

'Still Waiting' for Justice: Migrant Workers' Perspectives on Labour Exploitation in Ireland

CLÍODHNA MURPHY*, DAVID M. DOYLE** AND MUIRÉAD MURPHY***

Acceptance Date September 29, 2019; Advanced Access publication on November 7, 2019.

ABSTRACT

Although there is a growing recognition that a labour law approach is well-placed to tackle migrant workers' vulnerability to labour exploitation, empirical studies in this field are few and far between. This article explores how migrant workers subjected to severe and routine exploitation experience the Irish labour law framework in practice. Drawing on interviews with 23 workers, as well as legal and policy analysis, the research shows that those who have endured the 'continuum' between routine and severe labour exploitation have many commonalities in their lived experiences of labour conditions and law. It is argued that the key problems identified by this research—the intertwining of employment and immigration enforcement; workers' lack of awareness of employment rights; the ineffectiveness of labour inspections; the uncertain impact of undocumented status on employment rights and difficulties with enforcing employment awards—all point to the failure of institutional labour protections for migrant workers in Ireland. By enabling a more nuanced understanding of exploited migrant workers' needs and perspectives, this study contributes to the ongoing debate on how to develop better regulatory and institutional conditions in Ireland and beyond.

1. INTRODUCTION

The question of how to better protect the rights of migrants at work has attracted much attention in recent years.¹ An expanding body of research

*Lecturer, Department of Law, Maynooth University, email: cliodhna.murphy@mu.ie;

**Lecturer, Department of Law, Maynooth University, email: david.doyle@mu.ie;

***PhD Candidate, Department of Law, Maynooth University, email: muiread.murphy.2014@mumail.ie.

¹See for example preamble to International Labour Organisation, Protocol of 2014 to the Forced Labour Convention, 1930 (Entry into force: 09 Nov 2016) Adoption: Geneva, 103rd ILC session (11 June 2014); C. Costello and M. Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014); C. Murphy, 'Tackling Vulnerability to Labour Exploitation Through Regulation: The Case of Migrant Fishermen in Ireland' (2017) 46(3) *ILJ* 417–434; European Union Agency For Fundamental Rights, *Protecting Migrant Workers from Exploitation in the EU: Boosting Workplace Inspections*

has documented the mistreatment experienced by some migrant workers, especially in informal and low-paid sectors such as the food industry and domestic work.² Much of the legal scholarship has been dominated by analysis and critique of criminal law responses to severe forms of labour exploitation (slavery, servitude, forced labour and labour trafficking).³ Despite this focus, there is a growing recognition that a labour law approach⁴ is well-placed to deal with the full 'continuum of exploitation' which ranges 'from decent work through minor and major labour law violations, to extreme exploitation in the form of forced labour'.⁵ However, it is also known that there are serious problems with the design and enforcement of employment law for migrant workers.⁶

(Luxembourg: Publications Office of the European Union, 2018); C. Barnard, A. Ludlow and S.F. Butlin, 'Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers' (2018) 47(2) *ILJ* 226.

²G. Netto and G. Craig, 'Migration and Differential Labour Market Participation' (2017) 16(4) *Social Policy and Society* 607–611, 608; M. Potter and J. Hamilton, 'Picking on Vulnerable Migrants: Precarity and the Mushroom Industry in Northern Ireland' (2014) 28(3) *Work, Employment and Society* 390–406, 401; B. Anderson, 'Migrant Domestic Workers: Good Workers, Poor Slaves, New Connections' (2015) 22(4) *Social Politics* 636–652; B. Rogaly, 'Intensification of Workplace Regimes in British Horticulture: The Role of Migrant Workers' (2008) 14(6) *Population, Space and Place* 497–510; Migrant Rights Centre Ireland, *Left High and Dry: The Experience of Migrant Workers in the Irish Fishing Industry* (Dublin: MRCI, 2017).

