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# Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights

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**ABSTRACT**

Human rights law has begun to address the inequalities and exclusions that structure the domain of domestic work. The "everyday" of exclusions from employment law and social security, and precarious migration status, had, until recently, attracted only limited attention. This article examines the reforms introduced in the Overseas Domestic Workers (ODW) visa regime in the United Kingdom. The move towards a more precarious migration status for migrant domestic workers marks a rejection of the reforms secured through sustained political activism. It also highlights the contingency and instability of political moments that secure progressive change for migrants, and the enduring limits of human rights law.

## I. INTRODUCTION

Domestic work, the provision of caring work in the intimate, domestic sphere, is work that continues to be undertaken primarily by women and increasingly by migrant women.[1] The expected reduction in demand for paid domestic workers has not materialized, leading some to ask whether the emergence of "global care chains" should be assessed as a major defeat for feminist

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1. Helma Lutz, *At your Service Madam! The Globalization of Domestic Service*, 70 Feminist Rev. 89 (2002). *See also* Maria Galotti, International Migration Program, *The Gender Dimension of Domestic Work in Western Europe*, No. 96 International Migration Papers 9–13 (2009).

movements or as "unfinished business."[2] Combined with the movement of women into paid employment, the retreat from welfare state supports in Western Europe has produced care economies that are increasingly reliant on the outsourcing of intimate, reproductive labor.[3] A range of factors has contributed to the demand for paid domestic labor, including population aging, changing household structures, increasing female participation in the labor market, difficulties in reconciling paid employment and caring for dependants, and the availability of a flexible, low cost, female, and mainly migrant, work force.[4]

Human rights law has somewhat belatedly begun to address the inequalities and exclusions that structure the domain of domestic work. As in other areas of international law, it is primarily the moments of crisis that have captured the attention of human rights law. The everyday of workplace exploitation, exclusion from the protections of employment law and social security, and precarious migration status have attracted less attention to date. Recent standard setting initiatives have attempted to address this gap and have included the adoption of the landmark 2011 International Labour Organization (ILO) Convention Concerning Decent Work for Domestic Workers,[5] a General Recommendation from the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) on women migrant workers,[6] and a General Comment from the UN Committee on Migrant Workers and their Families on migrant domestic workers.[7] Against the background of this "justice cascade,"[8] however, migration laws continue to function as limits to the transformative promise of such initiatives. Migration status adds yet another axis of discrimination to the intersections of gender, race, and class, and contributes further to the constructed vulnerability of domestic workers.[9] States remain reluctant to recognize the "dissensus" that arises between "border norms" and evolving human rights standards.[10]

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2. Helma Lutz, *Gender in the Migratory Process*, 36 J. Ethnic & Migration Stud. 1647, 1656 (2010); *see also* Judy Fudge, *Global Care Chains: Transnational Migrant Care Workers*, 28 Int'l J. Comp. Labour L. & Indus. Relations 63 (2012).
3. Lutz, *supra* note 2, at 1654; *see generally* Bridget Anderson, Doing the Dirty Work? The Global Politics of Domestic Labour (2000).
4. For a detailed analysis of global care chains in the context of globalization and North-South inequalities, see Ann Stewart, Gender Law and Justice in a Global Market (2011).
5. Convention Concerning Decent Work for Domestic Workers, (ILO No.189), *adopted* at the 100th session of the International Labour Conference, Geneva (2011) [hereinafter Convention Concerning Decent Work].
6. Committee for the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 26 on Women Migrant Workers (5 Dec. 2008), U.N. Doc. CEDAW/C/2009/WP.1/R (2008) [hereinafter General Rec. No. 26].
7. Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No. 1 on Migrant Domestic Workers (23 Feb. 2011), U.N. Doc. CMW/C/GC/1 (2011) [CMW General Comm. No. 1].
8. This term is borrowed from Kathryn Sikkink, The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics (2011).
9. *See* Lutz, *supra* note 2, at 1654; *see generally* Anderson, *supra* note 3.
10. *The* term "border norms" is borrowed from Linda Bosniak, The Citizen and the Alien: Dilemmas of Contemporary Membership (2006).

The UN Special Rapporteur on Contemporary Forms of Slavery has identified a "net of dependency factors" that prevent domestic workers from leaving situations of exploitation, many of which include constructed vulnerabilities linked to migration status.[11] The exploitation of migrant domestic workers is often presented by states as the action of an aberrant and abusive individual employer. The role migration law plays in creating the conditions within which such exploitation occurs, and often goes unchecked, is not acknowledged. As Bridget Anderson notes, however, migration law not only reinforces the unequal power relations between migrant domestic workers and their employers, it also provides unscrupulous employers with mechanisms of control they might not otherwise have.[12]

This article examines the reforms introduced in the Overseas Domestic Workers (ODW) visa regime in the United Kingdom and the politics and practice of human rights that has surrounded these changes. The move toward a more precarious migration status for migrant domestic workers marks a rejection of the reforms secured through sustained political activism by domestic workers advocates. It also highlights the contingency and instability of political moments that secure progressive change and legal recognition of migrant workers' human rights claims. The reforms to the ODW visa follow on from the UK government's failure to support the 2011 ILO Convention on Decent Work for Domestic Workers and its ambiguous commitment to the expansion of EU anti-trafficking legislation.[13] These steps reflect a resistance to the cascade of human rights standards that have sought to overcome the limits of migration status as a prerequisite to the exercise of rights.[14]

A series of cases before the European Court of Human Rights has highlighted the nexus between migration status and heightened risks of exploitation,[15] as has the work of the CEDAW and Migrant Workers Committees. Limited access to secure migration status, however, remains the norm

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11. Report of the Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences, Gulnara Shahinia, U.N. Doc A/HRC/15/20 ¶ 47 (18 Jan. 2010).
12. Bridget Anderson, *Migration, Immigration Controls and the Fashioning of Precarious Workers*, 24 Work, Employment & Soc'y 300, 312 (2010).
13. *See* Statement to the House of Commons from Minister Damien Green (22 Mar. 2011), *available at* http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/eu-direct-human-trafficking-wms/. The UK Government did not initially opt in to the proposed Directive.
14. *See, e.g.*, Inter-American Court of Human Rights Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion OC-18/03, (17 Sept. 2003), Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003)). See also the work of the Global Forum on Migration and Development: Background Paper, *Protecting Migrant Domestic Workers: Enhancing their Development Potential* (Prepared for Mauritius GFMD 2012, *available at* http://www.gfmd.org/en/docs/mauritius-2012); Checklist to Support and Protect Domestic Workers, Mauritius GFMD 2012, *available at* http://www.gfmd.org/en/docs/mauritius-2012).
15. Siliadin v. France, App. No. 73316/01, Eur. Ct. H. R. (2005); Rantsev v. Cyprus and Russia, App. No. 25965/04 Eur. Ct. H. R. (2010); C.N. and V v. France, App. No. 67724/09 Eur. Ct. H. R. (2012); C.N. v. The United Kingdom, App. No. 4239/08 Eur. Ct. H. R. (2012).

for many domestic workers. As the changes in the UK migrant domestic workers' visa regime reveal, states continue to invoke the deportability of migrant workers.[16] The move by the UK government to introduce a highly precarious temporary status for migrant domestic workers and wider policy discourse on circular migration marks a resistance to the expansion of human rights norms to the realm of domestic work and to migrants.[17] This resistance is accompanied by appeals to protective norms that have shaped the law's engagement with migrant women. The draft Modern Slavery Bill, published on 16 December 2013, returns the focus again to the specter of trafficking and slavery, yet leaves untouched the precarious migration status that exacerbates the potential for exploitative work conditions for domestic workers.[18] These protective norms do little to expand or support the agency of domestic workers and ultimately pose only a limited challenge to the continuums of exploitation that define domestic work, particularly for those whose migration status is precarious or irregular.[19] Against this background, the "jurisgenerative" potential of human rights standards, heralded by many, continues to be limited.[20]

## II. DECENT WORK STANDARDS, EXPANDING HUMAN RIGHTS NORMS: A JUSTICE CASCADE?

As Joseph Carens has noted, migrant domestic workers are "hard to locate on the map of democracy."[21] The movement of migrant domestic workers across multiple jurisdictional boundaries, between states as well as from the public domain into the private domain of the home, is central to the constructed vulnerability of the domestic worker.[22] Law plays a dual role

16. On the "deportable alien," see Alison Kesby, The Right to Have Rights: Citizenship, Humanity, and International Law 111 *et seq.* (2012).
17. Catherine Dauvergne & Sarah Marsden, *The Ideology of Temporary Labour Migration in the Post-Global Era*, *in* Citizenship in a Globalized World: Perspectives from the Immigrant Democracies (Ayelet Shachar & Geoffrey Brahm Levey eds., 2012).
18. Home Office, *Draft Modern Slavery Bill,* Dec. 2013 Cm 8770. *See also* Joint Committee on the Draft Modern Slavery Bill, oral evidence 28 Jan. 2014, *available at* http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-modern-slavery-bill/written-evidence/. (HC [1019], discussing the implications of the 2012 changes to the overseas domestic worker visa regime.)
19. The concern with international law's resort to protective norms, particularly in the realm of human trafficking is evident in the work of Dianne Otto and others.
20. The term "jurisgenerative" is borrowed from Robert M. Cover, *The Supreme Court, 1981 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 15 (1982). *See also* Selya Benhabib, Dignity in Adversity: Human Rights in Troubled Times 15 (2011); Dauvergne & Marsden, *supra* note 17, at 56; Fudge, *supra* note 2, at 63.
21. Joseph H. Carens, *Live-in Domestics, Seasonal Workers, and Others Hard to Locate on the map of Democracy*, 16 J. Pol. Phil. 419 (2008).
22. Judy Fudge, *Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada*, 23 Can. J. Women & L. 235 (2011).

