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# **The state's contradictory response to the exploitation of immigrant workers: the UK case**

*Lea Sitkin*

In 2004, the bodies of 21 Chinese illegal immigrants were found on the shores of Morecombe Bay in the northwest of England. Hired by gangmasters to pick cockles – a type of British shellfish delicacy – the group, mostly made up of young men in their 20s and 30s, were trapped by incoming tides and died as a result. The high-profile tragedy threw a spotlight on the underground world of local gangmasters and more generally, highlighted the risks and dangers of clandestine migration into the British economy.

The reaction of the British state to the exploitation of immigrant workers – as well as native workers – has been to criminalize the actors directly committing the abuses. Immediately following the Morecombe Bay tragedy, the then-Labour government introduced the *Gangmasters Licensing Act 2004*, which requires all labour providers in the agriculture, food processing and shellfish gathering industries to be licensed by a centralized authority, on pain of criminal sanction.<sup>i</sup> That same year, the *Asylum and Immigration (Treatment of Claimants) Act* introduced criminal offences for trafficking for the purposes of slavery and forced labour.<sup>ii</sup> This was the first time that trafficking for non-sexual offences had been subject to criminal law. The *Immigration, Asylum and Nationality Act 2006* repealed previous legislation on employer sanctions and introduced a civil penalty regime alongside a criminal offence for *knowingly* employing adults subject to immigration controls. The number of employers subject to sanction has increased dramatically since the introduction of the civil penalty regime, although

criminal prosecution figures remain low (Aliverti 2013: 44). Following criticism of the UK legal regime on forced labour in two cases before the European Court of Human Rights,<sup>iii</sup> the *Coroners and Justice Act 2009* created criminal offences of holding another person in slavery or servitude or requiring them to perform forced or compulsory labour (s.71). Most recently, Home Secretary Theresa May has pledged a “modern-day slavery crackdown”, promising new criminal offences, greater resources allocated to enforcement and tougher sanctions for traffickers and gangmasters.<sup>iv</sup>

In these endeavours, the British state takes on a particular role as the protector of exploited workers, placed in direct opposition to a guilty party – the greedy employer; the trafficker, the gangmaster – whose nefarious practices it is trying to control. However, framing the issue in such a way denies the state’s complicity in rendering a specific group of workers – immigrant workers – uniquely vulnerable to exploitation (Anderson 2010). In particular, a burgeoning body of literature argues that it is the fact that migrant workers face a constant threat of arrest, imprisonment, detention and ultimately deportation that undermines their ability to negotiate on an equal footing with employers (Bauder 2006; Calavita 1992; Calavita 1998; Calavita 2003; De Genova 2002; De Genova 2004; De Giorgi 2006; De Giorgi 2007; De Giorgi 2010; Escobar 2010 ; Melossi 2003; Nagels and Rea 2010; Palidda 2005; Palidda 2009; Wacquant 1999). In this analysis, borders operate not to exclude foreign nationals, but rather as flexible gateways that define immigrants’ subordinate position in host country labour markets. In turn, as the enforcer of border control, the state plays an integral role in fostering foreign nationals’ subordinated inclusion in the workplace.

The relationship between immigration status and exploitation is most acute for irregular immigrants, who fear that their employers – and indeed, anyone aware of their legal situation – may denounce them to the authorities. In turn, employers and other parties use the threat of denunciation to the authorities as a method of exerting extra control over immigrants (Heyman 1998). However, the threat of detention and deportation also affects regular immigrants' labour market behaviours, since their immigration status is often tied to specific employment obligations such as the requirement to stay with a particular employer, or a compulsory 'live-in' aspect. Where workers do not abide by these conditions, they – like irregular immigrants – are liable to deportation. Thus, these conditions work so as to “cheapen the labour power of a growing number of people once they are inside the country and to leave them vulnerable to all forms of market relations” (Sharma 2001: 417). Furthermore, borders' “power-effects” are projected inside the nation-state through the institutionalisation of a stratified system of socio-legal entitlement that limits the options available to immigrants who are seeking to meet their basic needs (Bloch 2000). Far from being a neutral and objective dispenser of justice, the unique power of the employer over his or her foreign worker is propped up by the state.

The present chapter explores the contradictory response of the state: on the one hand, criminalizing those perpetrating abuses; and on the other, fostering immigrant workers' particular susceptibility to exploitation. To this end, it analyzes the conditions attached to four different types of immigration status currently available in the UK: Tier 2 (general) visas, domestic workers in private households, A2 nationals working under the “freedom of establishment” and finally, irregularly resident workers. Importantly,

understanding the effect of immigration status on workplace requires an analysis of immigration law's interaction with other bodies of law, most notably, labour and social welfare law. Data for the chapter was collected through legal methodology (most notably, the collection and analysis of cases), official statistics, academic and 'grey' literature reviews, and finally, semi-structured interviews with lawyers, migrant rights activists and immigrant workers, recruited through snowball sampling. As a non-random method of sampling, snowball sampling is limited in terms of its representativeness. Importantly, the chapter does not argue that the experiences discussed in this chapter happen to all immigrant workers – instead, it intends to illuminate the ways in which immigration status leaves immigrants in an institutionally vulnerable position.

