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Domestic Workers, the 'Family Worker' Exemption from Minimum Wage, and Gendered Devaluation of Women's Work

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ABSTRACT

Domestic workers, who work in private households carrying out tasks such as cooking, cleaning, and care for children and the elderly, are overwhelmingly women and often from migrant and/ or ethnic minority backgrounds. This article examines a stark example of domestic workers' exclusion from labour law protection, regulation 57(3) of the National Minimum Wage Regulations, which exempts employers from paying the minimum wage where a worker lives in their employer's family home and is treated 'as a member of the family' in relation to accommodation, meals, tasks and leisure activities. Drawing on feminist theory on the divisions between 'productive' work outside the home versus 'reproductive' work within it, it argues that the exemption's application has reflected gendered devaluation of domestic labour, stemming from its conflation with work normally performed for free by women in the 'private sphere' of the home. Focusing on the December 2020 Employment Tribunal (ET) judgment in *Puthenveettil v Alexander & ors,* which held that the exemption was unlawful and indirectly discriminatory on the grounds of sex, the article provides timely and in-depth analysis of the prospects for challenging the devaluation of domestic work in light of the limitations of legal protections for domestic workers in the UK.

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1. INTRODUCTION

Domestic workers, who are mainly women and often ethnic minorities and/ or migrants, work for private households carrying out tasks including cooking, cleaning and care for children and the elderly.[1] The demand for domestic work has grown, particularly in industrialised countries, as women's participation in work outside the home increases alongside failings in reconciliation with family life, limitations in public provision and care needs of the elderly and disabled.[2] Despite playing a crucial role in supporting these societal needs, in many jurisdictions domestic workers face widespread exclusion and lesser protection from labour law compared with other workers.[3] This exclusion can stem from a lack of coverage by legislation that applies to workers in other sectors or subjection to less favourable standards, and from failings in enforcement, the isolated nature and informality of the work, and vulnerabilities arising from immigration status.[4] This type

[1]ILO, 'Report IV(1)—Decent Work for Domestic Workers—99th Session of the International Labour Conference' (Geneva: International Labour Office, 2010) 5; S. Marchetti, 'The Global Governance of Paid Domestic Work: Comparing the Impact of ILO Convention No. 189 in Ecuador and India' (2018) 44 *Critical Sociology* 1191, 1194; ILO, 'Making Decent Work a Reality for Domestic Workers—Progress and Prospects Ten Years after the Adoption of the Domestic Workers Convention, 2011 (No. 189)' (Geneva: International Labour Office, 2021) 4–5, 13, 35, 57–8.

[2]B. Ehrenreich and A. R. Hochschild, 'Introduction' in B. Ehrenreich and A. R. Hochschild (eds), *Global woman: nannies, maids and sex workers in the new economy* (London: Granta Books, 2003) 8–9; J. Fudge and R. J. Owens, 'Precarious Work, Women and the New Economy: The Challenge to Legal Norms' in J. Fudge and R. J. Owens (eds), *Precarious work, women and the new economy: the challenge to legal norms* (Oxford: Hart, 2006) 21; ILO, 'Report IV(1) 99th Session' (n 1) 5; E. N. Glenn, *Forced to Care: Coercion and Caregiving in America* (Cambridge, Massachusetts; London: Harvard University Press, 2012) 3–4; J. Conaghan, 'Gender and the Labour of Law' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (Oxford: OUP, 2018) 283.

[3]V. Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (2012) 34 *Comparative Labor Law & Policy Journal* 133, 133; V. Pavlou, 'Whose Equality? Paid Domestic Work and EU Gender Equality Law' (2020) 2020 *European Equality Law Review* 36, 36–37.

[4]See e.g. E. G. Rodríguez, *Migration, Domestic Work and Affect: A Decolonial Approach on Value and the Feminization of Labor* (New York: Routledge, 2010); Mantouvalou (n 3); E. Albin, 'From "Domestic Servant" to "Domestic Worker"' in J. Fudge, S. McCrystal and K. Sankaran (eds), *Challenging the legal boundaries of work regulation* (Oxford: Hart, 2012); S. Mullally and C. Murphy, 'Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights' (2014) 36 *Human Rights Quarterly* 397; V. Mantouvalou, '"Am I Free Now?" Overseas Domestic Workers in Slavery' (2015) 42 *Journal of Law and Society* 329; L. Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Cheltenham, UK: Edward Elgar Publishing, 2016); A. Blackett, *Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law* (New York: Cornell University Press, 2019).

of exclusion is seen in the UK, which has not ratified the ILO's Convention 189 on the rights of domestic workers (hereafter 'C-189'),[5] and where domestic workers remain outside some key labour protections.[6]

This article focuses on a particular example of this exclusion, a legislative provision that has led to some live-in domestic workers in the UK being not being entitled to the National Minimum Wage (NMW), which it refers to as the 'family worker exemption.' The NMW came into force in April 1999,[7] and can be understood as both a redistributive mechanism and a way to ensure human dignity is respected.[8] These goals are important for all workers but particularly crucial for those, like domestic workers, who are otherwise marginalised. Yet from the outset, the NMW has excluded 'work relating to the family household,' when the worker lives in the employer's family home and is treated as a member of the family in relation to accommodation, meals, tasks and leisure.[9] The exemption relies on the projection of a worker as a member of their employer's family to class their labour as exempt from the minimum wage in certain circumstances. This article argues that it reflects the gendered devaluation of domestic work, and has created a shocking and discriminatory situation potentially affecting a substantial group of highly disadvantaged workers. It highlights the December 2020 Employment Tribunal (ET) judgment *Puthenveettil v Alexander,* a case brought by a former domestic worker, which found the family worker exemption to be unlawful and indirectly discriminatory on the ground of sex.[10] This case illustrates the problems that can arise from the family worker exemption and the eventual acceptance of a comprehensive challenge to its application.

The article builds on pre-existing analysis of the family worker exemption,[11] centring feminist theory on the public/ private sphere divide and the

[5] ILO, 'C189—Convention Concerning Decent Work for Domestic Workers' (100th ILC Session 2011).

[6] This includes working time protections and labour inspections—see section 2.

[7] National Minimum Wage Act 1998.

[8] G. Davidov, 'A Purposive Interpretation of the National Minimum Wage Act' (2009) 72 *Modern Law Review* 581, 582. On wages, pay inequality and theories of justice see Hugh Collins, 'Fat Cats, Production Networks, and the Right to Fair Pay' (2022) 85 *Modern Law Review* 1.

[9] Minimum Wage Regulations 1999 (SI 1999/584), reg 2(2), subsequently replaced by National Minimum Wage Regulations (SI 2015/621), reg 57(3)—see section 2C.

[10] *Puthenveettil v Alexander & George & Secretary of State for Business, Energy and Industrial Strategy—Case Number 2361118/2013—judgment of 15 December 2020* (Employment Tribunal).

[11] Salient commentary includes Albin (n 4); R. Cox, 'Gendered Work and Migration Regimes' in L. Leonard (ed), *Transnational Migration, Gender and Rights* (Bingley: Emerald, 2012);

devaluation of work in the private sphere. Section 2 introduces this conceptual framework and the way the divide acts to marginalise work that takes place in the home, casting it as inferior to labour in external workplaces. This gendered devaluation of domestic work means that, even when such work is performed on a paid basis, it is conflated with work that would otherwise be provided for free by women in the family.[12] This devaluation is exacerbated by the concentration of women that are disadvantaged on other grounds, such as ethnicity and migration status, in paid domestic work. Applying this conceptual framework, section 3 analyses pre-*Puthenveettil* case law on domestic workers and the family worker exemption. It argues that the 2012 Court of Appeal case *Nambalat v Taher*[13] relies on tropes around the domestic worker as a family member, such that its reasoning reflects the devaluation of domestic work and its classification as a nurturing activity that is distinct from 'real' or productive work. Next, it addresses cases that contrast with the outcome in *Nambalat v Taher* prior to *Puthenveettil,* including a series of lesser-known first instance decisions. Although these challenges were ultimately favourable to the workers who brought them, each turned on its own, often extreme, facts, leaving domestic workers liable to be caught by the exemption or at least facing an additional practical hurdle.

Alongside analysis of the family worker exemption using the public/ private sphere divide framework, the article makes a new contribution by providing in-depth and timely analysis of the 2020 *Puthenveettil v Alexander* judgment,[14] which has received little academic attention at the time of writing. This is enriched by first-hand observation of the virtual hearing in July 2020 and analysis of court documentation. Although a number of domestic workers had successfully resisted the exemption's application to

Mantouvalou (n 3); Mullally and Murphy (n 4); J. Moss, 'Migrant Domestic Workers, the National Minimum Wage and the "Family Worker" Concept' in R. Cox (ed), *Au Pairs' Lives in Global Context: Sisters or Servants?* (Houndsmills, Basingstoke, UK: Palgrave Macmillan, 2015); Rodgers (n 4); S. Fredman and J. Fudge, 'The Contract of Employment and Gendered Work' in Mark Freedland (ed), *The contract of employment* (Oxford: OUP, 2016); L. J. B. Hayes, *Stories of Care: A Labour of Law: Gender and Class at Work* (London: Palgrave Macmillan Education, 2017); A. Boucher, 'The Exploitation of Migrant Domestic Labour: A Webinar' (Migration Mobilities Bristol, 2 June 2020).

