International Labor Rights Case Law_Template for Commentaries

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Hyperlink to case:	https://www.supremecourt.uk/cases/docs/uksc-2014-0105-judgment.pdf
Decision-making body:	UK Supreme Court
Date of Decision:	22 June 2016
Case/Decision name:	*Taiwo v Olaige and another ; Onu v Akwwiwu and another, [2016] UKSC 31*
Primary Issues:	Race discrimination
Primary legal provisions:	Section 9(1) Equality Act 2010
Related cases, if any:	*Allen v Hounga* [2014] UKSC 55; Chandok v Tirkey UKEAT/0190/14/KN

Paragraph/page numbers to be extracted from decision/case:	Paragraphs referred to: 14, 15, 23, 26, 28

Summary of decision (approx. 250 words):	This joint case concerned two Nigerian nationals who had been recruited to work as domestic workers in private households in the UK. They claimed that their employers had breached a number of their employment rights during the course of their employment, including their right to receive a minimum wage, and rights under working time legislation (right to adequate rest breaks and annual leave). They also claimed race discrimination. At first instance, the Tribunals in both cases had (independently) upheld the workers claims for breach of minimum wage and working time rights. However, the claims for race discrimination were more problematic. The race discrimination claims were based on establishing a link between immigration status and race, such that the claims could come within the scope of section 9 (1) Equality Act 2010. In one claim, the Tribunal found that such a link could be established, and upheld the claim for race discrimination. In the other, the Tribunal found that no such link could be established and rejected the claim. The Supreme Court set out to clarify whether discrimination on the grounds of immigration status could fall within 9 (1) Equality Act 2010. They found that the scope of section 9 (1) was wide enough to incorporate the notion of nationality. The question was whether there was sufficient connection between immigration status and nationality for a claim of race discrimination to be upheld in these circumstances. The Court was referred to European human rights instruments (article 14 ECHR) and UK criminal instruments which did view immigration status as a protected characteristic. However, the Court determined that these instruments were irrelevant to the point: they

	did not establish a link between treatment on the grounds of race/nationality and treatment on the grounds of immigration status. It was also argued that there was a functional connection between nationality and immigration status (migrant workers were necessarily from outside the UK). The Court determined that this was also an irrelevant consideration. There were many migrant workers for whom their nationality (and their immigration status) did not put them at a disadvantage. In event, there was no evidence in this case that nationality was the source of the ill-treatment of the domestic workers. Both claims failed. In summary, there is no automatic connection between nationality and immigration status which will bring migrant workers within the scope of 9 (1) Equality Act 2010.
Title of Commentary:	Race discrimination and migrant domestic workers: A Legal Loophole

Introduction

There is a long running tension when it comes to the regulation of employment relationships. On the one hand, the presence of a contract of employment suggests that contractual principles should dominate and that regulation should proceed on the basis of assumptions of freedom of contract and equality of the parties. On the other hand, it has become clear that the assumptions of contract law do not represent the reality of many employment relationships, and that regulations need to recognise that employment relationships form a framework in which abuses occur and in which inequality is perpetrated.[1] The problem for Claimants is that even the more progressive regulations under employment law (for example the law on discrimination in employment) do not escape contractual assumptions completely. They aim still towards economic efficiency rather than, say human rights protection. Furthermore, human rights legislation tends to be considered a separate area of law, an area of public protection which does not extend to 'private' employment relationships. Thus there opens up a wide lacuna in the law through which Claimants fall: employment rights do not adequately cover human rights abuses, whilst human rights law cannot penetrate employment relationships. It is international law which is making most inroads into closing that gap.

