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RESEARCH AND REPORTS

Researching Barriers to Access to Justice for Migrant Domestic Workers in Diplomatic Households

1. INTRODUCTION

The vulnerabilities created by the precarious legal status of many migrant domestic workers, as well as the influence of the relationship of power and dependency between domestic workers and their employers on this precariousness, have been highlighted in recent research in the area.[1] The 'decent work deficit' suffered by domestic workers generally has begun to be addressed in international law, including through the adoption of the ILO Convention Concerning Decent Work for Domestic Workers in 2011.[2] Notwithstanding these important developments in standard setting at the international level, migrant domestic workers employed as private staff by diplomats continue to be among the most at-risk categories of worker when it comes to labour exploitation, with two elements combining to effectively block access to legal remedies for this group: the dependent nature of their legal status (the dependency of the worker's visa status on the on-going employment relationship) and the diplomatic immunity of the employer under the 1961 Vienna Convention on Diplomatic Relations[3] and customary international law.[4]

While a considerable body of case law and academic commentary has emerged in the USA around the specific gaps in rights protection experienced by diplomatic

[1] See, for example, Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 *Work, Employment &* Society 300; Murphy, 'The Enduring Vulnerability of Migrant Domestic Workers in Europe' *International and Comparative Law Quarterly*, forthcoming, July 2013.

[2] Convention Concerning Decent Work for Domestic Workers, International Labour Organisation, adopted at the 100th session of the International Labour Conference, Geneva, 2011. See generally, Albin and Mantouvalou, 'The ILO Convention on Domestic Workers: From the Shadows to the Light' (2012) 41 ILJ 67; Blackett, 'Introduction: Regulating Decent Work for Domestic Workers' (2011) 23 *Canadian Journal of Women and the Law* 1.

[3] Vienna Convention on Diplomatic Relations (adopted 14 April 1961, entered into force 24 April 1964), 500 UNTS 95 (hereinafter, the '1961 Convention').

[4] Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinia, UN Doc A/HRC/15/20 (18 January 2010), at para. 57.

domestic workers,[5] this has not been replicated in the European context. This short article reports on some of the key issues, as explored as part of an Irish Research Council-funded research project undertaken in University College Cork (led by Professor Siobhán Mullally) on 'Migrant Domestic Workers and EU Migration Law Regimes; exploring the limits of human rights protections'.

2. INFORMAL AND 'TIED' IMMIGRATION ARRANGEMENTS FOR DIPLOMATIC DOMESTIC WORKERS

Immigration arrangements relating to diplomatic domestic workers are often characterised by their relative informality and diplomatic domestic workers generally enter states without a separate legal status to that of their employer. As a general rule, the special immigration status of domestic workers is dependent on the continuation of the employment relationship and their employer's stay in the host country and therefore does not allow them to switch their employer, meaning that once the employment relationship has ended the domestic worker loses her or his right to stay and work in the host state's territory.[6] Ireland, for example, provides a striking example of this informality. No regulated system exists for the entry of diplomatic migrant domestic workers in Ireland: there is no work permit or contract required and the kind of work, the payment and the working conditions do not need to be specified by the employer.[7] The domestic worker has no legal existence independent of the employer and cannot change employer, and the domestic worker is essentially invisible in terms of Irish law. The high degree of informality in respect of the immigration status of diplomatic workers preserves the 'invisibility' of this category of migrant domestic worker.

In contrast, in the UK, 'private servants in a diplomatic household'[8] are covered by the Tier 5 category of the points-based system of immigration.[9] These diplomatic

[5] See generally, Siedell, '*Swarna* and *Baoanan*: Unraveling the Diplomatic Immunity Defense to Domestic Worker Abuse' (2011) 26 *Maryland Journal of International Law* 173; Chuang, 'Achieving Accountability for Migrant Domestic Worker Abuse' (2010) 88 *North Carolina Law Review* 1628; Hoover-Kappus, 'Does Immunity Mean Impunity? The Legal and Political Battle of Household Workers Against Trafficking and Exploitation by the Foreign Diplomat Employers' (2011) 61(1) *Case Western Reserve Law Review* 269; Tai, 'Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity.' (2007) 17(1) *American University Journal of Gender, Social Policy & the Law* 175.