[12] E.g. M. Duffy, 'Doing the Dirty Work: Gender, Race, and Reproductive Labor in Historical Perspective' (2007) 21 *Gender & Society* 313; P. Kotiswaran, 'Abject Labors, Informal Markets: Revisiting the Law's (Re)Production Boundary' (2014) 18 *Employee Rights and Employment Journal* 111; Fredman and Fudge (n 11).

[13] *Nambalat v Taher and another Chamsi-Pasha and others v Udin* [2013] ICR 1024 (CA).

[14] *Puthenveettil v Alexander* (n 10).

their individual cases previously, *Puthenveettil* is noteworthy as a generalised challenge. The ET's acceptance of the argument that the application of the family worker exemption in respect of the claim was unlawful and indirectly discriminatory on the grounds of sex prompted a review of the legislation by the Low Pay Commission, which concluded in October 2021 that the exemption is 'not fit for purpose' and should be removed.[15] The article argues that the decision in *Puthenveettil* amounts to a crucial first step away from the severe devaluation created by the exemption. At the same time, it elucidates a number of further obstacles to decent remuneration of domestic workers.

2. THE PUBLIC/ PRIVATE SPHERE DIVIDE AND THE DEVALUATION OF WORK IN THE HOME

The view of two separate spheres, one private and one public, has been a dominant concept in the Western liberal tradition.[16] The public sphere, associated with men and encompassing law, politics, culture, work and economics, has classically been viewed as superior to the private or domestic sphere of the home and family that is associated with women,[17] with relationships in each sphere viewed as taking place separately and independently of each other[18] and having fundamentally different qualities. As traditionally understood, the public sphere is based on free individualism, with consent needed to justify the exercise of power, 'governed by the universal, impersonal and conventional criteria of achievement, interests, rights, equality and property.'[19] By contrast, in the private sphere, the requirement for free consent and justification of the exercise of power on a rational basis has not been understood to apply in the same way.[20]

[15] Low Pay Commission, '2021 Report—Summary of Findings' (2021) 19 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1028738/LPC_summary_of_findings_2021_A.pdf> accessed 14 November 2021.

[16] S. M. Okin, 'Gender, the Public, and the Private' in A. Phillips (ed), *Feminism and politics* (Oxford: OUP, 1998) 116.

[17] H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 626; R. J. Cook, 'Women's International Human Rights Law: The Way Forward' in R. J. Cook (ed), *Human Rights of Women: National and International Perspectives* (Philadelphia, PA: University of Pennsylvania Press, 1994) 6.

[18] C. Pateman, 'Feminist Critiques of the Public/ Private Dichotomy' in S. I. Benn and G. F. Gaus (eds), *Public and Private in Social Life* (London: Croom Helm, 1983) 281–4.

[19] ibid 284.

[20] ibid 283–4.

This divide constructs the family, as part of the private sphere, as a 'haven in a heartless world,' which needs protection from legal and state-based scrutiny.[21] The public/private sphere divide, therefore, acts to conceal power relationships within the family, based on an assumption that 'altruism and the harmony of interests' prevail,[22] and prioritising the maintenance of a façade of domestic peace has been prioritised, often at the expense of women's rights.[23] By contrast, 'where bonds of kinship, affection and intimacy can no longer hold,' a rights-based framework becomes necessary.[24] The aim of countering the lack of visibility, accountability and scrutiny of activities in the private sphere has been a central theme of feminist thought and action, often expressed through the slogan 'the personal is political.'[25]

A key manifestation of lack of accountability and scrutiny in the private sphere is the tendency to exclude homes that employ domestic workers from labour inspections.[26] Contrary to 'the view of the domestic work environment as a "safe haven,"' workers in reality face many risks to health and safety, which are exacerbated for those living with their employers by 'unsuitable and unsafe' accommodation.[27] This is especially problematic given the isolated nature of domestic work, exposure to abuse and some workers' lack of knowledge of rights,[28] language barriers and a lack of familiarity with the 'legal culture.'[29] The justification for excluding domestic work from

[21] S. B. Boyd, 'Challenging the Public/Private Divide: An Overview' in S. B. Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto; London: University of Toronto Press, 1997) 9. Includes quotation from Latsch 1977.

[22] S. M. Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989) 128.

[23] This is reflected in the historical treatment of domestic violence and marital rape as non-criminal; while no longer the formal position in the UK, practical obstacles to prosecution often persist—J. Koshan, 'Sounds of Silence: The Public/Private Dichotomy, Violence, and Aboriginal Women' in S. B. Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto; London: University of Toronto Press, 1997) 89–90; C. Moore, 'Women and Domestic Violence: The Public/Private Dichotomy in International Law' (2003) 7 *The International Journal of Human Rights* 93, 95; M. Randall and V. Venkatesh, 'The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law' (2015) 41 *Brooklyn Journal of International Law* 153, 155.

[24] J. Waldron, 'When Justice Replaces Affection: The Need for Rights—Symposium on Law and Philosophy' (1988) 11 *Harvard Journal of Law & Public Policy* 625, 628, 647.

[25] Okin (n 22) 124; S. B Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto; London: University of Toronto Press, 1997) 11.

[26] ILO, *Labour Inspection and Other Compliance Mechanisms in the Domestic Work Sector: Introductory Guide* (Geneva: International Labour Office, 2016) 17.

[27] Rodgers (n 4) 181.

[28] Mantouvalou (n 4) 332; Pavlou (n 3) 39.

[29] D. McCann and J. Murray, 'Prompting Formalisation Through Labour Market Regulation: A "Framed Flexibility" Model for Domestic Work' (2014) 43 *Industrial Law Journal* 319, 326.

labour inspection reflects a refusal to see 'the household as somebody else's workplace,'[30] centring on the worker's live-in status and association with the family, such that their situation is understood as 'non-regulatory' and part of the 'private sphere.'[31] It is part of a broader exclusion of domestic workers from protections granted to others because their work is deemed not to be taking part in public and therefore not subject(able) to scrutiny.

A. Devaluation of Work in the Private Sphere

In addition to the above problems with accountability, the separation of spheres obscures the work and requirements of women through the assumption that only paid work in the public sphere contributes to the economy, or is properly counted as work.[32] It, therefore, leads to what this article refers to as 'devaluation': the systematic construction of work performed in the home and family, typically by women, as inferior to and less important than work in the 'public' sphere, separate from the broader economy, and not contributing to it in the same way as 'productive' work in the public sphere. Instead, it is assumed to be 'an act of love' performed by women as a result of 'a natural attribute of our female physique and personality.'[33] Childcare and other domestic work appear as a private responsibility and a gendered, nurturing activity that should not be performed for economic reward[34] and that would be undermined by financial compensation.[35]

This situation is not inevitable or natural. Feminist theorists have shown how a strict separation between work performed in the home and outside intensified with industrialisation, which removed much of production from the family remit and separated it from economic exchanges.[36] Whereas the pre-industrial economy was 'centred in the home and its surrounding farmland' meaning women's work completed there was no less respected than

[30] Blackett (n 4) 25.

[31] Albin (n 4) 242. See section 2C.

[32] Charlesworth, Chinkin and Wright (n 17) 640.

[33] S. Federici, 'Wages against Housework' (*caring labor: an archive*, 16 September 2010) <https://caringlabor.wordpress.com/2010/09/15/silvia-federici-wages-against-housework/> accessed 7 January 2022.

[34] Hayes (n 11) 26.

[35] K. Teghtsoonian, 'Who Pays for Caring for Children? Public Policy and the Devaluation of Women's Work' in S. B. Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto; London: University of Toronto Press, 1997) 117.

