Those arrests were the first for the new offence of holding a person in slavery or servitude (s. 71 Coroners and Justice Act 2009) and demonstrate that the worst kind of labour exploitation is not confined to the sex industry but extends to the abuse of workers across the UK, in particular in agriculture and domestic service. There are no figures on the extent of the problem; victims are often undocumented migrants and reluctant to come forward. Abusers seek out those who are hidden from view and who can be coerced and controlled as in the Green Acre Farm case. The House of Commons Home Affairs Select Committee could only guess that there were ‘more than 5,000’ affected.

For those who do have the courage to escape their situation, how can they obtain compensation or enforce the wages to which they are entitled?

The UK is a signatory to the Council of Europe Convention on Action against Trafficking of Human Beings, Article 15 of which provides the right of victims of trafficking, including those brought to the UK for the purposes of forced labour, slavery or practices similar to slavery or servitude, to compensation and to free legal aid. Under Article 4 of the European Convention on Human Rights the UK has a positive duty to secure the right not to be subject to such practices and, under case law, to provide access to a remedy for its breach, as considered in Siladin v France app. no. 73316/01.

However, the UK has not taken any steps to legislate for a particular tort of trafficking or slavery and there has been an incoherent response to the implementation of these obligations. The Government’s response to the 26th Report from the Joint Committee on Human Rights Session was to assert that HM Revenue & Customs’ National Minimum Wage Helpline, or the employment tribunal, provide access to the appropriate remedy, while the Home Affairs Select Committee opined that the Criminal Injuries...
Compensation Scheme was the appropriate recourse. Other options include tort claims for false imprisonment or post conviction compensation orders.

The reality is that there is enormous difficulty in obtaining a remedy, particularly as part of the criminal justice process, in circumstances where evidence is often extremely limited and where ‘employers’ nurture a fear of the authorities and cultural and physical isolation. The possible financial and immigration incentives to potential claimants inevitably makes credibility a live issue and getting over the criminal standard of proof challenging. The police and Crown Prosecution Service have frequently been reluctant to prosecute and awards under the Criminal Injuries Compensation Scheme have accordingly been very limited.

The first and to date only post-conviction compensation order was made in March of this year and concerned Mwanamisi Mruke, from Tanzania, who was brought to the UK by Saeeda Khan to work as her domestic servant. She was promised just £31 a month but desperate to fund her daughter’s college education, she agreed. When she got to London, her passport was taken and she was forced to sleep on the kitchen floor. She was given just two slices of bread a day for food and worked from 6am to midnight without break; she did not have a day off in over four years. When Mrs Khan was convicted she was ordered to pay £25,000 in compensation.

While the compensation is undoubtedly a success story, at an equivalent annual salary of £6,250 per annum, it was no substitute for education, she agreed. When she got to London, her passport was taken and she was forced to sleep on the kitchen floor. She was given just two slices of bread a day for food and worked from 6am to midnight without break; she did not have a day off in over four years. When Mrs Khan was convicted she was ordered to pay £25,000 in compensation.

Mrs Mruke is far removed from the industrial tribunal and a number of cases have been successfully brought under the National Minimum Wage Act 1998 and as race discrimination claims. But are the employment tribunals appropriate venues for hearing such heartbreaking accounts of human exploitation? The experience of people like Mrs Mruke is far removed from the industrial disputes that are typically encountered by employment tribunals. With no legal aid funding, no witness protection mechanisms and inadequate case management powers, employment tribunals were not designed to deal with disputes of this nature. On the contrary, employment law is founded on the principles of contract including freedom of contract, the very absence of which is one of the defining characteristics of slavery and forced labour. The claimant in a National Minimum Wage Act claim must establish that there is a contract, which can be problematic. Where a person has been sold by one person to another, perhaps by the trafficker to a UK recipient, how can it be said that there is agreement or intention to create legal relations?

It may be that Article 4 European Convention on Human Rights (ECHR) and the UK’s treaty obligations provide a means for arguing for a purposive approach, mitigating the strict contractual requirements with the need to do justice to victims in the most extreme cases of true slavery and forced labour. However, such arguments are challenging to the very principles of employment law. Claimants must be prepared for the kind of drawn out legal battle that the vulnerable client is unlikely to be willing to engage with.

A second and more common problem in the contractual model is that of illegality. Contracts exploiting migrant workers are frequently tainted by illegality in the immigration process and the worker who knowingly participates will not be able to recover under their contract, no matter how deserving their case may otherwise be.

No case underlines this more than that of Hounga v Allen UKEAT/0326/10/LA; UKEAT/0327/10/LA, UKEAT/0329/10/LA which came before the Employment Appeals Tribunal (EAT) this year and was described as ‘probably one of the saddest cases that has come before this Tribunal’. The case concerned a 13 year old girl recruited from Nigeria to take care of the Respondents’ children and brought to the UK on the meagre promise that she would be paid £50 a month and could attend school. Mr and Mrs Allen engineered a plan to facilitate her entry which involved the child swearing an affidavit giving a false name and date of birth and stating that she was visiting relatives in the UK. The tribunal found that as she was a church going girl she would have known that what she was doing was wrong.

On her arrival in the UK her passport was taken from her and throughout the course of her employment in the Respondents’ home she was subject to ‘serious physical abuse’. She knew she was in the UK illegally and her immigration status was used, as it frequently is, to threaten and coerce her.

The employment tribunal, upheld by the EAT, found that she could not recover any wages for her work as her contract of employment was tainted by illegality and she had knowingly participated by falsely swearing the affidavit. She had never had a right to work in the UK and so could not be paid for her work, although she was able to recover more limited damages for race discrimination on the broader test set out in Hall v Woolston Hall Leisure Ltd [2001] ICR 99.

A visa obtained on false pretences, or even the lack of a visa, will not always preclude a successful claim where the migrant did not knowingly participate and, in evidencing this, they can rely on their lack of familiarity with English and with the relevant rules: Wheeler v Quality Deep Ltd (t/a Thai Royale Restaurant) [2004] EWCA Civ 1085, (2004) Times, 30 August. However, as Hounga v Allen demonstrates, individuals are frequently vulnerable to exploitation precisely because they are desperate to escape their already impoverished situations and often do participate or are coerced into participation. In such circumstances, the tribunal has little choice but to reject the wages claim leaving the victim without compensation for their work. ‘Employers’ seek out migrants not only with the expectation that they can treat them less well, but also in the belief that that they are less protected. Sadly, the effect of the law in this area is to reinforce this belief.

The solution, if there is one, may be for a statutory tort. However in the meantime, the interests of justice overwhelmingly support a strong purposive approach so as to give effect to the UK’s Treaty obligations and to Article 4. We must recognise the fallacy of contractual freedom in these cases, which are not predicated on negotiation but on the exploitation of the vulnerable and the abuse of the powerless. That there remain individuals who continue to be treated as slaves in the UK in the 21st century demands that they be provided the protection of the law.

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