

THE HIGH COURT

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

[2013 No. 1550 SS]

BETWEEN

WIN LIN

APPLICANT

AND

GOVERNOR OF CLOVERHILL PRISON, IRELAND, THE

ATTORNEY GENERAL AND THE DIRECTOR OF

PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 23rd day of April, 2014

1. Up to relatively recently, many observers would, if asked, have probably stated that slavery in the western world ended with the efforts of the reformer William Wilberforce, Lincoln's Emancipation Proclamation and the subsequent defeat of the Confederate Forces at the close of the American Civil War in April 1865.

2. But if these events marked *finis* to the institution of slavery in western society, other developments – such as the growth of air travel and immigration - over the last thirty years or so have contributed to the emergence of new forms of slavery and servitude, including the enormous social problem of human trafficking. 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.

3. It is, however, the allegation of human trafficking which forms the backdrop to these Article 40 proceedings. The applicant, Mr. Lin, maintains that he is the victim of human trafficking and that, as a result, he ought not to be prosecuted in respect of certain drugs offences, having regard in particular to the provisions of Recital 14 and Article 8 of Directive 2011/36/EU ("the 2011 Directive"). Since he is presently remanded in custody since his arrest on certain drugs offences in November 2012 and following a further guilty plea on a cultivation charge under s. 17 of the Misuse of Drugs Act 1977 in March 2014, he maintains that his current detention is unlawful.

4. In November 2012 the applicant was found by Gardai in a premises in Henrietta Place, Dublin 1 which had been turned into a cannabis growhouse. Mr. Lin was then charged with a variety of offences under the Misuse of Drugs Act 1977 (as amended). He has indeed pleaded guilty to one such offence (namely, the offence of cultivation under s.17) and is currently awaiting trial in respect of the other offences. As he has no identity papers, he has never applied for bail and he has been remanded in custody from time to time ever since.

5. The background to all of this is as follows: according to his account, the applicant is a 36 year old Chinese national who is married with one child. All his family live in China. He was born in the Fu Jian province and it appears that he has but a basic primary school level of education. He was apparently born outside of the "one child per family" policy and, if so, this would render him something of an outcast in Chinese society, thus making him potentially vulnerable to labour exploitation.

6. He claims that his father was induced to invest in a project which turned out to be worthless. His father was left indebted to moneylenders and he could not repay the debt. The moneylenders threatened the family with violence with the result that the applicant was coerced to travel abroad in order to earn money to repay the racketeers.

7. The applicant has given slightly different versions of the manner in which he claims to have been trafficked. In this regard some allowance must, I think, be made for the fact that Mr. Lin does not speak or read English and that he is of limited education. I had the benefit of observing him during the course of cross-examination and he struck me as a very vulnerable person. There are, nevertheless, features of his account regarding the manner in which he came to Ireland which struck me as implausible.

8. Mr. Lin contends that he was told to follow a middle aged man to Guang Dong. After a week he and others were taken in a mini-bus to Hong Kong. He (and others) were given advice as what they should look out for at the airport and how to answer questions. He claims that during this period he was given only sparse amounts of bread, biscuits and dried fruit to eat. He says that he was attacked verbally and physically to comply with directions.

9. It was striking that the applicant could give no specific details at all of how he came to be in Ireland or, indeed, even the approximate dates on which he arrived here. He said that he had taken four or five flights along with a boat trip. At one stage on the journey he stated that he had stayed in a forest. At another stage he stated that he stayed in a house where he was beaten up by a number of African men. The available evidence (which I will refer to presently) suggests that he arrived at some stage in 2010 or perhaps early 2011.

10. At all events, upon his arrival at Dublin Airport he says that he was met by two (named) Chinese nationals. He says that these individuals initially coerced him to work in a variety of Chinese restaurants. There is little doubt but that Mr. Lin did work at such restaurants. It is also clear that he had some free leisure time and that he was able to take photographs of a variety of different locations throughout the State with an expensive I-phone. Certainly, so far as the respondents are concerned, it is the fact that Mr. Lin was demonstrably at liberty during this period which is inconsistent with his claims that he was trafficked and, specifically, his claims that he was rarely allowed out by his traffickers.

11. It appears that some time around October, 2012 Mr. Lin met another Chinese national by prior arrangement in Dublin city centre. Although Mr. Lin gave differing accounts as to whether he still had a restaurant job at this time, he agreed to accept a job watering plants. This job paid better than any of the restaurant jobs. At one point in his evidence Mr. Lin stated that he understood that the plants in question were tea plants, but this is scarcely credible given the clandestine nature of the tasks he was required to undertake. It is, in any event, inconsistent with his guilty plea to the cultivation charge under s. 17 of the Misuse of Drugs Act 1977.