[36] Boyd (n 21) 8; Fredman and Fudge (n 11) 232.

the labour of men,[37] the process of land privatisation brought an end to the subsistence economy and led to monetary relations dominating economic life.[38] It consequently came to be understood that only production for market exchange created value, while 'the reproduction of the worker began to be considered as valueless from an economic viewpoint and even ceased to be considered as work.'[39] The creation of the private sphere as separate took place simultaneously with the devaluation of work in and related to that sphere, to which women were increasingly tied.[40] Tasks in the private sphere or the home came to be constructed as a natural attribute of women and viewed, as best, as 'unskilled' work and at worst, not acknowledged as work at all,[41] with women constructed primarily as dependents of male breadwinners.[42]

A key way to counteract the view of women's work as inferior and detached is by demonstrating 'the interconnectedness of the public and private spheres'—the fact that one could not function without the other.[43] The concept of 'social reproduction' is illuminating here. It can denote a range of activities including 'the care of children and their birth, day-to-day recreation of conditions needed to support life, and looking after older and disabled people.'[44] Socially reproductive work has a wider role in the regeneration of communities and social bonds,[45] but it is also necessary to 'produce and reproduce labour-power'—i.e. the ability to work.[46] Without reproductive

[37] A. Y. Davis, *Women, Race & Class* (London: Penguin Classics, 2019) 28. See also J. Whittle, 'A Critique of Approaches to "Domestic Work": Women, Work and the Pre-Industrial Economy' (2019) 243 *Past & Present* 35, 36.

[38] S. Federici, *Caliban And The Witch: Women, the Body and Primitive Accumulation* (2nd edn, New York: Autonomedia, 2014) 63–74.

[39] ibid 74–75.

[40] ibid 74; Davis (n 37) 309.

[41] S. Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (Oakland, CA: PM Press, 2012) 16; Hayes (n 11) 52, 81; L. Peroni, 'The Borders That Disadvantage Migrant Women in Enjoying Human Rights' (2018) 36 *Netherlands Quarterly of Human Rights* 93, 14.

[42] A. A. Ocran, 'Across the Home/Work Divide: Homework in Garment Manufacture and the Failure of Employment Regulation' in S. B. Boyd (ed), *Challenging the public/private divide: feminism, law, and public policy* (Toronto; London: University of Toronto Press, 1997) 148.

[43] Teghtsoonian (n 35) 132.

[44] J. Conaghan, 'Labour Law and Feminist Method' (2017) 33 *International Journal of Comparative Labour Law* 93, 14–15.

[45] A. Zbyszewska and S. Routh, 'Challenging Labour Law's "Productivity" Bias Through a Feminist Lens: A Conversation' in A. Blackham, M. Kullmann and A. Zbyszewska (eds), *Theorising Labour Law in a Changing World: Towards Inclusive Labour Law* (Oxford; Chicago: Hart, 2019) 247–255.

[46] M. Carlin and S. Federici, 'The Exploitation of Women, Social Reproduction, and the Struggle against Global Capital' (2014) 17 *Theory & Event* 6.

labour in the private sphere, other work would not be possible. This notion foregrounds the inseparability of 'reproductive' work conducted primarily by women in the home from 'productive' work in the private sphere.

B. Devaluation and Paid Domestic Work

Although much of the feminist analysis of the devaluation of reproductive labour has focused on unpaid work, there is increasing recognition of the need for a broader analysis encompassing 'the parallel devaluation of paid reproductive labour,'[47] and for a view of market-based reproductive labour as on a 'continuum' with that carried out in the context of marriage.[48] Domestic labour is conflated with work that women would often otherwise carry out in their own family home without pay and that is perceived to be 'innate' to them.[49] Since the nineteenth century, women have dominated paid domestic work.[50] This concentration of women is closely linked with devaluation, and continues to be replicated at worldwide and regional levels today.[51] Male domestic workers are not only a minority but are also more likely to be concentrated in niche areas such as driving, cooking, gardening, building, maintenance and security,[52] where this erasure of skill or conflation with 'non-work' is less likely, and where physical demands are more obvious than in caring and cleaning work.

Beyond gender, the concentration of migrant and ethnic minority women in domestic work also contributes to the sector's devaluation.[53] This is a self-perpetuating process: women from marginalised ethnic groups are pushed towards domestic work by factors including economic necessity and a lack of other opportunities, and once there 'their association with "degraded labour"' reinforces notions of inferiority projected by comparatively privileged groups.[54] The work is also portrayed as inferior because of its

[47] Duffy (n 12) 315–6. See also Fredman and Fudge (n 11) 252.
[48] Kotiswaran (n 12) 117–20.
[49] ILO, 'Report IV(1) 99th Session' (n 1) 5.
[50] R. Sarti, 'The Globalisation of Domestic Service—An Historical Perspective' in H. Lutz (ed), *Migration and Domestic Work: A European Perspective on a Global Theme* (Aldershot: Ashgate, 2008) 91.
[51] ILO, 'Making Decent Work a Reality' (n 1) 13.
[52] ibid.
[53] G. Rodríguez (n 4) 6–15, 141–5; Marchetti (n 1) 1194.
[54] E. N. Glenn, 'From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor' (1992) 18 *Signs* 1, 32.

association with the body and emotions rather than rationality,[55] and therefore excluded from the greater prestige afforded to some categories of work in the public sphere.[56] The combined impact of these factors points to the need for an 'intersectional' understanding of the disadvantages faced by domestic workers recognising the role of 'race'/ ethnicity, migration status and class alongside gender. This draws on Crenshaw's exposition of the 'compounded nature' of black women's experience of discrimination, as distinct from sexism experienced by white women or racism experienced by black men,[57] meaning categories that give rise to disadvantage, such as gender and race should be understood as interrelated in their effects. Intersectionality also helps underscore the structural nature of the interactions between different forms of disadvantage.[58] It, therefore, has much to offer an understanding of the devaluation of domestic work based on its association with ethnicity, migration status, class and gender.[59]

C. Legal Manifestations of the Devaluation of Paid Domestic Work

The devaluation of paid domestic work continues to be reflected by labour law provisions excluding domestic workers from protections that apply to other sectors. Many domestic workers worldwide, particularly when living with their employers, are subject to longer hours than in other sectors.[60] This reflects the 'boundarilessness' of domestic workers' time, with an expectation of constant availability while the worker's own needs are obscured.[61] The tasks domestic workers complete are constructed as not being 'real work' of equivalent value to that taking place outside the home, and

[55] G. Rodríguez (n 4) 92.

[56] I. K. Thiemann, 'Beyond Victimhood and Beyond Employment? Exploring Avenues for Labour Law to Empower Women Trafficked into the Sex Industry' (2019) 48 *ILJ* 199, 215–6.

[57] K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 *University of Chicago Legal Forum* 139, 149–166.

[58] S. Atrey, *Intersectional Discrimination* (Oxford: OUP, 2019) 33, 41.

[59] For other discussions of intersectionality and domestic work see M. L. Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers' (2005) 8 *Yale Human Rights & Development Law Journal* 1, 8–14; M. Blofield and M. Jokela, 'Paid Domestic Work and the Struggles of Care Workers in Latin America' (2018) 66 *Current Sociology* 531, 534–7.

[60] ILO, 'Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection' (Geneva: International Labour Office, 2013) 58–60.

[61] A. Blackett, 'The Decent Work for Domestic Workers Convention and Recommendation, 2011' (2012) 106 *American Journal of International Law* 778, 784; Blackett (n 4) 61–70.

as being impossible to accurately measure. This relates to the frequent conceptualisation of domestic workers as akin to a member of their employer's family,[62] which is a stark example of devaluation. The presentation 'is often used euphemistically to describe paternalistic relations' that mirror earlier relationships of dependency,[63] masking deeply unequal relationships of subordination,[64] and marking the distinction between domestic work and other forms of contract-based work in the public sphere. By virtue of its location in the home, paid domestic work has been treated as 'a labour of love and thus not subject to market calculation,' although the worker's family-like status does not provide the same benefits as for an actual family member,[65] legitimating domestic workers' exclusion from protection.

In the UK, those classed as 'domestic servants' are excluded from some key working time protections such as the maximum hourly working week of 48 hours.[66] The situation reflects a historical legacy: in Britain from the 15th century, the category of 'menial servant' that predated the term 'domestic servant' denoted those who worked and lived in the master's home and were seen as having a private, personal relationship based on status rather than contract.[67] As the relationship was understood as 'non-regulatory' and familial, domestic workers were expected to constantly serve their masters without provision for free time, and were increasingly disadvantaged compared to other sectors through exclusion from protective legislation and collective bargaining.[68] Similar issues have arisen in care work,[69] which overlaps with domestic work because of the invisibility of the labour, the depiction of the work as 'unskilled' and its conflation with work provided for free by women in the family.[70]

[62] See e.g. E. Albin and V. Mantouvalou, 'The ILO Convention on Domestic Workers: From the Shadows to the Light' (2012) 41 *Industrial Law Journal* 67, 68; M. Kontos, 'Negotiating the Social Citizenship Rights of Migrant Domestic Workers: The Right to Family Reunification and a Family Life in Policies and Debates' (2013) 39 *Journal of Ethnic and Migration Studies* 409, 410.

[63] Cox (n 11) 46.

[64] Albin (n 4) 234; Cox (n 11) 46; M. Blofield, *Care Work and Class: Domestic Workers' Struggle for Equal Rights in Latin America* (Pennsylvania: Penn State University Press, 2012) 16–17.