Analysis

This case demonstrates precisely the kind of problems that Claimants face when they seek to claim rights abuse by their employers under employment legislation. The case was a joint claim by two workers on very similar facts. Both workers (Ms Taiwo and Ms Onu) were Nigerian nationals who entered the UK on migrant domestic worker visas and entered domestic service in private households. In both situations their employers drew up 'contracts of employment', but in Ms Taiwo's case the employment contract did not represent the reality of the situation (it presented far more favourable terms than Ms Taiwo ever experienced), and in Ms Onu's case the terms of the contract included obligations which went beyond mere 'employment' (towards forced labour or slavery). During the course of their employment, both workers experienced dramatic and sustained abuse. Both workers had their passports seized by their employers, were required to work for the majority of their waking hours, were not given rest periods or annual leave and were not paid the minimum wage. Independently, the domestic workers brought successful claims in the Employment Tribunal against their employers for breach of a number of statutory employment regulations, and also brought claims for direct and indirect

[1] These arguments are explored more fully in G Davidov, *A Purposive Approach to Labour Law* (OUP 2016)

race discrimination. The Employment Tribunal in Ms Onu's case upheld her claim for direct discrimination, but Ms Taiwo's claim was rejected. In the latter case, the Tribunal found that abuse as a result of vulnerable migrant status did not amount to racial abuse (an individual having different racial characteristics but the same immigration status would have been treated the same).

The Supreme Court set out to resolve the uncertainty which had arisen in the earlier cases on the direct discrimination point, and decide definitively whether the conduct of the employers as a result of the Claimants' immigration status could amount to race discrimination under the Equality Act 2010 (the question of indirect discrimination having been dismissed). It was clear that the scope of the Equality Act was wide enough to incorporate discrimination on the grounds of nationality. It was not clear that discrimination on the grounds of immigration status equated to discrimination on the grounds of nationality. The Supreme Court considered two main arguments in support of the connection between immigration status and nationality. The first was that immigration status and nationality were 'indissociable' in practice.[2] The second was the line of jurisprudence outside of employment law in which immigration status was a protected characteristic.

In relation to the first point, the Supreme Court accepted that as a general statement, immigration status is a 'function' of nationality.[3] However, in this case, the abusive treatment of the domestic workers 'had nothing to do with the fact that they were Nigerians'.[4] Indeed, the employers were non-nationals themselves (and even of the same race). The Court found that for a claim to fall under a particular protected characteristic, the characteristics of the individual had to 'coincide exactly' with the stated protected characteristic, and as such the Claimants could not satisfy the tests for direct discrimination under UK law.[5] In relation to the second point, the Supreme Court accepted that immigration status could be a protected characteristic in human rights law. It also accepted that immigration status could form the basis of a successful criminal action. However, the Court went on to state that human rights and criminal law were not pursuing the same ends as the employment legislation in the Equality Act 2010. The aim of setting out the protected characteristics in the Equality Act was to limit freedom of contract only in very narrow circumstances, namely to groups which had suffered historical labor market disadvantage. Immigration status was not included in this list, and this was an intentional omission: the Equality Act could not cover all employment access problems which arose from the whole range of immigration statuses.

Implications for UK law

In the Supreme Court judgement, the judges accepted that the Claimants had been 'treated disgracefully' at the hands of their employers.[6] They considered that it was regrettable that the decision of the Court would mean that the Claimants were not adequately compensated for the harms that they had suffered. However, they clearly did not consider that employment law was the right place to seek a remedy in this case. Employment law was too narrowly focussed and its aims too specific to include this category of claimants. They suggested that an action for human rights/criminal abuses under the Modern Slavery Act 2015 would be a more suitable and fruitful arena for this kind of claim.