12. At the same time there are aspects of the manner in which he came to be operating in the greenhouse which give rise to some concern. As I have already stated, Mr. Lin was a deeply vulnerable individual. It does not appear to be in dispute but that Mr. Lin was effectively locked into the premises, although the fridge was stocked with basic food and provisions. It is true that Mr. Lin had access to two mobile telephones and a lap-top, but he said that he was only allowed to contact his family in China and he was not permitted to make any local calls.

13. A further complication is that on 22nd January, 2014 – at a time when these Article 40 proceedings were still at hearing – a Chinese national, Ms. Y., was arrested by Gardaí in relation to the greenhouse. Ms. Y. had taken a lease of the premises at Henrietta Place. In the course of a search of her private dwelling pursuant to a search warrant, Gardaí uncovered bank records, business documents and the passport of three other Chinese nationals.

14. I should digress at this point to explain how this evidence came about. The applicant's trial in respect of the drugs offences was scheduled to start on 13th March, 2014. On the eve of the trial, however, the prosecution arranged for the disclosure of material relating to Ms. Y. given that she had taken a lease of the premises. Although Mr. Lin pleaded guilty to the cultivation charge under s. 17 of the Misuse of Drugs Act, following further argument, His Honour Judge Hogan agreed to discharge the jury. The most serious offences were then stood over to await a fresh trial which is currently scheduled to commence on April 29th, 2014.

15. I was originally scheduled to give judgment on this Article 40 application on March 25th. I was then asked to re-open the inquiry to take account of this evidence. At the resumed hearing, Sergeant Maria Cassells, emphatically rejected the suggestion that she had previously withheld relevant evidence in relation to Ms. Y. Sergeant Cassells was not part of the team who arrested Mr. Lin at Henrietta Place in November, 2012. In fact, she only became involved in Mr. Lin's case as a result of a complaint from his solicitors that he was the victim of human trafficking. With a view to investigating this complaint she conducted a series of interviews with Mr. Lin in Cloverhill Prison in October, 2013.

16. It is true that when Sergeant Cassells gave evidence before me in December, 2013 no mention was made of Ms. Y. But at that point Ms. Y. had not been arrested. In any event, Sergeant Cassells pointed out that Ms. Y. was lawfully present in the State and that so far as the Gardaí were concerned no evidence had emerged to suggest that she was a people trafficker. For my part I found Sergeant Cassells to be an impressive witness who gave her evidence fairly and completely honestly and without any question of evasion. I therefore reject the contention that she conveniently withheld relevant evidence from this Court.

17. Yet it cannot be denied that the fact that Ms. Y. was found in possession of the passports of other Chinese nationals is itself a factor which invites some suspicion. Looking, therefore, at Mr. Lin's case at his highest, it might be said that he is a Chinese national who possesses no identity papers, who speaks no English and is here illegally. In addition Mr. Lin feels obliged to raise money to compensate his family for the debt bondage to which they are subject and, in that respect, he is at the mercy of criminal extortionists.

18. So far as the respondents are concerned, nearly everything regarding Mr. Lin's case is vague and unclear. He has no passport or other documents to confirm his identity. Nor has Mr. Lin satisfactorily explained how he came to be in the State. While it is recognised that his illegal status makes him vulnerable to labour exploitation and, indeed, it is acknowledged that he may already have been so exploited, the critical point made by the respondents is that he was at complete liberty for a significant period of time. As evidenced from the photographs found on his I-phone Mr. Lin was free to travel to various parts of the State – ranging from Ashford Castle in Co. Mayo to the Botanic Gardens in Dublin – at various dates in 2011 and perhaps 2012.

19. From the perspective of the respondents this is perhaps the crucial factor which takes the applicant completely out of the category of trafficked persons. Even if – which is by no means admitted – Mr. Lin was in fact trafficked into the State, there is, in any event, no necessary nexus between the drugs offences to which he has either pleaded guilty or with which he is presently charged and such trafficking. Viewed thus, the applicant is just another disadvantaged and vulnerable person who has been sucked into the vortex of the criminal underworld in order to free himself from the burdens of debt bondage which has been visited upon himself and his family.

The definition of "trafficking" in Irish and EU law

20. The Criminal Justice (Human Trafficking) Act 2008 ("the 2008 Act") gives effect to a Council Framework Decision of 19 July 2002 on human trafficking. As we shall shortly see, that Framework Decision was itself replaced by the 2011 Directive, Article 22(1) of which provides that Member States were required to take appropriate steps to transpose the Directive by 6th April, 2013, at the latest.