here, jealously guarding the public borders of the state through immigration laws while at the same time "reifying the private borders of the home."[23] The UN Special Rapporteur on the Human Rights of Migrants has pointed out that "the lack of watchdog mechanisms and inadequate monitoring by the Government in the country of destination, the recruiting agencies and even consulates, mean that migrant domestic workers are cut off and abuses remain unseen."[24]

For some, the movement to establish decent work standards for domestic work is doomed to failure, given the historical legacy of low status, low pay, and exploitation associated with such work. Legal reforms, it is argued, cannot fully account for the wider "realm of indignities" experienced by domestic workers or the dynamics of power played out on "concrete historicized bodies" that are gendered, raced, and classed.[25] Migrant domestic workers are situated in the isolating and devalued "privatized economy of household labor," where highly personalized and emotionally exacting work is undertaken in situations that are "heavy with the histories of radicalized subordination."[26] Lack of enforcement and application restricts the potential for human rights norms to disturb the ongoing reproduction of such histories.[27] Against this background, the expansion of decent work standards to domestic work may provide a corrective, as Adelle Blackett has suggested, to the "abstract articulations" of rights that traditionally overlook exploitation of domestic workers.[28] The refusal on the part of some governments and employers to support this expansion of rights, however, continues to postpone what is a significant political moment for domestic workers.

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23. *Id.* at 243, referencing the work of Adelle Blackett, *Promoting Domestic Workers: Human Dignity through Specific Regulation, in* Domestic Service and the Formation of European Identity: Understanding the Globalization of Domestic Work, 16th–21st Centuries (Antoinette Fauve-Chamoux ed., 2005).
24. *Report of the Special Rapporteur on the Human Rights of Migrants*, Commission on Human Rights, 60th Sess. U.N. Doc. E/CN.4/2004/76 (2004).
25. Adelle Blackett, *Introduction: Regulating Decent Work for Domestic Workers*, 23 Canadian J. Women & L. 1, 43 (2011), *citing* Encarnación Gutierrez-Rodriguez, Migration, Domestic Work and Affect: A Decolonial Approach on Value and the Feminization of Labor 6 (2010).
26. Fiona Williams, *Migration and Care: Themes, Concepts and Challenges*, 9 Soc. Pol'y & Soc'y 385, 386 (2010).
27. Shireen Ally, *On Laws, Rights and Conventions: A Provocation, in* Helen Schwenken, Elisabeth Prügl et al., *Conversations*, 13 Int'l Feminist J. Pol. 437, 457 (2011).
28. Blackett, *Introduction: Regulating Decent Work for Domestic Workers*, *supra* note 25, at 44, *citing* Adelle Blackett, *Situated Reflections on International Labour Law, Capabilities, and Decent Work: The Case of Centre Maraîcher Eugène Guinois*, Revue Québécoise de droit Int'l 223, 242 (2007).

### A. The ILO Convention on Decent Work for Domestic Workers: Beyond "Noblesse Oblige"

This reification (and exclusion) of the household was one of the key issues that emerged in debates leading up to the adoption of the ILO Convention on Decent Work for Domestic Workers (Convention). The 2011 Convention is the first dedicated international instrument to address the specificity of domestic work. As the Report that preceded the Convention notes, it is intended to mark a transition from paternalistic conceptions of "good employer[s] acting out of a sense of *noblesse oblige*," to respect for domestic workers' rights.[29] The Convention seeks to extend core decent work standards concerning fair terms of employment and working conditions to the realm of domestic work. States are required to ensure that domestic workers enjoy equality with other workers regarding working time,[30] entitlements to minimum wage,[31] healthy and safe working conditions,[32] and social security protection, including maternity.[33] It also requires states to introduce measures providing for the regulation of employment agencies[34] and for effective and accessible dispute resolution mechanisms for domestic workers.[35]

The only specific provision in the Convention directly relating to migration is found in Article 8, which provides that national laws or regulations specify that written job offers or contracts of employment are provided to domestic workers prior to their departure to the country where the work is to be performed.[36] The conditions under which migrant domestic workers are entitled to repatriation following the expiry or termination of their contract of employment are also to be specified predeparture.[37] This requirement, while important, is relatively weak. It requires only that such terms and conditions be specified, but does nothing to address the inequalities of bargaining power between worker and employer. Article 7 of the Convention adopts a similarly minimal approach, requiring that domestic workers be informed of the terms and conditions of their work, but without specifying what the terms and conditions should be.[38] Article 9 requires that domestic workers are "free to reach agreement with their employer or potential employer on whether to reside in the household."[39] Such freedoms remain illusory,

29. International Labour Conference, 99th sess., *Report on Decent Work for Domestic Workers* (Report IV(1)) 13 (2010) [hereinafter ILO Report IV(1)].
30. *Id.* art. 10.
31. *Id.* art. 11.
32. *Id.* art. 13.
33. *Id.* art. 14.
34. *Id.* art. 15(a).
35. *Id.* art. 16.
36. Convention Concerning Decent Work, *supra* note 5, art. 8(1).
37. *Id.* art. 8(4).
38. *Id.* art. 7.
39. *Id.* art. 9(a).

however, where immigration restrictions including access to public funds, such as affordable or social housing programs, for migrants are restricted and where minimum wage protections are not enforced or applicable. The proposed model contract of employment for domestic workers, noted in the accompanying Recommendation, seeks to overcome the minimal approach taken in the Convention itself.[40] Its inclusion in the nonbinding text of the Recommendation, however, reflects the reluctance of states to take concrete steps to realize the aspirations of a shift from status to contract for domestic workers. Even these limited requirements attracted opposition from states, however. The UK government argued that it was not, in its view, "the duty of a government to ensure that terms and conditions of employment were understood by workers."[41]

Despite the commitment to addressing disadvantage within the domestic work sector, the Convention's scope is deliberately limited. The specific difficulties facing agency workers, domestic workers in diplomatic households, irregular migrant domestic workers, and workers categorized as "au pairs" were highlighted repeatedly in the submissions made during the drafting process of the Convention.[42] These issues remain unresolved as the Convention continues to allow for "de-juridifications" that could render its expansion of rights meaningless for such workers. Allowing for the possibility of opting out, of excluding certain categories of domestic workers, was a concession to states and to employers' organizations, many of which opposed the proposal to adopt a legally binding instrument.[43] The position of the European Union during the negotiating process, for example, was to support the adoption of a Convention supplemented by a Recommendation, but to ensure flexibility in the text of the Convention itself.[44] This flexibility is found in Article 2 of the Convention, which allows for a sweeping measure of disentitlement with respect to "limited categories of workers in respect of which special problems of a substantial nature arise."[45] These special problems are not specified. A requirement of consultation with employers or employees—and where they exist, domestic workers' organizations—is intended to provide a check on the process of opting out. The Office of the High Commissioner for Human Rights had specifically expressed concern

40. ILO, Recommendation Concerning Decent Work for Domestic Workers, (ILO Recommendation No. 201) Geneva, 16 June 2011, ¶ 6(3) [hereinafter ILO Recommendation 201 Concerning Decent Work].
41. ILO, *Report of the Committee on Domestic Workers, Provisional Record No. 15*, (ILO Conf. 100th sess.), Geneva (June 2011), ¶ 895 [hereinafter, ILO, *Report of the Committee on Domestic Workers*, 2011].
42. RESPECT Network, Introduction and Key Recommendations for an ILO Convention on Domestic Work, Amsterdam: Briefing Paper, Recommendations 3–4 (May 2009).
43. ILO Report IV(1), *supra* note 29, ¶ 15.
44. *Id.* ¶ 2.
45. Convention Concerning Decent Work, *supra* note 5, art. 2(2)(b).

at the wide discretion allowed by Article 2 during the drafting process.[46] Despite its concerns, the provision remained in the final text, however, and is a significant concession to the pursuit of greater flexibility, for employers and states, in defining the content of rights enjoyed by domestic workers.

The ILO has specifically acknowledged the need to address a wide spectrum of actors, both state and non-state, if the objectives of standard-setting initiatives such as the Convention and Recommendation are to be met. Recruitment agencies are key actors in this process. Article 15 of the Convention specifically addresses the role of private recruitment agencies and notes measures required to safeguard against abusive practices by such agencies.[47] This provision is particularly important for migrant domestic workers. The need for cooperation between states to address exploitative practices in the context of transnational recruitment is highlighted. However, the requirement of an "employment relationship" in Article 1 of the Convention itself potentially restricts the application of the Convention to domestic workers categorized as self-employed or those who are recruited through private agencies. The specific role of intermediaries, such as recruitment agencies is widely recognized as a matter of concern given the vagaries of domestic employment legislation and its application to agency workers. Although Article 15 of the Convention requires members to adopt laws specifying the obligations of agencies toward domestic workers, considerable discretion is left to determining the scope of such obligations.

The regulation of employment agencies was one of the more contentious issues that arose during the drafting process, with several NGOs, workers' representatives, and governments highlighting the importance of close monitoring. The government members of the Africa group, represented by South Africa, specifically identified the role of private recruitment agencies as a key concern. Human Rights Watch, in its submission, pointed to the need to ensure that employment agencies did not charge domestic workers for recruitment costs incurred by employers, a practice that frequently leads domestic workers to forced labor and servitude.[48] The issue of exorbitant fees charged by agencies was also highlighted by the Migrant Forum in Asia.[49] Despite recognition of these risks, the Convention itself does little to directly address abusive practices by agencies.

