

THE HIGH COURT
JUDICIAL REVIEW

Record No.: 2013/795 JR

Between/

P.
(otherwise P.)

Applicant

and

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

Respondents

and

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION (formerly the
IRISH HUMAN RIGHTS COMMISSION)

Amicus Curiae

OUTLINE SUBMISSIONS OF THE AMICUS CURIAE

I. Introduction

1. By Order dated 25th February 2014, the High Court granted the Irish Human Rights and Equality Commission¹ (“**the Commission**”) liberty to intervene as amicus curiae in the within proceedings.²

¹ The Irish Human Rights and Equality Commission 2014 came into operation on 1st November 2014, replacing the Irish Human Rights Commission: S.I. No. 450/2014, Irish Human Rights and Equality Commission Act 2014 (Establishment Day) Order 2014.

² Under section 10 of the 2014 Act, the functions of the Commission include the protection of human rights and equality, the promotion of understanding and awareness of the importance of human rights and equality in the State and working towards the elimination of human rights abuses, discrimination and prohibited conduct. To this end, the Commission may apply to the High Court for liberty to appear as *amicus curiae* in proceedings before that court “that involve or are concerned with the human rights or equality rights of any person”.² For the purposes of the 2014 Act, “human rights” means: “(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution,

2. The Commission sought liberty to intervene in these proceedings as *amicus curiae* because the proceedings raise important issues relating to the human rights of persons who apply to be identified as a victim of trafficking in human beings, the significance of which goes beyond the parties to the proceedings. For reasons which are set out in detail below, the Commission has concerns that the process of identification of victims of trafficking in human beings currently in place in Ireland may raise issues under the Constitution, European Union law and the State's international human rights obligations including the issue of adequacy of protection of the rights of persons who claim to be victims of human trafficking.
3. The Commission notes that, on the basis of the affidavit evidence before the Court, there is a range of factual matters in dispute between the parties to the proceedings. It is not the role of the Commission as *amicus curiae* to express views on matters of factual dispute. Where the Commission's submissions refer to the factual background to the proceedings, the Commission has endeavoured to refer to either the undisputed facts or, in case of disputed facts, to refer to the conflicting positions of the parties.

II. Respondents' Application to Strike Out

4. In respect of the Respondents' motion to strike out the Applicant's proceedings on the grounds that there has been material non-disclosure and that the proceedings are premature, the Commission takes the view that this is a matter primarily for the parties and ultimately for the Court. The Commission simply notes that the Applicant is entitled to an effective remedy, under Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union, where she contends that the Respondents have violated her rights by refusal to recognise her as a victim of human trafficking or by undue delay in reaching a decision on recognition and where her proceedings are not manifestly ill-founded or otherwise an abuse of process. In this regard the Commission considers on the facts of this case that the Applicant does have *locus standi* to bring the present proceedings. Moreover, for reasons which are set out fully below, the Commission takes the view that these proceedings raise important and legitimate issues about the Respondents' process for identifying and assisting potential victims of human trafficking.

(b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party, and

(c) without prejudice to the generality of *paragraphs (a) and (b)*, the rights, liberties and freedoms that may reasonably be inferred as being—

(i) inherent in persons as human beings, and

(ii) necessary to enable each person to live with dignity and participate in the economic, social or cultural life in the State;..."

III. Trafficking in Human Beings as a Gross Violation of Fundamental Rights

5. Trafficking in human beings is expressly recognised under EU law as a “serious crime” and constitutes a “gross violation of fundamental rights”.³ Protection against trafficking is an implied right under the Irish Constitution and the European Convention on Human Rights (“**the ECHR**”) and an express right under the Charter of Fundamental Rights of the European Union (“**the Charter**”). Ireland is party to a number of international agreements which expressly protect the rights of victims of trafficking in human beings and affirm the entitlement of victims to full respect for their human rights. In particular, Ireland and the European Union are parties to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the United Nations Convention against Transnational Organized Crime (“**the Palermo Protocol**”).⁴ Ireland is also a party to the Council of Europe Convention on Action against Trafficking in Human Beings (“**the Warsaw Convention**”).⁵ The Warsaw Convention establishes a monitoring mechanism in the form of the Group of experts on action against trafficking in human beings, known as GRETA, which carries out an evaluation of parties’ implementation of the Convention.⁶ Ireland has also opted into Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (“**the Directive**”).⁷
6. Trafficking in persons or human beings is defined in Article 3(a) of the Palermo Protocol and the Warsaw Convention in the following terms:

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs...”

³ Directive 2011/36/EU, Recital (1).

⁴ Ireland signed the Palermo Protocol on 13 December 2000 and ratified it on 17 June 2010. The European Union signed the Palermo Protocol on 12 December 2000 and approved it on 6 September 2006. Article 216(2) TFEU provides: “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States”. Since Case 181/73 *Haegeman* [1974] ECR 449, the Court of Justice has confirmed that international agreements binding on the EU form an integral part of EU law.