[6] Angelica Kartusch/German Human Rights Institute, 'Domestic Workers in Diplomats' Households: Rights Violations and Access to Justice in the Context of Diplomatic Immunity' (2011), at 26.

[7] Migrant Rights Centre of Ireland, 'Protections for Migrant Domestic Workers Employed by Foreign Diplomats in Ireland: Time for Reform' (December 2010).

[8] The term 'private servant' is drawn directly from the 1961 Convention, which defines the term in Art 1.

[9] They fall into the 'temporary worker - international agreements' category of Tier 5.

employees are generally not exempt from UK immigration law (with the exception of servants of the head of a diplomatic mission employed and paid directly by the state)[10] and are dealt with under the Immigration Rules,[11] however, the process leading to the grant of the visa is relatively informal, the main requirement being a certificate of sponsorship signed by the diplomatic mission.[12]

Despite falling within the scope of the Immigration Rules, private servants working in diplomatic households are not in a position to negotiate favourable terms and conditions of employment or raise employment-related complaints through the employment tribunal system. They are not permitted to change employer, even within the domestic work sector.[13] This in-built level of dependence on the diplomat for employment, legal immigration status and accommodation constitutes an additional structural barrier to bringing an employment claim against the employer, to add to other obstacles such as isolation within the diplomatic home and language difficulties. For these reasons, tied immigration statuses for domestic workers have been criticised by the UN Committee on Migrant Workers and their Families and the UN Committee for the Elimination of all forms of Discrimination against Women.[14]

3. TACKLING THE PROBLEM AT THE ENTRY STAGE: AN EFFECTIVE PROTECTION MECHANISM?

Media and NGO attention focussed on the vulnerability of diplomatic domestic workers has led some countries to put in place mechanisms of control at the 'entry' stage of the immigration process. Some jurisdictions require a work contract signed by both parties and in line with the host country's labour law standards,[15] or a declaration signed by the employer and stamped by the embassy confirming that they

[10] See UK Border Agency, 'Private servants in diplomatic households: changes affecting diplomatic missions', available at http://www.ukba.homeoffice.gov.uk/sitecontent/newsfragments/61-servants-diplomatic (last accessed 3 July 2013).

[11] Paras 158 and 159 and 245ZM to 245ZS of the Immigration Rules.

[12] See para 245ZO of the Immigration Rules and paras 105 and 111(f) of Appendix A to the Immigration Rules ('Attributes'). Workers who have a Certificate of Sponsorship are awarded sufficient points to qualify under the points-based system.

[13] Para 245ZR(h)(iv) of the Immigration Rules.

[14] Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No 1 on Migrant Domestic Workers (UN Doc CMW/C/GC/1, 23 February 2011); Committee for the Elimination of All Forms of Discrimination Against Women, General Recommendation No 26 on Women Migrant Workers (UN Doc CEDAW/C/2009/WP.1/R, 5 December 2008).

[15] Austria, Belgium and France provide mandatory model contracts. German Human Rights Institute, at 23.

will respect national labour law and will provide for the domestic worker's accommodation, health insurance and return flight after the contract ends.[16] In Austria, France and the Netherlands it must be shown that an Austrian bank account has been opened.[17] Foreign Affairs departments in some countries have personal meetings with domestic workers.[18]

Following amendments to the Immigration Rules in 2012, it is now a requirement of diplomatic domestic workers visa (as well as the ordinary 'overseas domestic workers' visa) that written terms and conditions of employment in the UK are agreed by the worker and the employer prior to entry.[19] In addition, administrative practice is to be that information will be provided to the worker when they apply for their visa, which 'will inform them of their rights in the UK and how to obtain help if they have problems'.[20] The express reasoning behind these changes is to 'minimise the possibility of abusive relationships being brought to the UK'.[21] These initiatives mirror practices in other European states, as mentioned above, aimed at reducing the invisibility and isolation of diplomatic domestic workers.