The chapter concludes that the current government have employed a dual tactic of criminalizing the immediate perpetrators of exploitation and restricting avenues for legal immigration. In turn, these efforts obfuscate wider issues of labour regulation and immigration policy (Fudge and Strauss 2013: 13). Although the European Courts offer some possibilities for challenges to the UK's legal regime, the essential political tensions between the desire to protect business interests, limit immigration and protect immigration workers' rights means that it is likely that the contradictory legal regime on migrant workers' exploitation will continue, with devastating consequences for those caught in its net.

## **WORK PERMIT HOLDERS**

The UK used to have an 'open' labour migration category for highly skilled migrants, which allowed anyone with a sufficient number of 'points' to immigrate to the UK and look for work or self-employment opportunities. Significantly, the 'Tier 1 (General)'

category for highly skilled immigrants did not require applicants to have a job offer nor a sponsoring employer. Foreign nationals on this visa enjoyed total freedom of occupation and the ability to change employer. Subsequently, the coalition government has realigned the immigration admissions system, so that “sponsorship is at the heart”<sup>v</sup> of the immigration system. In the UK, the largest labour migration category – accounting for 35% of visas in 2010 – was Tier 2, for “foreign nationals who have been offered a skilled job to fill a gap in the workforce that cannot be filled by a settled worker.”<sup>vi</sup> There is a quota of 21,000 places for jobs paying below £152,000; jobs paying more than this do not fall within the limitation.

The stated aim of the program is to attract the ‘best and brightest’ of a highly skilled and mobile global elite. However, critics have warned that the restrictions contained within the Tier 2 visa program are likely to discourage would-be applicants, who are aware of the implications of these conditions. The key issue is the lack of ‘employment portability’ – that is, the ability to change employment. Visa holders are not allowed to take employment outside of that which is stated in the Certificate of Sponsorship – and they face deportation if they lose their job.<sup>vii</sup> Furthermore, since April 2012, a cooling off period has been in operation, which means that any Tier 2 migrant whose visa has been cancelled or has expired and who has left the UK having not made a fresh in-country application is subject to a 12 month ban from making an application to reapply in the same category. Thus, Tier 2 workers are reliant on their employer not only for their livelihood, but for their right to stay in the country. This leaves workers on this program vulnerable to a form of “hyper-dependence”,<sup>viii</sup> which goes beyond the

personal dependence and subordination British nationals experience in their employment relationships.

Employers have been known to take advantage of immigration status and the threat of deportation as a means of exercising control over work permit holders, including forbidding union membership (Walia 2010). Although it is difficult to conclude how widespread this issue is, a survey of employment advisors carried out by the Trade Unions Congress found that 39 per cent of advisers were commonly or very commonly approached by migrant workers whose employers had threatened to deport them if they reported problems at work (Trade Union Congress 2007: 53). Similarly, Alan Ritchie of construction union UCATT said: “Bosses often falsely suggest that workers will be deported if they join unions or report abuses.”<sup>ix</sup>

Furthermore, migrants on work permits may be conscious enough of this possibility to police themselves through, for example, working for less money, avoiding industrial disputes and more generally, staying with an unsatisfactory employer (Anderson 2010). Migrant workers consistently claim that the lack of freedom to change employers is the main reason for remaining in exploitative conditions (MRCI 2010). This self-regulation may in fact be more widespread than overt threats on the behalf of the employer: as one respondent<sup>x</sup> said ‘Employers don’t threaten... [because immigrants] never complain’. Similarly, a lawyer interviewed for the study argued that:

even the legal people...they are often asked to do more than their colleagues, they are often asked to do the work that isn’t most people’s cup of tea...and

naturally their chance for promotion is less because it's the type of job that people don't want to do and you have less opportunity to shine. The reason why is that they know, their visa, Tier 2, must be attached to that employer. If you want to change, they cannot. So, in a way, the company implies that, just be nice, at least for five years. And a lot of people suffer in silence.