⁵ Ireland signed the Warsaw Convention on 13th April 2007 and ratified the Convention on 13th July 2010, with the Convention entering into force for the State on 1st November 2010.

⁶ Warsaw Convention, Articles 36-38.

⁷ Directive 2011/36/EU, Recital (34).

7. Article 2(1) of the Directive is in broader terms:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

8. In light of these definitions, Ireland has defined human trafficking in sections 1-4 of the Criminal Law (Human Trafficking) Act 2008 (as amended by the Criminal Law (Human Trafficking) (Amendment) Act 2013⁸).
9. The Palermo Protocol, the Warsaw Convention and the Directive all adopt a multi-faceted approach to the problem of trafficking in human beings: they criminalise or require the criminalisation of trafficking; they protect victims by imposing obligations on States to put in place mechanisms for their assistance and support; they require States to take steps to prevent trafficking. While the Oireachtas has enacted legislation to give effect to Ireland's commitments under these instruments, this legislation - Criminal Law (Human Trafficking) Act 2008 and the Criminal Law (Human Trafficking) (Amendment) Act 2013 – focuses almost exclusively on the criminalisation dimension of human trafficking. This legislation does not create or provide for the creation of mechanisms for the assistance and support of victims of human trafficking or for the prevention of human trafficking.
10. Human trafficking, by its nature, raises a range of very serious human rights issues. In the first instance, individuals have a right to be free or protected from trafficking. Secondly, victims or potential victims of human trafficking enjoy the core fundamental rights of all individuals and, because of the vulnerability of such persons, these rights must be safeguarded with special care. Thirdly, and also reflecting the vulnerability and special situation of victims of such persons, States have agreed to grant specific additional rights and protections to victims of human trafficking.

A. The Right to Freedom from Trafficking

11. The European Court of Human Rights (“**the ECtHR**”) has held that trafficking in human beings falls within the scope of the prohibition of slavery and forced labour

⁸ The Criminal Law (Human Trafficking) (Amendment) Act 2013 *inter alia* gives effect to certain provisions of the Directive.

enshrined in Article 4 ECHR. In its judgment in the case of *Rantsev v. Cyprus and Russia*, the Court (First Section) held:

“There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.”⁹

12. The ECtHR continued by observing that Article 4 ECHR “enshrines one of the basic values of the democratic societies making up the Council of Europe” and noting that it “makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation”.¹⁰
13. The ECtHR in *Rantsev* further stated that, in assessing whether there has been a violation of Article 4 ECHR, “the relevant legal or regulatory framework in place must be taken into account” and “the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking”.¹¹ In addition to the positive obligation on Contracting Parties to prohibit and punish trafficking in human beings, Article 4 ECHR “may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of trafficking”¹² and entail “a procedural obligation to investigate situations of potential trafficking”.¹³ In the latter context, an effective investigation into a situation of potential trafficking for the purposes of Article 4 ECHR must be independent from those implicated in the events and must be capable of leading to the identification and punishment of those responsible. While the investigation must be undertaken as a matter of urgency where the possibility of removal of an individual from a harmful situation is available, “[a] requirement of promptness and reasonable expedition is implicit in all cases”.¹⁴

⁹ *Rantsev v. Cyprus and Russia* (2010) 51 E.H.R.R. 1, para. 282. See also the earlier decision of the ECtHR in *Silaidin v. France*, Application no. 73316/01, Court (Second Section), 26 July 2005.

¹⁰ *Rantsev*, note 9, para. 283.

¹¹ *Rantsev*, note 9, para. 284.

¹² *Rantsev*, note 9, para. 286.

¹³ *Rantsev*, note 9, para. 288.

¹⁴ *Rantsev*, note 9, para. 288.

14. Under section 3 of the European Convention on Human Rights Act 2003, subject to any statutory provision or rule of law, every organ of the State – which definition includes the Respondents herein – “shall perform its functions in a manner compatible with the State's obligations under the Convention provisions”. It follows that the First and Second Named Respondents in this case must perform their functions – including their functions relating to the identification and protection of potential victims of trafficking in human beings – in a manner consistent with the State’s obligations under Article 4 ECHR, as interpreted in *Rantsev*.
15. It is submitted that trafficking in human beings represents a grave infringement of the personal rights of the victim of trafficking under Article 40 of the Constitution, including the right to liberty protected under Article 40.4.1° of the Constitution and the unenumerated right to freedom from inhumane and degrading treatment under Article 40.3.3°. ¹⁵ In the recent judgment in *Lin*, the High Court (Hogan J.) noted that developments over the past thirty years or so, such as the growth of air travel and immigration, “have contributed to the emergence of new forms of slavery and servitude, including the enormous social problem of human trafficking”. The Court continued:

“This problem is largely hidden from view as the traffickers operate within the parameters of a criminal underworld whose methodology and ruthlessness is simply alien to the vast bulk of society.”¹⁶

16. While the Irish courts have not yet had to specifically address the issue, it is submitted that the right to freedom from trafficking, either independently or as an element of a broader right to freedom from slavery and forced labour, constitutes one of the implied personal rights protected under Article 40.3.1° of the Constitution or in the alternative the rights to the person under Article 40.3.2° as identified by Kearns P. in *Fleming v Ireland & Ors*.¹⁷ Even if the right to freedom from trafficking were not recognised as protected under Article 40.3.1°, trafficking of a human being would amount to a violation of a wide range of other express and implied constitutional rights, including *inter alia* the right to liberty, the right to bodily integrity, the right to work, the right to privacy, and the right to travel within and outside the State.¹⁸ In the same way as the ECHR does not really refer directly to trafficking, the interpretation of the rights protected under the Convention has led the ECtHR to the inevitable conclusion that human trafficking is prohibited under Article 4. It is submitted that a

¹⁵ *The State (C) v. Frawley* [1980] ILRM 82, p. 93.

¹⁶ *Lin v. Governor of Cloverhill Prison & Ors* [2014] IEHC 214, para. 2.

¹⁷ *Fleming v. Ireland & Ors* [2013] IEHC 2, paras. 49 and 77.

¹⁸ See generally Hogan and Whyte (eds), *JM Kelly: the Irish Constitution* (2004), pp.1413-1481.

similar approach should be taken by this Court to the interpretation of fundamental rights under the Constitution.

17. In addition to their obligations under the Constitution and the ECtHR, the Respondents must comply with the Charter of Fundamental Rights of the European Union. Under Article 51(1) of the Charter, the provisions of the Charter are addressed to the EU institutions, bodies, offices and agencies and “to the Member States only when they are implementing Union law”. Human trafficking is regulated by EU law both under the Charter itself and under Directive 2011/36/EU.
18. Article 5 of the Charter, in its first two paragraphs, reflects the terms of Article 4 ECHR by providing, first, that no one shall be held in slavery and servitude and, secondly, that no one shall be required to perform forced or compulsory labour.
19. The Grand Chamber of Court of Justice of the European Union (“CJEU”) emphasised in its judgment in *Åkerberg Fransson*, “the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations”.¹⁹ In this case, Directive 2011/36/EU lays down common rules *inter alia* on the protection of victims of human trafficking. In Article 11 of the Directive specifically, the Directive addresses the identification of potential victims of human trafficking. For this reason, when the Respondents are acting under and implementing the provisions of the Directive, as in this case, the protections of the Charter apply.
20. Article 52(3) of the Charter provides that, insofar as the Charter contains rights corresponding to rights guaranteed under the ECHR, “the meaning and scope of those rights shall be the same as those laid down by the said Convention” although this provision “shall not prevent Union law providing more extensive protection”. Under Article 53 of the Charter, nothing in the Charter “shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions”. Thus, the provisions of Article 5 of the Charter must be understood in light of the jurisprudence of the ECtHR in *Rantsev*. Significantly, Article 5 of the Charter expands on Article 4 ECHR by expressly prohibiting trafficking in human beings in paragraph 3. As the Explanations to the Charter make clear, the prohibition of human trafficking in paragraph 3 “stems directly from human dignity and takes account of recent

¹⁹ See *Åkerberg Fransson*, Case C-617/10, ECLI:EU:C:2013:105, paragraph 19.

developments in organised crime, such as the organisation of lucrative illegal immigration or sexual exploitation networks”.²⁰ The practice of human trafficking may also be considered to violate human dignity as protected in Article 1 of the Charter.

21. The Constitution, the ECHR and the Charter thus provide strong protection for the right of individuals to be free from human trafficking.

B. The Right of Victims or Potential Victims of Human Trafficking to Enjoy Fundamental Rights

22. Ireland’s international commitments in the field of human trafficking positively affirm that victims of human trafficking are entitled to full respect for their human rights. For example, the Palermo Protocol, in its Preamble and in the Statement of Purpose contained in Article 2, make it clear that protection of the victims of trafficking in human rights requires protection of their internationally recognised human rights. While the Palermo Protocol and Warsaw Convention have only been partially incorporated into Irish law, in accordance with long-established principles, Irish law should be interpreted, insofar as it is possible to do so, in a manner compatible with the State’s international obligations.²¹
23. The Preamble to the Warsaw Convention notes that trafficking in human beings “constitutes a violation of human rights and an offence to the dignity and integrity of the human beings” and “may result in slavery for victims”; for this reason, it affirms that “respect for victims’ rights, protection of victims and action to combat trafficking in human beings must be paramount objectives”. Article 1 describes the purpose of the Convention, in paragraph b, as being “to protect the human rights of the victims of trafficking...”.
24. For its part, the Directive itself adopts an “integrated, holistic, and human rights approach to the fight against trafficking in human beings” and notes that it is necessary “for victims of trafficking in human beings to be able to exercise their rights effectively”.²² Recital (33) to the Directive states:

²⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>

²¹ *The State (D.P.P.) v. Walsh* [1981] IR 412; *Ó Domhnaill v. Merrick* [1984] IR 151.