³See for example J. Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Leiden: Brill, 2012); V. Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (2014) 3(2) *Cambridge Journal of International and Comparative Law* 407–443; J. Collins, 'Exploitation of Persons and the Limits of the Criminal Law' (2017) 3 *Criminal Law Review* 169–186; V. Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81(6) *Modern Law Review* 1017.

⁴C. Costello, 'Migrants and Forced Labour: A Labour Law Response' in A. Bogg, C. Costello, A. Davis and J. Prassl (eds), *The Autonomy of Labour Law* (Oxford: Hart Publishing, 2015); M. Zou, 'The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations' (2015) 31(2) *The International Journal of Comparative Labour Law and Industrial Relations* 141–162; I. K. Thiemann, 'Beyond Victimhood and Beyond Employment? Exploring Avenues for Labour Law to Empower Women Trafficked into the Sex Industry' (2018) 48(2) *ILJ* 199–224; J. Fudge, 'Why Labour Lawyers Should Care About the Modern Slavery Act 2015' (2018) 29(3) *King's Law Journal* 377–406.

⁵K. Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation* (York: Joseph Rowntree Foundation Programme Paper, November 2010) 4.

⁶See for example, M. Zou, 'The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations' *supra* n 4. C. Murphy, 'The Enduring Vulnerability of Migrant Domestic Workers in Europe' (2013) 62(3) *International and Comparative Law Quarterly* 599–627. C. Barnard and A. Ludlow 'Enforcement of Employment Rights by EU-8 workers in Employment Tribunals' *supra*, n 1.

This article argues that existing analyses must be accompanied by research into how migrant workers experience the legal framework in practice.⁷ While there has been a small number of criminological studies exploring the experiences of victims of labour trafficking and other forms of labour exploitation,⁸ comparable empirical work in the labour law field is rare.⁹ This research draws on 23 semi-structured interviews conducted with individuals living and working in Ireland, who fall into two broad legal categories:

- (i) Non-EU migrant workers identified as potential or suspected victims of labour trafficking (referred to in this article as ‘severe exploitation’);
- (ii) Non-EU migrant workers who had experienced employment breaches falling short of the threshold of severity required for victim of trafficking status (referred to as ‘routine exploitation’).¹⁰

This article analyses the participants’ experiences of the Irish employment law framework under five headings: working conditions and types of labour violations experienced; means of control used by employers; experiences of labour inspections; barriers to reporting via the employment enforcement authorities and seeking redress.

Following a brief overview of the theoretical context of the work, the article outlines the factual, legal and policy background in Ireland. This includes a consideration of the legal hurdles faced by migrant workers who seek to enforce employment law and an overview of the anti-trafficking framework. It then goes on to analyse the participants’ experiences under the headings set out above. These sections focus directly on the perspectives of those interviewed and draw on their suggestions for change. The interviews suggest that the two groups under consideration (those who have

⁷See the similar approach taken in A. Nicholson, M. Dang and Z. Trodd, ‘A Full Freedom: Contemporary Survivors’ Definitions of Slavery’ (2018) 18(4) *Human Rights Law Review* 689–704.

⁸B. France, *Labour Compliance to Exploitation and the Abuses In-Between* (London: Labour Exploitation Advisory Group (FLEX), August 2016). D. M. Doyle, C. Murphy, M. Murphy, P. R. Coppari and R. J. Wechsler, ‘“I Felt Like She Owns Me”: Exploitation and Uncertainty in the Lives of Labour Trafficking Victims in Ireland’ (2018) 59(1) *The British Journal of Criminology* 231–51; J. Davies, ‘From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry’ (2018) 19(3) *Criminology and Criminal Justice* 1–17.

⁹Although, see V. Mantouvalou, ‘“Am I Free Now?” Overseas Domestic Workers in Slavery’ (2015) 42(3) *Journal of Law and Society* 329–357; and C. Barnard and A. Ludlow ‘Enforcement of Employment Rights by EU-8 Workers in Employment Tribunals’ *supra*, n 1.