The adoption of the Convention and the global momentum that led to its enactment as the first binding ILO instrument in more than a decade is an important political moment. However, it is one that is marked by an

46. ILO: *Decent work for Domestic Workers*, Report IV(2A), International Labour Conference, 100th Session, Geneva, 2011 at 21.
47. Convention Concerning Decent Work, *supra* note 5, art. 15.
48. ILO, *Report of the Committee on Domestic Workers*, 2011, *supra* note 41, ¶ 49.
49. *Id.* ¶ 50.

enactment of limits. The exclusions and exemptions that remain within the text of the Convention reflect the continuing reluctance by some members to acknowledge the domestic worker as a subject of rights and as more than a commodity or ingredient in an economic process. There is also a reluctance to acknowledge the imperative to redraw gendered boundaries between public and private if international legal standards are to secure a movement beyond *noblesse oblige*. Taking this additional step also requires recognizing the intersections of overlapping axes of discrimination ~~of~~ race, gender, and migration status.[50] Recognition of these intersections is evident in the work of UN human rights treaty bodies, which have somewhat belatedly begun to address the sphere of domestic work. This gradual expansion of multilateral standards to encompass the realm of domestic work has the potential to move beyond the limits of bilateral attempts at reform, where the predictable tradeoff between access to jobs and workers' rights too frequently kicks in.[51]

## B. Human Rights at the Intersections: Recognizing the Nexus with Migration Status

As Kimberlé Crenshaw has noted, "the intersections of racism and sexism . . . cannot be captured wholly by looking at the race or gender dimensions of those experiences separately."[52] Addressing the intersections of both expands the possibilities of human rights law's potential to address discrimination. Migration status, however, is often excluded from the scope of race discrimination prohibitions and is frequently ignored in analyses of discrimination that adopt a "nationally insular approach."[53] Notably, the reluctance to extend nondiscrimination norms to the migration context is evident even in the Migrant Workers Convention, which does not include migration status in the list of nondiscrimination prohibitions.[54] The Migrant Workers Convention[55] has been described "as a beacon of what has not been

50. See written comments submitted by Interights to the European Court of Human Rights (pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court) in Kawogo v. UK, App No. 56921/09, Eur. Ct. H. R. ¶ 18 (2013).
51. *Labor and Migration in International Law: Challenges of Protection, Specialization and Bilateralim, Remarks by Nisha Varia*, 105 Am. Soc'y Int'l L. Proc. 410, 411–12 (2011).
52. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1244 (1991).
53. Bosniak, *supra* note 10, at 144, n.23.
54. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *adopted* 18 Dec. 1990, G.A. Res. 45/158, U.N. GAOR, 45th Sess., 2220 U.N.T.S. 3 (*entered into force* 1 July 2003).
55. *Id.*

achieved in the realm of rights,"[56] both because of its limited ratifications to date and the distinctions it makes between the rights of documented and undocumented workers. In the practice of UN human rights treaty bodies, including the Migrant Workers Committee, however, the significance of migration status as relevant to questions of racial and gender discrimination is increasingly probed, despite apparent textual exclusions from the treaty standards themselves.[57]

The obligations of effective deterrence that arise from forced labor, slavery, and trafficking prohibitions are enshrined in several international and regional instruments, including the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[58] the International Covenant on Civil and Political Rights,[59] the Palermo Protocol,[60] and the Council of Europe Convention on Action Against Trafficking.[61] Developing obligations of due diligence at the regional and international levels have highlighted the nexus between states' positive obligations of prevention and nondiscrimination norms potentially of significance to migrant domestic workers. The European Court of Human Rights has repeatedly recognized that a state's positive obligations under the Convention go beyond the imposition of criminal sanctions and include policing and operative measures. In *Opuz v. Turkey*, the European Court of Human Rights, for the first time in Strasbourg caselaw, linked states' obligations to combat domestic violence to the Article 14 nondiscrimination requirements of the European Convention on Human Rights (ECHR).[62] More generally, the gradual expansion of indirect discrimination prohibitions suggests possible strategies for such challenges.[63] The *Jessica Lenahan* case before the Inter-American Court of Human Rights,[64] the *Campo Algondero* case,[65] and others similarly point to the nondiscrimination nexus. Given that the majority of domestic work-

56. Dauvergne & Marsden, *supra* note 17, at 21.
57. Committee for the Elimination of All Forms of Racial Discrimination, General Recommendation No. 30 on Discrimination against Non-Citizens, (10 Jan. 2004).
58. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (*entered into force* 3 Sept. 1981).
59. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).
60. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000).
61. Council of Europe Convention on Action against Trafficking in Human Beings 197 (2005).
62. Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H. R., ¶212 (2009).
63. D.H. and Others v. the Czech Republic App. No. 57325/00, Eur. Ct. H. R. (2006).
64. Jessica Lenahan (Gonzales) v. United States, Inter-American Court on Human Rights, Judgment, 21 July 2011.
65. Gonzalez ("Cotton Fields") v. Mexico, Inter-American Court on Human Rights, Judgment, 16 Nov. 2009.

ers are women and many are migrants, a similar nexus between migration law, positive obligations, and nondiscrimination norms arises. The Advisory Opinion of the Inter-American Court on the Juridical Condition and the Rights of Undocumented Migrants points to the transformative promise that underpins human rights standards.[66] Fitting into the discrimination paradigm is not without its difficulties, however, and is a strategy that brings many pitfalls, particularly when required to identify an appropriate comparator[67] or when faced with the possibility not of a legal remedy, but of deportation.

In its General Comment on Migrant Domestic Workers, the Migrant Workers Committee outlines the specific role that immigration law plays in the production of vulnerability.[68] Overly restrictive immigration laws, it notes, lead to higher numbers of migrant domestic workers who are undocumented or in an irregular situation and thus particularly vulnerable to human rights violations.[69] Similar vulnerabilities arise where migration laws tie a worker's migration status to the continued sponsorship of a particular employer, with the result that domestic workers may risk deportation if they leave abusive employment.[70] Any such arrangement can "unduly restrict" liberty of movement and increase exploitation and abuse, "including in conditions of forced labour or servitude."[71] Migration status may also limit access to rights such as family reunification. Where visa or work permit permissions impose limits on access to public funds, rights to education, healthcare, and housing remain illusory.[72] The nexus between discrimination, vulnerability, and migration status is also recognized in the Committee for the Elimination of all Forms of Discrimination Against Women (CEDAW Committee) General Recommendation No. 26 on Women Migrant Workers. The CEDAW Committee notes that while state parties are entitled to control their borders and regulate migration, they must do so "in full compliance" with their international obligations. Those obligations include, "the promotion of safe migration procedures and the obligation to respect, protect and fulfil the human rights of women throughout the migration cycle."[73]

The CEDAW Committee has also called on states to ensure that visa schemes do not indirectly discriminate against women by excluding or limiting options for certain female-dominated occupations, such as domestic

66. Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants, OC-18/03, Inter-American Court of Human Rights (IACrtHR), 17 Sept. 2003.
67. Alice Edwards, Violence Against Women Under International Human Rights Law 141 (2010).
68. CMW General Comm. No. 1, *supra* note 7, ¶ ¶ 21, 22, 27.
69. *Id.* ¶ 21.
70. *Id.*
71. *Id.*
72. *See generally* Sarah Spencer & Jason Pobjoy, *The Relationship Between Immigration Status and Rights in the UK: Exploring the Rationale*, Centre on Migration, Society and Policy Working Paper No. 86 (University of Oxford, 2011).
73. General Rec. No. 26, *supra* note 6, ¶ 3.

work.[74] The changes introduced in the UK Overseas Domestic Worker visa regime, however, ignore this call, revealing the continuing willingness of states to circumvent human rights standards and resort to what Paul Berman has described as "sovereigntist, territorially-based prerogatives."[75]

## III. MIGRANT DOMESTIC WORKERS IN THE UNITED KINGDOM: EXCLUSIONS FROM RIGHTS

### A. Limited Recognition of Domestic Work: A Concession

Until 1979, resident domestic workers in the United Kingdom came within the scope of the general work permit regime operating under the 1971 Immigration Act.[76] In 1980, when the issuing of work permits for unskilled workers ended,[77] a limited exception was made for domestic workers who had worked for their employers for at least twelve months prior to coming to the United Kingdom.[78] Given the important reproductive function carried out by domestic workers, allowing for such a concession was justified in the national interest so as to ensure that productive, highly skilled migrants would continue to choose the UK as a preferred destination.[79] (Many years later, a similar rationale would surface in the caselaw of the Court of Justice of the European Union on the free movement rights of EU citizens and their third country national spouses.)[80] Under the concession scheme, employers were permitted to bring domestic workers into the United Kingdom either as a visitor or as a "person named to work with a specified employer."[81] A degree of confusion surrounding the appropriate immigration status to be granted was evident in the varying statuses granted to domestic workers on entry.[82] In general, however, it was presumed that the employment rights of domestic workers and their migration status were linked to their employers, increasing the potential for exploitation and abuse despite the recognized national interest that their work served.[83]

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74. *Id.* ¶ ¶ 19, 26(b).
75. Paul Schiff Berman, *Global Legal Pluralism*, 80 Southern Cal. L. Rev. 1155 (2007).
76. Statement of Immigration Rules for Control on Entry, EEC and Other Commonwealth Nationals, Laid before the Houses of Parliament 25 Jan. 1973 (HC 81). For a brief history of entry to the UK to work and the development of the work permit scheme, see Gina Clayton, Textbook on Immigration and Asylum Law 343, 376–77 (5th ed., 2012).
77. Clayton, *supra* note 76, at 376.
78. 521 Parl. Deb., H.L. (5th ser.)(1990) 1437–8 (U.K.).
79. 523 Parl. Deb., H.L. (5th ser.)(1990) 1052 (U.K.).
80. Mary Carpenter v. Secretary of State for the Home Department, Judgment, 11 July 2002, C-60/00 [2002] ECR I-6279.
81. *See* Anderson, Doing the Dirty Work, *supra* note 3, at 89.
82. *See* Immigration Act 1971, § 3(1)(c).
83. Bridget Anderson, Britain's Secret Slaves (1993). *See also* Anderson, Doing the Dirty Work, *supra* note 3, at 89.