²² Directive, Recitals (7) and (18). Recital (9) recognises that the Palermo Protocol and Warsaw Convention “are crucial steps in the process of enhancing international cooperation against trafficking in human beings”. It continues: “It should be noted that the Council of Europe Convention contains an evaluation mechanism, composed of the Group of experts on action against trafficking in human beings (GRETA) and the Committee of the Parties. Coordination between inter national organisations with

“This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and notably human dignity, the prohibition of slavery, forced labour and trafficking in human beings, the prohibition of torture and inhuman or degrading treatment or punishment, the rights of the child, the right to liberty and security, freedom of expression and information, the protection of personal data, the right to an effective remedy and to a fair trial and the principles of the legality and proportionality of criminal offences and penalties. In particular, this Directive seeks to ensure full respect for those rights and principles and must be implemented accordingly.”

25. Of particular importance for victims or potential victims of human trafficking in the identification and protection process are the right to fair procedures and natural and constitutional justice as protected under the Constitution, as well as the rights of defence and the right to an effective remedy protected under the ECHR and the Charter, including Articles 41 and 47 thereof.

C. The Specific Rights Granted to Victims of Human Trafficking

26. In addition to the fundamental rights enjoyed by all persons, including victims of human trafficking, the Warsaw Convention and the Directive confer a number of specific rights on victims of human trafficking.
27. Under Article 12 of the Warsaw Convention, each party must adopt measures that “assist victims in their physical, psychological and social recovery”, which assistance shall include at least:
- a standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
 - b access to emergency medical treatment;
 - c translation and interpretation services, when appropriate;
 - d counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
 - e assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
 - f access to education for children.

competence with regard to action against trafficking in human beings should be supported in order to avoid duplication of effort.”

28. Parties to the Warsaw Convention, such as Ireland, “shall take due account of the victim’s safety and protection needs”. Further provision is made in Article 12 for access to medical or other assistance, access to the labour market, vocational training and education. Article 11 protects the private life and identity of victims. In addition, Article 13 of the Warsaw Convention requires parties to provide in its internal law “a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim”, during which time the victim is entitled to remain on the party’s territory. Furthermore, Articles 14, 15 and 16 provide respectively for the granting of residence permits to victims, the entitlement of victims to compensation and legal redress and the repatriation and return of victims to their countries of permanent residence in appropriate circumstances.

29. In a similar vein, Directive 2011/36/EU provides that Member States shall take the necessary measures to ensure that assistance and support are provided to victims of human trafficking. Article 11(1) of the Directive provides for such assistance and support “before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in Framework Decision 2001/220/JHA, and in this Directive” while Article 11(2) makes provision for “assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3”. Assistance and support are not to be conditional on the victim’s willingness to cooperate in the criminal proceedings: Article 11(3). More specifically, according to Article 11(5), the assistance and support measures shall be “provided on a consensual and informed basis” and shall “include at least standards of living capable of ensuring victims’ subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate”. Article 11(6) stipulates that the information provided under Article 11(5) “shall cover, where relevant, information on a reflection and recovery period pursuant to Directive 2004/81/EC, and information on the possibility of granting international protection”. Under Article 11(7), Member States “shall attend to victims with special needs, where those needs derive, in particular, from whether they are pregnant, their health, a disability, a mental or psychological disorder they have, or a serious form of psychological, physical or sexual violence they have suffered”. Further provisions of the Directive reinforce these protections, including Article 12 on protection in the criminal process, including through access without delay to legal counselling and legal representation, and Articles 13 to 16 on the special positions of child victims of trafficking in human beings, including unaccompanied victims. Article 17 requires Member States to ensure that “victims of trafficking in human

beings have access to existing schemes of compensation to victims of violent crimes of intent”.

30. Moreover, both the Warsaw Convention, in Article 26, and the Directive, in Article 8, require the State to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of human trafficking for their involvement in criminal activities to the extent that they have been compelled to commit such acts. However, in order for victims of trafficking in human beings in Ireland to be able to rely on their fundamental rights, under the Irish Constitution, the ECHR, the Charter of Fundamental Rights and the State’s other international obligations, it is essential that a victim of trafficking is identified by the State as such.