21. The main effect of the 2008 Act is to create specific criminal offences penalising persons who engage in the trafficking of adults and children. It does not, as such, confer any rights or entitlements on any trafficked person.

22. There is, however, an administrative notice entitled Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking (2008). Paragraph 3 of the notice provides that it 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 s.2 or s. 4 of the 2008 Act."

23. Paragraph 3 of the administrative notice further provides that the question of whether there are reasonable grounds for suspecting that a particular foreign national is the victim of human trafficking is to be determined by a Garda Superintendent attached to GNIB. Where there is such a reasonable suspicion, then paragraph 5 provides for a period of reflection and recovery, the object of which is to enable the person concerned "to make an informed decision as to whether he can assist Gardaí" or other relevant authorities in relation to any investigation or prosecution arising in relation to the alleged trafficking.

24. Returning to the 2008 Act, it is clear that the definition of the relevant terms contained in ss. 1 and 4 of the 2008 Act are very broad. Section 4(1) of the 2008 Act provides:

"A person (in this section referred to as the "trafficker") who trafficks another person (in this section referred to as the "trafficked person"), other than a child or a person to whom subsection (3) applies, for the purposes of the

exploitation of the trafficked person shall be guilty of an offence if, in or for the purpose of trafficking the trafficked person, the trafficker-

(a) coerced, threatened, abducted or otherwise used force against the trafficked person,

(b) deceived or committed a fraud against the trafficked person,

(c) abused his or her authority or took advantage of the vulnerability of the trafficked person to such extent as to cause the trafficked person to have had no real and acceptable alternative but to submit to being trafficked,

(d) coerced, threatened or otherwise used force against any person in whose care or charge, or under whose control, the trafficked person was for the time being, in order to compel that person to permit the trafficker to traffic the trafficked person, or

(e) made any payment to, or conferred any right, interest or other benefit on, any person in whose care or charge, or under whose control, the trafficked person was for the time being, in exchange for that person permitting the trafficker to traffic the trafficked person."

25. Section 4(2) then provides that in a prosecution for an offence under s. 4(1), it shall not be a defence to show that the "person in respect of whom the offence was committed" had consented to the commission of these acts.

26. A key word in the present context is the term "exploitation". This term is defined by s. 1 as including "labour exploitation." That term is in turn defined by s. 1 as meaning:

"(a) subjecting the person to forced labour,

(b) forcing him or her to render services to another, or

(c) the enslavement or the person or subjecting him or her to servitude or a similar condition or state."

27. The reference here to "enslavement" and "servitude" is a clear echo of the Thirteenth Amendment of the US Constitution of 1865:

"Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall take place within the United States, or any place subject to their jurisdiction."

28. This was the first of three post-Civil War amendments designed to eradicate slavery and all incidents of slavery in the United States. Both the wording and the sentiments this amendment expresses may be found in a variety of later international agreements, including the Slavery Convention (1926), the ILO Forced Labour Convention (1930) and the Council of Europe Convention on Action against Trafficking (2008). Of course, along with the provisions of Article 3 ECHR (prohibiting inhuman or degrading treatment), Article 4 ECHR's prohibition of slavery or servitude is at the heart of the protections provided for by the Convention, reflecting as it does the response of the international community to the appalling and despicable use of forced labour on an industrial scale by the National Socialist regime of wartime Germany:

"1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour."

29. The concept of "servitude" in the context of the 13th Amendment to the US Constitution was helpfully explored by the US Supreme Court in *United States v. Kozminski* 487 US 931 (1988). In that case two intellectually disabled men, Mr. Fulmer and Mr. Molitoris - each of whom had a mental age between 8 and 10 respectively - were found labouring on the respondents' farm in poor health, in squalid conditions, and in relative isolation from the rest of society. The farm owners were then charged with violating with violating federal legislation by conspiring to prevent the men from exercising their Thirteenth Amendment right to be free from involuntary servitude and in knowingly holding the men in involuntary servitude.

30. At the respondents' trial the prosecution evidence indicated, *inter alia*, that the two men worked on the farm seven days a week, often 17 hours a day, at first for \$15 per week and eventually for no pay, and that, in addition to actual or threatened physical abuse and a threat to reinstitutionalize one of the men if he did not do as he was told, the respondents had used various forms of psychological coercion to keep the men on the farm. The trial court instructed the jury that, under both statutes, involuntary servitude may include situations involving any "means of compulsion . . . , sufficient in kind and degree, to subject a person having the same general station in life as the alleged victims to believe they had no reasonable means of escape and no choice except to remain in the service of the employer." The jury found respondents guilty, and the court imposed sentences.