¹⁰D. M. Doyle, C. Murphy, M. Murphy, P. R. Coppari and R. J. Wechsler, ‘“I Felt Like She Owns Me”: Exploitation and Uncertainty in the Lives of Labour Trafficking Victims in Ireland’ *supra* n 8; J. Davies, ‘From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry’ *supra* n 8.

suffered severe labour exploitation and those subjected to routine exploitation) face similar difficulties in accessing employment protections and redress. They experience similar types of violations and are threatened with similar reprisals for speaking out (i.e. deportation). The study also finds that due to serious problems in the functioning of the Irish anti-trafficking regime, special mechanisms which are in theory available to victims of trafficking (e.g. criminal compensation) are unavailable in reality, bringing the experiences of the two groups even closer together. In practice, therefore, despite the starkly different legal treatment of trafficking victims and other mistreated migrant workers (discussed further below), these groups have many commonalities in their lived experiences of labour conditions and law.

The article concludes that labour law, as it currently operates in Ireland, is ineffective to address the high level of precarity and dependence experienced by migrant workers in their work relations. The employment law framework also fails to provide satisfactory remedies for those who experience routine or severe exploitation. In these ways, the vulnerability to labour exploitation experienced by migrant workers is 'actively produced and institutionalised by employers and the state'.¹¹ However, we suggest that the State's deep-rooted resistance to acknowledging the extent of labour exploitation amongst migrant workers in Ireland will constitute a significant barrier to meaningful reform in this area.

2. FRAMING THE DEBATE: LEGAL AND THEORETICAL RESPONSES TO LABOUR EXPLOITATION

Since the turn of the twenty-first century, the crimes of human trafficking; slavery; servitude and forced labour—often collectively referred to using the non-legal terms 'severe exploitation'¹² or 'modern slavery'¹³—have been

¹¹K. Strauss and S. McGrath, 'Temporary Migration, Precarious Employment and Unfree Labour Relations: Exploring the "Continuum of Exploitation" in Canada's Temporary Foreign Worker Program' (2017) 78 *Geoforum* 199–208, 202.

¹²EU Fundamental Rights Agency, *Severe Labour Exploitation: Workers Moving Within or Into the European Union States' Obligations and Victims' Rights* (Vienna: EUFRA, 2015). The EUFRA defines severe labour exploitation as 'forms of exploitation of workers which are criminal under the legislation of the EU Member State where the exploitation occurs' (at 9).

¹³International Labour Organisation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (Geneva: ILO and Walk Free Foundation, 2018) 9. For the purposes of its estimates, the ILO defines 'modern slavery' as 'a set of specific legal concepts including forced labour, debt bondage, forced marriage, other slavery and slavery like practices, and human trafficking'.

high on the international and domestic political agendas. During this period, international human rights law¹⁴ has evolved to impose far-reaching duties on states to identify, assist and protect individuals who are victims of human trafficking as well as other forms of severe labour exploitation. States, in turn, implement these international obligations through trafficking and forced labour prohibitions that are tied to criminal enforcement.¹⁵

Many studies have emphasised the limitations of a criminal law approach to labour exploitation. Fudge points out that a focus on criminal law tends to overbear other responses, including labour law.¹⁶ Davies (following Strauss and others)¹⁷ argues that when states concentrate on criminal law responses to severe exploitation, while simultaneously undermining labour standards, this results in the normalisation of routine exploitation (i.e. exploitation which, if reported, would typically be addressed through civil, regulatory or labour law).¹⁸ It is against this background that our research examines the experiences associated with both severe and routine exploitation.

A further criticism of the anti-trafficking/modern slavery paradigm is that the ‘binary logic’¹⁹ of ‘evil traffickers’ and ‘vulnerable victims’—on which neo-abolitionist discourse is based—depoliticises the migration debate and obscures

¹⁴V. Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and State's Positive Obligations in European Law* (Cambridge: Cambridge University Press, 2017). *CN v The United Kingdom* App no 4239/08 (ECHR, 13 November 2012). *Ransev v Russia* App no 25965/04 (ECHR, 7 January 2010). *Siliadin v France* App no 73316/01 (ECHR, 26 October 2005).