IV. The Process of Identification of Victims of Trafficking in Human Beings and its Importance for Potential Victims of Trafficking

31. It follows from *Rantsev* that the State may, in certain circumstances, be under a positive obligation to protect victims or potential victims of trafficking and to investigate situations of potential trafficking under Article 4 ECHR and under its analogous provision in the Charter, Article 5. Giving effect to and reinforcing the obligations under the ECHR and the Charter, the Directive makes provision for the identification of persons as victims of human trafficking in some detail.

32. Article 11 of Directive 2011/36/EU lays down common rules on identification of, and assistance and support for, victims of trafficking in human beings. It provides, in paragraph 4, 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.”

33. In addition, it provides, in paragraph 2, that:

“Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3.”

34. Article 11, paragraphs 1 and 3, of the Directive address assistance and support for victims in the context of criminal proceedings specifically. These provisions reflect

Article 10 of the Warsaw Convention, which is referred to in recitals (9) and (13) of the Directive.

35. These provisions of the Directive reflect the relevant provisions of the Palermo Protocol (in particular Article 6) and the Warsaw Convention (in particular Article 10).
36. Ireland has not put in place any legislative measures to transpose Article 11 of the Directive. Moreover, whereas various aspects of human trafficking have been made criminal offences under the national legislation, there is no express definition provided for under national legislation of “victim”.
37. Instead, Ireland relies on an administrative procedure in purported discharge of its obligations under EU and international law. It appears that Ireland has provided international bodies with a detailed description as to how the administrative procedure is to operate, and, in particular, as to the test applied in identifying victims of trafficking.
38. In this regard, the GRETA Report’s account of the Irish victim identification process is of interest. GRETA is the monitoring body for the Warsaw Convention. The Report records the Government as stating that, 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 being trafficked to the Garda Authorities (i.e. the Irish Police) until such time as there is compelling evidence that they are not”.²³ The Report also states that, in practice, the determination of whether a person is a victim of human trafficking is “made by three senior staff of the Human Trafficking Investigation and Co-ordination Unit (HTICU) of the Garda National Immigration Bureau”: these officers apply “the model recommended by IOM, according to which the screening process to determine if a person is a victim of trafficking consists of two stages: an assessment of the varying indicators that can be evaluated before an interview takes place, followed by a detailed interview with the person concerned” and “apply UN.GIFT general indicators, updated by the Delphi Indicators developed by ILO and the European Commission”.²⁴ Insofar as the treatment of potential victims pending determination is concerned, GRETA sets out the position of the Irish authorities in the following paragraph:

²³ GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland, First Evaluation Round, 26 September 2013 (“GRETA Report”), para. 147.

²⁴ GRETA Report, para. 148.

“The Irish authorities have indicated that while identification is ongoing, suspected victims are granted protection under the Administrative Immigration Arrangements and are entitled to avail themselves of the full range of services (i.e. accommodation, medical and legal), as well as not be removed from Ireland during this process. An Garda Síochána officers performing identification are obliged to inform potential and suspected victims of the availability of accommodation and support by the Reception and Integration Agency (see paragraph 173), legal aid provided by the Legal Aid Board (see paragraph 159), and care planning services provided by the Health Service Executive (see paragraph 180). A leaflet is provided to all victims at the outset of the identification procedure.”²⁵

39. GRETA concluded this section of its Report by noting that “the Administrative Immigration Arrangements do not contain entitlement to any of the assistance envisaged in Article 12 of the Convention and refer only to voluntary repatriation”.²⁶
40. The identification process for victims of trafficking is a vital process for determining the status and rights of potential victims; it may also affect their liability under the criminal law. If a person is not properly identified as a victim of trafficking, that person will not be able to access or enjoy the rights and protections which the State is obliged to safeguard under international and EU law and indeed under the Constitution. If a person is only belatedly identified as a victim of trafficking, the practical benefit and utility of the victim’s rights and protections may be undermined. As GRETA notes in its Report on Ireland, “without trafficked people being identified as such, the whole system of assistance and protection would become irrelevant”.²⁷ In short, the entire system for the protection of victims of human trafficking is dependent on the existence of an effective mechanism for the identification of victims.
41. Pending a decision on their status, which has such significant implications for their legal rights and status, the rights of potential victims of trafficking in human beings must be protected and safeguarded. In light of Article 10(2) of the Warsaw Convention and Article 11(4) of the Directive, the State should ensure that potential victims are afforded such assistance and support as they may require pending the determination of their claim; potential victims must also not be removed from the jurisdiction. More generally, potential trafficking victims must be afforded the right to fair procedures and natural and constitutional justice within the identification process itself. While paragraph 147 of the GRETA Report appears to suggest that the First Respondent operates a type of presumption that a claimant is a victim of human

²⁵ GRETA Report, para. 149.

²⁶ GRETA Report, para. 149.