31. The US Supreme Court ultimately quashed these convictions, finding that the references to psychological coercion in the trial judge's instructions to the jury to be too broad. It was notable that the Kozminskis had not resorted only to threats of physical violence as such, but also controlled the unfortunate men by means of subtle psychological tactics. As O'Connor J. summarised the key facts (487 US 961, at 935-936):

"Fulmer and Molitoris worked on the Kozminskis' dairy farm seven days a week, often 17 hours a day, at first for \$15 per week and eventually for no pay. The Kozminskis subjected the two men to physical and verbal abuse for failing to do their work and instructed herdsmen employed at the farm to do the same. The Kozminskis directed Fulmer and Molitoris not to leave the farm, and on several occasions when the men did leave, the Kozminskis or their employees brought the men back and discouraged them from leaving again. On one occasion, John Kozminski threatened Molitoris with institutionalization if he did not do as he was told. The Kozminskis failed to provide Fulmer and Molitoris with adequate nutrition, housing, clothing, or medical care. They directed the two men not to talk to others and discouraged the men from contacting their relatives.

At the same time, the Kozminskis discouraged relatives, neighbours, farm hands, and visitors from contacting Fulmer and Molitoris. Fulmer and Molitoris asked others for help in leaving the farm, and eventually a herdsman hired by the Kozminskis was concerned about the two men and notified county officials of their condition. County officials assisted Fulmer and Molitoris in leaving the farm and placed them in an adult foster care home. In attempting to persuade the jury that the Kozminskis held their victims in involuntary servitude, the Government did not rely solely

on evidence regarding their use or threatened use of physical force or the threat of institutionalization. Rather, the Government argued that the Kozminskis had used various coercive measures - including denial of pay, subjection to substandard living conditions, and isolation from others - to cause the victims to believe they had no alternative but to work on the farm. The Government argued that Fulmer and Molitoris were "psychological hostages" whom the Kozminskis had "brainwash[ed]" into serving them."

32. O'Connor J. then acknowledged (487 US 931, 942-944) that:

"While the general spirit of the phrase "involuntary servitude" is easily comprehended, the exact range of conditions it prohibits is harder to define. The express exception of involuntary servitude imposed as a punishment for crime provides some guidance. The fact that the drafters felt it necessary to exclude this situation indicates that they thought involuntary servitude includes at least situations in which the victim is compelled to work by law. Moreover, from the general intent to prohibit conditions akin to African slaveryas well as the fact that the Thirteenth Amendment extends beyond state action..... we readily can deduce an intent to prohibit compulsion through physical coercion... Putting aside such exceptional circumstances [such as sailors serving at sea], none of which are present in this case, our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion. The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labour by other means, such as psychological coercion."

33. It is also of some interest that both O'Connor J. and Brennan J. referred in their judgments to legislation enacted by the US Congress in the 1870s with the onset of Italian immigration into the United States dealing with the so-called "padrone" ("master") system. This was in essence a system of debt peonage or bondage which had emerged from the ashes of the abolition of the feudal system in Italy from the renaissance onwards. It involved the effective sale of young boys to a "padrone", often in satisfaction of some debt which the parents had incurred. The padrone then controlled the young boy by forcing him to work as a beggar or a bootblack or a street musician.

34. O'Connor J. referred to the padrone legislation, adding (487 US 931, 947-948):

"Our conclusion that Congress believed these terms to be limited to situations involving physical or legal coercion is confirmed when we examine the actual physical conditions facing the victims of the padrone system. These young children were literally stranded in large, hostile cities in a foreign country. They were given no education or other assistance toward self-sufficiency. Without such assistance, without family, and without other sources of support, these children had no actual means of escaping the padrones' service; they had no choice but to work for their masters or risk physical harm. The padrones took advantage of the special vulnerabilities of their victims, placing them in situations where they were physically unable to leave."

35. Pausing at this point, therefore, there is much in the analysis of the concept of servitude in *Kozminski* which has a resonance for the present case. It is true that the applicant is an adult, but one must not, I think, underestimate the practical difficulties which Mr. Lin undoubtedly faced in surviving in a State where, virtually friendless and with a completely illegal status, he neither speaks nor reads English.