## B. Enacting Rights: The ODW Visa

In 1998, the newly elected Labour Government announced a scheme to regularize the position of domestic workers who had entered under the concession scheme.[84] In 2002, the ODW visa scheme was introduced[85] following an extensive advocacy campaign by migrant domestic workers' NGOs, including the Waling-Waling, Kalayaan, and the Commission for Filipino Migrant Workers.[86] The ODW visa scheme permitted migrant domestic workers to change employers, a key element of the campaign for reform. Employment protections were also recognized as applying to domestic work and, as with other categories of migrant workers, domestic workers could apply to have their dependants join them in the United Kingdom.[87] The possibility of qualifying for indefinite leave to remain was also recognized, subject to meeting generally applicable criteria such as the requirement of continuous employment.[88] While these hurdles were not insignificant and could have posed barriers to secure migration status, a route out of temporary residence was at least, in principle, available.[89]

However, the ODW visa scheme limited the labor market mobility for domestic workers because visa extensions were dependant on securing continuous employment in the domestic work sector,[90] thus limiting possibilities for moving out of a traditionally low paid and under-valued employment sector. The eligibility criteria also limited the potential impact of the visa scheme; only domestic workers employed for one year or more in the houses of their employers or in a connected household were eligible to apply. The requirement of no recourse to public funds meant that, in practice, many domestic workers had no option but to accept live-in arrangements, exacerbating the isolated nature of the work and heightening risks of abuse. Thus, while the ODW visa provided important employment rights protections, it did not fully resolve the precarious status of migrant domestic workers.

In 2006, the Labour Government presented a new "Points Based System" of immigration,[91] which proposed that domestic workers would receive six-month non-renewable business visitor visas only and lose the right to change

84. *See* Announcement by Mr. Mike O'Brien M.P. (Immigration Minister) on 23 July 1998. HC Deb col 611W (23 July 1998).
85. *See* The Statement of Changes in Immigration Rules, 1994, HC 395 of 1994 as amended by Cm 5597 of 22 Aug. 2002) [hereinafter Immigration Rules].
86. Waling-Waling was established in 1984 and became a self-organized group with a membership of domestic workers. The supporters of the migrant domestic workers formed Kalayaan in 1987. The Commission for Filipino Migrant Workers (CFMW) was founded in 1979. Bridget Anderson, *Mobilizing Migrants, Making Citizens: Migrant Domestic Workers as Political Agents*, 33 Ethnic & Racial Stud. 60 (2010).
87. This was not set out in the Immigration Rules but was accepted practice.
88. Immigration Rules, *supra* note 85, ¶ 159G.
89. Kalayaan, Annual Report 2009–2010, at 15. *See also* Kalayaan, Annual Report 2010–2011, at 16.
90. Immigration Rules, *supra* note 85, ¶ 159EA.
91. *See generally* Home Office, A Points-Based System: Making Migration Work for Britain (2006).

employers.[92] Following an extensive campaign led by Kalayaan and other NGOs,[93] the government agreed to postpone the introduction of changes to the ODW pending a review of the national anti-trafficking strategy.[94] The government also affirmed its commitment to minimizing risks of abuse or exploitation in any process of reform. In 2009, the House of Commons Home Affairs Select Committee in its Report on Human Trafficking in the UK concluded that the retention of the existing ODW visa and the protections it offered was the single most important issue in preventing forced labor and trafficking of domestic workers.[95] Given the particular vulnerability of migrant domestic workers to abuse, the Home Affairs Select Committee argued that the preservation of the ODW regime would be necessary for much longer than the proposed two-year period.[96] In 2010, the United Nations Special Rapporteur on the Human Rights of Migrants specifically commended the effectiveness of visa protections for migrant domestic workers in the United Kingdom and recommended that its protections be extended to cover domestic workers in diplomatic households.[97]

### C. Reform: Enacting Exclusion

The issue of reform, delayed by the previous Labour Government, came to the fore again in 2011. In June 2011, a consultation paper on overseas domestic workers published by the Liberal Democratic-Conservative coalition government proposed abolishing the special entry route for domestic workers, abolishing the special ODW visa regime or significantly restricting its operation to a six-month nonrenewable entry visa, and removing the right to change employers (in effect, returning to the earlier Labour Government proposals),[98] noting that the United Kingdom was "more generous in its provision for ODWs than other EU countries."[99] This generosity it seemed

92. *Id.* at 15.
93. Kalayaan & Oxfam, The New Bonded Labour? The Impact of the Proposed Changes to the UK Immigration System on Migrant Domestic Workers (2008). *See also* The Housekeeper Company (HKC), *Campaign Statement of Kalayaan* (Jan. 2007), *available at* http://www.housekeepercompany.co.uk/kalayaan-campaign-statement-january-2007/.
94. UK Border Agency, *Government Response to the Consultation on Visitors* at 5 (June 2008).
95. Home Affairs Select Committee, The Trade in Human Beings: Human Trafficking in the UK, 2008–9, H.C. 23-I, ¶ 59 (U.K.) [hereinafter Human Trafficking in the UK].
96. *Id.*
97. UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland,* 16 Mar. 2010, U.N. Doc. A/HRC/14/30/Add.3, at 19, Rec. ¶ 76.
98. *Id.* at 13.
99. UK Border Agency, Employment-Related Settlement, Tier-5 and Overseas Domestic Workers: A Consultation 30 (June 2011) [hereinafter Consultation Paper].

was not to be commended. The new government pointed to documented abuses as well as levels of unemployment in the UK domestic labor market as support for the case to abolish the ODW visa.[100] The announcement of the proposed reforms coincided with the UK government's decision to abstain from voting on the ILO Convention, a move that attracted significant criticism from domestic workers' advocates.[101]

The stated rationale for the proposed reforms reveals the continuing characterization of domestic work as low-skilled and of little economic value.[102] Migrant domestic workers, the government argued, were "generally doing low skilled work."[103] Continuing to allow "unrestricted low skilled entry for an extended period" ran counter to the policy of seeking to attract highly skilled migrants and limiting access to settlement routes.[104] This policy also comports with broader trends at the EU level to encourage and facilitate preferential immigration routes for "highly qualified workers" and their family members.[105] The categorization of skill levels in this context is potentially a highly gendered exercise. The stated concerns to protect demand-led labor migration ignore the continuing demand for domestic workers. The consultation paper pointed to the existence of the National Referral Mechanism as sufficient for identifying victims of trafficking and for responding to abuses experienced by domestic workers.[106] It did not consider a route to settlement, such as that offered by the ODW visa, as an appropriate response to the risks of abuse. The consultation paper presented the level of documented abuses of migrant domestic workers in itself as a reason to reform the ODW visa. This argument seems difficult to sustain given the acknowledged protections that it offered to migrant domestic workers, including the right to change employers.[107]

Again, in this debate, we see the reluctance to acknowledge the nexus between access to safe migration routes and states' positive obligations to deter and prevent human rights abuses. NGOs strongly resisted the proposed reforms and argued that the changes would remove crucial protections from migrant domestic workers.[108] Central to the debates on the impact of reform

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100. *Id.*
101. *See* Rachel Williams, *Behind Closed Doors: The Plight of the UK's Domestic Workers*, Guardian Online, 15 June 2011, *available at* http://www.guardian.co.uk/lifeandstyle/the-womens-blog-with-jane-martinson/2011/jun/15/domestic-workers-uk-obstructive.
102. Consultation Paper, *supra* note 99, at 31.
103. *Id.* at 29.
104. *Id.* at 6.
105. The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01), ¶ 6.1.
106. Consultation Paper, *supra* note 99, at 30–31.
107. *Id.* at 30.
108. Kalayaan Statement, *Government Proposes Return to Slavery for Migrant Domestic Workers in the UK* (2011). *See also Kalayaan Response to Consultation: Questions on MDWs* (5 Aug. 2011).

proposals is the disputed role that immigration laws and policies play.[109] The state instrumentalizes the constructed vulnerability of the migrant domestic worker to justify the imposition of further immigration restrictions. While advocates for the retention of the ODW visa regime highlighted immigration restrictions as likely to contribute to further abuse and exploitation of domestic workers, the government invoked controls on immigration as essential to curbing abuse by unscrupulous employers.[110] This argument was also made by the government in its response to the Organization for Security and Co-operation in Europe (OSCE) Special Representative's Report on her 2011 country visit.[111]