(immigration solicitor, interviewee 3, 20 June 2012)

Finally, the lack of employment portability undermines possibilities for migrants to access Employment Tribunals, should they want to enforce a claim. In the UK, an employer may withdraw the Certificate of Sponsorship at any time if the work finishes or is no longer available or if the worker is unsuitable and the migrant will have to leave the UK within 60 days if they have not found another authorised sponsor. The predictable result of this condition is that "if [Tier 2 visa holders] get dismissed...it can be difficult to remain in the UK for a sufficient time when the case is going on, financially...and maybe they can't stay in the country ...and some employers will use that to their advantage"(immigration solicitor, *ibid*). The only exception to the requirement to leave the country occurs in cases of suspected trafficking, when a 45 day reflection and recovery period means victims cannot be deported. This right follows the UK's ratification of the Council of Europe (CoE) Convention on Actions against Trafficking in Human Beings in 2008. However, leave beyond this reflection period is discretionary. Furthermore, as former Parliamentary Under Secretary of State for the Home Office Mr. Alan Campbell has spoken about, immigration officers are often suspicious that irregular migrants might be claiming to be victims in order to get round immigration rules.<sup>xi</sup> Most of all, the 'grace period' only applies to trafficking and not to



other labour market crimes and offences. Thus, the vast majority of immigrants on work permits do not have the practical means to prosecute or make claims against their employers.

### **FREEDOM OF ESTABLISHMENT: A NEW HOLE IN THE LEGAL REGIME**

A great deal of intra-European labour mobility occurs under the aegis of the freedom of establishment and of services, as opposed to the freedom of movement of workers. The freedom of establishment (Art 49) includes “the right to take up and pursue activities as self-employed persons and to set up and manage undertakings in other EU states”.

While the transitional restrictions on Romania and Bulgaria meant that nationals of these countries had restrictions on their right to work as employees, their right to freedom of establishment was unaffected, meaning they could work as self-employed.

The predictable result of this has been a siphoning of Romanian and Bulgarian immigrants into self-employment. Although official statistics are not kept, estimates suggest that the rate of self-employment is 42 per cent among nationals from these countries – around five times higher than the rate among the previous generation of East European accession immigrants, whose immigration to the UK was not limited by transitional arrangements (Rolfe 2013: 24). For example, the UK construction labour market shows a ratio of 11 to 1 in terms of self-employment over direct employment from workers entering from East Europe (Memorandum, UCATT 2009).<sup>xii</sup>

For optimists, increases in self-employment reflect a change in work attitudes within the labour force: a trend towards a new spirit of entrepreneurship and more autonomous concepts of work (Gottschall and Kroos 2003: 5). Undoubtedly, many self-employed

workers are not in a precarious situation, but instead enjoy the ‘non-pecuniary’ advantages of self-direction and flexibility that being one’s own boss affords (Benz and Frey 2008a; Benz and Frey 2008b). Nonetheless, the funnelling of East European nationals into self-employment has a number of troubling consequences in terms of vulnerability to precarious work.

In particular, self-employment is associated with fewer workplace rights in the UK. In British law, employees are subject to labour law, a body of law introduced to intervene in the employment contract and compensate for the market-based subordination of the employee vis-à-vis the employer (Perulli 2003: 6). Recent legislation has established a second category of ‘worker’, which is used for agency workers, with most (not all) of the same rights as employees. These apply to all contracts where an individual agrees to personally carry out work without running a genuine business of their own and include working time, minimum wage levels, disability discrimination, part-time work and protection from unauthorised wage deductions (Böheim and Muehlberger 2006).

By contrast, self-employed persons are understood as their own bosses and seen as equal to the parties they contract with. This distinction is reflected in the legal construction of a difference between contract of services and contract for services. Instead of employment law, the self-employed are subject to civil and commercial law (Buschoff and Schmidt 2009). This means they do not have employment rights, because they are their “own boss and can therefore decide, for example, how much to charge for [their] work and how much holiday to give [themselves]”.<sup>xiii</sup> Although they have the right not to be discriminated against<sup>xiv</sup> and are entitled to a safe and healthy working

environment on their client's premises, they are exempt from some of the most basic employment rights, including the statutory minimum wage,<sup>xv</sup> legislation on working time and rest breaks and unauthorized deductions of pay. Instead of claiming for unfair dismissal in an employment tribunal, they claim for a breach in contract in a small claims court.<sup>xvi</sup>

Secondly, self-employed persons have fewer social rights. Indeed, the fiscal incentives to opt for self-employment are bought at the expense of some longer term disadvantages in terms of access to state benefits. In the UK, the general contractor – that is, the person who enters into a contract with the self-employed worker - avoids the National Insurance contribution, which constitutes around 12.8 per cent of employees' gross wage payment. At the same time, the self-employed worker pays a lower contribution, representing in a saving of about 7 per cent on gross earning (Briscoe, Dainty and Millett 2000). However, exclusion from contributions means that self-employed workers are excluded from sick pay and contribution-based unemployment benefit. These benefits are important in terms of avoiding exploitation because they give workers means of survival should they fall ill or leave their employment. Furthermore, deprived of any pension entitlements, self-employed workers face an old age of means-tested poverty – unless, without a designated retirement age, they work until they die (Harvey 2001).