²⁷ GRETA Report, para. 164.

trafficking until proven to the contrary, in the present case the Court must ask itself whether in practice this is what is being done.

42. The process of victim identification is not an adversarial process in which the person claiming the status of a victim of trafficking is under an onus to prove their status. The Commission relies on Article 11(4) of the Directive and Article 10(1) of the Warsaw Convention in this regard. Instead, the process is a collaborative one, requiring the State authorities to cooperate not only among themselves but also with the potential victim of human trafficking and, in particular, relevant support organisations. In order to determine that a person is a victim of human trafficking, it is sufficient for the identifying authorities to have “reasonable grounds” for this conclusion. In its 2013 Report on Ireland’s implementation of the Warsaw Convention, GRETA recalled that “the issue of identification is of fundamental importance” and continued in the following terms:

“It is therefore vital for the State to ensure that an effective system for proactive identification of victims of trafficking is put in place, irrespective of their nationality and immigration status. Many trafficked people do not always identify themselves as “victims” and are not aware of the legal meaning behind the term. Therefore, the onus of identification lies with the authorities. At the same time, GRETA considers that specialised NGOs can substantially contribute to the victim identification process and should be involved in a multi-agency effort to ensure that no victim of trafficking remains unidentified. This is envisaged by Article 10 of the Convention, according to which identification is a collaborative process between the authorities and relevant victim support organisations.”²⁸

43. While the GRETA Report is focused on the Warsaw Convention, it is submitted that similar considerations must apply to Article 11(4) of the Directive, given the close connection between the Directive and the Warsaw Convention from which the Directive draws inspiration and to which it makes reference.

V. The Commission’s Concerns about the State’s Victim Identification Process and its Compatibility with Human Rights

44. On the basis of the evidence before the High Court as a whole, the Commission is concerned that the procedures and practices used by the First Respondent for the

²⁸ GRETA Report, para. 164.

purpose of identifying and assisting victims of human trafficking do not give full effect to the State's obligations under international and EU law and do not fully comply with the State's obligations to protect the human rights of potential victims of human trafficking.

A. The Apparent Lack of an Appropriate Mechanism for Identification of Trafficking Victims

45. The Commission's first concern is of a general nature and relates to the failure of the State to adopt effective, transparent and accessible measures for the purpose of giving effect to its obligations under Article 11(4) of the Directive and indeed its analogous obligations under Article 10 of the Warsaw Convention. The Oireachtas has not adopted any legislative measures to give effect to either of these provisions. Instead, the State appears to rely on certain administrative practices and procedures for this purpose.

46. In particular, in these proceedings, reliance is placed on the Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking (as amended) ("**the Arrangements**"). The Arrangements, on their own terms, are concerned solely with the immigration status in the State of a person suspected of being a victim of human trafficking. The Arrangements address the victim identification process by way of passing reference in paragraph 3:

"Whether there are reasonable grounds for that belief [that a person is a victim of an offence under the State's anti-trafficking legislation] 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."²⁹

47. They do not set out the nature and detail of that process. Moreover, the Arrangements apply only to persons who would not otherwise have a permission to be in Ireland, including persons who are considered documented, such as Irish and EEA nationals and, significantly, asylum seekers. According to the GRETA Report, the majority of suspected victims of trafficking in Ireland were asylum seekers and others were Irish or EEA nationals. For this reason, GRETA concluded "the vast majority of the persons who are identified as victims of human trafficking in Ireland are not dealt with under the Administrative Immigration Arrangements".³⁰ Thus, insofar as the Arrangements constitute the necessary measures for the implementation of Article 11(4), they appear to be very limited in their application.

²⁹ Administrative Immigration Arrangements, paragraph 3.

³⁰ GRETA Report, para. 159.

48. The Commission notes that other documents – such as the Department of Justice’s Statement of Roles and Responsibilities of State Organisations, Non-Governmental Organisations and International Organisations in Ireland engaged in cooperation regarding the prevention, protection of victims and prosecution of trafficking in human beings (“the Statement of Roles and Responsibilities”) – also address the victim identification process, by setting out the respective roles of different bodies in this process. In addition, as noted above, the GRETA Report provides some further information from the State authorities on the victim identification process.
49. The piecemeal and fragmented nature of the measures implementing the State’s obligations under Article 11(4) is of itself problematic, both because it may represent an additional barrier and challenge for potential victims of trafficking and their advisers and because it makes assessment and enforcement of the State’s compliance with its obligations far more difficult. Moreover, at least on the basis of the evidence of the Respondent, there would appear to be certain discrepancies between the State’s avowed practices and procedures, as per the GRETA Report, and the actual practice of victim identification. This is irrespective of the ultimate validity of the Applicant’s claim to be a victim of human trafficking.
50. For these reasons, the Commission is concerned that the State has not taken “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” for the purposes of Article 11 of the Directive. The Commission is also concerned that such measures as the State has taken to give effect to Article 11(4) do not provide adequate protection for the human rights of suspected victims of trafficking in human beings, including for the reasons set out in the following section. Article 11(4) should be interpreted and applied in a manner which is compatible with the Charter. If, contrary to the Commission’s submissions, the measures adopted by the State are fully compliant with Article 11(4) of the Directive, it is submitted that the Directive itself may be incompatible with the Charter.³¹