However, experience across Europe (as well as the US) shows that it is very difficult to monitor the effectiveness of such policies, partly because they are usually set out in administrative circulars and documents rather than in legally binding texts (although the requirement for a contract of employment forms part of the binding Immigration Rules in the UK), and also because of the inviolability of the diplomat's private residence under the 1961 Convention.[22] These preventative measures may be useful for domestic workers commencing their employment with diplomatic and consular officials, however, avenues of redress for those already suffering abuse and exploitation remain limited due to the restrictions of diplomatic immunity.

[16] OSCE Occasional Paper No 4, at 28.

[17] The Austrian authorities also require a layout plan of their house showing where the private room of the domestic worker is to be located. German Human Rights Institute, at 23.

[18] Upon arrival, workers in Austria, Belgium, Switzerland and (with some exceptions) in France must attend the relevant department unaccompanied to collect their special identification card. In Austria, the domestic worker has a personal meeting with the Austrian authorities each year. German Human Rights Institute, at 24.

[19] Para 245ZO(f)(ii) of the Immigration Rules. For the form of the 'Statement of the Terms and Conditions of Employment of an Overseas Domestic Worker in a Diplomatic Household in the UK', see Appendix Q to the Immigration Rules.

[20] 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, at 16. This information is a two-page letter, providing (among other things) contact details for employment rights agencies, the NGO Kalayaan and the trade union Unite. This is available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/ecg/dworkers-informationsheet.pdf (last accessed 3 July 2013).

[21] Ibid., at 16.

[22] Article 29 of the 1961 Convention.

4. DIPLOMATIC IMMUNITY

The other important element that increases the power of the diplomatic employer vis-à-vis the domestic worker is the immunity afforded by the 1961 Convention. Article 31 provides that diplomatic agents[23] shall enjoy immunity from jurisdiction and from enforcement measures, with Article 31(1) stating as follows:

> A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

The Article 31(1)(c) exception to civil immunity has been interpreted as excluding from its scope ordinary contracts 'incidental to life in the receiving state', such as a contract for domestic services.[24] This means that diplomatic domestic workers do not benefit from this exception to civil immunity and are left in a position of being unable to enforce employment-related rights against employers.

5. LITIGATING EMPLOYMENT RIGHTS IN THE CONTEXT OF DIPLOMATIC IMMUNITY

These issues have been litigated in a series of cases in the USA, which have concerned a spectrum of questions including the interpretation of the commercial activity exception, residual immunity and civil suits for trafficking and forced labour.[25]

[23] Note that diplomats who are nationals or permanent residents of the host state have more limited immunity. They enjoy immunity from jurisdiction and inviolability only in respect of official acts performed in the exercise of their function (Art. 38 (1)).

[24] Malcolm M. Shaw, *International Law* (Cambridge University Press, 6th edn, 2008), p. 767. *Tabion v Mufti* 73 F.3d 535 and Denza, *Diplomatic Law*, p. 301. See also *De Andrade v De Andrade* 118 ILR, pp 299, 306–307.

[25] Some of these authorities include *Tabion v Mufti* 877 F. Supp. 285 (E.D.Va. 1995), aff'd, 73 F.3d 535 (4th Cir. 1996); *Baoanan v Baja* F.Supp.2d 155; and *Swarna v Al-Awadi*, 622 F.3d 123 (2d Cir. 2010). See also, for example, *Montuya v Chedid* Civil Action No 10–695 (JEB) (D.D.C.,

There appears to have been no UK authority on this issue until the 2012 High Court case of *Wokuri v Kassam*,[26] which was an application for dismissal of employment claims on the grounds of diplomatic immunity. Ms Wokuri had made claims that her diplomat employer had not issued her with a copy of her employment contact and had failed to pay her in full. Ms Wokuri was employed in London as a chef and general domestic worker for Ms Kassam, a Ugandan diplomat. Ms Kassam was reassigned to Rome in 2011. The applicant argued that the claimant was employed directly by the High Commission and that even if she had employed the claimant herself, she did so in the exercise of her functions as a diplomat in the High Commission and was entitled to diplomatic immunity.[27] The High Court referred to two Articles of the 1961 Convention (as implemented in UK law by the Diplomatic Privileges Act 1964)[28] as being applicable in this case: Article 31(1) and Article 39(2).[29] Article 39(2) provides for a limited residual immunity to a diplomat who is no longer in post, providing that privileges and immunities shall normally cease when the person's functions come to an end, however, 'with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist'.