[65] Glenn (n 2) 136–148.

[66] Working Time Regulations—SI 1998/1833, reg 19 for England, Wales and Scotland; Working Time Regulations (Northern Ireland) 2016—SI 2016/49 reg 23 for Northern Ireland.

[67] Albin (n 4) 232–5.

[68] ibid 235–41.

[69] Davidov (n 8) 600; L. Rodgers, 'The Notion of Working Time' (2009) 38 *Industrial Law Journal* 80; Hayes (n 11).

[70] Hayes (n 11) 36–7, 48–52, 118–43.

Devaluation is also manifested in the subjection of domestic workers to specific, unfavourable migration regimes. In the UK, domestic workers are primarily women from the Philippines and other countries in South/ South East Asia, the Middle East and Africa.[71] They usually require an 'Overseas Domestic Worker' ('ODW') visa, which was changed in 2012 to be valid only for a non-renewable six-month period and tied to the particular employer with whom the worker entered the country.[72] An independent review in 2015 strongly criticised these changes, finding that the inability to change employers led to a lack of bargaining power, a sense of being 'owned' or 'trapped' by an employer, and the risk of creating a large class of undocumented workers who lack legal protection.[73] The tie to the employer was formally removed in 2016, but the non-renewable six-month limit remains.[74] This makes it extremely difficult for domestic workers to change employers or challenge abuse,[75] curtailing labour mobility and autonomy.

The 2012 changes to the visa scheme must be understood in the context of a move to a 'points-based' immigration system, which designates certain categories of migrants as 'low-skilled' workers, and their work as lacking economic value, and uses this to deny opportunities for longer term residence and other benefits such as family reunification.[76] The government rationalised continuing to admit domestic workers, as against the general bar on 'low-skilled' migration from outside the EU at the time, to allow 'productive, highly skilled migrants' to 'bring' their domestic staff with them[77] on the understanding that the worker would not stay in the country longer

[71] Home Office response to Freedom of Information Request by Jamila Duncan-Bosu, at p 916–8 of trial bundle for hearing of *Puthenveettil v Alexander* (n 10).

[72] Mantouvalou (n 4) 336.

[73] J. Ewins, 'Independent Review of the Overseas Domestic Worker Visa' (2015) 22 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486532/ODWV_Review_-_Final_Report__6_11_15_.pdf> accessed 15 January 2022.

[74] With some limited exceptions for those identified as potential survivors of trafficking or modern slavery—Home Office, 'Immigration Rules. Appendix Domestic Worker Who Is a Victim of Modern Slavery—Updated 4 January 2022' <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-domestic-worker-who-is-a-victim-of-modern-slavery> accessed 15 January 2022; N. Sedacca and A. Sharp, 'Dignity, Not Destitution: The Impact of Differential Rights of Work for Migrant Domestic Workers Referred to the National Referral Mechanism' (London: Kalayaan, 2019) 9–11.

[75] M. Gower, 'Calls to Change Overseas Domestic Worker Visa Conditions' (2016) House of Commons Library Briefing Paper 4786 20, citing comments by L. Hylton at Lords report stage of the Immigration Bill; N. Sedacca, 'Domestic Labour and Human Rights: Challenging the Exclusion of Domestic Workers (PhD Thesis)' (University College London 2021) 150–1.

[76] Mullally and Murphy (n 4) 411; Mantouvalou (n 4) 336.

[77] Mullally and Murphy (n 4) 408.

than their employer.[78] The rationale relies on a view of domestic workers as appendages to higher-earning, 'productive' employers, reinforcing the devaluation associated with work in the private sphere. The concept of 'skill' should be problematised: its denial in the context of domestic and care work 'continues to reinforce gendered perceptions of homecare as "wife-like" work' and the link to women's unpaid labour in the family.[79]

To reiterate, two key interrelated factors in the devaluation of paid domestic work are its depiction as 'not real work' and the understanding of those that perform it as akin to members of the employing family. Both these concepts are central to the 'family worker' exemption from minimum wage. The relevant parts of the exemption[80] provide that 'work' does not include any 'work done by a worker in relation to an employer's family household' where (emphasis added):

(a) the worker resides in the family home of the worker's employer;
(b) the worker *is not a member of that family, but is treated as such*, in particular as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities;
(c) The worker is neither liable to any deduction, nor to make any payment… as respects the provision of the living accommodation or meals;
(d) if the work had been done by a member of the employer's family, it would not be treated as work or as performed under a worker's contract…

The provision uses the concept of being 'like a member of the family' to deny one of the most basic rights by designating work performed on a live-in basis for a household as 'not work' for the purpose of minimum wage calculation. Any argument that non-payment of the minimum wage is justified by the provision of goods such as housing, food and social ties can be sharply criticised. ILO C-189 stipulates paying domestic workers in cash, with any payments 'in kind' to be no less favourable than those for other sectors, be agreed by the worker, and have a fair and reasonable value attributed to them.[81] A lack of payment in cash creates dependency on employers associated with relations of servitude,[82] and migrant domestic

[78] Ewins (n 73) 19.
[79] Hayes (n 11) 52.
[80] National Minimum Wage Regulations 2015 (SI 2015/621), reg 57(3). This is slightly reworded but in substance the same as the original provision in Minimum Wage Regulations 1999 (SI 1999/584), reg 2(2).
[81] ILO, 'ILO Convention 189' (n 5), Art 12. See also section 4B on this argument in the *Puthenveettil* hearing.
[82] Glenn (n 2) 132.

workers come to the UK specifically to make money, usually to support family members through remittances.[83] The exemption, therefore, shows discrimination against women's work being 'directly rooted in their function as unpaid labourers in the home,'[84] as paid work is devalued because of its association with the 'private sphere.'

3. THE FAMILY WORKER EXEMPTION AND ITS APPLICATION TO DOMESTIC WORKERS

Rather than being intended to apply generally to live-in domestic workers, parliamentary debates show that the family worker exemption was envisaged as applying to 'au pairs,'[85] understood as young, unmarried women without dependents, visiting the UK for cultural reasons and working no more than five hours per day, and treated as part of the family of their employers or hosts.[86] Even this conception is not a reasonable justification for paying below minimum wage. The view of au pair's work as 'help' is also gendered, based on a historical arrangement allowing 'middle class daughters to spend a period of time abroad with an equally middle class family learning some of the skills they would need to run their own homes after marriage and polishing up an additional language.'[87] In addition, the understanding is far removed from today's reality. Since the debate took place, the au pair sector has been deregulated and the sectoral visa abolished, increasing precariousness and meaning that what was once a cultural exchange scheme for educated and relatively privileged Western Europeans is now 'a mainstream and long-term migration route.'[88] The position of au pair can no longer be strictly delineated from other roles such as nanny and domestic worker.[89] The idealised view the family worker exemption relied on is therefore inaccurate even for many individuals classed as au pairs, and is

[83] R. S. Parreñas, *Servants of Globalization: Migration and Domestic Work* (Second edition, Stanford, California: Stanford University Press, 2015); Sedacca and Sharp (n 74) 15.

[84] Federici, *Caliban And The Witch* (n 38) 94.

[85] Lord Sainsbury of Turville, HL Deb 02 March 1999, vol 597, col 1621–32

[86] M. Hodge, HC Deb 25 February 1999, vol 326 col 634–5.

[87] R. Cox, 'Gender, Work, Non-Work and the Invisible Migrant: Au Pairs in Contemporary Britain' (2018) 4 *Palgrave Communications* 1, 3.

[88] Cox (n 11) 35–6.

[89] N. Busch, 'The Employment of Migrant Nannies in the UK: Negotiating Social Class in an Open Market for Commoditised in-Home Care' (2013) 14 *Social & Cultural Geography: Gendered Spaces of Commoditised Care* 541, 547; R. Cox and N. Busch, *As an Equal?: Au Pairing in the 21st Century* (London: Zed, 2018).

even more clearly at odds with the situation of domestic workers who work full time to provide for household needs. Yet domestic workers' employers have often sought to rely on it to deny payment of the minimum wage, as discussed below.

A. *Nambalat v Taher* in the Court of Appeal as a Reflection of Devaluation

A notable example of the family worker exemption being applied to domestic workers is the 2011 Employment Appeal Tribunal (EAT) case *Julio v Jose*[90] and the subsequent 2012 Court of Appeal judgment *Nambalat v Taher*.[91] In the EAT, three domestic workers brought claims against their former employers. The first, Ms Jose, worked six days a week from early in the morning until late at night, albeit regulating her own tasks during the day, carrying out childcare, cleaning, cooking, shopping, washing and ironing.[92] Ms Nambalat likewise worked six days per week on cleaning, washing, ironing and childcare.[93] For the third Claimant, Ms Udin, there was greater factual dispute about hours worked but significant issues arose about accommodation and privacy: after a change in her employers' financial circumstances caused them to downsize, she shared a bedroom with the two younger sons and later slept on a mattress on the dining room floor.[94] None of the three was anything like the idealised form of au pair on a cultural exchange that forms the basis for the family worker exemption, yet the exemption was found to apply to all.