In the House of Commons debates on the proposed reforms, Members of Parliament (MP) arguing in favor of retaining the ODW visa emphasized the critical role that the right to change employers plays in limiting the potential for exploitation.[112] The proposed reforms, it was noted, would lead to an increase in abuse and illegality and would "dramatically increase the power that the employer has over the worker."[113] Despite these arguments, the government continued to refuse to recognize the links between migration routes, migration status, and vulnerability to abuse. The issuing of immigrant visas, it argued, was "not the way to deal with that."[114]

A series of changes to the Immigration Rules applicable to domestic workers came into effect on 6 April 2012.[115] Against the trend of expanding human rights norms for migrant domestic workers, the reforms introduced significantly increase the precariousness of the migrant domestic worker's position. Domestic workers are now permitted to enter and stay in the United Kingdom for a maximum period of six months only.[116] Critically, the right to change employer was removed,[117] as was the possibility of sponsoring dependants and seeking longer term settlement in the United Kingdom.[118] In introducing these changes, the government signaled its intention to align the domestic worker migration route with wider migration policies and to return it to its original purpose: "to allow visitors and diplomats to be accompanied by their domestic staff—not to provide permanent access to the

109. *See* Home Office, Consultation on Employment-Related Settlement, Tier 5 and Overseas Domestic Workers: (9 June–9 September 2011) Summary of The Findings From the Consultation (2011) Summary of the Findings from the Consultation (2012).
110. Anderson, *Mobilizing Migrants, supra* note 86, at 70–73.
111. Report by OSCE Special Representative and Coordinator for Combating Trafficking in Human Beings, following her visit to the UK, 7–10 March 2011, SEC.GAL/200/11, 18 Jan. 2012, Appendix 1, at 12.
112. 446 Parl. Deb., H.C. (6th ser.) (2006) 101 (U.K.).
113. *Id.*
114. *Id.*
115. Statement of Changes in Immigration Rules, Presented to Parliament Pursuant to § 3(2) of the Immigration Act 1971, HC 1888 (15 Mar. 2012).
116. Immigration Rules, *supra* note 85, ¶ 159A(iv).
117. *Id.* ¶ 159E provides: "An extension of stay as a domestic worker in a private household may be granted for a period of six months less the period already spent in the UK in this capacity."
118. *Id.* ¶ 159G(i).

UK for unskilled workers."[119] Central to the government's position is the view that the domestic worker's reproductive labor requires limited skills and is easily replaced. The intimate connections, relationships, and caring skills involved in much of domestic work are denied, as are the wider protections afforded to other workers. The confinement to a temporary status, combined with increasing policy discourse on circular migration, facilitates further curbs on family reunification as the domestic worker is denied the possibility of claiming family unity rights.

Migrant domestic workers employed in diplomatic households have not enjoyed the right to change employer, even prior to the reforms introduced in 2012. Their migration status was and continues to be tied to their employment directly with a named diplomatic or international civil servant.[120] In 2010, the UN Special Rapporteur on the Human Rights of Migrants specifically recommended that the UK government consider extending the right to change employers to domestic workers in diplomatic households as a safeguard against abusive practices.[121] In 2011, the OSCE Special Representative and Coordinator for Combating Trafficking in Human Beings included a similar recommendation in the report on her visit to the United Kingdom.[122] Yet, the United Kingdom ignored these recommendations. Instead, the government enacted further limits on the rights of domestic workers in diplomatic households and removed the route to settlement that had previously been available after a five-year residence period.[123]

The changes to the ODW regime and the return to a highly temporary and tied status for domestic workers has been noted with concern in the UK evaluation report of the Council of Europe Group of Experts on Action Against Trafficking in Human Beings (GRETA).[124] In its response, the government argued that the removal of the right to change employer would not affect its ability to take other positive measures to combat trafficking.[125]

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119. Home Office Announcement, Immigration (Employment-Related Settlement, Overseas Domestic Workers, Tier 5 of the Points Based System and Visitors), 29 Feb. 2012, at 2 [hereinafter Announcement].
120. Immigration Rules, *supra* note 85, ¶ 155, which was deleted in 2008 (HC 1113, ¶ 39), provided that in order to extend their stay in the UK, such workers had to show that they were still engaged in the employment for which the entry clearance was granted.
121. UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland, supra* note 97, ¶ 76(a).
122. Report by OSCE Special Representative and Coordinator for Combating Trafficking in Human Beings, following her visit to the UK, 7–10 Mar. 2011, SEC.GAL/200/11, 18 Jan. 2012, Rec. 5, at 8
123. Announcement, *supra* note 119, at 2; Immigration Rules, *supra* note 85, ¶ 245ZR(d).
124. *See Report Concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by the United Kingdom*, GRETA (2012) 6 (Strasbourg, 12 Sept. 2012), Appendix I: List of GRETA-~~s~~-Proposals, ¶ 8, at 83.
125. *Id.* United Kingdom authorities' Comments on the Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, at 97–98, GRETA(2012)6, Strasbourg, 12 Sept. 2012 ¶ 19.

This argument, however, refuses to acknowledge the chilling effect that immigration controls can and do play on accessing legal remedies. Elsewhere the GRETA report notes both the limited engagement with the UK's National Referral Mechanism on human trafficking and the concerns NGOs have expressed that this is, at least in part, due to the absence of an immigration firewall and the ever present threat of deportation.[126] Given the very temporary nature of the immigration routes, it is likely that an increasing number of migrant domestic workers will find themselves in an irregular situation. As Gregor Noll has noted, in such cases human rights law provides little assistance.[127] The absence of a firewall between employment, social security, or other legal remedies and migration laws ensures that the disciplinary and punitive reach of immigration controls function as limits to the claiming of rights.

### D. Domestic Work, the Public and the Private: Work Like "No Other"

Prior to the final adoption of the 2011 ILO Domestic Work Convention, the UK government had signaled its commitment to a "workable convention" that could be ratified by as many states as possible and that would protect "vulnerable domestic workers worldwide."[128] Despite this commitment, the UK government was one of eight states to abstain from the final vote on the Domestic Work Convention.[129] Ultimately, the government concluded that the Convention failed to acknowledge the specificity of domestic work or the particular difficulties concerning the application of labor rights in the domestic household.[130] Speaking in the House of Commons, the Minister for Employment Relations commented that the "main sticking point" for the government was the potential application of health and safety legislation to private homes.[131] Such a legislative disincentive to employment of domestic workers could, he argued, force elderly or disabled individuals into residential homes thereby undermining government policy to support independent living through direct payments to recipients of care supports.[132]

In refusing to support the Convention, the government was concerned with protecting its own care and welfare policies, as shielding employers in the domestic sphere from what it argued were unnecessary and burdensome

126. *Id.* ¶ 231, at 54.
127. Gregor Noll, *The Laws of Undocumented Migration*, 12 Eur. J. Migration & L. 143 (2010).
128. 528 Parl. Deb., H.C. (6th ser.) (2011) 469W (U.K.).
129. The other states that abstained from the vote were El Salvador, Malaysia, Panama, Singapore, Thailand, the Czech Republic and Sudan. *See* 530 PARL. DEB., H.C. (6th ser.) (2011) 269 (U.K.).
130. As quoted by Fiona MacTaggart MP, *Id.* at 269–93.
131. 530 Parl. Deb., H.C. (6th ser.) (2011) 288–9 (U.K.).
132. *Id.*

regulatory obligations. The shift toward direct cash payments has been a key feature of social care policy in the UK over the last decade, facilitating a trend toward the outsourcing of care work to private actors including migrant women. Direct payments in the social care system are cash payments given to service users in lieu of community care services[133] and are presented as facilitating greater choice and independence in sourcing care supports.[134] A system of direct payments has been in place since 1996,[135] premised on an increasing trend towards personalization of care, including through allocation of personal budgets and direct payments.[136] Fiona Williams has argued that direct cash payments of this kind have encouraged the development of a particular form of care or domestic help: home-based, often low-paid, commodified, and generally accessed privately through the market.[137] At the same time, the trend towards outsourcing of care, she notes, has expanded employment opportunities for newly arrived migrant women workers, creating yet another link in a wider transnational political economy of care.[138] The employer-driven nature of the market for care workers, however, contributes to the potential for exploitation of migrant domestic workers particularly in a context where the usual decent work standards are deemed not to apply.[139]

The claimed specificity of domestic work, as work that takes place in the household, was also central to the government's decision not to support the Convention. Echoing sentiments expressed in earlier eras in the context of debates on domestic violence, the Minister for Employment Relations questioned why the government would wish to pass "quite an intrusive law,"[140] one that would give to health and safety inspectors a "new right to visit millions of homes?"[141] The evidence of the need for such a change, he argued, was weak—households being "low risk in health and safety terms."[142] The previous government had balked at taking such a measure and had continued to uphold the exemptions applicable to domestic households

133. *See* Community Care, Services for Carers and Children's Services, Regs. 7, 8 (Direct Payments) (England) Regulations 2009 (No. 1887 of 2009).
134. Dept. of Health, Guidance on Direct Payments for Community Care, Services for Carers and Children's Services 8 (2009).
135. Direct payments were introduced in relation to social care services for adults through the Community Care (Direct Payments) Act 1996. This Act was repealed (in relation to England) by the Health and Social Care Act 2001. Direct payments are now governed by the 2001 Act and the Children Act 1989.
136. Dept. of Health, A Vision for Adult Social Care: Capable Communities and Active Citizens 8 (2010).
137. Fiona Williams, *Markets and Migrants in the Care Economy*, 47 Soundings 22, 25 (2011).
138. *Id.*
139. Lordes Gordolan & Mumtaz Lalani, Kalayaan Justice for Migrant Domestic Workers, Care and Immigration: Migrant Care Workers in Private Households 39 (2009).
140. 530 Parl. Deb., H.C. (6th ser.) (2011) 269–93 (U.K.).
141. *Id.*
142. *Id.*

from the operation of the 1974 Health and Safety Act.[143] The increased vulnerability of domestic workers, the Minister argued, arose not from health and safety concerns but rather from the actions of individual employers that were already covered in other legislation.[144]