Finally, much self-employment is 'bogus': that is, it does not reflect the reality of the employment relationship. This issue is particularly acute with the UK's construction industry: one estimate suggests that as many as 80 per cent of the taxed self-employed

would be designated employees, if they were to go to employment tribunal (ibid: 21). It is extremely difficult to control bogus self-employment, particularly where both the employer and employee are complicit. Demonstrating the mismatch between the contract – or, if there is no written contract, the actual terms of engagement – and the reality of the working situation can be extremely difficult. Furthermore, self-employment is defined according to numerous dimensions which carry equal weighting. This means that many circumstances fall into a grey zone between ‘pure’ self-employment and employment. In the UK, the challenge of prosecuting bogus self-employment is also complicated by the use of agencies or payroll service companies (Elliot 2009). Once an individual signs a contract with the third pay company, they no longer have a legal relationship with the general contractor but instead are legally defined as self-employed subcontractors or ‘freelance operatives’ of the payroll company itself. The implication of this is that the general contractor is protected from liability for employment or tax issues – despite the fact that they retain the right to ‘negotiate the provision of labour’ with the ‘freelance operative’ (Elliot 2009). To date, none of the legal challenges initiated by Her Majesty’s Revenue and Customs (HMRC) against payroll companies have been successful.

Romanian and Bulgarian workers who are ‘bogus self-employed’ find themselves in a particularly difficult situation. Instead of being reinstated as employees – and reimbursed for the wages/social rights that they were previously excluded from - they are often dismissed. A particularly noteworthy case was the dismissal of 200 Romanian workers on the Olympic Park site, after inspectors from the UK Border Agency found that they were, in reality, working in an employment relationship.<sup>xvii</sup> Notably, the

construction union UCATT supported the Romanian workers' dismissal, given the ban they had negotiated on self-employment on the Olympic Park site. In this case, limiting A2 nationals to self-employment constituted a real life, de-facto restriction on their employment portability.

## **DOMESTIC WORKERS**

In February 2012, the government announced that instead of abolishing the overseas domestic work visa,<sup>xviii</sup> it would limit its duration to a maximum of six months, with no extensions, or until the employer leaves the UK, whichever was sooner. A migrant domestic worker may only enter the UK with a non-British employer who has been granted the right to reside in the UK through a separate category, or with a returning UK expatriate. These (mainly female) workers come from a variety of countries such as India, Indonesia, the Philippines and Sri Lanka, while their employers are mainly Middle Eastern, Indian or British nationals (Wittenburg 2008: 5). The program is intended to make the UK attractive to wealthy transnational migrants by allowing them to relocate not only themselves but also their households, including their domestic staff (Fudge and Strauss 2013: 2). In 2012, around 15,553 visas were granted in the 'domestic worker in private household category'.<sup>xix</sup>

Domestic workers are some of the most vulnerable workers in the UK. In general, the home-based nature of domestic employment poses unique challenges in terms of monitoring living and working conditions. Furthermore, employers' discomfort with the idea of bringing a market relationship into the home can translate into blurry boundaries in terms of what it is appropriate to ask the worker to carry out (Anderson 2007). In

such cases, the idea of the domestic worker as a ‘member of the family’, rather than an employee, obfuscates the duty of the employer to respect the worker’s employment rights, as well as their right to privacy and ‘time-off’.

The conditions attached to the domestic worker visa only exacerbate workers’ susceptibility to exploitative working practices. Firstly, domestic workers in the UK have to live with their employers. This allows employers to call on their workers at any time. As one respondent described, “If you stay [at home, the] employer ask you to do some jobs without pay. Much more misuse.”<sup>xx</sup> Furthermore, the employer/host family has the power to control access to the means of survival – accommodation and food – as well as power over wages and social intercourse (Anderson 2007: 255). Thus, domestic workers suffering exploitation are isolated in a unique and troubling manner.

The live-in requirement is also implicated in another problem domestic workers face in terms of their employment rights. Domestic workers in the UK are excluded from a number of labour standards, such as the maximum weekly working time, restrictions on the duration of night work and occupational health and safety legislation.<sup>xxi</sup> In addition, if domestic workers are ‘treated as a member of the family’ they fall under an exemption to the national minimum wage.<sup>xxii</sup> These issues affect all domestic workers, including British nationals. However, foreign nationals are more likely to fall under this exemption because of the live-in requirement, which constitute one of the main legal tests for deciding whether a domestic worker is a member of the family.<sup>xxiii</sup> In reality, most foreign domestic workers fall under the exemption. For instance, in a recent conjoined appeals case,<sup>xxiv</sup> one of the defendants – Ms. Nambalat – was found to fall

within the exemption given that she shared meals with the family, would watch television with them and was invited on family outings. Another worker – Ms. Udin – was found on appeal to fall within exemption despite the fact that her accommodation for part of her time with the family was a mattress on the dining room floor. Here, the court decided that poor standards of accommodation did not necessarily mean that she was not treated as part of the family since other members of the family were also living in cramped conditions at the time.

