

# THE HIGH COURT

## JUDICIAL REVIEW

[Record No.2013/795 JR]

**IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, DIRECTIVE 2011/36/EU, THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION AND THE CONSTITUTION OF IRELAND.**

**BETWEEN**

**P.**

**(OTHERWISE P.)**

**APPLICANT**

**AND**

**THE CHIEF SUPERINTENDENT OF THE GARDA NATIONAL IMMIGRATION BUREAU, THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND and THE ATTORNEY GENERAL**

**RESPONDENTS**

**THE IRISH HUMAN RIGHTS COMMISSION**

**AMICUS CURIAE**

**JUDGMENT of Ms. Justice Iseult O'Malley delivered the 15<sup>th</sup> day of April 2015.**

### **Introduction**

1. This case concerns the administrative arrangements in place in this jurisdiction for the protection of persons who are accused of committing a criminal offence but who are also suspected to be the victims of human trafficking. "Trafficking" as defined in the relevant legal instruments is a broad concept covering many forms of exploitation, and does not necessarily require a cross-border element. The main concern in this instance relates to labour exploitation.

2. It is common case between the parties that the trafficking of a human person involves a breach of that person's rights under the Constitution, under the European Convention on Human Rights and under EU law. It is also agreed that the State has undertaken a range of legal obligations to the victims of trafficking, including the obligation to ensure that, where a victim is suspected of having committed a criminal offence, the prosecuting and judicial authorities respectively have a discretion not to prosecute, or not to punish. The State is therefore obliged to have in place a mechanism for the identification of victims in this context.
3. The mechanism in operation in this jurisdiction, as established in 2008, is an administrative scheme (hereafter "the administrative arrangements") drawn up by the Department of Justice and Law Reform. Pursuant to its terms, the determination of an application for recognition as a victim of trafficking is allocated to a Garda officer not below the rank of Superintendent of the Garda National Bureau of Immigration. The first named respondent is the Chief Superintendent in the Bureau.
4. The applicant is a Vietnamese woman who is currently in custody in the Dóchas Centre on charges relating to the alleged possession and cultivation of cannabis plants in November, 2012. The circumstances of her arrest, in what is known as a "growhouse", gave rise to an application in December, 2012 to the first named respondent to be identified as a victim of trafficking of human beings. She says that in September, 2013 he refused her application, and that in so doing he failed to give reasons and acted in breach of her right to fair procedures in a number of other respects under national law, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

5. The applicant argues in particular that there has been a breach of her rights under Directive 2011/36/EU (which relates to the victims of trafficking) and that the directive has not been properly transposed into Irish law.
6. The first named respondent accepts that he is obliged, in making his decision, to observe the requirements of fair procedures. It is also accepted, for the purposes of this case, that there would be an obligation to give reasons for a decision. However, he says that the applicant's case is misconceived, in that he had not in fact made a decision at the time when she sought leave from the High Court. He denies all allegations of breach of rights and says that the delay in the process is the applicant's own fault, in that he says that she has by turns been untruthful or vague in the provision of relevant information sought from her.
7. It is contended that the directive has been adequately transposed by means of the administrative arrangements.
8. This respondent has brought a motion, heard at the same time as the applicant's case, seeking an order setting aside the leave to seek judicial review. The motion is based on the argument that the application was premature and therefore had no reasonable chance of succeeding, and also on the contention that the applicant was guilty of lack of candour in the *ex parte* application. It is also submitted that the applicant lacks *locus standi* in respect of certain issues.

9. In keeping with the policy of her office, the second named respondent has not discussed her reasons for maintaining a prosecution against the applicant. She makes a general submission that she enjoys a discretion under Irish law, to the degree required by the directive, not to prosecute a person whom she considers to be a victim of trafficking and that she can exercise this discretion independently of any finding by the first named respondent.
10. By order made on the 25<sup>th</sup> February, 2014, the Irish Human Rights and Equality Commission was granted liberty, pursuant to the provisions of its governing legislation, to intervene in the case as *amicus curiae*. The Commission takes no position on any factual disputes between the parties but in its analysis of the undisputed facts and the legal issues it is supportive of the applicant's case as to the adequacy of the administrative arrangements.

### Legal provisions

11. Before dealing with the history of the case, it is necessary to consider the legal context in which the issues arise.

### *The Criminal Law (Human Trafficking) Act, 2008*

12. Section 4 of this Act makes it a criminal offence to traffick an adult person for the purposes of exploitation of that person. (It should be noted that many of the definitions in the Act were amended by the Criminal Law (Human Trafficking)

(Amendment) Act, 2013 but for the purposes of this case the relevant concepts are contained in the following provisions of the Act of 2008.)

13. The term “trafficking” includes the procurement, recruitment, transport or harbouring of the victim; the taking of the victim under one’s control; and the provision of accommodation or employment. “Exploitation” includes “labour exploitation”, which means

- (a) subjecting the person to forced labour,*
- (b) forcing him or her to render services to another, or*
- (c) enslavement of the person or subjecting him or her to servitude or a similar condition or state.*

**Directive 2011/36/EU**

14. The Directive establishes minimum rules concerning the criminalisation of trafficking in human beings and introduces provisions to strengthen the protection of victims.

Article 8 provides as follows:

*“Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to [an offence of human trafficking].”*

15. Article 11(2) obliges Member States to take the necessary measures to ensure that assistance and support are provided

*“...as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to [an offence of human trafficking].”*

16. “Assistance and support” are not to be made conditional on the victim’s willingness to cooperate in the criminal process relating to the offence of trafficking. They are to be of a standard at least capable of ensuring subsistence and are to include appropriate and safe accommodation and material assistance, as well as any necessary medical treatment.

17. Article 11(4) of the Directive provides that Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims in cooperation with relevant support organisations.

18. The State was required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 6<sup>th</sup> April, 2013.

19. The State is also party to other international instruments relating to this issue, most notably the Council of Europe Convention on Action Against Trafficking in Human Beings, 2005 and the United Nations Protocol to Prevent, Suppress and Punish

Trafficking in Persons, 2000. It is not suggested that these instruments may be relied upon as having direct effect in Irish law but it is accepted that the standards established by them are those which the Irish State has undertaken to apply. Article 26 of the Convention requires each State, in accordance with the basic principles of its own legal system, to provide for the possibility of not imposing penalties on victims for their involvement in criminal activities, to the extent that they have been compelled to be involved.

20. In particular, reference is made to the “Delhi indicators”. This list of factors to be considered when assessing whether or not a person has been a victim of human trafficking was drawn up by the EU Commission and the International Labour Organisation.

#### *The Administrative Arrangements*

21. The Act of 2008 came into force on the 7<sup>th</sup> June, 2008. On the same day, the Department of Justice and Law Reform issued a notice entitled “Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking”.
22. As the title and the first paragraph of the notice make clear, the document is concerned primarily with the immigration status of a foreign national who is identified as a person suspected of being a victim of human trafficking. Since a foreign national either has or does not have permission to be in the State, the scheme applies only to those who do not have permission. It makes provision for the giving of

permission to such persons to remain, at least temporarily, within the State and for assistance and support to be furnished to them.

23. Paragraph 3 of the notice sets out the general scope of the Scheme in relevant part as follows:

*“This notice applies to a foreign national who is identified as a suspected victim of human trafficking, that is, where there are reasonable grounds for believing that he or she is a victim of an offence under sections 2 or 4 of the Criminal Law (Human Trafficking) Act 2008...Whether there are reasonable grounds for that belief in any particular case is determined by a member of the Garda Síochána not below the rank of Superintendent at the Office of the Garda National Immigration Bureau (GNIB) at 13-14 Burgh Quay, Dublin 2. For the purpose of this notice a ‘foreign national’ means a person from outside the European Economic Area.”*

24. The consequences of identification as a suspected victim are set out in some detail.

The person may be granted a permission to remain lawfully within the State for a period of 60 days – the “recovery and reflection period”. The purpose of this period is stated to be

*“to allow the person –*

- a) time to recover from the alleged trafficking, and*
- b) to escape the influence of the alleged perpetrators of the alleged trafficking*



*so that he or she can take an informed decision as to whether to assist Gardai or other relevant authorities in relation to any investigation or prosecution arising in relation to the alleged trafficking.”*

25. The person will not be removed from the State during this period which may, in certain circumstances related to cooperation with a Garda investigation or prosecution of the crime of trafficking, lead to extended permission to reside here. The recovery and reflection period, or any subsequent residence permission, may be terminated by the Minister in certain specified circumstances. If the person concerned wishes instead to return to his or her country of origin, assistance can be provided.
26. It should be noted that the notice does not prescribe any procedures for the identification process, and that it does not specifically refer to the position of persons who are themselves suspected of involvement in criminal activity.
27. The administrative arrangements were amended in March, 2011 but not in a way germane to this case.

### **The National Action Plan**

28. In 2009 the Anti-Human Trafficking Unit of the Department of Justice, Equality and Law Reform published a “National Action Plan” to prevent and combat trafficking of human beings in Ireland. This is a lengthy and comprehensive document, which drew upon submissions made by a large number of organisations and individuals, and

which demonstrates a broad understanding of the national and international issues arising in this area.