Counsel for Ms Jose and Ms Nambalat submitted that, when determining whether household tasks were shared for the purpose of the exemption, it was necessary to consider the work each claimant was employed to do and/ or did.[95] The EAT rejected this, holding that work completed under the worker's contract was not relevant to the question of whether tasks were shared.[96] The finding strongly reflects a view of this labour as less than work: regardless of the number of hours completed under the worker's contract, if certain household tasks are found to be shared with the employing family, this allows the worker to be considered as a family member.

[90] *Julio & Others v Jose & Others* [2012] ICR 487 (EAT).
[91] *Nambalat v Taher* (n 13).
[92] *Julio & Others v Jose & Others* (n 90) [15–7].
[93] ibid [22].
[94] ibid [33–8].
[95] ibid [44].
[96] ibid [45].

The EAT also approved a finding that the type of involvement with the family classifying the worker as a family member 'must entail taking part, or at least being expected or invited to take part, in tasks and activities which fall outside the scope of the work for which she is employed.'[97] It referred to the ET having seen photographs of Ms Jose on holiday with the employer and her children in Angola, 'showing us that there was this close relationship' between them, and the conclusion that apart from as regards wages and holiday entitlement there had been 'no exploitation' and a 'good relationship.'[98] The EAT accepted there was 'plainly force' in the submission that exploiting her position as a migrant worker to pay her below the agreed wages of £800 net per month would run counter to her being treated as a family member. Nonetheless, it found that a 'holistic approach' was necessary and that the Claimant's apparently good relationship with the family meant she was fully integrated into it.[99] This relies on the supposedly family-like relationship to justify exploitation.

Also notable is the EAT's finding that a worker need only be invited to take part in such activities, and not necessarily actually do so, to be classified as akin to a family member. Indeed, *declining* invitations was found to reinforce the case that Ms Udin was treated as a family member.[100] Had she accepted invitations, this would presumably have also been taken to suggest she was part of the family: she could only have escaped such a classification if the employer decided not to invite her, and she was therefore given no opportunity to determine her own status. A similar theme in other cases will be highlighted below.

Ms Nambalat and Ms Udin appealed to the Court of Appeal, where their submissions referred to the contrast between an (idealised version of an) au pair with the situation of domestic workers whose 'employment is to relieve the family of most of its household tasks,' who 'are likely to be female and from ethnic minorities' and are particularly vulnerable to exploitation.[101] Still, the Court of Appeal maintained that the family worker exemption applied to both, refusing to accept that a 'broad equivalence' of work done between the worker and family members was needed, since, '[a] person receiving free accommodation and meals may be expected to perform more

[97] ibid [37].
[98] ibid [18-21].
[99] ibid [15, 50].
[100] ibid [38].
[101] *Nambalat v Taher* (n 13) [7].

household duties for the family than other family members.'[102] This shows a circularity in applying the definition, since other family members like dependent children would usually also receive free accommodation without being expected to serve the family on a full-time basis or more.

While accepting that there would be cases 'where the demands on the worker are so onerous and extensive as to be inconsistent with the worker being treated as a member of the family,'[103] the Court held that no such abuse of the exemption took place on the facts of these cases. This is stark bearing in mind the workers' long hours and poor living conditions. Holding that Ms Udin could fall within the exemption even though she had been sleeping on a mattress on the dining room floor, the Court found there was no requirement for the accommodation provided to be 'of a particular standard' for the exemption to apply, and that it was 'entirely speculative' to compare her treatment to a hypothetical actual daughter in her late thirties.[104] This demonstrates the one-sided impact of the family worker exemption: a worker need not reap benefits associated with being a family member,[105] yet the status can be used to deny wage entitlement.

Although Ms Nambalat had her own room, the family kept their computer, printer and linen there and would print documents to the room,[106] reflecting the lack of privacy that is often a feature of live-in domestic work.[107] However, this invasion of her privacy was rationalised as demonstrating a close relationship, again reflecting the Claimant's lack of influence over the determination of her status. The Court found that the ET had focused on 'the appropriate issues' when determining if Nambalat was treated as a member of the family, including the point that she had spent time with the children 'beyond the scope of her duties.'[108] This has the 'perverse effect' of meaning that undertaking additional tasks can be used to negate the entitlement to pay,[109] reflecting the gendered idea of such household work as not real work. In other sectors, even if proper overtime is not paid, the idea of additional time an employee spent beyond their duties being used to *reduce*

[102] ibid [42].
[103] ibid [47].
[104] ibid [37].
[105] Glenn (n 2) 148.
[106] *Julio & Others v Jose & Others* (n 90) [24].
[107] B. Anderson, *Doing the Dirty Work?: The Global Politics of Domestic Labour* (London: Zed, 2000) 43.
[108] *Nambalat v Taher* (n 13) [19–20].
[109] Moss (n 11) 78.

wage entitlement would be likely to be seen as absurd and irrational. The courts' interpretation of the family worker exemption thus conveys the view of 'a distinctively different and less "worthy" group of workers,' conflating paid employment with 'women's traditional unpaid role in the home,'[110] and legitimating the provision of inadequate living and accommodation standards to this group of vulnerable migrant women.

B. Contrasting Case Law and Analysis of the Position Prior to *Puthenveettil*

While *Nambalat* is a stark example, there are some further instances of ETs finding the exemption to apply to domestic workers. Known examples are the 2010 case *Genova v Allin,* where the exemption was deemed applicable although the Claimant was responsible for childcare and domestic chores while the Respondents worked,[111] and *Puthenveettil* at first instance as discussed below. Conversely, there are a greater number of examples where workers have successfully argued against the application of the exemption at first instance,[112] including *Asuquo v Gbaja,*[113] *Awan v Shariiff,*[114] *Nassr v Ibrahim*[115] and *Ale v Chugani*,[116] and both at first instance and on appeal in *Taiwo v Olaigbe*[117] and *Onu v Akwiwu*.[118] However, these findings do not negate the concerns expressed about the exemption, because the successful challenges have turned on specific and often extreme facts. For example, *Onu v Akwiwu* involved abuse and threats by the employers, including to

[110] Hayes (n 11) 142–3.

[111] 'Witness Statement of Jamila Duncan-Bosu in Puthenveettil v Alexander' (10 June 2019) [34–5].

[112] The cases discussed here are reproduced in the Puthenveettil trial bundle.

[113] *Miss P Asuquo v Mrs Kenny Gbaja—case no 3200383/2008—judgment of 2 January 2009* (Employment Tribunal).

[114] *Hasna Awan v Rosita Shariff & Noah Salleh—case 3302769/07—judgment of 20 May 2009* (Employment Tribunal).

[115] *Mr N Nassr v Mr A Ibrahim—case 2201422/2009—judgment of 19 November 2010* (Employment Tribunal).

[116] *Mrs U D Ale v (1) Arjun, Vijay and Priti Chugani (2) Secretary of State for Business, Energy and Industrial Strategy—Case No 2601528/2016—judgment of 28 July 2017* (Employment Tribunal).

[117] *Ms Folashede Taiwo v Mr Joshua Olaigbe and Mrs Sara Olaigbe—Case No 2350075/2011—judgment of 16 January 2012* (Employment Tribunal). The appeal to the Supreme Court turned on the issue of discrimination—*Taiwo v Olaigbe; Onu v Akwiwu* [2016] UKSC 279.

[118] *Ms P Onu v Mr O Akwiwu & Mrs E Akwiwu—Case No 3303543/2010—3300119/2011—judgment of 16 September 2011* (Employment Tribunal). Again, the appeal focused on discrimination and was heard jointly with *Taiwo—Taiwo v Olaigbe; Onu v Akwiwu* (n 117).

report the Claimant to immigration authorities and police, and restrictions on movement, which were held to undermine the case that the worker was treated as a family member.[119] The Claimant in *Asuquo v Gbaja* was subject to verbal and physical attacks and was not allowed to leave the house without permission.[120] In *Awan v Shariff* the Claimant slept in a bunkbed in a child's bedroom, had her passport kept by the respondents, ate separately from the family and could not leave the flat voluntarily, such that she was found to be in a situation of servitude.[121] This also demonstrated the issue of workers' inability to determine their status[122]—for example, emphasis was placed on the Claimant not eating with the employing family, since they had not bought a large enough table,[123] implying that different actions by the family could have led to a different determination.