One cannot deny Mr. Lin's moral guilt in accepting an offer of employment which he must have known involved rank criminality. Yet there at least is some evidence to suggest that once Mr. Lin agreed to take up the position, he could not desist without incurring the risk of physical violence of the criminal gang which organised the cannabis greenhouse. This was especially so given that he appears to have been incarcerated in the building for several weeks. Certainly, the photographs taken by Gardai of the premises show a shuttered entrance with bars on the windows from which there does not appear to have been any obvious means of escape.

36. I do not here overlook the fact that Mr. Lin had access to a mobile telephone and an I-Phone while incarcerated in the greenhouse. But, one might ask, how could some one in his position safely make effective contact with the Gardai or other persons in authority where he could neither speak or read English? I will return to this issue presently.

The decision of the ECtHR in *Siliadin v. France*

37. The leading decision of the ECtHR on the issue of servitude in Article 4 ECHR remains that of *Siliadin v. France* [2005] ECHR 545, (2006) 43 EHRR 16. In that case a Togolese national arrived in France at the age of 16. She worked for several years for Mr and Mrs B., carrying out household tasks and looking after their three, and subsequently four, children for seven days a week, from 7 a.m. to 10 p.m., without receiving any remuneration whatsoever. She was obliged to follow Mrs B.'s instructions regarding her working hours and the work to be done, and was not free to come and go as she pleased.

38. The applicant did move between various families and at times travelled unsupervised by public transport between different houses for this purpose. It had been understood by the applicant's family in Togo that the B family would ensure that Ms. Siliadin's immigration status would be regularised, but this did not occur. Following complaint about her circumstances, she moved for a few months to a Haitian family who treated her well.

39. Her family in Togo was not happy with this arrangements and as the Court of Appeal in Versailles put it:

"Finally, far from showing that [the applicant] was happy to return to Mr and Mrs B.'s home, the conditions in which she did so after an absence of several months are, on the contrary, indicative of the pressure she had been subjected to by her family and of her state of resignation and emotional disarray.

With regard to the victim's state of dependence and vulnerability during the period under examination, it should be noted that this young girl was a minor, of Togolese nationality, an illegal immigrant in France, without a passport, more often than not without money, and that she was able to move about only under Mrs B.'s supervision for the purposes of the children's educational and sports activities."

40. The European Court of Human Rights ultimately found that Ms. Siliadin was held in conditions of servitude, but not slavery:

"Sight should not be lost of the Convention's special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions, and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies ...

The Court notes at the outset that, according to the 1927 Slavery Convention, "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". It notes that this definition corresponds to the "classic" meaning of slavery as it was practised for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object".

With regard to the concept of "servitude", what is prohibited is a "particularly serious form of denial of freedom" (see *Van Droogenbroeck v. Belgium*, Commission's report of 9 July 1980, Series B no. 44, p. 30, §§ 78-80). It includes, "in addition to the obligation to perform certain services for others ... the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition". In this connection, in examining a complaint under this paragraph of Article 4, the Commission paid particular attention to the Abolition of Slavery Convention (see also *Van Droogenbroeck v. Belgium*, no. 7906/77, Commission decision of 5 July 1979, DR 17, p. 59).

It follows in the light of the case-law on this issue that for Convention purposes "servitude" means an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of "slavery" described above (see *Seguin v. France* (dec.), no. 42400/98, 7 March 2000). Furthermore, under the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, each of the States Parties to the convention must take all practicable and necessary legislative and other measures to bring about the complete abolition or abandonment of the following institutions and practices:

"(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour."

In addition to the fact that the applicant was required to perform forced labour, the Court notes that this labour lasted almost fifteen hours a day, seven days per week. She had been brought to France by a relative of her father's, and had not chosen to work for Mr and Mrs B. As a minor, she had no resources and was vulnerable and isolated, and had no means of living elsewhere than in the home of Mr and Mrs B., where she shared the children's bedroom as no other accommodation had been offered. She was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.

In addition, the applicant, who was afraid of being arrested by the police, was not in any event permitted to leave the house, except to take the children to their classes and various activities. Thus, she had no freedom of movement and no free time. As she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on Mr and Mrs B.

In those circumstances, the Court concludes that the applicant, a minor at the relevant time, was held in servitude within the meaning of Article 4 of the Convention."

Comparison between the facts of *Siliadin* and Mr. Lin's case

41. While there are similarities between the facts of the two cases, there are also important differences which required to be closely examined.

The different ages of the foreign nationals

42. In arriving at the conclusion in *Siliadin* that the applicant had been held under conditions of servitude the European Court emphasised that she was a minor when she arrived in France from Togo, whereas Mr. Lin is a married man in his mid-30s.