29. The plan describes the identification of suspected victims as

*“one of the most difficult problems facing any counter-trafficking strategy, not only because traffickers themselves seek to avoid detection, but also because suspected victims – for numerous reasons – often go to great lengths to hide their experience from State authorities. Suspected victims will tend to purposely avoid police if they harbour fear and mistrust towards them, a fear which may stem from past experiences in their home country...*

*...the process is often a complex, time-consuming one which requires professional guidance and special victim supports to create a safe environment for the victim.”*

30. It is noted in the plan that the Council of Europe Convention requires the State to adopt such legislative or other measures to identify victims, as appropriate, in collaboration with other states and relevant support organisations. It also requires the State to ensure that, if the competent authorities have reasonable grounds to believe that a person has been a victim of trafficking, that person shall not be removed from the territory until the identification process has been completed.

31. It is stated in the plan that the Garda Síochána takes into account in every case the measures set out in the Council of Europe Convention to protect and promote the rights of victims, including identification of victims.

*“They do not require absolute certainty for not removing a person from the State. If there are reasonable grounds for suspecting a person to be a victim of human trafficking then the person is recommended for permission to remain lawfully in the State for 60 days.”*

32. The document refers to the then-recently published Delhi indicators and states that the Gardaí will take account of them.

*“To enable the Garda Síochána to establish if any of the indicators are present it is necessary for the person to be interviewed by a member of the Garda Síochána. The purpose of the interview is to elicit as much information as possible from the person and assess the veracity, or otherwise, of the account being provided. The outcome of the interview will assist the Garda Superintendent in being satisfied that there are reasonable grounds for believing that the person is a suspected victim of human trafficking...*

*While ‘reasonable grounds’ are not the same as evidence, in the context of contemplation of any criminal offence, to arrive at a state of mind that a person is a suspected victim of human trafficking the Garda Superintendent must be in possession of sufficient information to afford reasonable grounds*

*for that belief. The test of reasonable is - whether or not a reasonable person, acting without passion or prejudice, believes what he/she is being told....*

*Where there is insufficient information for the Detective Superintendent to have reasonable grounds for believing that a person is a victim of suspected trafficking the case remains open and every effort is made to gather additional information from the potential victim or other sources."*

33. The obligations imposed by Article 26 of the Convention are noted, as is the fact that numerous contributors to the consultation process for the plan raised concerns about this issue. The discretion of the Director of Public Prosecutions to decide whether or not a prosecution would be in the public interest is referred to and it is observed that

*"It is certainly arguable that it would not be in the public interest to prosecute a person for an act he/she was forced into committing."*

34. It is stated that the Director had decided to allocate cases involving trafficking to lawyers in a specific unit of the office and was considering whether to deal with such cases by way of specific guidelines or by an amplification of the existing guidelines for prosecutors.

#### *The review of the National Action Plan*

35. The Plan was reviewed by the Department in 2012. It is noted in the review that the Immigration, Residence and Protection Bill, 2010 will provide for a substantially

simplified and streamlined process for applications for protection and other reasons to remain in the State.

36. The review also reports the commitment given by the Human Trafficking Unit to make a recommendation on a recovery and reflection period within one month of contact with the person and where possible within five days, if there is sufficient information.
37. There is a reference to certain criticisms of the process made by relevant organisations, one of which related to the practice of not giving reasons for a negative decision. The view taken is that there is no legal requirement to give reasons for a decision that no reasonable grounds exist.

*The Director of Public Prosecutions Guidelines for Prosecutors, 2010*

38. The guidelines are addressed to “prosecutors” which, depending on the context, includes the Director herself, her professional officers, State solicitors and counsel acting on her behalf, and Gardaí prosecuting summary offences in the District Court. The following paragraphs come from the 2010 Guidelines, which are the most recent version.

*4.7 In assessing whether the public interest lies in commencing or continuing with a prosecution, a prosecutor should exercise particular care where there is information to suggest that the suspect is a victim of crime. An example would be where it is suggested that the suspect is a victim of human*

*trafficking. Such a person may be suspected of a range of offences from breaches of immigration law to offences related to prostitution. In a case where there is credible information that a suspect is also a crime victim, the prosecutor should consider whether the public interest is served by a prosecution of the suspect.*

*4.8 Factors which should be considered in assessing whether to commence or continue with a prosecution include (i) the relative seriousness of any offence allegedly committed by the suspect and of any offence of which the suspect is believed to be a victim, (ii) whether there is any information that coercion or duress was exercised against the suspect, (iii) where there are allegations that the suspect was subjected to duress whether it is alleged that this included violence or threats of violence or the use of force, deceit or fraud, or an abuse of authority or exploitation or exploitation of a position of vulnerability, and (iv) whether the suspect has cooperated with the authorities in relation to any offences believed to have been committed against the suspect.*

#### **Other relevant texts**

##### **The GRETA Report**

39. On the 26<sup>th</sup> September, 2013, the Group of Experts on Action against Trafficking in Human Beings (“GRETA”) reported on the implementation by Ireland of the Convention on Action against Trafficking. This, again, is a lengthy document. For

present purposes the first relevant section is that commencing on p.39 relating to the identification of victims of trafficking. At paragraph 147 the following is stated:

*“In Ireland, a person is considered to be a suspected victim of human trafficking once they, or someone acting on their behalf, make a claim of having been trafficked to the Garda Authorities (i.e. the Irish Police) until such time as there is compelling evidence that they are not.”*

40. Reference is made to the administrative arrangements, with the observation that under the terms of the scheme, identification as a victim depends on there being reasonable grounds for believing that the person is a victim of an offence under the Act of 2008. The process is described as having two stages: assessment of the varying indicators that can be evaluated before an interview takes place, followed by a detailed interview with the person concerned. The report states that Garda officers performing identification apply UN.GIFT general indicators, updated by the Delhi Indicators. The determination has to be made as early as possible following the provision of all necessary information.

41. The report also refers to the National Plan and to the statement therein that “reasonable grounds” are not the same as evidence but that, in determining that a person is a suspected victim, there must be sufficient information to afford reasonable grounds for that view.

42. A later section in the report deals with the requirement that there be a possibility of non-punishment for the involvement of victims of trafficking in criminal activities, to

the extent that they have been compelled to become involved in such activities. The report notes and commends the DPP's guidelines, and the information provided to the Group to the effect that dedicated personnel in the DPP's office are assigned to human trafficking cases so that specialised knowledge of the issues can be built up. However it queries the fact that there is no specific advice to prosecutors on the steps to be taken when prosecuting suspects who might be victims of trafficking.

43. It was considered that further measures should be taken in this area.

44. The report also comments on the length of time taken to process some applications.

### **Background facts**

45. This is a case where setting out all of the facts in strict chronological order would not be particularly helpful in that, firstly, matters continued to develop after the grant of leave to seek judicial review and secondly, certain information was not made available to the applicant, or indeed to the court, until the first named respondent issued the motion to dismiss. For the most part I have therefore followed the sequence of the affidavits and the evidence contained therein.

### **The arrest of the applicant**

46. On the 20<sup>th</sup> November, 2012, Gardaí acting under the supervision of Sergeant Damian Fitzpatrick of Store Street executed a search warrant, obtained pursuant to s. 26 of the Misuse of Drugs Act, 1977/84, in relation to a property in an industrial estate in west



Dublin. According to the statements in the book of evidence, it was a warehouse secured by means of steel roller shutters to the doors with external padlocks. The Gardaí therefore made a forcible entry.

47. On entering the property the Gardaí found numerous cannabis plants at various stages of maturation with what were described as sophisticated cultivation facilities. It is relevant to this case to note that there was a significant amount of electrical equipment including lighting units and high wattage bulbs.
48. The Gardaí also found the applicant, who was inside a small bedroom adjacent to the rooms with the plants. She was arrested by Garda Neil Cepeda on suspicion of an offence contrary to s.15 of the Misuse of Drugs Act 1977/84 – that is, possession of a controlled substance with intent to supply. The Gardaí claim that the total market value of the cannabis plants seized amounts to €940,800.00.
49. The applicant was detained at Store Street Garda Station under the provisions of s. 2 of the Criminal Justice (Drug Trafficking) Act, 1996. She said that her date of birth was the 20<sup>th</sup> November, 1960. During interviews, she gave an account, via a Vietnamese interpreter, of her presence in the warehouse. She said that she had been there for a month and that her task was to turn the heat lights on and off at specified times. Supplies of food were brought to her by men who made it clear to her that she was not allowed to leave the building. She said that when she was brought to this country she had expected a job cleaning or minding children but had been deceived.

50. Two matters of relevance arose during the course of the applicant's detention. The first was that the solicitor who attended the station on her behalf on the day of her arrest, Mr. Gareth Noble, was told by Sergeant Fitzpatrick that it was possible that the applicant was a victim of trafficking in human beings. The second was that, when applying to his Chief Superintendent for a twenty-four hour extension of the detention, Sergeant Fitzpatrick said that, amongst other matters to be investigated, the question whether the applicant was the subject of human trafficking required "attention and examination".
51. On the morning of the 22<sup>nd</sup> November, 2012, the applicant was charged with two offences under the Misuse of Drugs Acts 1977/1984, namely possession and possession with intent to supply.
52. The Garda file was sent to the DPP on the 30<sup>th</sup> January, 2013, and directions to proceed with the current charges were received on the 11<sup>th</sup> February, 2013. These now include a charge relating to cultivation of cannabis and a charge under s.15A of the Misuse of Drugs Acts as amended, being possession with intent to supply of cannabis to a value greater than €13,000. The latter carries a presumptive mandatory penalty of not less than ten years imprisonment.
53. The applicant has been returned for trial to the Circuit Court but the prosecution has been stayed pending the outcome of these proceedings. No application has been made for bail, in circumstances where the prosecuting officer has indicated that there would be an objection based on the seriousness of the offence, the strength of the evidence, the absence of identification documents and the lack of ties to the jurisdiction.