B. Specific Concerns about the Victim Identification Process

51. In addition to its general concern about the existence and effectiveness of an appropriate mechanism for the identification and assistance of victims of human trafficking, the Commission has a number of specific concerns about aspects of the victim identification process, as it was carried out in the Applicant’s case.

³¹ See e.g. C-293/12 *Digital Rights Ireland* (finding that Directive 2006/24/EC was invalid in the light of Articles 7, 8 and 52(1) of the Charter).

(i) Delay

52. On the basis of the undisputed evidence before the Court, it would appear that the Applicant's solicitor first formally sought a determination that the Applicant was a victim of human trafficking in a letter dated 6th December 2012, more than two years ago. It was not until 30th September 2013 that the First Respondent informed the Applicant's solicitor that he had not concluded that there were reasonable grounds for believing that the Applicant was a victim of trafficking in human beings as defined by Irish law. The Commission notes that the First, Third, and Fourth Respondents' view that it has still not reached a final decision on the status of the Applicant.

53. While the Commission appreciates that the process of identification of a victim of human trafficking may be a complex and time-consuming process, a question arises for this Court as to whether a period of more than two years in making such a determination is, absent compelling reasons, excessive.³² Of guidance in this regard is Article 11(4) of Directive 2011/36/EU that requires that Member States take the necessary measures to establish appropriate mechanisms aimed at the *early* identification of victims.³³ According to the Department's Statement of Roles and Responsibilities, An Garda Síochána "will endeavour to identify suspected victims within a maximum period of 31 days".³⁴ The GRETA Report comments in this regard:

"... according to NGOs, although a commitment has been given by the authorities that a reasonable ground decision will be made within a month, persons referred for identification by NGOs have occasionally waited over six months for a decision. The lack of time frame for identification impacts negatively on the effectiveness of the identification process and persons can reportedly remain in the system for months without being granted suspected victim status."³⁵

54. Bearing in mind the particular vulnerability of victims of human trafficking, the obligation in Article 11(4) underlines the importance of identifying victims as such at an early stage so that the victims can avail of the assistance and support mechanism

³² In *M. v. Minister for Justice, Equality and Law Reform*, Case C-277/11, Advocate General Bot, in his Opinion dated 26th April, 2012, stated, at paragraphs 113 to 116, that the two years and three months taken by the Irish authorities to process the applicant's refugee and subsidiary protection applications was "*manifestly unreasonable*", referring inter alia to a person's "right to good administration" under Article 41 of the Charter.

³³ Emphasis added.

³⁴ Statement of Roles and Responsibilities, p. 2.

³⁵ GRETA Report, para. 162.

provided under the Directive and under international law. The failure to identify a victim of human trafficking at an early stage may constitute a further violation of the human rights of an individual who has already been subject to a gross violation of those rights.

(ii) Duty to Cooperate with Relevant Support Organisations

55. Article 11(4) of the Directive, in a similar way to Article 10 of the Warsaw Convention, imposes a duty on the authorities charged with victim identification to collaborate or liaise not only with the potential victim and other authorities within the State but also with relevant support organisations for victims of human trafficking. Under the administrative procedures and practices adopted for identification of victims of human trafficking, there is no express provision for cooperation or liaison with relevant support organisations.

56. In the formal recommendations in its 2013 Report, GRETA urged the Irish authorities to ensure that all victims of human trafficking are properly identified, *inter alia* by “promoting multi-agency involvement in victim identification by formalising the role and input of specialised NGOs and involving other relevant actors, such as labour inspectors, social workers and medical staff”.³⁶ It is not clear in this case how the First Respondent proactively engaged with the relevant agencies.

(iii) Duty to Give Reasons

57. In *Mallak*, Fennelly J. for the Supreme Court eloquently summarised the importance of the duty to give reasons in administrative law:

“In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.

³⁶ GRETA Report, para.165. See also GRETA Report, para. 161.

“Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them.”³⁷

58. Among the converging legal sources referred to by Fennelly J., which are relevant in this case which falls within the scope of EU law, are Article 296 TFEU, Article 41 of the Charter and the decision of the CJEU in Case C-417/11 *Council v Bamba*. In *Bamba*, the CJEU explained the purpose of the duty to give reasons in the following terms:

“...the purpose of the obligation to state the reasons on which an act adversely affecting an individual is based, which is a corollary of the principle of respect for the rights of the defence, is, first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the European Union judicature and, second, to enable that judicature to review the legality of that act...”³⁸

59. While noting that the First, Third and Fourth Respondents do not consider that they have arrived at a final decision on the Applicant’s claim to be a victim of human trafficking, the First Respondent has nonetheless decided, on a number of occasions to date, not to recognise the Applicant as a victim of trafficking. While this may not represent the First Respondent’s final decision or determination—and the delay in allegedly reaching a final decision may itself constitute a breach of the Directive—it nonetheless amounts in effect and in substance to a finding on the Applicant’s status. Having regard to the intended collaborative nature of the victim identification process and to the importance of the determination for the Applicant’s rights and status, the Commission considers that it is incumbent on the First Respondent to give reasons for its findings so that the Applicant is in a position to respond meaningfully to such concerns as the First Respondent may have.

(iv) Duty to Respect Fair Procedures within the Identification Process

60. More generally, having regard to the particular characteristics of the victim identification process, the Commission has concerns that the process as operated by the First Respondent in this case does not fully respect the Applicant’s right to fair procedures.

³⁷ *Mallak v. Minister for Justice* [2012] IESC 26, paras. 66-67.

³⁸ *Bamba*, para. 49, referred to at para. 69 of *Mallak*.

61. First, in a process of this kind, the First Respondent ought to disclose any relevant material, including any relevant adverse material, to a potential victim of trafficking in a timely manner. This is necessary both to ensure that the victim identification process is undertaken without delay and especially in order to give a potential victim the opportunity to respond to the material and to clarify any matters arising. In its judgment in *Kadi II*, in which the fundamental rights of persons whose assets had been frozen under EU law giving effect to UN sanctions were considered, the CJEU stated:

“... respect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons provided by the Sanctions Committee (see, to that effect, the *Kadi* judgment, paragraphs 336 and 337), so that that individual is in a position to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action before the Courts of the European Union.”³⁹

62. In the context of any judicial review of such measures, the CJEU expressed the view that the courts should base their decisions solely on the material disclosed to them.⁴⁰ While *Kadi II* was concerned with the application of sanctions freezing an individual’s assets, similar considerations relating to the disclosure of material must apply in the context of a decision-making process which has a significant bearing on a potential trafficking victim’s status, rights and potential criminal liability.

63. Secondly, in this case, there would appear to have been overlap between the authorities, offices, and personnel involved in the criminal investigation into the Applicant, on the one hand, and in the victim identification process, on the other. While recognised primarily in the context of a trafficking victim *qua* victim of crime, as opposed to *qua* accused, the Warsaw Convention and the Directive both emphasise the need for a clear separation between any criminal proceedings and the identification, support and assistance of victims. The GRETA Report recommends that the victim identification process should in practice be “dissociated from the suspected victim’s co-operation in the investigation”.⁴¹ The Report also notes that the same authorities are responsible for victim identification as well as border control and illegal immigration, raising the “question whether entrusting both the victim identification and the THB investigation to immigration officials does not involve a

³⁹ GRETA Report, para. 111.

⁴⁰ GRETA Report, para. 123.

⁴¹ GRETA Report, para. 165.

conflict of interest”.⁴² If the dual role in immigration control and victim identification raises a potential conflict of interest, this is *a fortiori* the case where the relevant authorities have a dual role in taking criminal proceedings against the accused and in victim identification. In such a case, there is a risk of objective bias in the process because the decision-maker, even if not lacking independence, certainly lacks the appearance of independence.⁴³ Where criminal proceedings against the potential victim and the application for recognition as a victim are before the same authorities in parallel, it is difficult to see how the victim identification process cannot be tainted or adversely affected by the ongoing criminal proceedings which the Gardai have a duty to investigate and prosecute.

VI. Conclusion

64. For all these reasons, the Commission is concerned at the adequacy of the mechanisms for the identification and assistance of potential victims of human trafficking in the State. Noting the State’s obligations under the Directive and the Warsaw Convention, it is respectfully submitted that the question before the Court is whether the mechanisms adopted in practice for the above purposes, as determined in this case, fully respect the human rights of potential victims under the Constitution, the ECHR and the Charter.

Garrett Simons SC
Michael Lynn SC
David Fennelly BL

19 January 2015

⁴² GRETA Report, para. 160.

⁴³ See, by analogy, the Supreme Court decision in *Damache v. Director of Public Prosecutions & Ors* [2012] IESC 11 (finding that s. 29(1) of the Offences against the State Act, 1939 (as inserted by s. 5 of the Criminal Law Act, 1976) and referred to as s. 29(1) of the Act of 1939), was repugnant to the Constitution as it permitted a search of the appellant’s home contrary to the Constitution, on foot of a warrant which was not issued by an independent person).