The vulnerability of the foreign nationals

43. In *Siliadin* it was stressed that the applicant's status in France was irregular and her passport was controlled by Ms. B. She was afraid of going to the police for fear of arrest. She had few friends apart from the Haitian couple to whom she went for a few months. She was without resources and found herself completely dependent on Mr. and Ms. B. On the other hand, she spoke very good French and, unlike Mr. Lin, she was in a position to communicate effectively with persons in authority who might be in a position to help her.

44. Mr. Lin equally lacked financial resources. It is true that he worked illegally for a variety of Chinese restaurants prior to agreeing to take up a position in the growhouse, but there are grounds to believe that he was paid less – perhaps far less – than the basic minimum wage in the course of that restaurant employment. He certainly had to work for long hours in the restaurant business. It is unclear whether Mr. Lin had lost his job prior to taking up the position in the growhouse. At one point in the evidence Mr. Lin suggested that he had lost his job, but on other occasions he seemed to suggest that he voluntarily took up the new position because it offered better terms than the restaurant business.

45. A further striking feature of this case is that Mr. Lin was found in the growhouse without any documentary identification whatever. I cannot say that I found his explanation as to the circumstances in which he came to travel to and to be in the State to be a convincing one, even if the underlying story regarding his family's debt peonage is accepted as correct. It is quite possible that a trafficker took possession of his passport, but on balance I accept – in the absence *at present* of any cogent evidence to the contrary – the assessment of the Gardaí that he was not trafficked into the State.

46. This is a matter which, I understand, is kept under constant review by the Gardaí. This would, I think, be consistent with the State's general obligations to uphold the guarantee of personal liberty under Article 40.4.1 of the Constitution and the specific exemplification of that particular obligation found in Article 4(1) and Article 4(2) ECHR.

47. The manner in which the Gardaí conducted the investigation into the trafficking claims was subject to adverse criticism by Mr. Kavanagh SC, counsel for Mr. Lin. I cannot, say, however, that the investigation lacked professionalism or thoroughness. I found that the GNIB officers who gave evidence were genuinely open-minded and were not unconcerned regarding Mr. Lin's welfare. I have no doubt but that if evidence of trafficking had been uncovered, they would have acted accordingly. It is rather that, like myself, they

could not uncover any satisfactory evidence that Mr. Lin was trafficked.

The nature of the work

48. It is clear from the judgment in *Siliadin* that the nature of the work which was required in that case was unrelenting and relentless. It cannot be said that the tasks which were required of Mr. Lin in the growhouse were anything like as onerous.

Freedom of movement

49. While the European Court did allude to the fact that Ms. Siliadin had freedom of movement, it must be stressed that at various stages the various French courts stressed the autonomous freedom of movement which she enjoyed. As the European Court noted (at paras. 32-37 of the judgment) the Paris Court of Appeal found at another stage of the (admittedly complex) series of appeals:

32. "The Court of Appeal found that the additional investigation had made it possible to confirm that the applicant had arrived in France aged 15 years and 7 months, in possession of a passport and a three-month tourist visa. During the period that she lived with Mrs D., from January to October 1994, she had been employed by the latter, firstly, to do housework, cook and look after her child, and, secondly, in the latter's clothing business, where she also did the cleaning and returned to the rails clothes that customers had tried on, without remuneration.

33. Around October 1994 the applicant had spent a few days at Mr and Mrs B.'s home, shortly before Mrs B. gave birth to her fourth child. She travelled by underground to Mr and Mrs B.'s home every day and returned to Mrs D.'s house in the evening to sleep.

34. In July/August 1994 she was "lent" to Mr and Mrs B., and stayed in their home until December 1995, when she left for Mrs G.'s home, where she was remunerated for her work and given accommodation. She had returned to Mr and Mrs B. in May/June 1996 on her uncle's advice.

35. The Court of Appeal noted that it had been established that the applicant was an illegal immigrant and had not received any real remuneration. Further, it noted that it appeared that the applicant was proficient in French, which she had learnt in her own country. In addition, she had learnt to find her way around Paris in order, initially, to go from Mrs D.'s home to the latter's business premises, and later to travel to Maisons-Alfort, where Mrs G. lived, and finally to return to Mr and Mrs B.'s home.

36. She had a degree of independence, since she took the children to the locations where their educational and sports activities were held, and subsequently collected them. She was also able to attend a Catholic service in a church near Mr and Mrs B.'s home. In addition, she left the house to go shopping, since it was on one of those occasions that she had met Mrs G. and agreed with her to go to the latter's home.