*The application to the first named respondent*

54. The application to the first named respondent was made by the applicant's solicitor on her behalf on the 6<sup>th</sup> December, 2012.

55. In the letter of application Mr. Noble referred to the applicant's arrest. He then set out her case to be identified as a victim of trafficking on the basis of her instructions.

These were that she had been approached in Vietnam by individuals who offered her a cleaning job in Europe. She had been transported to Ireland by sea, in a container, and had found herself forced to work in a cannabis factory.

*"The circumstances of Ms. P. 's arrest and her instructions to date give rise to a credible suspicion that Ms P. was recruited by deception and transported to Ireland for the purposes of exploitation. Accordingly, there must be reasonable grounds to believe that Ms. P. is a victim of an offence..."*

56. A decision was requested within five days of the letter.

57. The application was promptly acknowledged by the first named respondent, who said that he would write again when in receipt of relevant information.

58. On the 17<sup>th</sup> December, 2012, the applicant's solicitor wrote again, saying that sufficient information had now been given and again calling for a decision to be made within five days, failing which the applicant reserved her right to issue High Court

proceedings. This letter was, again, responded to promptly. The first named respondent informed the solicitor that the GNIB personnel were in regular contact with the investigating officers in Store Street, that those officers had been made aware of the correspondence and that any available information in the possession of the applicant should be forwarded to the sergeant in charge of the investigation.

59. On the 9<sup>th</sup> January, 2013, Mr. Noble wrote again, drawing attention to Article 4(e) of the Warsaw Convention and to the applicability of the Delhi Indicators (as referred to in the National Action Plan) to the applicant's case.

*"Ms P. instructs that she was recruited in Vietnam and was deceived about the nature of the job, location and employer and about the conditions of work and living she could expect. She was not told where she was going and was deceived about travel conditions and about how much she would be earning. Her traffickers abused her poverty, her lack of education in terms of language and literacy and her lack of information. The circumstances in which Ms P. was found by Gardaí indicate that she was living and working in very bad conditions in the grow-house. She instructs that she worked all day, every day, and was never paid. She was isolated and confined in the grow-house, forced to labour there while all the time completely dependent on her exploiters."*

60. Mr. Noble called for the decision to be made within 10 days of this letter. The urgency of the matter was said to relate to a number of issues. In the first instance, identification as a victim would enable the applicant to obtain an address and an identity document, which would assist her in applying for bail. Secondly, she would

be able to access assistance from the Health Service Executive's Anti-Human Trafficking Team. Thirdly, it would assist her to persuade the Director of Public Prosecution that it would not be in the public interest to prosecute her. Finally, it would enable her to access assistance in returning to her home country.

61. The first named respondent replied on the following day, giving an assurance that the matter was being investigated by the Store Street officers. Sergeant Fitzpatrick had been assigned particular responsibilities in relation to it, while GNIB personnel continued to maintain regular contact with a view to ensuring that the Bureau's role under the Arrangements was fulfilled.

*"However, to date, a determination has not been made...that there are reasonable grounds for believing that the aforementioned Ms P. is a victim of an offence...*

*The progress of the aforementioned investigation being undertaken at Store Street garda station, will be monitored by relevant personnel at GNIB with a view to continually assessing if there are reasonable grounds for believing [that she is a victim of a trafficking offence].*

*It is very important that Ms. P. provides investigating officers at Store Street garda station, with all relevant information which could assist in progressing investigations being undertaken regarding the allegation that she is a victim of human trafficking. In this regard, I will ensure that contact is again made by relevant personnel at GNIB with the investigating officers at Store Street*

*garda station, today, with a view to establishing if any additional information is available which could be relevant... "*

62. On the 12<sup>th</sup> January, 2013, the applicant was interviewed by two Gardaí, one being Garda Neil Cepeda, the arresting officer involved in investigating the drug seizure, and the other an officer from GNIB.

63. In late March, 2013 Mr. Noble wrote to the Gardaí seeking information as to the progress of the investigation. In reply, Sergeant Fitzpatrick informed him that information provided by the applicant at the January interview was being investigated. He said that progress had been made regarding some of the details, while lines of enquiry were pending on others and so at that time investigations were inconclusive.

64. On the 23<sup>rd</sup> May, 2013, the applicant was sent forward by the District Court for trial in the Circuit Court. She appeared in that court on the 14<sup>th</sup> June, when a psychological assessment was recommended by the presiding judge. The matter was put back to the 5<sup>th</sup> November, 2013, for arraignment. That meant that a decision had to be made by that date as to whether the applicant was to plead guilty to all or any of the charges or would request a trial date.

65. Mr. Noble wrote to Sergeant Fitzpatrick and the first named respondent again on the 24<sup>th</sup> June, 2013. He noted that the applicant had not yet been formally identified as a victim of human trafficking, and that she had only once been interviewed by a

member of the GNIB. It was submitted that the failure to make a decision was “manifestly unreasonable”. The letter was formally acknowledged.

66. On the 23<sup>rd</sup> July, 2013, a report requested on behalf of the applicant was finalised by Dr. Randall of Forensic Psychological Services. This was based on two interviews with the applicant, carried out with the assistance of an interpreter, and a review of the book of evidence.

67. The report deals with the applicant’s account of how she came to be in Ireland and in the warehouse and her understanding of what was going on there.

68. It also refers to her health. Her symptoms were said to be

*“acute symptoms of fear, anxiety, nightmares and physiological ill health.”*

69. The symptoms of physical ill health were, primarily, stomach pains, headaches and loss of hair.

70. The following are the conclusions of the report:

*“Ms P. presents as a psychologically vulnerable individual experiencing acute anxiety and depression as a result of her experiences of trafficking, forced labour and subsequent incarceration.”*

*It appears that she was a victim of a criminal conspiracy that engaged her services under false pretences and held her against her will using psychological abuse and captivity to ensure her compliance. Given her vulnerability she was easily exploited using debt bondage, isolation, intimidation and implied collusion.*

*Ms. P. 's description of the months prior to her arrest are congruent with documented experiences of people who have been trafficked."*

71. It was strongly recommended that the applicant attend individual therapy without delay, since early intervention is considered to be crucial in cases of experienced trauma.
72. This report was forwarded to the first named respondent with a letter dated the 31<sup>st</sup> July, 2013, in which it was submitted that there was now "powerful evidence" that the applicant was a victim of human trafficking. A decision was called for within seven days. The respondent replied on the 10<sup>th</sup> August, 2013, stating that he would revert within a week. On the 19<sup>th</sup> August he wrote again, stating that he had read the report and was interacting with the Store Street Gardaí and the DPP in relation to the issues.
73. On the 13<sup>th</sup> September, 2013, the applicant was seen by Dr. Brendan Kelly, consultant psychiatrist. In preparing his report Dr. Kelly also had access to the book of evidence and to the report of Dr. Randall.



74. Dr. Kelly's report is dated the 14<sup>th</sup> September, 2013. He states that the account given to him by the applicant of the sequence of events leading up to her arrest was consistent with the account given by her in the book of evidence and with that given to Dr. Randall, and describes her as being "notably clear and consistent" in this regard. He concluded that she fulfilled the criteria for post-traumatic stress disorder, with associated mood problems.

75. The report was sent to the Chief Superintendent on the 25<sup>th</sup> September, 2013. He responded on the 30<sup>th</sup> of that month, acknowledging receipt and stating that the report had been forwarded to the investigating officers in Store Street. The letter then goes on:

*"The question arises as to the applicability of the Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking, to your client, with regard to the allegation which she has made that she is a victim of human trafficking. In this regard, I am to inform you that I, a member of the Garda Síochána not below the rank of superintendent at the Office of the Garda National Immigration Bureau (GNIB), have not, to date, concluded that there [are] reasonable grounds for believing that the above-mentioned P. (also known as P.), is a victim of an offence...*

*In the course of considering if there are reasonable grounds for believing that your client is a victim of the offences enumerated above, I have considered the content of statements made by the said P. (also known as P.) to the aforementioned investigating officers. For this purpose, I have also considered other evidence uncovered in the course of the relevant*

*investigation and the content of both the above-mentioned report completed by Dr. Brendan Kelly and the report completed by Mr. Marcus Dowling, M.A. (Forensic Psychology) and Dr. Patrick Randall, M.A. (Clinical Psychology)...*

*In the course of the correspondence which I have forwarded to the investigating officers at the garda station at Store Street, Dublin 1, on this date, I have requested that I be made aware of all relevant developments with regard to the said investigation and, in particular, any additional evidence which has been gathered. When I receive a response from the investigating officers, I will again assess if there are reasonable grounds for believing that your client is a victim of the offences enumerated above and, thus, if it is appropriate that provisions of the Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking be afforded to her."*

76. On the 4<sup>th</sup> October, 2013, Mr. Noble replied. In relevant part, the letter reads as follows:

*"We note that notwithstanding ample evidence supporting the contention that our client is a victim of human trafficking that you have refused to identify her as such.*

*We note that GRETA's recent report on Irish compliance with the COE Convention on Action against Trafficking in Human Beings 2005 records that the Irish authorities claim that 'in Ireland, a person is considered to be a suspected victim of human trafficking once they, or someone acting on their*

*behalf, makes a claim of having been trafficked to the Garda Authorities (ie the Irish police) until such time as there is compelling evidence that they are not' (par 147).*

*We also note the claim that 'Garda officers performing identification apply UN GIFT general indicators, updated by the Delhi Indicators developed by ILO and the European Commission' (par 148). We remind you that the head of the Garda HTCIU told GRETA that 'during the identification process, HTICU officials 'take cooperation very fluidly...the system errs on the side of caution and we accept that a person is a victim of trafficking unless there is reason to believe otherwise' (para 163)...*

*Your failure to identify our client as a suspected victim or victim of trafficking suggests that there is a very significant gap between theory and practice in the GNIB's victim identification process.*

*Your failure to determine the matter notwithstanding the evidence available and the length of time since this has been brought to your attention leaves us with little option but to institute legal proceedings in order to vindicate the rights of this very vulnerable lady."*

77. The Chief Superintendent responded to this letter on the 7<sup>th</sup> October, 2013, stating that he was continuing to liaise with the investigating officers.

