Revisiting the relationship between human trafficking and diplomatic immunity

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unreality to describing cargo passively on board a vessel as "in use" in any meaningful sense. Despite this, the alternative construction—that the cargo was not in use during the voyage—is even less compelling. The alternative view would, as Popplewell L.J. identified, denude the word "use" in s.10(4)(a) of any useful meaning (see at [93]–[96]). Ultimately, we consider that this is an issue of drafting that cannot entirely be overcome, even after the detailed interpretive exercise undertaken by the majority. As such, there is still much to be said, in our view, for adopting the more realistic concept of a "commercial cargo", as is the case in the Australian Foreign State Immunities Act 1985 (Cth). The concept of a "commercial cargo" also embraces, with more realistic language, what Andrews L.J. held (at [117]) to be the essential point, as we set out above—namely that the cargo was being transported pursuant to commercial contracts of carriage. ☙

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REVISITING THE RELATIONSHIP BETWEEN HUMAN TRAFFICKING AND DIPLOMATIC IMMUNITY

Overseas domestic workers (ODWs) play an important role in the daily running of diplomatic households across the world, including in the UK. The majority of applications for UK ODW visas are made by nationals of the Gulf states (J. Ewins (UK Government, 16 December 2015). Despite their axiomatic importance, ODWs have not always been treated with dignity and respect. In fact, there are a growing number of cases in which ODWs have been exploited in diplomatic households (Mantouvalou (2015) 42 *Journal of Law and Society* 329).

In the recent Supreme Court case of *Basfar v Wong* [2022] UKSC 20; [2022] 3 W.L.R. 208, the majority—Lord Briggs and Lord Leggatt (with whom Lord Stephens agreed)—took note (at [5]) of the fact that the "exploitation of migrant domestic workers by foreign diplomats is a significant problem" in the UK (at [5]), while Lord Wilson (with whom Lord Sumption, Lady Hale, and Lord Clarke agreed) in the 2015 UK Supreme Court case of *Reyes v Al-Malki* [2017] UKSC 61; [2019] A.C. 735 at [59] similarly expressed concern that the "UK confronts a significant problem in relation to the exploitation of migrant domestic workers by foreign diplomats". Lord Sumption in *Reyes*, with whom Lord Neuberger agreed, also acknowledged that there was "evidence that human trafficking under cover of diplomatic status is a recurrent problem" (see at [3]). Despite the fact that the proportion of domestic workers who are the victims of trafficking is considerably higher in diplomatic households than in other households, trafficking remains a low risk, high reward activity for diplomats, principally because of the 1961 Vienna Convention on Diplomatic Relations (VCDR) (to which the UK is a state party), which militates against the imposition of criminal liability on diplomats, and largely

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militates against the institution of civil proceedings in the receiving state, barring a few exceptions.

One of these exceptions—found in art.31(1)(c) VCDR—was recently considered by the Supreme Court in *Basfar*. It provides:

> "1. 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: …
>
> (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."

In *Basfar*, Ms Josephine Wong, an ODW from the Philippines, worked in the household of Mr Khalid Basfar, a member of the diplomatic staff of the mission of the Kingdom of Saudi Arabia in the UK. Ms Wong claimed that she was forced to work for Mr Basfar and his family in circumstances amounting to modern slavery. She brought a claim against Basfar in an employment tribunal for wages and various breaches of her employment rights. Basfar applied to have Ms Wong's claim against him struck out on the ground that he was immune from suit because of his diplomatic status. The employment tribunal held that, on the facts alleged, Ms Wong's claim came within the "commercial activity" exception to diplomatic immunity. The tribunal accordingly refused to strike out the claim. The Employment Appeal Tribunal [2020] I.C.R. 1185; [2020] I.R.L.R. 248, however, allowed Basfar to appeal against this decision directly to the Supreme Court. The Supreme Court subsequently granted permission for such a leapfrog appeal. The case ultimately turned on the question of whether, on the assumed facts, Basfar, a sitting diplomat, was exercising a "commercial activity" outside his official functions within the meaning of art.31(1)(c) of the VCDR.