The second major issue with the domestic worker visa is its lack of employment portability. These are even more stringent than those attached to Tier 2 work permits. In particular, from 6 April 2012, the rules regarding domestic workers were amended so that workers are “not allowed to change employer while [they] are in the UK or change to a different type of employment”.<sup>xxv</sup> This amendment has been subject to outcry by the charity *Kalayaan*, who were the drivers of a campaign to end this same restriction in 1997. They argue that the portability of the visa is key to protecting migrant workers:

between May 2009 and December 2010, 1053 domestic workers brought employment tribunal cases against their employers....Taking such action would be unthinkable if the worker had to continue working for their employer and residing in their household and would be impossible if workers lost their right to remain in the UK when they fled from an abusive employer.

(Lalani 2011: 6)

Thus, these changes will increase trafficking for domestic servitude as domestic workers will have no way of escaping abuse and employers will know therefore that they can abuse and exploit with impunity (Lalani 2011; Moss 2011).

The current coalition government has pursued a two-pronged argument against charges that the aforementioned change to the working conditions attached to the visa will lead to the increased exploitation of domestic workers. First, the fact that employers will have to negotiate an employment contract before they are allowed to bring in domestic workers is conceptualised as a mechanism for encouraging compliance with employment law. On the UK Border Agency website, domestic workers are told that they should “be paid... at least the minimum wage; not be forced to work excessive hours; be given agreed holiday pay; given [the] notice [they] are entitled to if [their] employment end”.<sup>xxvi</sup> However, the extent to which a leaflet outlining their employment rights at the point of obtaining a visa will be enough to protect them from exploitation is questionable, given that the requirement for a contract is already in place. Furthermore, in over 50% of cases examined in a recent study, the contracts do not contain enough information to ascertain whether the worker is paid the minimum wage (Clark and Kumarappan 2011).

More controversially still, the coalition government has argued that

the biggest protection for these workers will be delivered by limiting access to the UK through these routes. We are restoring them to their original purpose—to allow visitors and diplomats to be accompanied by their domestic staff—not to provide permanent access to the UK for unskilled workers.

(Home Office 2012)

This ignores the fact that shutting down a legal avenue for immigration does not stem the flow of immigration. Instead, restrictive admissions requirements contribute to the ‘illegalization’ of domestic work by foreign nationals. In turn, as discussed below,



irregular immigrants are even further excluded from the labour protections offered British workers.

### **IRREGULARLY RESIDENT**

There are two elements that determine the legal framework around illegally resident immigrant's employment rights: the enforceability of employment rights during undeclared or illegal employment, and the extent to which courts are under a duty to pass on information about immigration status to the relevant authorities. In the UK, judges are not compelled to inform the immigration authorities of irregular migrant status, although they are not prohibited from doing so. The possibility of discovery undoubtedly discourages many irregular resident migrants from making employment claims.

More fundamentally, the prevailing doctrine of illegality states that where a contract is not legal,<sup>xxvii</sup> the employment rights that it contains are not enforceable (Dewhurst 2012). The justification for this is deterrence and the need to protect the integrity of the judicial system. Despite pressure from Europe, the UK has held steadfastly onto its 'non-protection' stance, opting out of an EU Directive that would have provided undocumented migrant workers with the right to recoup unpaid wages. The rationale behind the Directive was based on the principle that the obligation to pay outstanding remuneration could increase the cost and risk of hiring an irregular immigrant, thus undermining one of the key demand factors in illegal foreign employment. However, in response to the European Migration Network Ad Hoc Query on the payment of back wages to foreign illegal workers, the UK reiterated the position that the introduction of

provision for back pay of any outstanding remuneration to illegally employed foreign nationals “could encourage some illegal workers to work in the knowledge that even if they are identified and removed from the UK they will still be paid in full”.<sup>xxviii</sup>

The implication of the ‘doctrine of illegality’ is severe for irregular migrants, who are largely prevented by this measure from seeking redress in courts. To date, there are no cases where the illegal status of the claimant has been known to the courts and they have successfully made a claim on the basis of employment rights. Until recently, questions remained about the right of irregular immigrants (and, more generally, claimants with illegal contracts) to claim for discrimination because the offence of discrimination is based on statutory remedies as opposed to contractual claims.

However, *Hounga v. Allen*<sup>xxix</sup> has narrowed the possibilities for making a claim on this basis. Ms. Hounga is a Nigerian national who came to the UK in 2007 to work for the Allen family, where she was told she would receive £50 a month to perform housework and look after their children. Her age is unclear but it is estimated that she was between 14-16 years old when she entered the arrangement. In order to obtain her passport and visa, Ms Hounga lied about her age and name and when she arrived in the UK, she lied to the immigration officers, claiming she was in the UK to visit her grandmother. Ms Hounga was assisted by the Allen family throughout this process. During this time she worked for the Allen family, she received no pay, and suffered serious physical abuse from Mrs Allen. She was eventually dismissed.