78. By letter dated the 23<sup>rd</sup> October, 2013, Mr. Noble called on the Chief Superintendent to provide the reasoned basis for his decision, together with any material upon which it had been based and which had not already been disclosed. It was stated that the failure to declare the applicant to be a victim of trafficking, coupled with the lack of adequate and reasonable explanation for such action, meant that she was now constrained to issue judicial review proceedings. This letter does not appear to have received a reply.

### **The application for judicial review**

79. On 4<sup>th</sup> November, 2014, the applicant obtained the leave of the High Court (Peart J.) to seek the following reliefs by way of judicial review:

- a. An order of *certiorari* quashing the decision of the first named respondent dated 30<sup>th</sup> September, 2013, not to identify the applicant as a victim of trafficking in human beings;
- b. An order of *mandamus* requiring the first named respondent to determine in accordance with the law the applicant's application for identification as a victim of trafficking in human beings;
- c. A declaration that Articles 40.4.1 and 40.3 of the Constitution, Article 4 of the European Convention on Human Rights 1950 ('ECHR'), section 3 of the ECHR Act 2003, Article 5 of the Charter of Fundamental Rights of the European Union ('CFREU'), Directive 2011/36/EU, and/or the principle of

good administration in EU law require the first named respondent to observe fair procedures – including the requirements to act within a reasonable time and to give reasons for decisions – in respect of the applicant’s application for identification as a victim of trafficking;

- d. A declaration that the third named respondent has failed to bring into force the laws, regulation and administrative provisions necessary to comply with the Directive 2011/36/EU and in particular Article 11 and 12 thereof;
- e. An order pursuant to Order 84, Rule 20(8) staying, until the determination of the proceedings herein, the applicant’s trial in the Circuit Criminal Court in respect of charges numbered 13304999, 13305005, 13572963 and 13572971 inclusive as set out in the second named respondent’s Book of Evidence entitled *Director of Public Prosecutions v. P.* and duly returned for trial on the 23<sup>rd</sup> May 2013 and pending before the Circuit Criminal Court;
- f. An injunction restraining the second named respondent from taking any further steps in the prosecution aforesaid until the determination of the proceedings herein;

80. The applicant also seeks damages.

81. In her grounding affidavit the applicant gave an account of her life in Vietnam as a farm labourer and petty trader. She said that she got into debt and that in 2012 she was forced to borrow money from a criminal who threatened to kill her if she did not

pay him back. A woman suggested to her that she should travel abroad to earn money, and said that this could be arranged for the equivalent of €1,000. The applicant borrowed this sum but was then told that the cost would be greater. However, she was told that she could pay the balance when she got to the destination.

82. The applicant said that she was given a passport and taken to the airport. When she got off the plane she was met by a man who took her to a house where she was kept for some weeks. She was then taken on a journey by truck which lasted for several days, left on the side of a road and then picked up in a van. She was in the van for a few days and when she was allowed out she was at the warehouse.

83. The applicant said that while in the warehouse she plugged and unplugged the lights as instructed. The men who came to bring her food and to check on the plants would not permit her to leave and she was frightened of them.

84. She says that she is a victim of human trafficking and cannot understand why she has not been formally recognised as such.

85. In view of the applicant's relative lack of English, there is an affidavit sworn by an interpreter that she read the statement of grounds and affidavits to applicant in Vietnamese and assisted in the making of some amendments. The interpreter avers that the applicant "perfectly understood the final versions."

#### **The Chief Superintendent's first affidavit**

86. In an affidavit sworn on the 18<sup>th</sup> December, 2013, the first named respondent said that while he was endeavouring to put before the court as much of the background as possible, he was obliged to keep certain matters confidential as to do otherwise would compromise the integrity of the investigation.

87. It is averred that on the 21<sup>st</sup> November, 2012, the day after the applicant was arrested, her fingerprints were sent to Interpol in order to establish her identity and to see if she was as a missing person or otherwise known in any other jurisdiction. A short reply was received on the following day. According to the affidavit:

*“Amongst other things Gardaí were informed that she was not a wanted person or a missing person.”*

88. Reference is then made to the charging of the applicant before the District Court on the 22<sup>nd</sup> November. The Chief Superintendent says that he understands that the defence solicitor asserted in court on that date that the applicant was a victim of human trafficking and says

*“This is the first time, I believe, that this was ever claimed.”*

89. However, it should be noted that in a subsequent affidavit the Chief Superintendent says that that he was informed that Sergeant Fitzpatrick had discussed the question with Mr. Noble on the 23<sup>rd</sup> November and had offered to meet with the applicant and her solicitor with a view to progressing her claim.

90. He refers to the initiating correspondence from Mr. Noble, and the subsequent liaison between the GNIB and the investigators in Store Street. In relation to the interview with the applicant on the 12<sup>th</sup> January, he comments

*"I say that the information she gave was extremely vague and the investigating Gardaí could not ascertain details which would enable them to ascertain her identity. At this same interview P. gave an account as to how she got to Ireland and again there was very little specific verifiable information forthcoming from her in this regard."*

91. The Chief Superintendent says that when the psychologist's report was received on the 31<sup>st</sup> July, 2013, it was noted that the biographical information contained in it was "contrary to the Garda understanding of her history" from the investigation. Accordingly, a GNIB officer contacted Sergeant Fitzpatrick on the 18<sup>th</sup> August, 2013, and directed that he attend to half a dozen specific enquiries which might clarify the situation.

92. On the 20<sup>th</sup> August, 2013, the same GNIB officer, Inspector Molloy, wrote to the Chief Superintendent setting out a detailed outline of the evidence gathered to date and itemising certain investigation measures which could be used to advance the issue. This memo was not exhibited but the Chief Superintendent says that the information thus provided to him justified a "tentative conclusion" that the applicant was not a victim of trafficking.



*“In broad outline I say that independently obtained intelligence suggests that the account offered by the applicant is not just less than candid but is wholly inaccurate in material respects. In particular as to both her means of arrival into the jurisdiction and the passage of time between departure from her home state to this jurisdiction. In the light of the above it is unfair to the applicant to act upon what the intelligence suggests, without adequate investigation and opportunity being afforded to her to either explain or clarify the significant anomalies that appear to exist.”*

93. The content of the “independently obtained evidence” is not disclosed in the affidavit, for reasons of confidentiality.

94. The Chief Superintendent refers to receipt of the report of Dr. Kelly but makes no comment on its contents.

95. Referring to his letter of the 30<sup>th</sup> September, the Chief Superintendent says that it was not intended to and did not amount to a final decision.

96. It is stated that on the 7<sup>th</sup> November, 2013 (after the grant of leave in these proceedings) the Gardaí made a further request for information to Interpol. It is averred by the Chief Superintendent that the reply to the request “contained information relevant to the issue under investigation”. Again, this affidavit does not go any further as to the content of the information.

97. On the 5<sup>th</sup> December, 2013 the Chief Superintendent had written to Mr. Noble stating that it was the intention of the Gardaí to interview his client further. Mr. Noble responded that this was irregular and inappropriate given the judicial review proceedings then in being, and also on the basis that further interviews could expose his client to “secondary victimisation”. The Chief Superintendent avers that he considers this to be an unreasonable refusal to cooperate, and a position which could only be due to the wish of the applicant not to have the facts of the matter to be properly investigated.

98. It is averred that a significant amount of time and attention has been “diverted” to the applicant’s claim and that it has been examined in good faith. As far as his own approach is concerned, the Chief Superintendent deposes that he and his colleagues have adjudicated upon a number of such applications and have on occasion determined that the claim was genuine. He says that it is his practice and intention to make a positive determination wherever it is appropriate to do so.

### **The motion to dismiss**

99. On the 16<sup>th</sup> May, 2014, the first, third and fourth respondents issued a motion seeking orders setting aside the leave granted to the applicant to seek judicial review, on the basis of an alleged breach of the principle of utmost good faith in seeking that leave. The respondents say that the applicant obtained leave on the basis of an account that was materially false. They also seek an order pursuant to O. 19, r. 28 striking out or dismissing the applicant’s proceedings on the grounds that the said proceedings disclose no reasonable cause of action against the respondents, or any of them, the

said proceedings are premature, frivolous and/or vexatious and the said proceedings are doomed to fail.