Although the majority considered that the normal employment of a domestic worker (that is, employment not tainted by modern slavery) does not amount to a "commercial activity" within the exception, they nonetheless ruled that, if the facts were proved, Basfar would not have immunity from the civil jurisdiction of the courts of the UK, since human trafficking is a "commercial activity" that is engaged in for profit in circumstances where labour is extracted from victims on an involuntary basis.

The majority in *Basfar* considered several methods of treaty interpretation when assessing the difficult question as to whether an employment contract infected by human trafficking amounts to a "commercial activity" within the meaning of art.31(1)(c) of the VCDR. They ultimately adopted the evolutionary method of treaty interpretation, finding that it was necessary to assess how the meaning and content of the words "commercial activity" have evolved since 1961. In this regard, they noted that, in an indirect way, the adoption of various international instruments to combat trafficking and related forms of exploitation:

> "may reflect increased prevalence and international awareness of such forms of exploitation of human beings for profit, as global migration has surged and the world has become more inter-connected" (see [2022] 3 W.L.R. 208 at [71]).

Having drawn an analogy with money laundering, which they felt constituted a "commercial activity", the majority ruled that legal developments in international law post-1961 make it clear that there is a critical distinction between ordinary domestic employment arrangements which are incidental to the daily life of a diplomat in the receiving state, and which do not fall within art.31(1)(c), and the exploitation of a domestic worker for profit, which amounts to a "commercial activity" (see at [72]).

The majority in *Basfar* held that there is a material and qualitative difference between ordinary employment, which is a voluntary relationship, freely entered into, and governed by the terms of a contract, and an employment contract infected by modern slavery in which labour is not freely offered. Rather, "the work is extracted by coercion and the exercise of control over the victim" (see at [43]).

To buttress their finding that involuntariness can convert an employment relationship into a coercive one, the majority pointed to the special vulnerabilities that make it impossible or very difficult for domestic workers to leave diplomatic households. More pointedly, domestic workers, like Ms Wong, are especially vulnerable because of their physical and social isolation. The fact of working alone and being cut off from family and other social support networks renders domestic workers "inherently vulnerable to exploitation" (see at [45]). On the assumed facts, physical and social isolation was deliberately maintained and magnified by Mr Basfar and his family who confined Ms Wong to their house 24 hours a day, never allowing her even to set foot outside (except to put out the rubbish). Ms Wong's isolation was made "even more complete" (see at [45]) by Basfar not allowing her to have a mobile phone and permitting her to use her employer's phone to speak to her family only twice a year.

The majority was also concerned about the extreme dependency created in diplomatic households like Basfar's, which, on the assumed facts, was augmented by psychological abuse. Ms Wong was shouted at incessantly, belittled by being called offensive names and humiliated by being made to wear a doorbell, and was constantly at the family's beck and call. She also had to eat the family's left-over food. Ms Wong's dependency was further exacerbated by the fact that Basfar, on the assumed facts, withheld Ms Wong's pay, which only served as a means of controlling and of preventing her from leaving his home. Withholding her pay meant that, if she left the house, she had no money with which she could pay for any food or shelter. It also locked her financially into continuing servitude by creating the perception that, if she left, she would lose any prospect of eventually receiving at least some recompense for her labour.

The majority was also concerned that the nature of domestic work meant that Ms Wong was:

> "effectively incarcerated in the household of her employer … beyond the reach of public authorities or private charities who might be able to help if they were aware of her situation" (see at [48]).

Her special vulnerability, on the assumed facts, was compounded by her employer's diplomatic status. In short, the majority concluded that Ms Wong was held in an involuntary exploitative situation that could properly be classified as a "commercial activity".