This argument, however, ignores the legislative exemptions relating to domestic work that continue to operate in the United Kingdom and that provide a protective shield to unscrupulous employers. Domestic workers are excluded from certain aspects of the regulation of working time under the Working Time Regulations 1998, for example.[145] Deductions may be made from the minimum wage payment if accommodation is provided,[146] effectively allowing for payments in kind for the live-in domestic worker.[147] Perhaps one of the most striking of these exemptions has been that provided by Regulation 2(2) of the National Minimum Wage Regulations, which allows for payments less than the national minimum wage where a domestic worker is treated as "a member of the family."[148]

New provisions introduced into the revised Immigration Rules are the requirements to provide written terms and conditions of employment as part of the pre-entry application process and to commit to complying with the terms of the National Minimum Wage Act 1998 and supporting regulations.[149] The strengthening of pre-entry protections is a feature of the Convention, which the government refused to support.[150] Given this refusal, it is unclear how effective pre-entry clearance measures will be in practice or whether there

143. *See* Health and Safety Act 1974, § 51.
144. *Id.* § 3.
145. Regulation 19, Working Time Regulations 1998 (No. 1833 of 1998), which provides that Regulations 4(1), (2), 6(1), (2), (7), 7(1), (2), (6), 8 do not apply in relation to a worker employed as a domestic worker in a private household. These Regulations cover the maximum weekly working time, length of night work, health assessment and transfer of night workers to day work, and weekly rest period.
146. Minimum Wage Regulations 1999, Regs. 36, 37 (No. 584 of 1999).
147. *Report on Decent Work for Domestic Workers* (Report IV(1)), *supra* note 29, at 7.
148. Minimum Wage Regulations, *supra* note 146, Reg. 2(2) provides that "work" for the purposes of the Regulations does not include work relating to the employer's household done by a worker where:

> the worker resides in the family home of the employer for whom he works;
>
> that the worker is not a member of that family, but is treated as such, in particular as regards to the provision of accommodation and meals and the sharing of tasks and leisure activities;
>
> that the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, in respect of the provision of the living accommodation or meals; and
>
> that, had the work been done by a member of the employer's family, it would not be treated as being performed under a worker's contract or as being work because the conditions in sub-paragraph (b) would be satisfied.

149. Immigration Rules, *supra* note 85, ¶ 159A(v).
150. ILO, *Report of the Committee on Domestic Workers*, 2011, *supra* note 41, ¶ 895.

is any political will to monitor their impact on the prevention of abuse. A previous report of the House of Commons Home Affairs Select Committee on Human Trafficking expressed skepticism as to the effectiveness of pre-departure interviews with domestic workers in preventing abuse, noting that "enforcement was patchy at best."[151] The family member exemption from the operation of the minimum wage requirements continues to apply, however.[152] And, as was noted by domestic workers' advocates, access to UK employment protections or remedies for failure to comply with minimum wage requirements is greatly limited by the temporary and tied nature of the new visa arrangements.[153]

The family member exemption, perhaps more than any other, reinforces the public private divide that limits the enforcement of decent work standards for domestic workers.[154] It is a line that is, of course, deeply gendered and reflects continuing categorization of domestic work as work like no other.

## E. Just Like One of the Family: Enacting Exclusions

A series of cases before the UK Employment Appeals Tribunal highlights the difficulties that arise when the family member exemption is applied.[155] Where the work done could be described as similar to the everyday work that characterizes intimate domestic life, it was removed from the scope of employment law protections reserved for the public domain. In *Ms. Julio v. Ms. Jose,* the Tribunal accepted Ms. Julio's argument that she was not at any time paid the agreed monthly salary,[156] but found that she was treated as "a member of the family, in particular as regards to the provision of accommodation of meals and the sharing of tasks and leisure activities."[157] The family member exemption from the minimum wage regulations was therefore applicable. In the case of *Ms. Nambalat v. Mr. Taher and Mrs. Tayeb*, the Tribunal found that there were distinct phases in the employment relationship, during which Nambalat's work duties varied widely. Despite these variations, the Tribunal concluded that the family member exemption nonetheless applied.[158] In the case of *Ms. Udin v. Mr. and Mrs. Chamsi-Pasha*,

151. Human Trafficking in the UK, *supra* note 95, ¶ ¶ 116–18, ¶55.
152. UK Border Agency, *Entry Clearance Guidance*, WRK2.1.9, *available at* http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/wrk2/wrk2-1/#header9.
153. Melanie Gower, *Immigration: Migrant Domestic Workers* (20 Mar. 2012), *available at* http://www.parliament.uk/business/publications/research/briefing-papers/SN04786/immigration-migrant-domestic-workers.
154. Mumtaz Lalani, Kalayaan/Lalani, Ending the Abuse: Policies that Work to Protect Migrant Workers 22 (2011).
155. Appeal No. UKEAT/0553/10/DM, Judgment of 8 Dec. 2011 (EAT Judgment).
156. EAT Judgment, *supra* note 155, ¶ 19, quoting from the Tribunal's decision.
157. *Id.* ¶ 20, quoting from the Tribunal's decision.
158. *Id.* ¶ 32, quoting from the Tribunal's decision.

the tribunal found that variations in the working and living conditions of the claimant changed the nature of the employment relationship. Financial difficulties encountered by the employers had led to a downsizing of accommodation space and more difficult living conditions for Ms. Udin for limited periods. For these periods only, the Tribunal concluded that the family member exemption did not apply, and Ms. Udin was therefore entitled to a remedy for the unauthorized deductions from her wages during this time.[159]

On appeal, each of the claimants argued that the Employment Tribunal had erred as a matter of law in its interpretation of the family member exemption.[160] The narrowest possible interpretation, it was argued, should be given to this exemption so as to ensure consistency with the statutory language and compliance with the public policy of eliminating gender and racial discrimination, given that the majority of domestic workers were women from minority ethnic communities.[161] It was also argued that a narrow interpretation was necessary to meet the state's positive obligations under Article 4 ECHR, in line with the judgment of European Court of Human Rights in *Siliadin v. France.*[162] The Employment Appeals Tribunal (EAT) did not specifically comment on the Article 4 ECHR arguments, but did accept that a narrow interpretation must be given to the family member exemption.[163] The dignity with which the domestic worker is treated, the degree of privacy and autonomy afforded, and the extent to which exploitation occurs were also relevant factors.[164] The core question was whether the worker is "integrated into the family."[165] If the answer is yes, then the limits of human rights protections appear to be reached. In each of the three cases before it, the Employment Appeals Tribunal concluded that the family member exemption applied and the domestic workers, all of whom were migrants, were not entitled to payment of the national minimum wage.[166]

Integration into the family can trigger an exemption from a core labor standard, which reveals a continuing reluctance, as the European Court of Human Rights has noted elsewhere, to apply human rights norms "within personal relationships or closed circuits."[167] Until recently, the UK Border Agency's Instructions to entry clearance officers noted that non-payment of

159. *Id.*
160. *Id.* ¶ 39.
161. *Id.* ¶ ¶ 39, 40.
162. (2006) 43 EHRR 16. EAT Judgment, *supra* note 155, ¶ 41.
163. *Id.* ¶ 46.
164. *Id.*
165. *Id.* ¶ 45.
166. *Id.* ¶ 58. In relation to Ms. Udin, the EAT over-turned the majority finding of the Employment Tribunal, concluding that in the overall context of the family's circumstances, the changing conditions did not result in Ms. Udin ceasing to be treated as a member of the family. *Id.* ¶ 57.
167. *Opuz*, *supra* note 62, ¶ 132.

the national minimum wage was not a valid reason for a refusal to issue an ODW visa. The House of Commons Home Affairs Select Committee in its Report on Human Trafficking in the UK criticized this practice, commenting that it "makes a mockery of the concept of a legal minimum wage."[168] Changes to the Immigration Rules introduced in April 2012 only partly address this criticism. Applicants for an ODW visa now have to demonstrate that the employer has agreed to pay the minimum wage in accordance with the National Minimum Wage Regulations.[169] However, the family member exemption continues to apply, giving legal standing to the paradox inherent in many domestic work employment relationships. Employers delegate intimate reproductive labor to domestic workers, expecting unconditional availability and care while remaining unwilling to comply with decent work standards.

## IV. LITIGATING ARTICLE 4 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Coroners and Justice Act of 2009 introduced into the domestic law of the United Kingdom the offense of holding another person in slavery or servitude or requiring them to perform forced or compulsory labor.[170] This law sought to remedy the legislative gap that arose in cases where trafficking had not occurred or the trafficking element could not be proven to a criminal standard.[171] A series of cases before the European Court of Human Rights highlights the inadequacies of the legal framework in place prior to the adoption of the Coroners and Justice Act and the challenges of enforcement of forced labor, servitude, and slavery prohibitions, particularly in a migration context. These cases build on the Court's evolving jurisprudence under Article 4, following the landmark *Siliadin* judgment.