100. The grounding affidavit for the motion, sworn by Chief Superintendent O'Driscoll on the 16<sup>th</sup> May, 2014, discloses certain information that was not included in his original affidavit. He says that the considerations which prevented such disclosure at an earlier stage "no longer apply".

101. It is stated that the request to Interpol on the 22<sup>nd</sup> November, 2012, elicited the information that the applicant's fingerprints had been matched to a person on the German database with two known aliases, who was on the system because of violations of German immigration law. The reply also confirmed that she was neither a wanted nor a missing person.

102. The Chief Superintendent refers to the interview conducted with the applicant on the 12<sup>th</sup> January, 2013. He says that the information given by her was

*"extremely vague and the investigating Gardaí could ascertain no detail enabling them to [establish] her true identity. At the same interview Ms P. gave an account as to how she got to Ireland and again there was very little specific identifiable information forthcoming from her in this regard."*

103. It appears that a follow-up request had been made to Interpol on the 14<sup>th</sup> January, 2013. This was replied to on the 18<sup>th</sup> January, with the information that the applicant had twice applied for asylum in Germany, in 1993 and again in 1994. Both

applications were unsuccessful but she appears to have remained in Germany until 1997. The applications were made in different names, giving different dates of birth.

104. The Chief Superintendent also says that enquiries with the police in Vietnam have confirmed that there is no record of the applicant on the criminal database there.

105. It appears that this additional information received from Interpol was furnished to Garda rank officers in Store Street and the GNIB but was not, in error, forwarded to the Chief Superintendent until November, 2013 (after the judicial review proceedings had commenced).

106. The request by the Gardaí to re-interview the applicant, referred to above, was ultimately acceded to in February, 2014. The interview was attended by the applicant's solicitor.

107. The applicant was again asked about her life in Vietnam and about her history of travel. She said that she had never been outside Vietnam before her journey to this country. In particular she denied having been in Germany or having been arrested there. It was put to her that there was concrete information that she had been in a European country but she replied that she had not. The Gardaí told her that they had reliable information that she had been in Germany for a long time and she denied it. She said that she had not been arrested prior to the arrest here.

108. Subsequently, Mr. Noble wrote to request the evidential basis for the matters asserted by the Gardaí in the interview. The Chief Superintendent responded with an

outline of the information received from Interpol. He also noted that at the interview, the applicant had given the 13<sup>th</sup> October, 1960, as her date of birth.

109. In this affidavit the Chief Superintendent also discloses the content of the memorandum of the 20<sup>th</sup> August, 2013, referred to at paragraph 92 above, from D/Inspector Molloy.

110. Having reviewed the file, D/Inspector Molloy had said that he agreed that there were “some indicators of human trafficking” present in the case but that he was struck by the lack of detail and vagueness in the accounts provided by the applicant to both the Gardaí and Dr. Randall. He suggested that the vagueness of the information made it difficult to find that there were reasonable grounds for believing that she was a victim of trafficking “at this point in time”. He recommended that the investigators at Store Street take a number of further steps – in summary, that they should provide further details in relation to the mobile phones and laptop found in the warehouse; make further inquiries about the applicant’s time in Germany; find out if the confidential source whose information led to the raid knew anything relevant, and consider asking Mr. Noble whether he or his client could provide any information to assist.

111. On the 30<sup>th</sup> September, the day that he wrote the letter the subject of these proceedings, Chief Superintendent also wrote to the Superintendent of Store Street Garda Station. He summarised the history of the case and attached some of the correspondence from Mr. Noble including the report of Dr. Kelly. He also attached the letter he had written to Mr. Noble. It is important to note the terms in which he described to the Superintendent that letter and the state of the investigation.

*“[In the letter] I state that, to date, I have not concluded that there are reasonable grounds for believing that the above-mentioned P. (also known as P.) is a victim of an offence [of human trafficking].*

*In the event that I conclude at any time that the said P. (also known as P.) is a victim of human trafficking, it has potential to have a significant bearing on the decision made by the DPP to proceed with the aforementioned charges. While the investigation of the allegation of human trafficking made by the aforementioned Vietnamese national is being conducted at Store Street, the aforementioned provisions of the Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking require that I make an independent assessment of whether there are reasonable grounds for believing that the above-mentioned P. (also known as Nan P.) is a victim of a relevant offence. For this purpose it is necessary that I have access to particular information regarding the investigation being undertaken at Store Street.*

112. The letter then sets out the queries raised by D/inspector Molloy as referred to above. The court is not aware whether this letter received any reply. It is however clear that it supports the contention that the Chief Superintendent had not made a final decision in the matter on that date.

113. The Chief Superintendent says in this affidavit that he has investigated the applicant's claim to the appropriate degree.

*“...with reference to a large number of matters which had been brought to my attention (including all representations made to me by or on behalf of the applicant) and with particular concerns of the Applicant’s true identity and the veracity of her account, I am unable to consider there are as yet reasonable grounds to sustain the Applicant’s contention. The Applicant appears to have concealed her true method of entry to this jurisdiction and her means of exit from her country of origin. As yet little basis remains for considering her to be a trafficked individual or the method whereby such may have occurred. However, as is evident from correspondence since these proceedings were initiated, the Applicant’s representatives have accepted the ongoing nature of the inquiry and investigation and I therefore submit it is being prolonged further and only due to the applicant’s mendacity and concealment.”*

114. At the hearing of this matter it was submitted on behalf of the respondents that this paragraph sets out the actual decision of the first named respondent.

115. In an affidavit sworn in November, 2014 Garda Neil Cepeda says that analysis of the laptop found in the warehouse established that it had been used to access Vietnamese news websites and Facebook, and that it had accessed the internet from August, 2012 until the 19th November, 2012 (the day before the Garda raid). He also avers that the applicant was not, when found by the Gardaí, in a distressed state. He further says that he is unaware of any Garda involved in the case holding the view that the applicant had been detained in the warehouse against her will and consent, as averred to by Mr.

Noble. (It may be noted that this view does not sit particularly well with the interventions of Sergeant Fitzpatrick.)

116. Sergeant Karen Clifford, who is attached to the GNIB, also swore an affidavit in November, 2014 in which she describes the interview with the applicant on the 17<sup>th</sup> October, 2014. Garda Cepeda and the applicant's solicitor were present.

117. According to Sergeant Clifford, the applicant gave a different date of birth to the one that she had furnished at the previous interview. She explained this by saying that she had been confused before. She was unable to give any address used by her in Vietnam, or say exactly where she was born or where she lived. She could not name any family, or any children of any family, that she had worked for in Germany, or say where in Germany they lived. She described returning to Vietnam with the family that had brought her to Germany but could not recall where in Vietnam they flew to.

118. The applicant was asked about her use of the laptop in the warehouse and stated that she only used it to play music. She denied ownership of a mobile phone found there and was unable to explain why there was a photo of her on it, dated August, 2010.

119. Sergeant Clifford's view of the interview was that when questioned regarding anything of relevance the applicant complained of being tired and unable to remember.

120. On the 5<sup>th</sup> December, 2014, Professor Patricia Casey, Professor of Psychiatry and a consultant psychiatrist, swore an affidavit on behalf of the respondents exhibiting a



report she had written based on a review of the file. She lists the discrepancies in the various accounts given by the applicant to her solicitor, the Gardaí and the psychologists and casts doubt on the applicant's veracity. She also takes issue with the opinion expressed by Dr. Kelly that post-traumatic stress disorder could affect the ability of a sufferer to recollect such matters as the name of the village she had lived in.

121. It is urged by the respondents that the judicial review application was founded upon material fraudulent non-disclosure, was premature, is effectively preventing any meaningful progress being made in the criminal proceedings and should be dismissed.

*Respondents' submissions on the motion to dismiss*

122. In relation to the non-disclosure issue, Mr. Devalley SC points in particular to the failure of the applicant to inform either the investigating Gardaí, the psychologists or the court of her years in Germany. She was specifically asked in the interview of the 28<sup>th</sup> February, 2014, whether she had been in that country and she denied ever having been in Europe before. She also gave contradictory accounts as to how she arrived in this country, having initially told her solicitor that she arrived by sea in a container but subsequently saying that she came by plane.

123. It is said that

*“the entire claim for victimhood is contingent on the applicant's word, and her narration of the events surrounding her journey to Ireland and how she*

*claims to have been deceived into making such a journey. It is submitted that her non-disclosure could scarcely be more relevant or damaging to the just disposal of the case."*

124. It is submitted that one of the clearest indicators of whether persons have been trafficked into the country, as opposed to being economic migrants, is the means by which they travel and their immigration history.

125. The relevance of the falsehood is emphasised by reference to the attempt by the applicant to portray herself as a naïve person with no experience of travel or foreign culture, when in fact she had a proven history of making false asylum claims in Germany and was prepared to flout the immigration laws there.

126. On the question of prematurity, the respondents say that the fact that, subsequent to the grant of leave, the applicant continued to engage in the process of seeking a determination of her status, and eventually agreed to be re-interviewed, demonstrates that she implicitly acknowledges that no final decision has been made.

