

Basfar (Respondent) v Wong (Appellant) [2022]

UKSC 20 On appeal from: UKEAT/223/19/BA

Date: 6 July 2022

Justices

Lord Briggs, Lord Hamblen, Lord Leggatt, Lord Stephens, Lady Rose

Background to the Appeal

Ms Josephine Wong (a national of the Philippines) is a migrant domestic worker who worked in the household of Mr Khalid Basfar, a diplomat representing the Kingdom of Saudi Arabia in the United Kingdom. Ms Wong claims to be a victim of human trafficking who was forced to work for Mr Basfar and his family in circumstances of modern slavery after they brought her with them to the UK in August 2016. Ms Wong alleges that she was confined, at all times, to Mr Basfar's house except to take out the rubbish; that she was held virtually incommunicado; that she was made to work from 7am to around 11.30pm each day, with no days off or rest breaks; and that she was subjected to other degrading and offensive treatment. After arriving in the UK, she was allegedly paid nothing for seven months, then paid a fraction of her contractual entitlement in July 2017, and not paid again until she escaped in May 2018.

Ms Wong has brought a claim against Mr Basfar in an employment tribunal for wages and breaches of employment rights. Mr Basfar applied to have her claim struck out on the ground that he has diplomatic immunity from suit. Under article 31 of the Vienna Convention on Diplomatic Relations 1961 (the "Diplomatic Convention"), incorporated into UK domestic law by the Diplomatic Privileges Act 1964, diplomatic agents enjoy complete immunity from the criminal jurisdiction of the receiving state and are also generally immune from its civil jurisdiction. There is, however, an exception for civil claims relating to "any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." None of the facts alleged by Ms Wong have been admitted by Mr Basfar, but for the purpose of deciding whether the claim should be struck out her allegations are assumed to be true. The issue is whether the conduct alleged constitutes a "commercial activity exercised" by Mr Basfar within the exception from immunity. (The conduct alleged is agreed to be "outside his official functions.")

The employment tribunal declined to strike out Ms Wong's claim. The Employment Appeal Tribunal allowed Mr Basfar's appeal but issued a certificate that the case was suitable for an appeal directly to the Supreme Court, "leapfrogging" the Court of Appeal. The Supreme Court then granted permission for this appeal.

Judgment

By a majority of three to two, the Supreme Court allows the appeal and decides that, if the facts alleged are proved, Mr Basfar does not have diplomatic immunity in relation to the claim. Lord Briggs and Lord Leggatt (with whom Lord Stephens agrees) give the joint majority judgment. Lord Hamblen and Lady Rose give a dissenting judgment.

Reasons for the Judgment

Diplomatic immunity is a fundamental principle of national and international law. Its purpose is to ensure the efficient performance of the functions of diplomatic missions as representing States [11-12]. Article 31 of the Diplomatic Convention provides for only limited exceptions from immunity, one of which is the "commercial activity" exception. Also relevant is article 42, which states that a diplomatic agent "shall not in the receiving state practise for personal profit any professional or commercial activity." The text of the convention must be interpreted in accordance with the principles contained in the Vienna Convention on the Law of Treaties 1969, the general rule being that a treaty "shall be interpreted in good faith in accordance

with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose" [16-17].

The majority agrees with Mr Basfar's contention that the ordinary employment of a domestic worker by a diplomat does not constitute a "commercial activity" within the meaning of the exception [27]. As a matter of language, hiring a domestic worker is capable of being described as exercising a "commercial activity". But the scope of the exception cannot be determined just by interrogating the ordinary meaning of the words used: it is also necessary to consider the purpose of the provision [28-33]. It would be contrary to the purpose of conferring immunity on diplomatic agents to interpret the words "any ... commercial activity" as including activities incidental to the ordinary conduct of daily life of diplomats and their families in the receiving state, such as purchasing goods and services for personal use [33-38].

However, Lord Briggs and Lord Leggatt reject Mr Basfar's contention that the same is true of the trafficking and exploitation of a domestic worker by a diplomat. Exploiting a domestic worker by compelling her to work in conditions of modern slavery is not comparable to an ordinary employment relationship that is incidental to the daily life of a diplomat. There is a material and qualitative difference between these two activities: employment is a voluntary relationship, entered into freely and governed by the terms of a contract, whereas the essence of modern slavery is that work is extracted by coercing and controlling a victim [42-43, 57]. This usually involves exploiting circumstances of the victim which make them especially vulnerable to abuse. In the case of migrant domestic workers, such circumstances often include physical and social isolation and invisibility to the outside world; the dependency of the victim may be increased by psychological abuse and withholding pay [44]-[48].

The extent of control over Ms Wong's person and dominion over her labour exercised by Mr Basfar on the assumed facts of this case was so extensive and despotic as to place her in a position of domestic servitude [51]. Further, on the assumed facts Mr Basfar gained a substantial financial benefit by deliberately and systematically exploiting Ms Wong's labour for almost two years, initially for a fraction of her contractual entitlement to wages and latterly for no pay at all. This conduct is accurately described as a commercial activity practised for personal profit [52-57].

In the view of the majority, the appropriate criteria for distinguishing between (i) ordinary domestic employment arrangements that are incidental to the daily life of a diplomat in the receiving state and are covered by immunity, and (ii) exploitation of a domestic worker for profit which falls within the exception for any "commercial activity" exercised by a diplomatic agent, are the concepts of servitude, forced labour and human trafficking recognised in international law and now often grouped together under description "modern slavery" [72-82]. On the assumed facts, this case falls within all these categories and is a paradigm example of domestic servitude [96-100].

Among the arguments rejected by the majority is an argument that, if Ms Wong is allowed to bring a civil claim in an employment tribunal for wages wrongly withheld, British diplomats abroad might be exposed to retaliatory measures. First, it is difficult to see how such a risk, even if genuine, can affect the meaning of the phrase "commercial activity". Second, there is no evidence to support the existence of such a risk [105-106].

The majority concludes that, if the facts alleged by Ms Wong are proved, Mr Basfar does not have immunity from the civil jurisdiction of the UK courts. However, unless admissions are made, a hearing is required to determine the truth of the allegations [107].

Lord Hamblen and Lady Rose dissent. Although they agree with the majority on the principles of interpretation and that the normal employment of a domestic worker does not amount to "commercial activity" within the exception, they disagree with the majority's conclusion that the conditions under which a person is employed or how they came to be employed can convert employment which is not of itself a "commercial activity" into such an activity falling within the exception [109-113]. The parties agreeing the Diplomatic Convention were aware that domestic servants were engaged in diplomatic households. But they recognised the importance of preserving diplomatic immunity despite the abuses of that immunity that could be expected to take place [119-123]. Modern international instruments designed to eliminate the abhorrent practices of trafficking, modern slavery, forced labour and domestic servitude contain nothing

suggesting that the meaning of the term “commercial activity” has been expanded now to include trafficked employment [124-154]. The majority’s expansion of the commercial activity exception risks seriously undermining the scope of diplomatic immunity by creating an uncertain boundary between what is and is not covered, as well as exposing the UK’s diplomats overseas to formal or informal retaliatory measures [155-169].

References in square brackets are to paragraphs in the judgment

Note

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available online. [Decided cases](#)