In *Siliadin*, the Court recognized for the first time that Article 4 could give rise to positive obligations for states, including the obligation to ensure that effective criminal sanctions were in place and enforced at the domestic level.[172] A key question that had arisen in the domestic legal proceedings was how to demarcate the boundaries of everyday intimate labor in the domestic sphere from working conditions that violate Article 4. The French Civil Court of Appeal in concluding that exploitation had taken place, was anxious to

168. Human Trafficking in the UK, *supra* note 95, ¶ 53.
169. Immigration Rules, *supra* note 85, ¶ 159A(v).
170. Coroners and Justice Act 2009, § 71.
171. Crown Prosecution Service, *Slavery, Servitude and Forced or Compulsory Labour* (2009), *available at* http://www.cps.gov.uk/legal/s_to_u/slavery_servitude_and_forced_or_compulsory_labour/.
172. (2006) 43 EHRR 16. EAT Judgment, *supra* note 155, ¶ 41.

clarify that Siliadin was not a member of the family and was not treated as such.[173] The public tests of rights compliance could, therefore, kick in. In contrast, the Court found that Siliadin had not been subjected to working conditions that were incompatible with human dignity. The Court noted that these conditions were "the lot of many mothers."[174] The Court's presumption that the usual standards of human dignity could not apply, therefore, served to distinguish domestic work as "work like no other."

These distinctions came into play again in the subsequent case of *Osman v. Denmark*,[175] where the European Court of Human Rights was required to distinguish between domestic care work provided by a minor in a family context and human trafficking. Osman, a Somali national, had lived in Denmark from the age of seven. At the age of fifteen, her father brought her to northern Kenya and left her at the Hagdera refugee camp to care for her paternal grandmother. After two years, she left the camp and applied to be reunited with her family in Denmark. The Court found that the Danish authorities' refusal to reinstate her residence status constituted an unjustifiable interference with her rights to privacy and to family life.[176]

The AIRE center, representing the applicant, had argued that Osman had been subject to intra-familial human trafficking and that the State had failed in its obligation to investigate and prosecute the offense of trafficking.[177] The Court rejected this argument, however, noting that neither the applicant nor her mother had complained of trafficking to the Danish authorities. This conclusion ignores the positive obligation on states to identify victims of trafficking, which is recognized as a core obligation under the Council of Europe Convention on Action Against Trafficking and an element of the positive obligations of prevention and deterrence implied by Article 4 of the ECHR, at least since *Rantsev.*[178] In its judgment, the Court distinguished the work done as part of everyday family life, from the exploitation that constitutes an element of human trafficking offenses.[179] Its conclusions, however, failed to acknowledge the role played by gender in determining the kind of work or harm that might be defined as exploitative or as merely a family role. Nor does it address the wider issue of cultural expectations concerning appropriate family roles and responsibilities or the intersections of gender, race, and age as overlapping axes of potential discrimination and disadvantage.[180]

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173. *See generally* Van Walsum, *Labour, Legality and Shifts in the Public/Private Divide*, (Paper presented at Seminar on Gender, Migration and Human Rights, EUI Florence, 18–20 June 2012) at 9 (copy on file with the authors).
174. *Siliadin*, *supra* note 15, ¶ 44.
175. Osman v. Denmark, App. No. 38058/09, Eur. Ct. H. R. (2011).
176. *Id.* ¶ ¶ 51–77.
177. *Id.* ¶ ¶ 46, 62.
178. *Rantsev*, *supra* note 15.
179. *Osman*, *supra* note 175, ¶ 64.
180. *See generally* Columbia Law School Sexuality and Gender Law Clinic, *Sent Away: The Trafficking of Young Girls and Women Within the Family Unit* (May 2010).

The issue of intra-familial trafficking has also come before the Court in the cases of *C.N. and V v. France*[181] and in *C.N. v. UK*. The case of *C.N. and V* concerned the treatment of two sisters aged sixteen and ten years old, originally from Burundi, who were living with their aunt and uncle in Paris following the death of their parents in Burundi's bloody civil war. Both sisters were required to undertake extensive domestic work and C.N., the older sister, was also required to undertake care work for the disabled son of her relatives. Reflecting again the continuum of exploitation that is frequently found in domestic work, the Court noted that it was necessary to distinguish "forced or compulsory labor" from work that could "reasonably be required in respect of mutual family assistance or cohabitation, taking into account, among other things, the nature and amount of work in issue."[182] The Court noted that C.N. had to perform, under threat of being returned to Burundi, activities that would have been described as work if performed by a remunerated professional. Regarding her treatment, the Court concluded that France had failed to meet its positive obligation to put in place an effective legislative and administrative framework to combat servitude and forced or compulsory labor. V, the younger sister, had attended school, developing social networks that were ultimately central to the Court's finding that no violation had occurred with respect to her situation.[183] This finding was arrived at despite the aunt having been convicted by a domestic court for aggravated assault of V.[184] The Court's finding suggests a failure to acknowledge the relative youth of V as a key issue in assessing the reasonableness of the demands made of her and the likely impact of coercive threats.

The absence of an effective legislative and administrative framework to meet the state's positive obligations under Article 4 of the ECHR has arisen under a series of cases in the United Kingdom. These cases also highlight the difficulties of establishing credibility and demonstrating the significance of the harm endured by migrant domestic workers. The case of *C.N. v. United Kingdom*[185] involved a Ugandan applicant who had come to the United Kingdom with the assistance of a relative to escape alleged physical and sexual violence. On arrival, her passport was taken from her by her relative and not returned.[186] She later began work as a live-in caregiver for an elderly couple, having been introduced to a private recruitment agency. C.N. claimed not to have received any of the remuneration paid to the agent.[187] She left her live-in caregiver position after several years, having

181. *C.N. and V. v. France, supra* note 15, ¶ ¶ 90–93.
182. *Id.* ¶ 74.
183. *Id.* ¶ 93.
184. The diplomatic immunity enjoyed by Mr. M., a former Burundi government minister and a UNESCO employee, was waived by UNESCO, as was that of his wife. *See id.* ¶ ¶ 22, 23.
185. *C.N. v. U.K., supra* note 15.
186. *Id.* ¶ ¶ 5–7.
187. *Id.* ¶ ¶ 10, 48.

fallen ill, and sought asylum. She was denied asylum in part because of a finding of a lack of credibility.[188] A complaint was submitted to the police concerning her treatment by her employers, but it was found that there was insufficient evidence to substantiate the allegation of trafficking, though it was accepted that there was dispute over payment of wages and that her relative had "kept more than he should have done."[189] Further requests from C.N.'s solicitor to consider prosecutions for *jus cogens* offenses of slavery or forced labor were rejected.[190]

Of note are comments made by the police authorities that the situation was one where, "one criminal (her uncle) has taken all the proceeds of their crime."[191] The reference to their crime reveals a preoccupation with the irregularity of C.N.'s employment. Elsewhere, the police noted that C.N.'s identity and travel documents were false, suggesting again that the illegality of the applicant's entry to and presence in the United Kingdom somehow weakened her claims.[192] As C.N. argued before the European Court of Human Rights, the suggestion that the lack of payment was no more than an absence of "honor among thieves betrayed a fundamental disregard of the ILO's key indicators of forced labor and a troubling ignorance of the vulnerabilities of illegal immigrants."[193] In correspondence with C.N.'s solicitor the police commented that they were not aware of any specific offense of forced labor or servitude in UK law, though they noted that "regulation of working conditions are controlled by such areas as health and safety legislation."[194] There is no acknowledgment and perhaps not even awareness on their part that the usual protections of health and safety law so confidently invoked here do not apply to domestic workers.

The Court found the United Kingdom to have violated Article 4 of the ECHR.[195] The Court's judgment on the meaning of servitude is an important one. It recognizes domestic servitude as a specific offense distinct from trafficking and exploitation, "which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance."[196] Due to the absence of a specific offense in domestic law, the Court found that the authorities were unable to give sufficient weight to these factors and to meet their obligation to carry out an effective investigation into C.N.'s complaints.[197] Drawing on *Ranstev*, the Court noted that a duty to

188. *Id.* ¶ 14.
189. *Id.* ¶ ¶ 15–18.
190. *Id.* ¶ ¶ 21–24.
191. *Id.* ¶ 25.
192. *Id.* ¶ 26.
193. *Id.* ¶ 49.
194. *Id.* ¶ 30.
195. The applicant had also alleged violations of Article 8 and Article 13 (read in conjunction with Articles 4 and 8). The Court found that no separate issues arose under Articles 8 and 13, given its findings on Article 4. *Id.*
196. *Id.* ¶ 80.
197. *Id.* ¶ ¶ 80–81.

investigate was triggered wherever a credible suspicion arose that rights had been violated. In this case, the Court was particularly critical of the police authorities' failure to interview key actors, notably C.N.'s relative and the private recruitment agent. What was required under Article 4, they said, was a thorough investigation premised on an understanding of "the many subtle ways an individual can fall under the control of another."[198] The Court was also critical of the failure to give any weight to C.N.'s complaints that her passport was taken from her, that her wages were withheld, and that she was frequently threatened with reporting to the immigration authorities. All of these were factors, as the Court noted, that came within the scope of the ILO's indicators of forced labor.[199]

The duty of effective investigation also arose in the case of *O.O.O. and Others v. Commissioner of Police for the Metropolis.*[200] In this case, four Nigerian women complained that they had been brought to the United Kingdom as children and forced to undertake extensive domestic work, including childcare. Each of the women complained that they had been regularly subjected to physical and emotional abuse. Although they sought protection and assistance from the police, their complaints were not pursued. The High Court accepted that the four claimants, who had alleged treatment contrary to Articles 3 and 4 of the ECHR on the part of their employers, were concerned about their migration status in the United Kingdom and that this concern had impacted their willingness to cooperate with a police investigation. The Court found, however, that reasonable sensitivity on the part of the police authorities could have overcome this obstacle.[201] A duty of effective investigation arose on the part of the police, they said, whenever a credible allegation was received, "however that information comes to their attention."[202] The duty of effective investigation arising under Articles 3 and 4 of the ECHR, the Court concluded, had not been met in this case.