127. The applicant is said not be entitled to an order of mandamus on the basis that there is no evidence of a clear and unambiguous demand calling on the Chief Superintendent to make a decision which he was by law bound to make, as opposed to entitled to make. There is no time-limit set in the Arrangements for the making of a determination. The investigation was conducted on a bona fide basis, and the applicant's own misdeclarations have contributed to the length of time it has taken.

128. Finally, it is submitted that the applicant cannot be entitled to any declaratory relief since the decision has not yet been made and it cannot be predicted that the outcome will be legally flawed.

*The applicant's response to the motion to dismiss*

129. The applicant swore a supplemental affidavit in response to the respondents' motion.

In it she confirmed that she had travelled to Germany in 1993 "to escape poverty in Vietnam" and that she had twice applied for asylum there under assumed identities. While there she worked illegally as a child-minder. She left Germany in 1997 and returned to Vietnam. In 2012 she was "offered the chance to return to Europe" and was deceived into believing that she would have a job looking after children.

130. The applicant says that she regrets not telling the Gardaí the truth about Germany, and that she did not reveal it because she was scared and thought it would get her into even more trouble. In a further supplemental affidavit she has apologised to the court.

131. Mr. Noble has also sworn supplemental affidavits in which he asserts that it is "grotesquely unfair" to characterise the information provided by the applicant as vague given that she is suffering from post-traumatic stress disorder. He accuses the Chief Superintendent of acting in an oppressive manner, of having "a reflexively dismissive and aggressive attitude inconsistent with a human-rights-based approach to the issue" and of a failure to understand the situation of victims of trafficking.

132. It is complained that at no point in the interview in February, 2014 was it put to the applicant that she had made asylum applications in Germany and had been there until 1997, and that the particulars of the information relating to this were not given to him until he requested them after the interview.

133. Mr. Noble asserts that the law does not place a burden of proof on victims of trafficking to “self-identify”. The obligation lies on the competent authorities, who are required only to have a reasonable or credible suspicion that a person has been trafficked. In this regard he has exhibited an expert report from Anti-Slavery International, a venerable organisation founded by William Wilberforce and based in London.

134. The author of the report, Ms. Klara Skrivankova, gives it as her opinion that the applicant was a victim of trafficking on the basis of the following indicators:

- Her travel was arranged by someone else
- Her passport was given to her by that person
- She was in debt bondage
- Her vulnerability was abused to put her into a situation of forced labour
- She was found by Gardaí in circumstances that pointed to a situation of human trafficking and forced labour
- She was anxious and disoriented.

135. Ms. Skrivankova says that identification of trafficked victims is crucial to combating the crime, but that it is not an easy task. It is often made more difficult by false

expectations as to how the victim should portray his or her experiences. She says that one challenge arises from the fact that most victims do not perceive themselves as such, but rather as migrants who happen to be in a difficult situation. Further, it is her experience that victims are reluctant to cooperate with the authorities for a variety of reasons, including fear of such authorities, and that trauma and the psychological consequences of trafficking have been known to affect a victim's ability to recall events accurately.

136. Dr. Kelly provided an additional report dealing with his diagnosis of post-traumatic stress disorder, giving a more extensive description of the disorder and its symptoms as observed by him in the applicant's case. He says that it is "highly likely" that it affected the consistency of her narrative across repeated interviews.

137. The Legal Officer of the Migrant Rights Centre Ireland, Ms Virginija Petrauskaite, has sworn an affidavit in support of the applicant. The MRCI is described as being recognised both nationally and internationally as an expert organisation in the area of anti-trafficking, and as the only organisation in Ireland providing expertise in the area of trafficking for the purposes of labour exploitation.

138. Ms. Petrauskaite says that in depth researches carried out by MRCI have shown a trend of potential trafficking for cannabis cultivation in Ireland, particularly of Vietnamese and Chinese nationals. She refers to figures for the prosecution of cultivation offences in the Dublin area over the period from 2011 to July 2013 and notes that out of 32 people incarcerated during that period, 24 were Vietnamese or Chinese. Nineteen of those persons made claims of exploitation or maltreatment but,

according to Ms. Petrauskaite, no investigations into trafficking issues were undertaken in their cases.

139. The Policy and Research officer of MRCI, Mr. Pablo Rojas Coppari, interviewed the applicant on the 30<sup>th</sup> June and the 1<sup>st</sup> July, 2014. He also reviewed her file. Applying the Delhi Indicators, he concluded that she was a victim of human trafficking for the purposes of forced labour.

140. On the issue of principle, the applicant submits that the jurisdiction of the court to discharge an order granting leave to seek to judicial review for breach of the obligation of good faith is one that should be exercised only in exceptional cases, as described in *Adam and Iordache v. Minister for Justice, Equality and Law Reform* [2001] 3 I.R. 53. The question for the court, as formulated by Cooke J in *Coulibali v Minister for Justice, Equality and Law Reform* [2011] IEHC 47, whether, having regard to the history of the case and in the light of the explanation offered, this is a clear and compelling case where the court ought to stop the proceedings before it goes any further.

141. It is submitted that the fact that the applicant had spent time in Germany in the 1990's does not bear upon the question whether she has been trafficked in this country and would not have been a material factor affecting the court's decision to grant leave. The court is also urged to have regard to the evidence in relation to the fact that victims of trafficking often do not cooperate fully with the authorities because of the traumas they have experienced.

142. On the separate but related issue as to whether the proceedings are premature or otherwise bound to fail, the submission is made that the jurisdiction under O.19 r. 28 is exercisable by reference to the pleadings only without assessment of the evidence.

Submissions of the amicus curiae on the motion to dismiss

143. The Commission observes that this is primarily a matter for the court. However, it does submit that the applicant has *locus standi* to bring the current proceedings. She has a right to an effective remedy under Article 13 of the European Convention on Human Rights and under Article 47 of the Charter of Fundamental Rights of the European Union, in circumstances where she contends that her rights have been violated, whether by reason of refusal to recognise her as a victim or because of delay in the process, if her proceedings are not manifestly unfounded or an abuse of process. The “right to a remedy” arises if she has an “arguable claim” and does not depend upon verification of that claim.

Submissions of the applicant on the substantive issue

144. On behalf of the applicant it is submitted by Mr. Finlay SC that, in the first instance, certiorari lies because the first named respondent, in his letter of the 30<sup>th</sup> September, 2013, communicated a formal decision not to recognise the applicant as a victim of human trafficking. The terminology used, including as it does reference to the Chief Superintendent’s position and his role under the administrative arrangements, supports this interpretation. Mr. Finlay says that the letter must be seen in context – there had already been significant delay and the arraignment date was looming. Any

decision made at that point would, from the applicant's point of view, be final. The suggestion that the matter could be reassessed in the future did not take away from the fact that it was a refusal.

145. The failure to give reasons for the decision is said to be a breach of the Constitutional requirements of fair procedures. In this regard reliance is placed on the decision of the Supreme Court in *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 and in particular the following paragraph from the judgment of Fennelly J.:

*"The underlying principles of judicial review are universal. Courts of the common law have developed and expanded the historic rules of natural justice, in more recent times with inspiration from international human rights instruments such as the European Convention on Human Rights 1950 and, in this jurisdiction, from the Constitution. The Court of Justice of the European Union speaks of a "complete system of legal remedies" as set out in Les Verts v Parliament (Case 294/83) [1986] E.C.R. 1339 at para. 23. The rules are composed of a number of interrelated features, the underlying fundamental presumption being that those to whom discretionary powers are entrusted will exercise them fairly insofar as they may affect individuals. Where fairness can be shown to be lacking, the law provides a remedy. The right of access to the courts is an indispensable cornerstone of a state governed by the rule of law."*

146. Reference is also made to the decision of the European Court of Human rights in *Rantsev v Cyprus and Russia*, ECHR App No 25965/04, 7 January 2010.



147. With reference to the Directive, the applicant submits in the first instance that it has not been adequately transposed in that the State has not established an “appropriate” mechanism aimed at identification of trafficking victims. The term “appropriate” is said to mean appropriate to the needs of those who claim to be victims, whose principal need is a prompt “reasonable grounds” identification followed by immediate access to assistance and support. The system actually in place is characterised by “delays, biases, lacunae and general unfairness”, coupled with the exclusion from the process of “relevant support organisations”.

148. In the absence of proper transposition, the applicant says that Article 11 of the Directive is sufficiently clear, precise and unconditional for her to rely directly upon it as obliging the State (insofar as is relevant to this case) to

- Establish an appropriate mechanism to identify victims of trafficking at an early stage
- Carry out the identification in cooperation with relevant support organisations
- Provide victims with assistance and support
- Provide such assistance and support as soon as there is a “reasonable grounds” indication for believing that the person might have been subjected to a trafficking offence.

149. It is submitted that in exercising the powers conferred upon him by the terms of the administrative arrangements, the first named respondent is acting as an emanation of the State for the purposes of EU law.

150. In the alternative, it is submitted that if the terms of the administrative arrangements are to be regarded as a transposition of the Directive, they must be interpreted in the light of the wording and purpose of the Directive so as to achieve that purpose in a manner consistent with the State's obligations thereunder.

151. The first named respondent is alleged to have violated the applicant's right to an early decision. This is described as an ongoing violation, on the basis that the respondent's case is that he has not yet made a decision.