Furthermore, several of the successful cases by domestic workers have relied on supporting evidence from a compelling independent witness.[124] It was fortunate that a concerned third party came forward and gave evidence in support of those claimants, but this will not always be viable for numerous reasons, including the 'behind closed doors' nature of the domestic work employment relationship. The relevance of independent witnesses in these cases also overlaps with the point on exceptionality—these individuals often gave evidence about extreme situations and incidents such as a violent attack,[125] the Claimant's weight loss because of inadequate food,[126] or the Claimant not having her passport or being allowed out and being scared of her employers.[127] These findings would not necessarily assist a domestic worker who was 'only' working long hours for below minimum wage pay without *also* being subject to additional factors such as restrictions on movement or abuse.[128] Despite workers' success in several claims, the lack of clarity about what should be a universal entitlement to the minimum wage remains highly problematic. As the Low Pay Commission recognised in their 2021 determination, 'The exemption puts the onus on vulnerable women to

[119] *Onu v Akwiwu (ET)* (n 118) [35, 84, 131].
[120] *Asuquo v Gbaja (ET)* (n 113) [74–9].
[121] *Awan v Shariff* (n 114) [17–24].
[122] As discussed in section 3A.
[123] *Awan v Shariff* (n 114) [5.8].
[124] *Asuquo v Gbaja (ET)* (n 113) [47]; *Taiwo v Olaigbe (ET)* (n 117) [9.72]; *Onu v Akwiwu (ET)* (n 118) [15].
[125] *Onu v Akwiwu (ET)* (n 118) [75].
[126] *Taiwo v Olaigbe (ET)* (n 117) [9.72].
[127] *Onu v Akwiwu (ET)* (n 118) [17–9].
[128] Moss (n 11) 78.

prove that they have not been treated as part of the family in order to defend their entitlement to fair pay.'[129] Prior to the 2020 *Puthenveettil* decision, there was far too high a threshold to meet simply for the basic entitlement of payment of the minimum wage, and a problematic blurring of boundaries given the impact of decisions such as *Nambalat v Taher.*

C. Practical Implications of the Family Worker Exemption

Given the ambiguity the exemption had created, some advice services have reportedly told domestic workers that they are not entitled to NMW.[130] In contrast to this uncertainty, unequivocal protection of the NMW is especially crucial for domestic workers. It is necessary to counteract the limited bargaining power that arises from factors including their frequent position as a sole earner for their family making it difficult to turn down work, limited English and/ or formal education,[131] and practical difficulties in organising collectively.[132] Furthermore, the exemption creates an extra hurdle, even for claimants that are ultimately successful in establishing their entitlement to minimum wage. For example in *Asuquo v Gbaja,* the Claimant had to give 'several hours of evidence' on photographs produced by her employers to explain that they simply showed her doing her job rather than meaning she was part of the family.[133] Cases that go to a tribunal must be viewed as the 'tip of the iceberg,' because not all domestic workers whose employers deny their entitlement to the minimum wage will be in a position to challenge this. Many will be without access to specialist advice and therefore unaware of claims they can pursue, or be unable or unwilling to do so for other reasons, including where their migration status prevents this.[134]

The exemption's existence accentuates other measures that employers may use to deny payment of the minimum wage. These include misleading suggestions that national labour law does not apply to workers on a 'foreign' contract (since workers will have worked for the same employer abroad) and the idea

[129] Low Pay Commission (n 15) 19.

[130] 'Witness Statement of Jamila Duncan-Bosu in Puthenveettil v Alexander' (n 111) [51–2]. This refers to examples of ACAS and the Citizens Advice Bureau.

[131] Moss (n 11) 73.

[132] ILO, 'Domestic Workers across the World' (n 60) 70; Z. Jiang and M. Korczynski, 'When the "Unorganizable" Organize: The Collective Mobilization of Migrant Domestic Workers in London' (2016) 69 *Human Relations* 813.

[133] 'Witness Statement of Jamila Duncan-Bosu in Puthenveettil v Alexander' (n 111) [41].

[134] See section 5B on the illegality defence and the offence of 'illegal working.'

(echoed by some politicians) that workers need not be too concerned about the minimum wage as the pay is much higher than in their home countries.[135] In principle, the immigration rules require that to enter or remain in the UK on an overseas domestic worker visa, the entry clearance officer must be satisfied that the employer 'genuinely intends to pay' at least the NMW,[136] following an amendment in response to concerns that the exemption was being used by traffickers.[137] However, staff of Kalayaan, a charity that provides practical advice and support for domestic workers and campaigns for their rights, have observed that not every application for leave to remain requires such a declaration to be made, and that workers often report their employers to have misstated the position to obtain the visa or further leave to remain.[138] The visa regime, therefore, fails to provide protection to domestic workers, exemplifying how gender and migration regimes overlap to produce devaluation.

4. THE SUCCESSFUL CHALLENGE IN *PUTHENVEETTIL V ALEXANDER*

Whereas the previous successful contestations were based on particular and severe features of individual cases, *Puthenveettil* was significant as a broader challenge to the family worker exemption.

A. Background and Proceedings Before 2020

Ms Kamalammal Puthenveettil arrived in the UK in 2005 and worked as a live-in domestic worker for the first and second Respondents from 14 November 2005, until her resignation on 23 April 2013.[139] Her contractual pay was £110 per week at the outset, rising to £120 per week in 2008, and she asserts that she actually received significantly less than this.[140] On

[135] Moss (n 11) 75.

[136] Home Office, 'Immigration Rules Appendix Overseas Domestic Worker - Updated 4 January 2022' <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-overseas-domestic-worker> accessed 15 January 2022 [5.5].

[137] 'Witness Statement of Jamila Duncan-Bosu in Puthenveettil v Alexander' (n 111) [57].

[138] Kalayaan, 'Response to Low Pay Commission Consultation on April 2022 National Minimum Wage Rates' (2021) 11 <http://www.kalayaan.org.uk/wp-content/uploads/2021/06/Response-to-Low-Pay-Commission-Consultation-June-2021-Final.pdf> accessed 20 June 2021. The author is a trustee for Kalayaan and contributed to this document alongside staff members.

[139] *Puthenveettil v Alexander & George—Case Number 2361118/2013—judgment of 3 February 2017* (Employment Tribunal) [1—Findings of Fact].

[140] ibid [37–49].

her account, she bore responsibility for all domestic chores, including day care of a two-year-old child along with household tasks, and worked seven days a week from 6:00 am to around 11:00 pm,[141] which would amount to a 17-hour day and a 119-hour week. She began a claim in 2013 under various heads including constructive dismissal, unlawful deduction of wages and breaches of the Working Time Regulations.[142] The Respondents contested the claim for unlawful deduction of wages using the family worker exemption. In response, the Claimant argued that the exemption amounted to indirect discrimination, contrary to Equality Act 2010 s19, on the grounds of sex, and under corresponding EU law on equal pay for male and female workers.[143]

At first instance in 2017, the ET held that the family worker exemption applied to the Claimant and did not consider the broader challenge under equality legislation.[144] The 2017 judgment again underscores how the family worker exemption is bound up with the devaluation of domestic work. The finding that the Claimant was treated as a family member was based on a range of factors including accommodation, meals, social activities and perceived credibility issues.[145] Accepting evidence that the term used to address the Claimant, Chechi, would translate as 'older sister,' the ET also referred to the nicknames she used for her employers, holding it was 'unlikely that someone who was regarded as a servant would address her employers using such terms of endearment.'[146]

As to sharing of meals and the dispute between the parties as to whether or not they ate together, the ET preferred the Respondent's case. They noted that since the Claimant had 'been a domestic servant on 2 previous occasions where there may well have been a clear demarcation between servant and master, to use old terminology,' she might have felt uncomfortable eating with the family but 'we are satisfied that it was a matter of personal choice.'[147] This demonstrates the Claimant's inability to determine her own status or have her view of the situation acknowledged, reinforcing

[141] 'Claimant's Statement of Claim in Puthenveettil v Alexander' [9–12].

[142] Although some aspects of the Regulations are excluded with regards to 'domestic servants,' Regulations 11 on weekly rest breaks and 14 on annual leave do apply.

[143] Including Art 157 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326. This requires EU member states to 'ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.'

[144] *Puthenveettil v Alexander 2017* (n 139).

[145] ibid [19–31].

[146] ibid [32].

[147] ibid [24–6].

gendered and class-based hierarchies of power. As with Ms Udin,[148] once Ms Puthenveettil is invited to do something, this is held to reinforce the 'family-like' relationships whether or not she accepts, even where her apparent discomfort and potential designation as a 'servant' should be seen as an indication to the contrary.