The claimant had worked for the applicant in Uganda for several years before she had even been appointed a diplomat, meaning that this contract was not entered into 'in the exercise of her functions' as a diplomat. There was no evidence that any changes were made to this contract when Ms Wokuri came to the UK to work for Ms Kassam or that the job had changed. Neither was there any evidence that she worked directly for the High Commission at any official functions.[30] On examining a number of relevant US authorities,[31] Newey J held that, pursuant to Article 39(2), diplomatic immunity did not apply in the circumstances as the claim did not arise out of acts performed in the exercise of Ms Kassam's functions as a diplomat.[32]

The decision in *Wokuri* was followed by the UK Employment Appeals Tribunal in *Abusabib v Taddese*,[33] a case taken on the grounds of direct race discrimination and harassment, harassment on grounds of religion and sexual harassment.

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26 April 2011); *Gonzales Paredes v Vila* 479 F. Supp. 2d 187, 189–90 (D.D.C. 2007); *Ahmed v Hoque* No 01 Civ. 7224(DLC), 2002 WL 1964806 (S.D.N.Y. 23 August 2002).

[26] [2013] Ch. 80.

[27] Ibid., para 3.

[28] Sched 1 to the Diplomatic Privileges Act 1964 contains Art from the 1961 Convention and s 2 of the Diplomatic Privileges Act 1964 provides for the Arts of the 1961 Convention to have the force of law in the UK. The Arts to be found in sched 1 include Arts 31 and 39 (discussed further below).

[29] Ibid., paras 9–10.

[30] Ibid., para 27(iii).

[31] The cases considered were *Tabion v Mufti* 877 F. Supp. 285 (E.D.Va. 1995), aff'd, 73 F.3d 535 (4th Cir. 1996); *Baoanan v Baja* F.Supp.2d 155; and *Swarna v Al-Awadi*, 622 F.3d 123 (2d Cir. 2010).

[32] [2013] Ch 80, para 27(v).

[33] *Abusabib & Anor v Taddese* UKEAT Appeal No. UKEAT/0424/11/ZT, 3 December 2012.

Reflecting US jurisprudence, these decisions recognise a narrow limitation on the doctrine of immunity which means that persons who are no longer diplomats cannot claim immunity for acts performed by them during their time as a diplomat which were outside the exercise of their functions as a member of the mission. However, both the High Court and the EAT confirmed that the immunity of a sitting diplomat employer of a domestic worker was more or less absolute, following the US courts' approach to the 'commercial activity exception' set out in Article 31(1)(c). This signals a reluctance to interfere with the overarching principles of diplomatic immunity, linked to the perceived international relations implications of exposing sitting diplomats to civil and criminal litigation.

6. CONCLUSIONS

The research briefly outlined in this report has sought to highlight and illustrate how the intersection of the legal regulation of the immigration and the diplomatic systems moulds diplomatic domestic workers into a position of subordination and susceptibility to exploitation. It is clear that employment and other protections which are available in principle to such workers are blocked by the operation of the law of immunity. In very serious cases involving forced labour, servitude and trafficking, this raises important issues concerning the nexus between the international law of immunity and international human rights norms, especially peremptory, or *jus cogens* rules of customary international law.[34] More broadly, it restricts the individual's access to the courts, as protected by Article 6 of the European Convention of Human Rights as well as other international instruments.[35] However, in practice, at the national level at least, the exigencies of preserving diplomatic immunity continue to prevail against human rights and labour protection considerations, and access to legal remedies for migrant domestic workers in diplomatic households remains severely constrained.

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[34] Some of these arguments were raised (unsuccessfully) in the US case of *Sabbithi v Al Saleh* 605 F. Supp. 2d 122 (D.D.C 2009), for example.

[35] *Cudak v Lithuania* (15869/02) Unreported 23 March 2010 and *Sabeh El Leil v France* (no 34869/05), 29 June 2011.

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