Ms Hounga brought a number of claims before the Employment Tribunal, who rejected her claims for unfair dismissal, breach of contract and unlawful deductions from wages

and holiday pay on the grounds that they arose out of the illegal contract. However, the claim for dismissal on racially discriminatory grounds was allowed because the court agreed that the admitted illegality—the violation of immigration rules—did not bar her claim based on the statutory tort of racial discrimination. The Employment Appeals Tribunal made a similar distinction. However, Ms. Hounga’s employers took the case to the Court of Appeal, who decided that all of Ms Hounga’s claims, including the discrimination claim, should be barred, because it was “inextricably bound up” with the illegality in question and therefore to permit her to recover compensation would appear to condone her unlawful conduct.

Thus, judges have tended towards a strict interpretation of the doctrine of illegality, to the detriment of migrant workers’ employment rights. Notably, the same issues also affect migrant workers who are legally resident but illegally working. In *Vakante v. Addey & Stanhope School & Others*,<sup>xxx</sup> Mr. Vakante, a Croatian asylum seeker, was given limited leave to remain in the UK, with the condition that he did not obtain any paid employment. In breach of that condition, Mr. Vakante undertook paid employment at the Addey and Stanhope School as a trainee teacher. In the process of applying for this position, Mr. Vakante made several false representations to the school about his right to work. Mr. Vakante was dismissed by the school and subsequently made a complaint of race discrimination contrary to section 4 of the Race Relations Act 1976. However, the claimants’ claim was dismissed on grounds on illegality.

Despite these issues, a small number of irregular migrants are in fact making claims in court. This occurs because of the fact that employers might similarly be interested in not

having the illegal status of the claimant come to light, because of the risk of penalty. In such cases, the employer and an irregular migrant agree that the latter's status will not be revealed in court. As one lawyer described, "Quite often you get into a game of bluff and counter bluff. They might say, the worker is illegal and then you reply, well, are you going to go out and admit to everyone that you have been employing someone illegally?"<sup>xxxix</sup> Such cases are often settled out of court. This is one of the rare occasions where third party sanctions have an indirectly positive effect on irregular migrants.

## **CONCLUSION**

The first aspect of current Conservative-Liberal coalition government's response to migrants' labour exploitation has been to criminalize and penalize the immediate actors perpetrating the exploitation. For instance, in response to report by the Salvation Army that it had witnessed an increase in domestic servitude after the visa changes came into effect, the Home Office replied that the most effective way to tackle the problem is to "target the criminal gangs behind trafficking, not blame immigration controls" (Fudge and Strauss 2013: 25). Likewise, the noted problems associated with Romanian and Bulgarian self-employment have mainly been confronted through efforts to control bogus self-employment. This does little to improve the living circumstances of the immigrants themselves. Notably, the preceding Labour government also largely resorted to criminal law, while avoiding responses that could be seen as 'rewarding' breaches of immigration legislation. Difficult questions about the rights of immigrants – and indeed, wider questions about the institutionally unequal nature of the British labour market – are put to one-side as the political vista focuses exclusively on the criminal actions of more easily identifiable villains.

The coalition government has also argued that one of the key ways of tackling migrant workers' exploitation is through limiting opportunities for legal immigration. Thus, the government's overarching populist goal of reducing immigration to the 'tens of thousands' is shrouded in humanitarian concern for the immigrants' welfare. However, a key concern with shutting down legal avenues for immigration is that it is associated with increases in illegal immigration. The argument here is that people will continue to move countries – compelled by war or civil strife or attracted by the idea of improving their economic circumstances – whether or not there are legal pathways for immigration. As Nicolas De Genova (2004) explores in his article on the history of the USA's immigration policy on Mexico, “ostensibly restrictive immigration laws purportedly intended to deter migration have nonetheless been instrumental in sustaining Mexican migration, but only by significantly restructuring its legal status as undocumented” (p.161). In turn, the exclusion of illegalized immigrants from employment rights firmly establishes this population as powerless workers.

At the present, the most significant possibility for challenge to the UK's immigration-labour regime has come from the European courts. For instance, while courts in the UK have been firm in their commitment to the doctrine of illegality, it is questionable whether they should be allowed to deny relief to workers in cases where the rights claimed can be derived from EU law, which does not permit derogations on grounds of public policy. In particular, the Race Directive permits no derogations on the grounds of public policy from the general principle of protection against discrimination. On the contrary, the Race Directive clearly states that the right to equality before the law and

protection against discrimination constitutes a ‘universal right’ and specifically requests that States take the necessary measures to ensure that any “laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished”.<sup>xxxii</sup> The question therefore arises as to whether the doctrine of illegality contravenes the Race Directive.