The dispute between the parties about the hours worked is also telling. As against the Claimant's account of performing lengthy hours of work seven days per week, the ET accepted the employers' contention that some housework she performed was 'not part of her job' and was completed on a 'voluntary' basis.[149] Accordingly, not only does the family worker exemption deprive a worker of minimum wage pay for the hours worked, but it can also lead to an underestimation of those hours, based on the idea of socially reproductive tasks not amounting to real work. In declining to accept the Claimant's account of hours worked, the ET went on to say 'it may well be the case that the claimant did the majority of the housework and that would not be surprising given that she was at home most of the day and the respondents went out to work.'[150] This obscures the point that she was at home because her labour took place there and implies that her role was not 'work' of the type that the Respondents completed in their external professional jobs. It exemplifies the conceptual divide between 'real' or 'productive' work in the public sphere, versus tasks in the private sphere that are not acknowledged as work. Conversely, the 'social reproduction' approach would recognise that the employers were able to go out to other jobs precisely because of the valuable work the Claimant completed in the private sphere.

Following the first instance judgment, the Claimant made a request for reconsideration, which the ET declined on 4 May 2017, stating it had 'no jurisdiction' to dis-apply the exemption.[151] The ET further held that it was unlikely that the Regulation containing the family worker exemption could be read compatibly with European law and that section 4(5) of the Human Rights Act 1998 ('HRA') meant the ET was not the appropriate forum to challenge the Regulation,[152] although the HRA played no part in the Claimant's case. Following an appeal, in April 2018 the EAT held that the ET had been wrong to say there was no power to dis-apply the exemption

[148] *Julio & Others v Jose & Others* (n 90) [38]. See section 3A.
[149] *Puthenveettil v Alexander* (n 10) [12, 31].
[150] *Puthenveettil v Alexander 2017* (n 139) [30].
[151] *Puthenveettil v Alexander & George—Case Number 2361118/2013—judgment on application for reconsideration—4 May 2017* (Employment Tribunal) [1].
[152] *Puthenveettil v Alexander 2017* (n 139) [2].

and that the point made about the HRA misunderstood the Claimant's case.[153] Consequently, it remitted the case to the ET for a further hearing on whether the family worker exemption could be read compatibly with EU law. The issue of working time was to be looked at again if the challenge to the exemption succeeded, since finding the Claimant's housework to have been voluntarily performed would only make sense where she fell to be considered as a family member.[154]

While the claim had originally been pursued against the two employers, Mr Alexander and Ms George, after the EAT judgment, the Secretary of State for Business, Energy and Industrial Strategy ('SOSBEIS') was joined as a party on 1 June 2018 at the request of the Government Legal Department. However, from 24 January 2019, the SOSBEIS declined to participate further in the case, leaving the first and second Respondents to defend the claim at the remitted hearing, which eventually took place in July 2020. The procedural complexities and delays in this case are a further example of the disadvantage the family worker exemption causes, even to those domestic workers who are eventually successful in resisting its application.

B. The 2020 Hearing—Issues and Judgment

To succeed in the generalised challenge to the family worker exemption, the Claimant first had to show that it disadvantaged women as a group. She provided substantial evidence to support the assertion that the majority of workers it affects are women, including witness statements, analysis of job advertisements, a breakdown of referrals to the National Referral Mechanism (NRM) that deals with potential victims of trafficking and modern slavery, and statistics of registration at Kalayaan and from ODW visas issued. The Respondents sought to deny both the disproportionate representation of women in domestic work and the particular disadvantage the exemption caused to women. They argued that NRM statistics showing 2.1% of women per annum were victims of domestic servitude meant that the others must be satisfied with the family worker exemption and in good relationships with their employers.[155] Reflecting submissions by Counsel for the Claimant that this assertion added a 'completely unwarranted' gloss to the statistics, the ET recognised that the NRM figures 'are clearly not representative of

[153] *Puthenveettil v Alexander and Secretary of State for BEI* (2018) 1 WLUK 549 (EAT).
[154] ibid [39, 59].
[155] *Puthenveettil v Alexander* (n 10) [51].

the whole picture of those in domestic servitude,' accepting that women were disproportionately affected.[156] This amounts to an important recognition that the prevalence of low pay and exploitation in the domestic work sector go far beyond the number of workers formally identified as potential victims of trafficking.

Once the disproportionate impact was established, the Court had to decide whether the exemption placed women at a disadvantage. The answer might seem self-evident, and in the earlier High Court case *Ajayi v Abu,* Master McCloud had noted that 'the basic notion that a worker is entitled to be paid a wage, rather than… being forced to take goods or services amounting to a deduction from wages at an employer's valuation' could be traced as far back as the 1400s.'[157] Nonetheless, during the *Puthenveettil* hearing the ET panel questioned whether the lack of payment was a disadvantage or whether it could be seen as a 'genuine quid pro quo' that allowed the worker to benefit from free accommodation. As the Claimant's Counsel pointed out, 'an absolutely fundamental aspect of the work-wage bargain is that there's a wage': migrant workers are here to earn money to support their families, rather than just to be provided with a room. Ultimately, the ET judgment accepted that this was a disadvantage, referring to ILO documents providing for limits on 'payments in kind' to domestic workers as a source of information.[158]

A crucial question for the ET was then whether the exemption could be justified as a proportionate means to meet a legitimate aim. The Secretary of State for Business, Energy and Industrial Strategy ('SOSBEIS') had suggested two aims: first, a reflection of 'the unusual working relationship which exists when a live-in worker is or is treated as a member of the family'; and secondly, 'encouraging and/ or not discouraging parents from seeking to return or from returning to work.'[159] Given the SOSBEIS's subsequent withdrawal from the case, there was scant supporting evidence, and the first aim was dismissed for failing to show a real need.[160] The ET concluded that the second objective, support for working families, was capable of amounting to a legitimate aim since it 'underpins a social policy of enabling mothers

[156] ibid [44–50, 54].

[157] *Rashida Ajayi v (1) Joel Abu (2) Theresa Abu* [2017] EWHC 1946 (QB) [10, 13].

[158] *Puthenveettil v Alexander* (n 10) [55–8]. This included a reference to Article 12 of ILO C-189, discussed above; although not ratified by the UK, this was relevant on the question of whether non-payment amounted to a disadvantage.

[159] ibid [76].

[160] ibid [78, 85].

to return to the workplace and fulfil their career ambitions.'[161] However, it failed the proportionality test because of the lack of evidence to show it had been adopted as an aim, let alone that it was proportionate given its very serious impact.[162] Furthermore, the government could have adopted a less discriminatory way of meeting these social policy objectives, and had missed number of opportunities for clarification, including after serious concerns raised by of the Low Pay Commission in 2014 and 2015.[163] The ET, therefore, held the exemption to be unlawful and indirectly discriminatory.

5. THE 2020 JUDGMENT AND PROSPECTS FOR CHALLENGING DEVALUATION

This section addresses the significance and potential ramifications of *Puthenveettil* before considering some of the ongoing ways that the law perpetuates devaluation of domestic work.

A. The Significance of *Puthenveettil*

As a first instance decision, the 2020 ET judgment in *Puthenveettil* is not formally binding on future courts and tribunals, although the clarity of its criticism could make it influential. The claim was brought under both domestic legislation (the Equality Act 2010) and EU equal pay law, including Article 157 TFEU.[164] The completion of the Brexit transition period should not negatively affect future similar challenges from workers' perspectives, since Article 157 has been held to have horizontal direct effect—that is, to 'apply directly in private relations.'[165] Therefore, by virtue of the European Union (Withdrawal) Act 2018, s4, which provides for existing provisions to continue on and after exit day, the Article will continue to provide horizontal direct effect. The ET judgment recognises the ongoing relevance of legislation in operation just before 'exit day' with regards to interpreting, dis-applying or quashing rules made beforehand.[166]

[161] ibid [86].
[162] ibid [88–98].
[163] ibid [99–100].
[164] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326.
[165] M. de Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?' (2011) 18 *Maastricht Journal of European and Comparative Law* 109.
[166] *Puthenveettil v Alexander* (n 10) [109].

A few months after the judgment, the Low Pay Commission began a review of the exemption, concluding in October 2021 that the exemption should be repealed.[167] It is now incumbent on the government to initiate the appropriate legislative amendment urgently. Pending such action, the main significance of the 2020 *Puthenveettil* judgment is its criticism of the severe form of devaluation of domestic work seen in the application of the family worker exemption, and its confirmation that the posited legitimate aims were not enough to justify the disadvantage to women. While it is uncertain whether more cogent evidence could have succeeded in justifying the exemption, the judgment is clear about the high evidential standard that would be required. It states that since the aim 'seeks to facilitate the return to employment of one category of workers by denying to another category of workers the statutory right to be paid… one would expect, or indeed require, some degree of cogent evidence on proportionality and the balance of competing interests.'[168] In other words, it will be difficult to justify denying basic rights to one group of women in the interests of another group of women and/ or of working families.