¹⁵See for example Modern Slavery Act 2015; Criminal Law (Human Trafficking) Act 2008, as amended (Ireland). C. Rijken, ‘Trafficking in Human Beings for Labour Exploitation: Cooperation in an Integrated Approach’ (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice* 9–35; J. Davies, ‘From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry’ *supra* n 8; J. van der Leun and A. van Schijndel, ‘Emerging From the Shadows or Pushed Into the Dark? The Relation Between the Combat Against Trafficking in Human Beings and Migration Control’ (2016) 44 *International Journal of Law, Crime and Justice* 26–42; M. Smit, ‘Trafficking in Human Beings for Labour Exploitation. The Case of the Netherlands’ (2011) 14 *Trends in Organized Crime* 184–197.

¹⁶J. Fudge, ‘Illegal Working, Migrants and Labour Exploitation in the UK’ (2018) 38(3) *Oxford Journal of Legal Studies* 557–584, 557.

¹⁷K. Strauss, ‘Social Reproduction and Migrant Domestic Labour in Canada and the UK: Towards a Multi-Dimensional Concept of Subordination’ in L. Waite, G. Craig, H. Lewis and K. Skrivankova (eds), *Vulnerability, Exploitation and Migrants* (Basingstoke: Palgrave Macmillan, 2015) 59–98; S. Scott, *Labour Exploitation and Work-Based Harm* (Bristol: Policy Press, 2017).

¹⁸J. Davies, ‘From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry’ *supra* n 8.

¹⁹K. Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation* *supra* n 5, 17.

the complex structural and systemic forces which shape migrant workers' vulnerability to exploitation.²⁰ Crucially, it distracts from the role of the State in creating the conditions for such exploitation to take place. Governments conflate trafficking with lax immigration control²¹ and instrumentalise the need to tackle exploitation as a justification for restrictive immigration measures and the expanding criminalisation of irregular migration.²² Anderson and Mantouvalou have demonstrated how the precarious immigration statuses, developed by States in this policy environment, create vulnerability to exploitation.²³ Mantouvalou welcomes the criminalisation of modern slavery in principle, due to its symbolic value in communicating that such conduct is unacceptable and furthermore, its potential practical effects in deterring employers and traffickers.²⁴ However, she also points to serious deficiencies in the operation of the UK Modern Slavery Act 2015, which makes this legislation ineffective in addressing even severe forms of labour exploitation.²⁵

These debates frame this paper and inform our research questions. Our primary focus is the labour experiences of migrant workers who have been subjected to exploitation in Ireland, and the efficacy of Irish employment law in preventing and providing remedies for such mistreatment. This work thus forms part of the strand of legal scholarship which emphasises the transformative potential of labour law in this sphere. Writing on migrant domestic workers, Pavlou observes that the applicability of the full range of labour law rights and protections to all domestic workers is a crucial precondition to making these workers less vulnerable to exploitation.²⁶ In their

²⁰See for example, J. O'Connell Davidson and B. Anderson, 'The Trouble With Trafficking,' in V. den Acker and J. Doornik (eds), *Trafficking and Women's Rights* (Gordonville: Palgrave, 2006); D. Coghlan and G. Wylie, 'Defining Trafficking/Denying Justice? Forced Labour in Ireland and the Consequences of Trafficking Discourse' (2011) 37 *Journal of Ethnic and Migration Studies* 1513–1526; J. O'Connell-Davidson, *Modern Slavery: The Margins of Freedom* (Bristol: Palgrave Macmillan, 2015).

²¹D. Gadd and R. Broad, 'Troubling Recognitions in British Responses to Modern Slavery' (2018) 58(6) *The British Journal of Criminology* 1440–1461.