Similarly, the role of legal immigration status and its impact on immigration status was recently questioned in *Rantsev v Cyprus and Russia*.<sup>xxxiii</sup> Here, the European court of Human Rights went beyond a ‘criminalization’ approach to trafficking to consider the extent of a Member state’s obligations to provide commercial regulation and immigration rules that deter trafficking. In particular, the Court found “that the regime of artiste visas in Cyprus did not afford to Ms Rantseva practical and effective protection against trafficking and exploitation.” In particular, it argued that the practice of requiring cabaret owners and managers “to lodge a bank guarantee to cover potential future costs associated with artistes which they have employed” contravened the principle that “responsibility for ensuring compliance and for taking steps in cases of non-compliance must remain with the authorities themselves”. Further, both the Aliens and Immigration Service and the Limassol police were criticised for releasing Ms. Rantseva from police custody back into her employers’ hands, after she left her employment for reasons unknown.<sup>xxxiv</sup> In total, the Court ruled that the scheme amounted to a violation of Article 4, the prohibition on slavery and forced labour.

The Europeanization of law is, however, not the catch-all answer to the problematic issues faced by migrant workers in the UK. . Given this context, it is easy to approach

discourses of care for migrant workers in a cynical fashion. However, contradictory legal regimes on migrant workers' exploitation are perhaps better understood in terms of the conflicting priorities that politicians try to balance. In this analysis, politicians are caught between the desire to limit immigration, support business AND protect immigrants' rights. To some extent, these aims reflect the desires of different groups in society, with the politician hopelessly trying to reconcile the demands of the public, lobbying human rights organisation and employers in one fellow swoop. More fundamentally, however, is the way in which individuals are fully capable of holding entirely contradictory views, in one breath condemning the negative transformations wrought on their neighbourhood by illegal immigrants and in another, truly horrified and saddened at tragedies such as the one in Morecombe Bay. In this understanding, the state's ambivalent response to the exploitation of immigrant workers reflects the cognitive dissonance which we all apply to the foreigners in our midst.

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<sup>i</sup> The Act also provides a criminal offence for employers using an unlicensed gangmaster, subject to due diligence, see S. 13 (2): 1 Gangmasters' Licensing Authority 2004.

<sup>ii</sup> S. 4 (4) (a) of the Asylum and Immigration (Treatment of Claimants) Act 2004: 'a person is exploited if (and only if) –(a) he is the victim of behaviour that contravenes Article 4 of the Human Rights Convention (slavery and forced labour)...

<sup>iii</sup> In both *Kawogo vs. UK* and *CN vs. UK*, victims of forced labour had approached the police, but their forced labour was not investigated as a crime. In addition, in *Silidain v. France*, the European Court of Human Rights argued that member states had an obligation to penalise slavery and forced labour. The offences under S. 71 of the Coroners and Justice Act (2009) were created in order to speak to circumstances where the exploited person was not trafficked or the "trafficking element [could not] be proved to the criminal standard" of proof (see *Human Trafficking and Smuggling*, Crown Prosecution Service guidance). Furthermore, rather than relying on more general offences such as assault, false imprisonment or labour offences, the new offences also gave prosecutors an option that might more accurately reflect the nature of offending.

<sup>iv</sup> "Theresa May pledges modern-day slavery crackdown", BBC News, 25 August 2013.

<sup>v</sup> 'Sponsoring migrants under the points-based system', UK Border Agency. Accessible here: <http://www.ukba.homeoffice.gov.uk/business-sponsors/points/>

<sup>vi</sup> Non-European Labour migration to the UK, The Migration Observatory. Accessible here: <http://migrationobservatory.ox.ac.uk/briefings/non-european-labour-migration-uk>

<sup>vii</sup> Unless they are nationals from Romania and Bulgaria, who have the right to live in the UK but who do not yet enjoy the full right to work.

<sup>viii</sup> A term used by Mimi Zhou in 'Panel 2: Socio-legal constructions of precariousness' at 'With and beyond citizenship. Lived experiences of contemporary membership', Refugee Studies Centre, Oxford, 11-12 April 2012.