## V. CONCLUDING REMARKS

For irregular or temporary migrants, the recognition of a positive duty to investigate is critical. The difficulty, however, is that investigation and the claiming of rights may lead, not to the possibility of remaining in the country, but to deportation. For those who are identified as victims of trafficking, rights to remain may be triggered.[203] Outside of the trafficking framework,

198. *Id.* ¶ 80.
199. *Id.*
200. O.O.O & Others v. Metropolitan Police [2011] EWHC 1246 (QB).
201. *Id.* ¶¶ 170–77.
202. *Id.* ¶163.
203. *See generally* GRETA Evaluation Report, *supra* note 124, ¶ 220, at 51, (discussing difficulties relating to the standard of proof applied to the identification of victims of trafficking and consequences for eligibility for residence permits).

however, deportability remains a constant limit to rights. That migrant domestic workers continue to invoke rights through a process of making claims before the European Court of Human Rights reveals the continuing resonance and force of these claims. States, employers, and others continue to resist such claims, however, and, in particular, refuse to acknowledge the nexus between denials of rights and migration status. Claiming rights through human rights litigation in domestic and international courts can lead to the creation of "contact zones" in which an "alternative legality" is presented, drawing on the transformative promise of human rights norms.[204] The claims presented reveal the potential to position domestic work firmly within the world of work and highlight the injustice of failing to apply generally applicable workplace and human rights norms. The obstacles to presenting such cases and claims are many. However, they are particularly steep for migrant domestic workers whose status may be tied to that of their employer or their presence within the territory of the state dependant on the goodwill of an unscrupulous employer, or whose presence might be irregular or illegal. The isolated and privatized nature of domestic work also limits the emergence of contact zones within which alternative legalities may be presented.

Given the high levels of irregularity and undeclared work in the domestic work sector, a key issue at the intersections of migration, gender, and race is the application and enforcement of employment protections to migrant domestic workers in irregular situations. In the United Kingdom, the generally applicable employment protections do not apply, especially where the worker is deemed to have participated voluntarily and taken an active part in the illegal conduct.[205] In *Hounga v. Allen*,[206] the Court of Appeal held that the applicant, a Nigerian citizen employed in the United Kingdom as an au pair, could not bring a racial discrimination claim against her employers as she was knowingly working unlawfully. Although the Court accepted that she had suffered ill-treatment, including physical abuse in the course of her employment,[207] it found that she was precluded from bringing forward a claim that was, "clearly connected or inextricably bound up or linked with her own illegal conduct."[208] The case has been criticized, however, as the right to nondiscrimination is not dependent in UK law on the existence of a valid employment contract. At the time of writing, an appeal is pending before the UK Supreme Court. More generally, of course, the protections human rights treaties—including the ECHR—afford do not admit of such sweeping exclusions. In practice, however, courts continue to be preoccupied with the migration status of the complainant.

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204. Boaventura de Sousa Santos, Toward a New Legal Common Sense: Law, Globalization, and Emancipation 472 (2002).
205. Zarkasi v. Anindita, Employment Appeal Tribunal, 18 Jan. 2012.
206. Hounga v. Allen, [2012] EWCA Civ 609, ¶ 61.
207. *Id.* ¶ 35.
208. *Id.* ¶ 61.

In *Siliadin,* the European Court of Human Rights recognized states' positive obligations in the context of Article 4. It failed, however, to recognize that such obligations could extend to regularization of a victim's migration status and to positive obligations of rehabilitation.[209] The nexus between migration routes and states' positive obligations of prevention and protection were given more consideration in *Rantsev v. Cyprus and Russia,*[210] a case involving trafficking for the purposes of sexual exploitation. Specifically, the Court found that Article 4 requires states to put in place adequate measures to regulate businesses used as a cover for human trafficking, and to ensure that domestic legislation provides "practical and effective protection of the rights of victims and potential victims of trafficking."[211] The Court found that the Cypriot government had violated Article 4 by not regulating the "cabaret artiste" industry and by maintaining a visa regime for cabaret artistes that did not provide effective protection against trafficking.[212] On this reading, destination states may be found in breach of their Convention obligations by continuing to operate immigration schemes that put migrant domestic workers at risk of treatment contrary to Article 4.[213]

The links between limited opportunities for legal migration for domestic workers and the high level of irregularity in the sector have been emphasized by the EU Fundamental Rights Agency, amongst others.[214] Irregularity, as they note, leads to high levels of insecurity, producing susceptibility to exploitation and difficulties in accessing rights protections.[215] In response to concerns of abuse and exploitation of migrant domestic workers, however, it is open to states to respond by expanding immigration controls rather than seeking to remedy the disadvantages that continue to attach to precarious migration status. As Catherine Dauvergne notes, "Once an argument is shifted to the terrain of rights, the right of the nation to shut its borders tends

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209. *See* Holly Cullen, *Siliadin v. France: Positive Obligations Under Article 4 of the European Convention on Human Rights,* 6 Hum. Rts. L. Rev. 585 (2006).
210. *Rantsev*, *supra* note 15.
211. *Id.* ¶ 284.
212. Concerning Cyprus, the Court found, had violated its procedural obligations under Article 2 ECHR, because of the failure to conduct an effective investigation into Ms. Rantseva's death. *Id.* ¶ ¶ 241–42. The Court also found that the procedural obligations under Article 2 included a duty of transnational cooperation and investigation.
213. *Id.* ¶ 495.
214. EU FRA, Migrants in an Irregular Situation Employed in Domestic Work: Fundamental Rights Challenges for the European Union and its Member States (2011) [hereinafter Migrants in an Irregular Situation]; *see also* Council of Europe Parliamentary Assembly Committee on Migration, Refugees and Population, Report on Protecting Migrant Women in the Labour Market (Doc. 12549, 24 Mar. 2011), ¶ 23.
215. Migrants in an Irregular Situation, supra note 214; *see also* Norbert Cyrus, *Being Illegal in Europe: Strategies and Policies for Fairer Treatment of Migrant Domestic Workers, in* Migration and Domestic Work: A European Perspective on a Global Theme (Helma Lutz ed., 2008).

to overshadow the rights claims of individuals."[216] The deportability of the alien persists as a constant threat to the claiming and enjoyment of rights.

The recent changes introduced in the ODW visa regime in the United Kingdom reveal the continuing willingness of states to limit migration options for domestic workers. Against the background of such resistance from states, the potential for human rights law to provide an effective bulwark against exclusion in the migration context must be questioned. Borders and limits proliferate the texts of human rights law, and as Boaventura De Sousa Santos argues, exclusion rather than exploitation has become the central mechanism of disentitlement from law's protections. His comment appears particularly relevant to migrant domestic workers. Exclusions and exemptions that operate in employment laws, in laws and policies on access to social security, in immigration and citizenship laws, and in the scope of diplomatic immunity protections reinforce the invisibility and vulnerability of domestic workers. These exclusions take the form and shape of de-juridifications that limit the application of human rights norms to domestic work and to migration status.[217]

Assessing the process of legal reform in the United Kingdom, it might be argued that the position from 1998 to 2012 was an anomaly of sorts, the product of a short-lived political moment and a powerful advocacy campaign that successfully enacted domestic workers' rights.[218] The ODW visa, though imperfect, provided a better "place in the world"[219] for migrant domestic workers—a route to settlement and the possibility of changing employers and of sponsoring family dependants. The reforms introduced by the UK government have removed these possibilities, returning migrant domestic workers again to a deeply unequal employment relationship and a precarious migration status. Is the status of the migrant domestic worker diminished then, to that of bare life? As yet, it is unclear whether human rights law can effectively resist such processes of exclusion or whether the deployment of law continuously reproduces "categories of illegal at its boundaries,"[220] limiting the transformative promise of human rights norms.

Human rights law, if recognizing the nexus between migration status, access to safe migration routes, and the enjoyment of rights, has the potential to be transformative. States continue to resist this potential, however. The process of enacting rights in courts and through political activism is a difficult

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216. Catherine Dauvergne, Making People Illegal: What Globalization Means for Migration and Law 27 (2008).
217. *See generally* Blackett, *Introduction: Regulating Decent Work for Domestic Workers*, *supra* note 28.
218. Jacques Ranciére, Disagreement: Politics And Philosophy (Julie Rose trans., 2004).
219. Hannah Arendt, The Origins of Totalitarianism 296–97 (Andre Deutsch ed., 1986).
220. Dauvergne, *supra* note 216, at 37.

and uncertain one, but one that can be empowering.[221] Reforms secured are contingent and reversible, as the story of the ODW visa reveals. In the context of migrant domestic workers in the United Kingdom, the shutting down of a migration pathway reflects the potential for coercive exercises of state power that reverse reforms secured through sustained political activism. Such reversals, however, may yet be challenged, at which point the inescapable nexus between the state's migration laws, migration status and human rights violations cannot be denied.

221. On the transformative potential of rights and their limits, see Benhabib, *supra* note 20, at 130.