The majority in *Basfar* then drew on a second meta-principle—profitability—as a crucial aspect of its finding that an employment contract infected by human trafficking is a "commercial activity". Having read art.31(1)(c), in conjunction with art.42 VCDR, the majority ruled that Basfar had exploited his control over Ms Wong for personal profit, which, alongside involuntariness, rendered the contract a "commercial activity". On the assumed facts, Basfar and his family enjoyed the benefit of Ms Wong's services for almost two years, initially for a fraction of her contractual entitlement to wages and latterly for no pay at all. This deliberate and continuing conduct conferred "a substantial financial benefit" (see at [52]) on Basfar.

The majority was not persuaded by the argument that, if Basfar had made Ms Wong's services available to someone else in return for payment, the commercial activity exception would have applied, but because he and his family enjoyed the benefit of her services themselves, it did not. In their view, this argument seemed "unsustainable as a matter both of law and economics" (see at [54]). They analogised that if, for example, as a term of their employment, a company executive is provided with the free use of a car and chauffeur, they enjoy an economic benefit which can be taxed and fairly valued at what it would cost to purchase this service in the market. In the same way, they held (at [53]):

> "[T]he monetary value of services derived from forced domestic labour can be measured as the difference between the amount for which the worker would willingly have provided the services or for which equivalent services could have been purchased in the labour market and the amount of money, if any, and other emoluments actually paid for them".

The majority concluded that, Basfar, on the assumed facts, made a substantial financial gain from his exploitation of Ms Wong's labour, albeit not in cash but in money's worth. In short:

> "The exploitation has been a systematic activity carried on over a significant period. It is accurately described as a commercial activity practised for personal profit" (see at [56]).

The case of *Basfar* illustrates labour law's emancipatory potential in appropriately responding to the exploitation of domestic workers in diplomatic households. *Basfar* is refreshingly progressive in dispelling the long-held belief that other, more appropriate avenues, are available to vindicate the interests of exploited ODWs, apart from labour law. Indeed, it is not simply enough to say that, under art.9 VCDR, a diplomat who has engaged in exploitation may be rendered *persona non grata*, as research has long shown that receiving states, for reputational reasons, rarely invoke this remedy because of the fear of reciprocity (Bergmar (2014) 47 V.J.T.L 501). Nor is it sufficient that diplomats can be prosecuted or subject to the jurisdiction of civil courts in their home state, as research has shown that enforcement in this regard is rarely effective (Bergmar at 505). Nor indeed is a waiver of immunity by the home state typically forthcoming or indeed generally effective (Bergmar at 520).

The *Basfar* decision, then, is undoubtedly an important one that is pregnant with the potential to liberate a growing subset of victims of exploitation who were, for

a long time, treated as outside the purview of labour law. That the majority recognised the special vulnerability of these individuals to exploitation in diplomatic households is a conceptually important shift in the conversation about the experiences of ODWs which is long overdue.

The majority should also be credited for taking the bold step of departing from a line of American cases which seemed strongly to suggest that an employment contract infected by human trafficking can never be transformed into a "commercial activity". Indeed, the US decisions of *Sabbithi v Al Saleh* 623 F. Supp. 2d. 93 (D.D.C. 2009) and *Fun v Pulgar* 993 F. Supp. 2d. 470 (2014) could be distinguished from *Basfar* in that the courts in those cases did not directly address the question of whether keeping a person in circumstances of modern slavery can reasonably be equated with the ordinary hiring of a domestic employee. Although the claimant in *Sabbithi* had alleged human trafficking, the court did not directly address its mind to the question of trafficking, finding instead that this was a case involving marginal wages, which was not a "commercial activity". Similarly, in *Fun*, the court was not persuaded that the defendants' conduct amounted to human trafficking. Thus, the majority in *Basfar* can be said to have been dealing with a slightly different set of circumstances than the courts in *Sabbithi* and *Fun*.

Further, the courts in *Sabbithi* and *Fun* did not address their minds to the (in)voluntary nature of the services provided by the claimants nor indeed the question of the profitability of those services. In fact, because the courts in those cases treated the US Government's *Statement of Interest* as dispositive, they did not seriously interrogate the defensibility of the earlier case of *Tabion v Mufti* 73 F. 3d. 535 (1996) on which they wholly relied, which did not address profitability nor voluntariness.