152. On the issue of locus standi it is submitted that the applicant has standing in that she has a bona fide interest or concern in the provisions sought to be impugned, or else because the rights which she seeks to protect are of general importance to society as a whole in circumstances where she is not a meddlesome or vexatious litigant. The case of *Lin v. Governor of Mountjoy* [2014] IEHC 214 is distinguished on the basis that the applicant seeks to enforce rights under Article 11 of the Directive, which covers the position of those who claim to be victims, rather than to rely on Article 8, which would require her to have been identified as a victim.

#### **Submissions on behalf of the respondent**

153. In the Statement of opposition of the first, third and fourth respondents it is pleaded that

*“Without prejudice to the Applicant’s right to be furnished with reasons in the wake of or in conjunction with any final decision made, it is the Respondents’ assertion that the Applicant has no right to receive, nor the Respondent’s any duty to transmit, details of such matters as have come to their attention requiring further investigation to establish the designation of the Applicant reasonably and fairly. Without prejudice to this or the other proceedings, the applicant’s claim that she would have a right to reasons being offered should her designation be refused, is premature.”*

154. However it is now contended that the first named respondent has made his decision, as set out in his second affidavit in the extract quoted above at para 113.

155. In relation to the applicant’s complaint of a failure to disclose relevant information, the respondents assert that the effective administration of the scheme and considerations of public order, may require that certain aspects of intelligence or sensitive material be retained without full disclosure, in the event of such a decision requiring reasons. The respondent further submits that this complaint appears to suggest that he should be blamed for not telling the applicant sooner that which she already knew, that she had been to Germany and worked there for a number of years. The respondent suggests that this line of argument seeks to transfer the responsibility for the applicant’s deliberate “misdeclarations”.

156. The respondent asserts that the administrative measure amounts to a full and effective implementation of Directive 2011/36/EU and the measure affords to the applicant, in an enforceable form, all rights which arise in her favour under terms of

the said Directive. It is further asserted that the State has abided by its duty to identify and assist victims of human trafficking in compliance with its obligations pursuant to Directive 2011/36/EU and that the applicant lacks standing to assert that the third named respondent has failed to transpose or put in obligations pursuant to Directive 2011/36/EU.

### **Submissions of the Second Named Respondent**

157. In her statement of opposition the second named respondent says that identification of the applicant as a victim of human trafficking under the Arrangements is a matter for the first, third and fourth named respondents rather than for her. However, such identification, or, independently of the view of those parties, credible information that a person has been trafficked “is capable of being a factor” to be taken into account in deciding whether or not to prosecute. It is stated that the identification of the applicant under the Arrangements would not have the effect of preventing her trial on the offences with which she is charged, nor any offences.

158. It is denied by the second named respondent that either the European Convention on Human Rights and Fundamental Freedoms, Article 5 of the Charter of Fundamental Rights of the European Union, Article 82(2) and 83(1) of the Treaty on the Functioning of the European Union or Directive 2011/36/EU impose upon the Director of Public Prosecutions a positive procedural obligation or a separate function of identifying or assisting victims of human trafficking.

159. The affidavit sworn on behalf of this respondent simply verifies the foregoing without more.

160. In submissions, Mr. Dwyer BL notes that the relief sought as against the Director is only pending the determination of these proceedings. However, the applicant has pleaded that this respondent is also under a procedural obligation to identify and assist victims of human trafficking and arguments have been made on that issue.

161. Mr. Dwyer cites the jurisprudence of the Irish courts relating to the independence and discretion of the office of the Director of Public Prosecutions, and the concomitant reluctance of the courts to interfere in prosecutorial decisions in the absence of evidence of perversity or mala fides. In that context, it is submitted that the court cannot embark upon an enquiry as to the merits of the decision to prosecute in this case, or otherwise interfere with the Director's proper exercise of her discretion.

162. The introductory paragraphs of the Director's guidelines for prosecutors are referred to as demonstrating that they constitute general guidance on matters to be taken into account at different stages of a prosecution. They are not issued under any statutory duty or power, and do not bind the Director not to prosecute a potential victim of trafficking. Furthermore, the decision of the Divisional Court in *Fleming v Ireland* [2013] IEHC 2 makes it clear that the Director has no obligation (unlike her counterpart in the United Kingdom) to issue guidelines in relation to any particular matter. The same court rejected a contention that the European Convention on Human Rights Act, 2003 could be interpreted as imposing such an obligation.

163. The Director also relies upon *Lin v Governor of Cloverhill* [2014] IEHC 214 as establishing that Article 8 of the Directive does not confer a right not to be prosecuted on a victim of trafficking.

#### **Submissions of the amicus curiae**

164. By order dated 25<sup>th</sup> February, 2014, the High Court granted the Irish Human Rights and Equality Commission liberty to intervene as amicus curiae in the within proceedings.

165. As noted above, the Commission takes no view on any disputed issue of fact but has made submissions on the legal issues.

166. It is submitted by counsel that the Directive is the chief source of the applicable principles. The Directive is described as envisaging a two-stage process. An applicant becomes entitled to certain rights once there is a “reasonable-grounds” indication. However, if upon the completion of the process the applicant is found not to be a victim those rights evaporate. Since the State’s position in this case is that no final decision has been made, certain rights should have been afforded to the applicant.

167. It is submitted that the Directive requires the State to take the necessary measures, at an early stage and in cooperation with relevant support organisations.

168. On the issue of transposition, Mr. Simons says that the absence of implementing legislation prima facie points to a failure to transpose. Measures to implement a

Directive must have binding legal effect, especially where the Directive is intended to confer rights on individuals. It is suggested that many of the problems in this case have arisen because of a lack of clarity as to the procedures and the test to be applied.

169. While accepting that Irish courts have on occasion found State bodies to be legally bound by administrative circulars, it is said that this is insufficient for the purposes of EU law. In that regard reference is made to *Commission v Ireland* (Case C-427/07). Since the Directive was to be implemented by the 6<sup>th</sup> April, 2013, the applicant is entitled to rely upon it as of that date.

170. The administrative arrangements are criticised for failure to set out the nature and detail of the identification process.

171. Criticism is made of the process that occurred in this case on the basis of delay, in circumstances where on the State's version the decision has still not been made more than two years after the application; and the lack of involvement on the part of relevant organisations (noting that the contributions made by such organisations in this case post-dated the leave application). The Commission is also supportive of the applicant's submissions on the duty of investigators to disclose material information, the overlapping roles of the Gardaí involved in the case and the failure to give reasons. It is said that if a decision-maker is going to rely on a particular matter as a basis for a negative decision, an opportunity must be afforded for a response. The overlap between the GNIB and the investigating Garda is described as giving rise to a perception of objective bias.

172. The Commission also makes the point that the process of victim identification is not intended to be adversarial and that the person claiming to be a victim is not under an onus to prove it. The GRETA report is referred to in support of the proposition that the onus of identification lies on the State authorities, who are therefore obliged to cooperate amongst themselves, with the potential victim and with relevant support organisations. It is submitted that similar considerations apply to Art. 11(4) of the Directive.

### **Discussion and conclusions**

#### *The motion to dismiss*

173. I do not propose to accede to this application. In the first instance, I do not consider that the non-disclosure by the applicant of her illegal presence in Germany twenty years ago provides a sufficiently “clear and compelling” ground for declining to consider her substantive case. It was undoubtedly a matter that should have been disclosed but if it had been, it is in my view highly unlikely that it would have had a material effect on the decision to grant leave.

174. The court also takes into account the context of this particular instance of non-disclosure, and in particular, the relatively vulnerable position of the applicant. She is a foreign national, charged with serious offences under an unfamiliar legal system in an unfamiliar language. While it may appear obvious to the respondents that she could not get into further trouble by divulging the facts as to her stay in Germany, it is not necessarily obvious to her.



175. Finally, on this issue, I note that the first, third and fourth respondents were aware that the applicant had been in Germany, and had not told them about it, when they filed their statement of opposition and affidavit in the substantive proceedings. (I am not sure whether or not it would be proper to include the Director of Public Prosecutions in this regard, because while the court was informed that the GNIB file was copied to her, I do not know when that occurred.) If the concern is that the process of the court is being abused, one might have thought that the issue could have been raised at that stage. I note that the first named respondent felt that he could not disclose all the information in his possession to the court at that stage, but I have to admit that I do not understand how disclosure of the fact that the applicant made false applications for asylum in another country twenty years ago could compromise a current criminal investigation into cannabis cultivation in this country.

176. The argument that the application was premature might be considered well-founded, but it would in the circumstances be a futile waste of court time to ignore the fact that matters have moved on since the grant of leave. The first named respondent has, on his own account, finalised his decision in the course of these proceedings.

#### Locus standi

177. I consider that the applicant does have *locus standi* to seek relief. For reasons dealt with below, I am of the view that the provisions of the Directive may be relied upon by her. She has made an application for identification that is not manifestly unfounded. If such an application is successful, the person concerned does not gain

any automatic right not to be prosecuted or to be granted bail in the event of prosecution, but as a matter of reality his or her position in relation to these issues would improve significantly. There is also the entitlement to specialised medical and psychological assistance of a sort not necessarily available to other remand prisoners. The applicant in this case remains in custody and has a legitimate interest in these matters. I accept the argument that in the circumstances, she does not have to establish that she is entitled to the status she seeks in order to claim an entitlement to proper procedures.