37. The Court of Appeal further noted that the applicant had had an opportunity to contact her uncle by telephone outside Mr and Mrs B.'s home and to pay for calls from a telephone box. She had met her father and her uncle and had never complained about her situation."

50. These findings of fact are of some importance, because they show that Ms. Siliadin had, for example, many opportunities to make her way around Paris for a variety of different purposes. The European Court nonetheless found that given Ms. Siliadin's youth, her irregular immigration status, her lack of resources, her (somewhat) impaired capacity of movement and her general state of psychological dependency on the B family all meant that she had had endured conditions of servitude within the meaning of Article 4(1) ECHR.

51. It is true that prior to entering the growhouse Mr. Lin probably had considerably greater freedom of movement than Ms. Siliadin. He was furthermore an adult, whereas she was a young person. She could, on the other hand, speak and read French quite well, whereas Mr. Lin lacks the capacity to communicate or even to read basic English. The deprivation of liberty which Mr. Lin subsequently endured – being locked into a growhouse for several weeks – was, however, more extreme than anything Ms. Siliadin had suffered.

52. While it is true that Mr. Lin in one sense agreed to all of this and although I do not seek to mitigate his moral guilt in participating in a serious criminal enterprise of this kind, the fact is that, once he had been ensnared, the threat of violence from the criminal gang was a real one. Those who masterminded this entire enterprise clearly identified a vulnerable – if foolish – man who they then ruthlessly exploited. In this regard, I cannot overlook the fact the Oireachtas has stipulated that in matters of this kind, the ostensible – or even actual – consent of the victim is irrelevant: see s. 4(2) of the 2008 Act and Article 2(4) of the 2011 Directive.

Conclusions on the servitude issue

53. It follows, therefore, that judged by the standards identified by the US Supreme Court in *Kozminski* and, even more pertinently, by the European Court of Human Rights in *Siliadin*, the circumstances in which Mr. Lin was detained in the growhouse amounted to "servitude or a similar condition or state" within the meaning of s. 1 of the 2008 Act. For this purpose, it is irrelevant as a matter of law that he originally agreed to take up this offer of employment. What is instead critical is that Mr. Lin was deprived of his liberty under the nascent – but real – threat of violence for a significant period in circumstances where, by reason of his very vulnerability in terms of language and immigration status, he could not effectively independently secure his release from that detention in the growhouse.

Article 8 of Directive 2011

54. This finding is, not, however dispositive of the applicant's case. Taken at its highest, Mr. Lin maintains that he has an entitlement not to be prosecuted under Article 8 of the 2011 Directive which provides:

"Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that the 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 any of the acts referred to in Article 2."

55. For my part, I do not think that Article 8 imposes any such direct obligation on the prosecution. Article 8 at most ensures that the public prosecutor of each Member State is entitled to stipulate that no prosecution will take place where a trafficked person has been compelled to commit crimes which are as a direct result of having been trafficked.

56. This was the point made by Judge L.C.J. in *L. v. Children's Commissioner for England, Equality and Human Rights Commissioner* [2013] EWCA Crim 991 where a number of young Vietnamese young men were found in different cannabis growhouses. In one of the three cases the accused had been found bare-foot and bound by police and it was accepted that he had been locked into the growhouse in question. In the other two cases it was clear that the accused were also the victims of trafficking. As Judge L.C.J. put it:

"...the distinct question for decision once it is found that the defendant is a victim of trafficking is the extent to which the offences with which he is charged, or of which he has been found guilty are integral to or consequent on the exploitation of which he was the victim. We cannot be prescriptive. In some cases the facts will indeed show that he was under levels of compulsion which mean that in reality culpability was extinguished. If so when such cases are prosecuted, an abuse of process submission is likely to succeed. That is the test we have applied in these appeals. In other cases, more likely in the case of a defendant who is no longer a child, culpability may be diminished but nevertheless be significant. For these individuals prosecution may well be appropriate, with due allowance to be made in the sentencing decision for their diminished culpability. In yet other cases, the fact that the defendant was a victim of trafficking will provide no more than a colourable excuse for criminality which is unconnected to and does not arise from their victimisation. In such cases an abuse of process submission would fail."

57. What is critical, however, is that the accused must be a victim of trafficking and that there must be a real and substantial connection between the applicant's status as a person who has been trafficked and the crimes which were actually committed. Had, for example, it been established that Mr. Lin had been trafficked into the State and that he had been coerced to work in the growhouse, then it is clear that serious consideration would have to have been given by the Director of Public Prosecutions as to whether there should have been a prosecution in the first place. Even if there had been, the decision of the English Court of Appeal (Criminal Division) in *L.* shows that in those type of circumstances the courts are more than prepared to hold that the prosecution constituted an abuse of process.