By contrast, the majority's resort in *Basfar* to the concept of voluntariness is defensible given that the distinction between contracts voluntarily entered into and those devoid of voluntariness has long been a recognised principle of law. In fact, although not cited in *Basfar*, as far back as 1890, Fry L.J., in *De Francesco v Barnum* (1890) 45 Ch. D. 430 at 438, insisted that "the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery". In other words, the essence of an enforceable employment contract is premised on the fact of voluntariness, without which the contract may be properly characterised as slave-like in its orientation. On the assumed facts, therefore, in the absence of voluntariness, the contract between Mr Basfar and Ms Wong could not be described as an ordinary one incidental to daily life, but rather a "commercial activity" characterised by a loss of autonomy.

Despite its liberating potential, however, the *Basfar* decision is not a panacea. First, the majority posited two narrow criteria which need to be satisfied before the exploitation of a domestic servant can be considered as a "commercial activity": (1) involuntariness arising from a situation of modern slavery; and (2) profitability. While these criteria may be satisfied by *some* victims who are subject to modern slavery in diplomatic households, several other victims of exploitation who experience various kinds of "unfreedoms" but whose abuse does not rise to the level of modern slavery would not obtain redress. In this regard, the majority's ruling does not go nearly far enough to protect and liberate these invisible workers, who may be paid for their work, but whose circumstances are abusive, though not

of a sufficient degree to be considered "modern slavery". Thus, although *Basfar* is an important part of labour law's reconstructionist project, it only goes so far as to correct the decent work deficit which has long characterised this area of the law. This issue was in fact acknowledged by the minority in *Basfar*, who were rightfully concerned that:

> "Many people in the UK and elsewhere work long, antisocial hours in unpleasant conditions doing menial work for low pay and having to put up with rude, bullying employers. They cannot afford to leave their jobs; they have families to feed and bills to pay and the alternatives open to them are very limited and unlikely to be much better. But they are not generally regarded as 'slaves' or as working in 'forced servitude'" (see at [163]).

Secondly, there is the practical issue as to how the second criterion—profitability—is to be applied in practice. In the majority's view, the appropriate methodology to be used to determine profitability is to compare how much the domestic servant was paid with how much a similarly placed person would willingly accept. The challenge with this approach, however, is that it is described at such a high level of generality that it may operate to the disadvantage of workers in relation to whom the disparity in pay vis-a-viz their comparators is not substantial enough to be properly regarded as affording a "profit" to their employers. Additionally, there is the difficultly associated with finding an appropriate comparator, as many ODWs choose to accept meagre pay in large part because they wish to escape even more dire economic circumstances in their home countries. In this respect, the profitability criterion, as conceptualised by the majority in *Basfar*, is in need of further refinement if it is to be a useful methodology which can be applied in varied contexts to deal with the disparate lived experiences of victims of exploitation in diplomatic households.

A final issue arising from the majority's strong, if not decisive, emphasis on profitability is that the Palermo Protocol does not treat all instances of trafficking as inherently motivated by profit. In fact, the *travaux préparatoires* of the Protocol reveal that the delegates made a deliberate decision to omit reference to profitability in the final text of the Protocol, as they were cognisant that not every instance of trafficking necessarily involves profitability. While there are some cases in which traffickers are motivated by profit, it cannot be assumed that all diplomats engage in trafficking for domestic servitude, for example, for profit. Some exploiters are sadistic and may exploit others more vulnerable than they are even when there is no expectation of profit. In this regard, the *Basfar* ruling leaves without protection victims who are not able to establish the criterion of profitability.

Despite these problematic aspects of the case, however, overall, the *Basfar* ruling is a refreshingly insightful and progressive one, which, along with *Reyes* on the question of residual immunity, goes a long way to correct the decent work deficit that has long affected ODWs.

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