#### The substantive issue

178. From any point of view what has happened in this case is not satisfactory. It is now over two years since the applicant first sought a decision on an issue that is meant to be determined swiftly. It is a substantial part of the case made on behalf of the first named respondent that he did not in fact make a decision until several months after the judicial review proceedings commenced. This is despite the fact that Article 11(4) of the Directive requires the State to put in place “appropriate mechanisms” for the early identification of victims.

179. In my view this case demonstrates a number of fundamental difficulties with the mechanism in place in this State, insofar as it relates to persons suspected of involvement in criminal activity.

180. The first difficulty is the onus of proof in relation to the application for recognition. The second is the state of mind required on the part of the respondent for him to

identify an applicant as a victim, or, put another way, what is required to be proved before recognition will be given. The third is the appropriate procedure to be followed, in circumstances where a separate but closely linked criminal investigation into the activities of the applicant is in being.

181. On the first issue, it is clear that the respondents consider the veracity of the applicant to be crucial. Where falsehood is detected in relation to what is considered to be a material event, it is seen as casting doubt upon the applicant's claim to be a victim. This is understandable, particularly if in a given set of circumstances the applicant is the only available source of information as to how he or she came to be involved in the suspected criminal activity.

182. However, it seems clear that the standard set by the Directive does not permit the State to impose a burden of proof of this sort on an applicant. The test of "reasonable-grounds indications" is an objective one. It may be satisfied by a convincing account on the part of an applicant, but even an unconvincing account may suffice if as a matter of fact there is objective evidence of trafficking. In this particular case, no theory has been put forward by the respondents which would plausibly explain the fact that the applicant was locked into the premises in circumstances that would not suggest that she was in control of the situation. This last observation is not intended to be read as placing an undue onus on the respondents, but it is in my view a reasonable comment in the context of an objective test.

183. Concentration on the veracity of an applicant may also lead the decision-makers to overlook the fact that what is at stake is not simply a matter of entitlement to a

beneficial status, as in an application for refugee status, but a measure intended to facilitate the investigation of a serious crime. It does not necessarily lead to any permanent material gain for the applicant but is intended to assist the State in preventing the modern blight of human trafficking. For this reason, and because experience shows that the victims of trafficking do not necessarily identify themselves as such and may not wish to cooperate with the authorities, the international consensus as reflected in the Directive is that a person should be identified as a “suspected victim” if there are reasonable-grounds indicators to that effect. That is the rationale for the prescribed period of “rest and reflection”. The presence of evidence suggesting that the victim consented to his or her treatment does not dispose of the issue.

184. Where the requisite suspicion is held, certain steps follow. None of these steps are irrevocable. The applicant’s legal advisors may at one stage have thought that identification as a victim would give her immunity from prosecution but that is clearly not the case – all that is required is that there must be a discretion on the part of the prosecution authorities not to prosecute. The Directive does not seek to interfere with the exercise of that discretion.

185. The exact description of the decision to be taken by the respondent seems to be a matter open to debate. The administrative arrangements refer to identification as “a suspected victim”, which arises when there are reasonable grounds for believing that the person is a victim.

186. The Garda officers involved in the case have described the issue as being whether there were reasonable grounds to believe that the applicant was a victim of human trafficking, which reflects the terms used in the administrative arrangements.

187. The National Plan utilises, without differentiation, the following formulations:

- The presence of reasonable grounds for suspecting a person to be a victim of human trafficking.
- The presence of reasonable grounds for believing that a person is a suspected victim of human trafficking, the test for reasonableness being whether a reasonable person, acting without prejudice or passion, believes what he or she is told.
- The possession by the Garda officer concerned of sufficient information to afford reasonable grounds for the belief that a person is a suspected victim.

188. The authors of the GRETA report appear to have been informed that, in this State, a person who claims to have been a victim is treated as such until “compelling evidence” demonstrates that they are not.

189. The directive requires the State to provide assistance and support “as soon as there are reasonable-grounds indications for believing that a person might have been subjected” to trafficking.

190. I have some difficulty with some of these concepts. It is not easy to understand what it means for a decision-maker to believe on reasonable grounds that he has a suspicion. Nor is it particularly helpful to suggest that if a reasonable person believes what he is being told then that constitutes reasonable grounds for suspicion. Belief and suspicion are not the same thing. Furthermore, reference to “belief in what a person is being told” may, again, suggest that it is the applicant’s veracity that is the only, or the principal, relevant consideration.

191. Finally, on the procedural issues, it is in my view clear that there is a necessity for rules or protocols, if not legislation, establishing what is to be done in circumstances where the person claiming to be a victim is also suspected of criminal activity.

192. I think it only fair to say that a very impressive amount of work has been done by the State parties, including the GNIB, in the general area of dealing with the issue of human trafficking in the State. The contents of the National Plan and the subsequent review are testament to that.

193. On the facts of this case, I see no reason to suspect the first named respondent of any bad faith in his handling of the matter. I do not believe that he approached the matter unfairly or oppressively. However, there are issues in relation to his role under the arrangements that seem to me to require clarification.

194. The first is whether this respondent should be so dependent for information, and for the investigation of matters pertinent to the decision he has to make, on the Gardaí responsible for investigating the suspected criminal offence. I note in this regard that

the applicant's solicitor was told to forward information to Store Street, and that Store Street officers attended at GNIB interviews. These interviews do not appear to have been carried out under caution, which is perfectly consistent with the GNIB's role but more difficult to understand given the presence of the prosecuting officer. I do not suggest that there should necessarily be a "Chinese wall" between the two investigations but I consider that the process can be validly criticised as giving rise to a conflict, or at least the appearance of a conflict.

195. Secondly, there is an issue as to disclosure of information to the applicant during the decision-making process. What transpired here, in relation to the non-disclosure of the Interpol information, would in many other contexts lead to a quashing of an adverse decision under the normal principles of public administrative law. A decision-maker has, in general, an obligation to put to an applicant information in his or her possession which is adverse to that person. In this case, the respondent withheld it because of his concern that disclosure might compromise the criminal investigation. As already stated, I do not know why that might be, and it certainly seems to be something that would have to have been disclosed in the criminal process in any event. However, assuming that the respondent was correct in that view, there is a need for clarification as to whether his role under the arrangements is secondary to the criminal investigation, to the extent that the normal requirements of fair procedures are overridden by the requirements of that investigation.

196. Finally, there is the question of whether the respondent is obliged to give reasons. In this case, the respondents have accepted for the sake of argument that there is. I note however the statement in the review of the National Plan that there is no obligation to

explain a finding that the respondent does not have reasonable grounds for identification.

197. The court must then consider whether, having regard to the foregoing, the Directive has been adequately transposed.

198. The Directive does not purport to prescribe any particular procedure, stating only that “appropriate mechanisms” are required. It does not seek to interfere with the criminal process, apart from requiring that the competent authorities should have the necessary discretion.

199. In my view “appropriate” must mean appropriate to the issues to be determined. In this context, the interests sought to be furthered will in all cases include both the State’s interest in investigating the potential crime of human trafficking and the interests of a victim in receiving assistance and support.

200. In the circumstances of a case such as this, there are two further interests to be considered, being the interest of the State in investigating and potentially prosecuting an applicant for criminal activities and the interest of the applicant as a suspect or accused person. The Directive enjoins the State to provide for prosecutorial discretion but does not require a particular outcome. It does not, therefore, confer an enforceable right on a victim of trafficking not to be prosecuted. It does however confer a right to “assistance and support” to persons recognised as victims, whether or not they are prosecuted.



201. In my view the Directive confers a right in all circumstances to an “appropriate” mechanism for determination of the question of the applicant’s status. The mechanism must be one that will facilitate early identification, and where identification is made consequential rights arise. This, therefore, being a Directive intended to confer rights on individuals, it may be relied upon directly.

202. It seems to me that the mechanism adopted in circumstances such as the present case cannot be considered to be “appropriate” unless it deals clearly with the interaction between the application for recognition and the criminal investigation into the applicant’s alleged activities.

203. This requires a decision by the appropriate authorities as to whether or not an application will be treated independently of the criminal investigation; whether or not information given in the course of the application may be used in the criminal investigation; whether or not the respondent is obliged to disclose adverse information in his possession, and whether, or in what circumstances, the respondent will not be obliged to give reasons for a negative decision. The first named respondent should not be left in a position of having to determine these issues on his own.

204. I have considered carefully whether or not they are issues which the court is entitled to determine and have concluded that they are not. To do so would, in my view, involve the court usurping the role of either the executive (if it is considered that the matter can properly be dealt with by administrative arrangement) or the legislature (if it is considered that legislative transposition is required), in order to determine the relationship between the two processes involved in this context. What is required is

the making of policy decisions within the area of discretion left by the Directive in cases involving suspected criminal activity on the part of the applicant. This discretion does not affect the overall obligation to implement an “appropriate” mechanism.

205. It follows that the current mechanism, such as it is, must be held to be inadequate in terms of the transposition of the Directive.

206. Since it does not appear that orders of *certiorari* or *mandamus* would necessarily be appropriate, and given that the applicant remains in custody on foot of criminal charges in respect of which no permanent injunction is sought, I propose to invite the parties to address the court further on the issue of an appropriate remedy in the circumstances.

207. Since no relief is sought against the Director of Public Prosecutions, I do not propose to make any finding in relation to her position.