These findings are also significant for their potential impact on the extended working hours permitted in the domestic work sector, discussed in section 2. The UK government's justification for keeping differential working time arrangements in the domestic work sector is to avoid 'compromising the benefits of domestic work to families, women in the workforce and communities...',[169] mirroring the reasoning for the family worker exemption that relates to support for working families or women in workplaces outside the home. The explanation is open to criticism since it relies on the labour market participation of some women coming at the expense of other women,[170] or realising the rights of one group of workers by denying basic rights to another. The private and family life of domestic workers should not be 'jeopardised by the drive to sustain the family life of the dominant party

[167] Low Pay Commission (n 15) 19.

[168] *Puthenveettil v Alexander* (n 10) [97].

[169] 'Record of Proceedings, ILC, 100th Session, Eighteenth Sitting, 15 June 2011, 25(Rev.)' 20. The UK representative was explaining the refusal to support ILO C-189 which requires Member States to take 'measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave' (Article 10).

[170] L. Casas and H. Olea, 'Trabajadoras de Casa Particular—Invizibiladas y Discriminadas' in Centro de Derechos Humanos (ed), *Informe Anual sobre Derechos Humanos in Chile 2014* (Santiago de Chile: Ediciones Universidad Diego Portales, 2014) 134.

to the wage-work bargain.'[171] While these are longstanding arguments by domestic workers and advocates for their rights, the 2020 judgment breaks new ground by recognising them in an Employment Tribunal setting.

B. Ongoing Obstacles to Challenging the Devaluation of Domestic Work

While a significant and positive development, the 2020 *Puthenveettil* judgment left the calculation of the number of hours worked unresolved and for future determination.[172] Since then, the difficulties in such calculations in the related care work sector have been further accentuated by the 2021 Supreme Court judgment *Mencap v Tomlinson-Blake*.[173] This confirmed that care workers are not entitled to minimum wage for the hours of a 'sleep in' shift when they are not awake and actively engaged in tasks, even though they may be required to listen out while asleep. The Supreme Court repudiated the idea that 'simply because at a particular time an employee is subject to the employer's instructions, he is necessarily entitled to a wage,' finding instead that this only applies when the worker is 'awake for the purposes of working.'[174] The judgment thus 'endorses and facilitates the fragmentation of work time' leaving many workers without protection from parts of their work being deemed ineligible for minimum wage.[175] The fraught and unresolved disputes over calculation of hours worked in care and domestic work, alongside domestic workers' exclusion from working time limits, are closely bound up with devaluation, stemming from the impetus to categorise time engaged in socially reproductive labour as 'not work.'

In addition to the calculation of working time, domestic workers can also face difficulties in enforcing payment of the minimum wage if they lack permission to work or face uncertainty over their migration status. The 'illegality defence' has often prevented workers in this situation from bringing

[171] McCann and Murray (n 29) 331.

[172] *Puthenveettil v Alexander* (n 10) [119].

[173] *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8; D. McCann, 'Temporal Casualisation and "Availability Time": Mencap, Uber and the Framed Flexibility Model—DWR Research Paper 01/2020' (Decent Work Regulation—Durham University 2020); D. McCann, 'Mencap and Uber in the Supreme Court: Working Time Regulation in an Era of Casualisation' (*OHRH*, 1 April 2021) <https://ohrh.law.ox.ac.uk/mencap-and-uber-in-the-supreme-court-working-time-regulation-in-an-era-of-casualisation/> accessed 7 April 2021.

[174] *Mencap v Tomlinson-Blake* (n 173) [35,44].

[175] K. Ewing, 'Submission to The Low Pay Commission Consultation 2021' (Institute of Employment Rights 2021) <https://www.ier.org.uk/publications/response-to-low-pay-commission-consultation-on-national-minimum-wage/> accessed 20 June 2021 [19].

contractual or statutory claims,[176] meaning their work is in effect treated as valueless. Some recent cases have partially shifted from this position, including *Okedina v Chikale,* which allowed a claim for unpaid wages by a migrant domestic worker who had lost permission to work.[177] However, the significance of this finding for future cases may be limited: the Court of Appeal in *Okedina* emphasised the Claimant's lack of knowledge that she did not have permission to work as meaning she was not blameworthy.[178] Yet exploitation may take place even when an individual is aware of their irregular status, and a person should not have to be an 'innocent victim' to benefit from basic labour protections.[179]

In addition, the worker-protective impact of *Okedina* is likely to be diminished since the Immigration Act 2016, s34 created an imprisonable offence of 'illegal working' when a person works with knowledge or reasonable cause to believe that they do not have permission to work. The creation of this offence shows both a 'lack of concern…. for the well-being of migrant workers' and a 'disregard for relevant international norms'.[180] This provision was not in force at the relevant time and is likely to create a predicament for courts hearing similar cases in future, since ordering payment of wages would require an employer to do an act that statute forbids.[181]

Therefore, the current position makes claims by irregular migrants highly uncertain and difficult to bring. At the same time, domestic workers are particularly vulnerable to falling into irregular status because of the unfavourable visa, which is limited to a six-month non-renewable period based on the supposedly 'low-skilled' nature of domestic work and the reproductive needs of employers.[182] The impact of the migration regime is to 'produce

[176] *Zarkasi v Anindita & Anor* [2012] ICR 788 (EAT); J. Fudge, 'Why Labour Lawyers Should Care About the Modern Slavery Act 2015' (2018) 29 *King's Law Journal* 377, 398; A. Bogg, '*Okedina v Chikale* and Contract Illegality: New Dawn or False Dawn?' (2020) 49 *Industrial Law Journal* 258.

[177] *Ivy Okedina v Judith Chikale* [2019] EWCA Civ 1393.

[178] ibid [14, 48].

[179] H. Shamir, 'A Labor Paradigm for Human Trafficking' (2012) 60 *UCLA Law Review* 76, 107; I. Thiemann, 'Human Trafficking as a Migration Crisis: Gender, Precariousness, and Access to Labor Rights' in C. Menjívar, M. Ruiz and I. Ness (eds), *The Oxford Handbook of Migration Crises* (New York: OUP, 2018).

[180] A. C. L. Davies, 'The Immigration Act 2016' (2016) 45 *ILJ* 431, 439. An example given is an ILO Convention, not ratified by the UK, requiring all migrants to be treated equally regarding rights from past employment, including pay—ILO, 'C143—Migrant Workers (Supplementary Provisions) Convention' (60th ILC Session 1975), Art 9.

[181] Bogg (n 176) 276.

[182] See section 2C.

workers with particular types of relations to employers and to labour markets;'[183] in the case of domestic work, this means producing workers who are systematically disadvantaged in enforcing their rights. The application of the illegality doctrine and the 'illegal working offence,' as they interact with other forms of exclusion, further reflect the devaluation of domestic work and the intersection of gender with other factors such as migration status in facilitating this.

6. CONCLUSION

The 'family worker' exemption and its application to domestic workers until the 2020 *Puthenveettil* judgment exemplifies the devaluation of domestic labour as work that is performed in the home, primarily by women, and viewed as unskilled work or even not work at all. Although not specifically intended by Parliament, in some cases courts and tribunals have sanctioned employers' use of the exemption to avoid the payment of minimum wage to domestic workers who are clearly not au pairs. The reasoning in these cases is heavily reflective of the devaluation of domestic work, which operates through the construction of workers as akin to family members. In *Nambalat v Taher,* parts of the extensive demands placed on the domestic workers had to be disregarded in order to portray a view of tasks being shared between them and members of the employing family. Likewise, time they spent in addition to specified duties was held to support the view of the employer as 'like a family member,' rather than performance of additional labour. While other cases at both ET and appellate level had decided against the exemption applying, before *Puthenveettil* these tended to rely on specific features such as indicators of trafficking or forced labour. The position created practical difficulties and uncertainty for domestic workers over their minimum wage entitlement.

The 2020 judgment in *Puthenveettil* is important as a response to the stark form of devaluation involved in denying minimum wage entitlement to domestic workers. Almost four years after the first instance decision, it recognises that the exemption creates a disadvantage to women as a group, which would require very cogent evidence to justify it. The finding in *Puthenveettil* is a welcome result from the perspective of domestic workers' rights, yet it

[183] B. Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 *Work, Employment and Society* 300, 306.

is striking that it has taken more than two decades since the introduction of the National Minimum Wage in the UK for a ruling of this nature to be made. *Puthenveettil* has the potential to provide powerful guidance to future tribunals deciding similar cases and can be hoped to spur legislative change particularly given the outcome of the Low Pay Commission Review. Welcome as this would be, a number of other manifestations of devaluation remain, including longer working hours and complexities in determining which hours are counted as 'work,' facilitating abusive employment relationships. The illegality defence is a significant obstacle to wage claims by irregular migrants, while the unfavourable visa scheme leads many domestic workers to find themselves without secure status. Alongside the urgency of repealing the 'family worker exemption,' these outstanding issues highlight the need for further reform to prevent the law reinforcing and reproducing the devaluation of domestic labour.