58. At the moment, however, I am not satisfied that there is any direct evidence – other than Mr. Lin's own testimony which, to repeat, I found unpersuasive on this point – that he was trafficked into the State. Indeed, it bears remarking that it is in cases of this kind that conventional rules as to the evaluation of evidence almost break down. Mr. Lin's story regarding the debt peonage, the various trips by road, air and even sea from China to Ireland, the control he claims was exercised by the traffickers as they encountered immigration authorities at various stages in different airports and even the circumstances in which he was delivered into persons who took his passport upon arrival at Dublin Airport might all well be true.

59. The difficulty is that there is almost no independent evidence to substantiate this story. At the moment, as the Detective Superintendent O'Driscoll pointed out in evidence, we cannot even be sure of his identity. Mr. Lin could not provide the authorities with a clear account of *how* and *when* he arrived here. Although, very commendably, the Gardai clearly took his complaint of trafficking seriously and endeavoured to investigate it, nothing has yet turned up other than the unadorned facts of Mr. Lin's case to suggest he was trafficked. It is true that the lessee of the growhouse premises, Ms. Y., was found to have had Chinese passports in her possession and this is certainly a suspicious fact. At the moment, however, the evidence available to date exonerates Ms. Y. of any suggestion in that regard of trafficking, although I again stress that the investigation is fluid and new important evidence may emerge.

60. As against all of that, there is the undoubted fact that Mr. Lin was at liberty for several months and was apparently free to move around the State. This freedom was viewed by the investigating Gardaí as being wholly incompatible with trafficked status. It may be – as illustrated by the facts of cases such as *Siliadin* – that this is not necessarily dispositive of this question. Sometimes trafficked persons may have little alternative but to return to the only people they know in a foreign country – namely, the traffickers – yet for the moment the fact that Mr. Lin was at liberty to travel extensively throughout the State for a significant period of time must be regarded as independent evidence which, on the facts of this case, at least, tends to negative the contention that the applicant was in fact trafficked.

61. I therefore find myself concluding on the basis of the available evidence that the applicant was not trafficked into the State. In these circumstances, it follows that any offences committed by the applicant in the growhouse were not as a "direct consequence" of being trafficked, the essential requirement of Article 8 of the 2011 Directive.

The challenge to the transposition of the 2011 Directive

62. Given that I have found that Mr. Lin was not trafficked into the State, then it seems to me that this is fatal to any challenge brought by him to the manner in which the 2011 Directive was transposed into national law. In other words, Mr. Lin would have had standing to advance such a challenge only if he were a trafficked person and since I have found that he is not, then that challenge simply falls away.

Relationship with the pending Circuit Court trial

63. For the avoidance of any doubt, I would wish to make clear that my findings of fact in these Article 40 proceedings are not intended to and should not in any way pre-determine any factual issues which the Circuit Court will be required to hear and determine so far as the remaining criminal charges against the applicant are concerned. Nor should this judgment in any way trammel the unquestioned right of the presiding Circuit Court judge to take such steps as he or she may think fit in those proceedings to make such rulings, findings or determination which are considered necessary for the proper administration of justice.

Conclusions

64. In summary, therefore, I find myself obliged to refuse the applicant the relief which he seeks. Taking the applicant's case at its absolute height, Article 8 of the 2011 Directive permits the relevant prosecuting authorities not to prosecute the victims of trafficking where the crimes which they have committed are the direct consequence of their exploitation by traffickers.

65. It is true that Mr. Lin was exploited in the sense that I have found that his incarceration in the growhouse amounted to conditions of servitude within the meaning of s. 1 of the 2008 Act. In the present case, however, I am not satisfied that the evidence establishes that he has been trafficked into the State. I am unpersuaded by his account of the manner in which he came to be into the State and key details in terms of identity, method of travel and dates of arrival have not been independently confirmed.

66. The very fact, moreover, that Mr. Lin was at liberty and could travel extensively throughout the State is a critical objective factor which negatives the suggestion that he was trafficked, even if this factor alone is not always dispositive of a trafficking claim. In the present case, however, it is the only independent ascertainable fact which is available to assess the veracity of Mr. Lin's claim and, absent any other cogent evidence, I am driven to conclude that trafficking has not been established.

67. In these circumstances, I find myself obliged to conclude that the applicant is currently in lawful detention.