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- ix ‘Bulgarian and Romanian workers at risk of exploitation’. Accessible here: <http://www.bdonline.co.uk/bulgarian-and-romanian-workers-at-risk-of-exploitation-says-ucatt/3098791.article>
- x Migrant worker with leave to remain, Interviewee 1, 20 February 2012
- xi ‘The Trade in Human Beings: Human Trafficking in the UK - Home Affairs Committee Identifying victims’. Accessible here: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/2307.htm>
- xii Accessible at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23we40.htm>
- xiii “Are you are worker, employee or self-employed?” Accessible here: <http://www.nidirect.gov.uk/are-you-a-worker-employee-or-self-employed>
- xiv S. 39(1) Equality Act 2010, although the right not to be discriminated against only applies with workers (including dependent self-employed) and self-employed with a contract for personal services, see: [http://ec.europa.eu/justice/discrimination/files/antidiscrimination\\_law\\_review\\_12\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/antidiscrimination_law_review_12_en.pdf) p.32
- xv For instance, in 2010, UCATT took a case to an employment tribunal where staff hired to work on another publicly-funded hospital building project were being paid just over £4 per hour, way below the national minimum wage. The employment agency who hired them, and which supplies staff to some of the UK’s biggest building contractors, claims they were self-employed and therefore exempt from the legal minimum. In turn, the workers insist they were falsely classified as self-employed in order to cut their employer’s cost.
- xvi “Employment Status and Statutory Employment Rights”, TUC, Accessible here: <http://www.tuc.org.uk/workplace/tuc-19836-f0.cfm>
- xvii ‘UK inspectors quietly sack 200 Romanian Olympic site workers’. The Independent, 02 February 2009. Accessible at: <http://www.independent.co.uk/news/uk/home-news/uk-inspectors-quietly-sack-200-romanian-olympic-site-workers-1522970.html>
- xviii There are two types of visas available for migrant domestic workers: domestic workers in private households (discussed in this section) and the domestic workers in diplomatic households. Under the Vienna Convention on Diplomatic Relations 1961, signatory states have to facilitate the entry of diplomats’ private domestic staff. The conditions relating to domestic workers employed in a diplomatic household differ in two respects from those pertaining to domestic workers in private households: the duration of the visa is tied to the length of the diplomatic posting and diplomat’s domestic workers are able to sponsor dependents. Further a problematic aspect of the domestic worker in a diplomatic household visa was that the employer can claim diplomatic immunity under the 1961 Vienna Convention on Diplomatic Relations. However, State Immunity legislation has recently been challenged in *Benkharbouche v Embassy of the Republic of Sudan* [2013] UKEAT 0401\_12\_0410 4 October 2013, when the Employment Appeals Tribunal accepted the appellants’ submission that the 1978 Act was incompatible with fundamental rights as contained in Art. 47 of the EU Charter, and should be disapplied, pursuant to section 2 of the European Communities Act 1972. This case has potentially wide-reaching ramifications for the employees of domestic workers across Europe.
- xix Non-European Labour migration to the UK, The Migration Observatory, Accessible here: <http://migrationobservatory.ox.ac.uk/briefings/non-european-labour-migration-uk>
- xx Migrants’ rights activist and former visa over stayer, Interviewee 23, 27 April 2013
- xxi See Regulation 19, Working Time Regulations; Health and Safety Act 1974, s 51
- xxii National Minimum Wage Regulations 1999, Regulation 2(2)
- xxiii Other tests revolve around the provision of accommodation and meals (without any liability to pay) and the sharing of tasks and leisure activities.
- xxiv *Nambalat v Taher & Anor: Udin v Pasha & Ors* [2012] EWCA Civ 124. Accessible here: <http://www.employmentcasesupdate.co.uk/site.aspx?i=ed12810>
- xxv ‘Domestic workers in private households’. UK Border Agency. Accessible here: <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/othercategories/domesticworkers/>
- xxvi “Domestic Workers in Private Households”, accessible at: <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/othercategories/domesticworkers/conditions/>
- xxvii Illegal contracts are not limited to criminal activity, but instead include those prohibited by law and those “which are unenforceable because their object, performance or underlying purpose is socially undesirable” (p.3). Illegality may arise from either statute law, where it is established that a contravention of a statute has occurred, or at common law where the courts consider that the terms of the contract offend public policy. See: Gunthrie R. & Tasseff, R. 2007. "Dismissal and Discrimination: Illegal workers in England and Australia." in 2007 Oxford Business & Economics Conference. Oxford .
- xxviii Accessible here: [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/return/183\\_emn\\_ad\\_hoc\\_payment\\_of\\_back\\_wages\\_7dec2009\\_wider\\_dissemination\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/return/183_emn_ad_hoc_payment_of_back_wages_7dec2009_wider_dissemination_en.pdf)
- xxix *Allen v Hounga* [2012] EWCA Civ 609
- xxx *Vakante v. Addey & Stanhope School and Others* UK/EAT/0565/03/RN
- xxxi Immigration lawyer, Interviewee 4, 26 June 2012
- xxxii Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 14 (a): Member states should take the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

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<sup>xxxiii</sup> Accessible here:

[http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/car\\_serbia/ECtHR%20Judgements/English/RANTSEV%20v%20CYPRUS%20%20RUSSIA%20-%20ECHR%20Judgment%20\\_English\\_.pdf](http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/car_serbia/ECtHR%20Judgements/English/RANTSEV%20v%20CYPRUS%20%20RUSSIA%20-%20ECHR%20Judgment%20_English_.pdf)

<sup>xxxiv</sup> Ms. Rantseva arrived in Cyprus in early 2001 on a cabaret visa. After a few days with her employer, she left a note saying she was going back to Russia. Ten days later, the manager of the cabaret found her in a disco and took her to the police asking them to declare her illegal in the country and to detain her. However, the police – in consultation with the Aliens and Immigration Service - concluded that Ms Rantseva was not illegal and asked the manager to collect her from the police station. A day after release, Ms. Rantseva was found dead in the street below the apartment to which the manager had taken her.