age limit (65) currently applied to those applying in the overseas domestic worker in private household category.

Another new change that will potentially affect everyone relates to applications made when a person have no leave, when they are an overstayer. While it will remain the case that a person who has a been found to be a survivor of trafficking or slavery (a positive conclusive grounds decision under the national referral mechanism) will have 28 days in which to make an application to stay in the UK as a domestic worker for up to two years, in all other cases the Home Office expects a person to make an application within 14 days of a refusal of an

[3] Statement of changes in Immigration Rules HC 877.

application for leave, or the end of the time they had to bring an appeal or administrative review to challenge the decision, or at the end of any appeals or other challenges. In all other cases a person will be expected to be out of time by no more than 14 days and to be able show a good reason why they are applying out of time. Previously a person could overstay for 28 days and did not have to show a reason for this when making a new application.

This change will not affect those applying for indefinite leave to remain insofar as any periods of overstaying before 24 November 2016 are concerned. It will still be all right to have had periods of overstaying of up to 28 days and still be considered to have been 'continuously lawfully resident' in the UK.

Another change that will affect those on the pre-April 2012 long-stay visa as domestic workers in private households is that henceforth when applying for more leave, instead of showing that a person is required for 'full-time' work they must show that they are required to work a 30 hour week. This is unlikely to be a problem for most domestic workers.

Case of *Benkarabouche* in the Supreme Court November 2016

Ms Janah was employed as a member of the domestic staff at the Libyan Embassy in London. Ms Benkharbouche was employed in the Sudanese Embassy. Following dismissal from their employment, they issued claims in the Employment Tribunal. Libya and Sudan claimed immunity from suit under the State Immunity Act 1978. Ms Janah and Ms Benkaharbouche said that it would be breach of their human rights under Article 6 (Right to a fair trial) and Article 14, of the European Convention on Human Rights (and, insofar as the cases fell within EU law, rights under Article 47 of the European Charter which also protects rights and freedoms) not to hear their cases and argued that the provisions of the State Immunity Act 1978 which were stopping them bringing their cases should be 'read down' as provided for in section 3 of the Human Rights Act 1998, so that their claims could proceed; and art.47 of the EU Charter parallels art.6 ECHR such that the State Immunity Act should be disapplied from the elements of the claim that come within the scope of EU law. The Court of Appeal agreed (**[2015] EWCA Civ 33).** Libya and Sudan might have been content to leave it there, but the Secretary of State for Foreign and Commonwealth Affairs asked to be made a party to the case and is taking it to the Supreme Court, which will make the final decision. The AIRE Centre and 4A Public Interest Lawyers are intervening.

Case of *Reyes* goes to the Supreme Court May 2016

This case was decided by the Court of Appeal; *Reyes & anor v Al-Malki & anor* [2015] EWCA Civ 32 (05 February 2015)

Here the workers, rather than being were employees of diplomatic agents rather than of mission. The diplomat, as an employer, is protected by the Diplomatic Privileges Act 1964, which implements the Vienna Convention on Diplomatic Relations 1961 into domestic law. The Act provides diplomatic agents with immunity against criminal prosecution and civil claims, except in limited circumstances identified in Article 31 of the Convention, set out in Schedule 1 to the 1964 Act. The Government has said that it will request a waiver of a diplomat's immunity if an allegation of mistreatment of abuse requires further police investigation.

In *Reyes* the workers were Philippine nationals employed as domestic workers by a Saudi diplomat. The workers brought discrimination and National Minimum Wage claims against their employer. The diplomat stated that he had diplomatic immunity; they said this did not apply because Article 31.1(c) of the Convention means that diplomatic immunity does not apply in relation to "commercial activity exercised by the diplomatic agent … outside his official functions". The Court of Appeal held that Article 31.1(c) did not apply, as employing domestic staff could not be construed as commercial activity outside the diplomat's functions and that therefore domestic workers of diplomatic agents could not assert UK employment rights against their employers. This is being appealed.