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[2] *Taiwo v Olaige and another ; Onu v Akwwiwu and another, [2016] UKSC 31*, para 15
[3] Ibid para 23
[4] Ibid para 26
[5] Ibid 28
[6] Ibid 14

This very cautious approach to employment legislation is reflected in other UK judgements. Firstly, judges are reluctant to go beyond the perceived will of Parliament in the construction of employment legislation, and secondly, are reluctant to depart from contractual doctrines which remain pervasive in the employment context. The first element is displayed in the recent case of *Chandok v Tirkey*,[7] which turned on whether discrimination on the grounds of caste could fall within the scope of the Equality Act 2010. The judge in this case considered that caste could not appear as an extra protected characteristic in its own right. Caste discrimination could only be included within the scope of the Equality Act if it fell within the (admittedly wide) scope of race under section 9(1). A good example of the second element of this cautious approach to employment legislation is displayed in the recent case law on illegality in employment relationships. In *Hounga v Allen,*[8] the operation of the contractual doctrine of illegality meant that the migrant worker's claims for tort discrimination failed in the Court of Appeal. In the Supreme Court, Lord Wilson questioned the use of contractual assumptions in this case, suggesting that contractual notions of choice and equality were non-sensical in the context of dramatic socio-economic inequality. The Court of Appeal judgement was overturned. However, in the dissenting judgements, it was made clear that the findings of the judgement were limited to the facts. If the claims had been based more squarely on the contract of employment (including statutory employment claims) they would have been barred for illegality. Moreover, Lord Wilson's position was immediately criticised in later case law.[9]

International implications

It might be easier to justify this kind of cautious approach if, as was suggested by the Supreme Court in *Taiwo*, migrant domestic workers can successfully bring their claims under human rights law. However, there are a number of difficulties with human rights law in this context. One of the main problems is that the conviction of employers requires that employment relationships are classified in a particular way. For example, Article 4 of the European Convention on Human Rights requires that the Claimant's treatment amounts to 'slavery', 'servitude' or 'forced labour'. In practice, these elements can be very difficult to prove. The existence of 'slavery' is particularly tricky to expound, given the decision in *Sillian v France*[10] that it requires proof of the exercise of rights of ownership, rather than (just) the restriction of personal autonomy. It is also more difficult for Claimants to bring human rights claims than employment-related claims, and the routes to compensation are often indirect (for example a claim under the Modern Slavery Act for slavery requires a conviction and a confiscation order to be already in place against an employer).

At international level, there has been an attempt to bring both the employment and human rights concerns in relation to (migrant) domestic workers into one document: the ILO Convention on Domestic Work.[11] This is reflected starkly in the context of Article 3 of this Convention which requires that Member States 'ensure effective protection of the human rights of all domestic workers' as well as respecting and promoting 'fundamental principles and rights at work'. Furthermore, the Convention is not restricted to those labour rights considered 'core' by the international community: freedom of association, the elimination of forced, compulsory and child labour, and the elimination of discrimination. The Convention also defines lower level

[7] UKEAT/0190/14/KN. See also the discussion in A Waughray, 'Is Caste Discrimination in the UK prohibited by the Equality Act 2010 (2016) 2 *International Labor Rights Case Law* 70

[8] [2014] UKSC 47. See also the discussion in A Bogg and S Green, Rights are Not Just for the Virtuous: What Hounga Means for the Illegality Defence in the Discrimination Torts' (2015) 44 (1) ILJ 101

[9] *Laboratoires Servier v Apotex* [2014] UKSC 55

[10] (73316/01) (2006) 43 EHRR 16 (ECHR)

[11] C189 - Domestic Workers Convention, 2011 (No. 189)

employment rights for domestic workers, including the right to be informed of their terms and conditions of employment, and the right to daily rest breaks and annual leave.

Conclusion

It is suggested that the integration of employment and human rights law (as reflected in the ILO Convention) is the correct appraochto the regulation of (migrant) domestic workers. Employment law needs to give greater consideration to human rights concerns, and this should be reflected in a wider and more flexible approach to discrimination law. At the same time, there should be a consideration of how human rights law can better respond to employment law concerns. A first step is the ratification of the ILO Convention on domestic work (which the UK has not ratified). Further steps involve changing national law and its interpretation to insure greater integration of employment and human rights. As long as employment law and human rights law remain separate considerations, migrant domestic workers will not be able to receive justice.