²²J. Fudge, 'Illegal Working, Migrants and Labour Exploitation in the UK' *supra* n 16, 557; B. Anderson, 'Where's the Harm in That? Immigration Enforcement, Trafficking, and the Protection of Migrants' Rights' (2012) 56(9) *American Behavioral Scientist* 1241–1257.

²³See the seminal article in this field, B. Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24(2) *Work, Employment and Society* 300–317; see also V. Mantouvalou, "'Am I Free Now?'" Overseas Domestic Workers in Slavery' *supra*, n 9.

²⁴V. Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' *supra* n 3, 1021.

²⁵*Ibid.*

²⁶V. Pavlou, 'Where to Look for Change? A Critique of the Use of Modern Slavery and Trafficking Frameworks in the Fight Against Migrant Domestic Workers' Vulnerability' (2018) 20 *European Journal of Migration and Law* 83–107, 102.

research on the use of employment tribunals by EU-8 nationals to enforce employment rights, Barnard *et al.* explain that if migrant workers do not successfully pursue employment claims, ‘concerns about (mis)treatment are justified and prompt the further question as to how their rights could be better protected in practice.’²⁷ Our study builds on this body of literature and is premised on the idea that migrant workers must be given a central role in the development of evidence-based measures to enhance the protection of their rights at work. It represents a first step in understanding the perspectives and experiences of non-EU migrant workers in Ireland, drawing on the views of the interviewees to make suggestions in relation to how better regulatory and institutional conditions could be developed.

In presenting the findings of the empirical research, the article draws on the idea of the ‘continuum of exploitation’ developed by Skrivankova, which understands labour exploitation as entailing a complex range of situations ‘ranging from the positive extremity (desirable situation) of decent work to the negative extremity of forced labour (most serious form of labour exploitation)’.²⁸ As Skrivankova points out, the space between these two extremes is ‘filled with situations that represent some form of violation of standards, starting from more benign forms (e.g. discrimination, payment under minimum wage, breach of contract), with increasing severity, leading to the most serious form of violation, forced labour’.²⁹ Here, we employ the definition of the continuum in a descriptive manner, to highlight the spectrum of experiences reported by the participants and the legal interventions available at the various points of this spectrum.

3. MIGRANT LABOUR AND THE CONTINUUM OF EXPLOITATION: THE IRISH CONTEXT

Given the relatively recent advent of labour migration into Ireland, the vulnerability of migrant workers to labour exploitation has only recently begun to be seen as an important issue.³⁰ The research to date suggests the existence of a continuum of experiences, from relatively minor breaches of

²⁷C. Barnard and A. Ludlow, ‘Enforcement of Employment Rights by EU-8 Workers in Employment Tribunals’ *supra* n 1, 1.

²⁸K. Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation* *supra* n 5, 18.

²⁹*Ibid.*

³⁰See, for example, A. Barrett and E. Kelly, *The Impact of Ireland’s Recession on the Labour Market Outcomes of its Immigrants* (Dublin: ESRI Working Paper Series No. 355, September 2010); P. J. O’Connell and F. McGinnity, *Immigrants at Work: Ethnicity and Nationality in the*

employment law to trafficking and forced labour. One study conducted by the Migrant Rights Centre Ireland (MRCI) found that migrant workers in Ireland often suffer from a decent work deficit, with a lack of promotion prospects, no union involvement, precarious hours, lack of avenues for complaint, racial discrimination and harassment.³¹ A landmark 2017 study also found that compared to White Irish respondents, Black respondents were 'three times more likely to experience discrimination in the workplace', whereas 'White non-Irish do not differ from White Irish respondents in reported discrimination in any domain', including the workplace.³² There is also evidence of discrimination against ethnic minority applicants at the recruitment stage.³³ Such 'vulnerability to racism is reinforced by a number of factors e.g. living in an environment that is relatively different in terms of language, culture, customs and economic and social context',³⁴ but it does appear that 'racialised workers and immigrants', irrespective of jurisdiction, are at 'high risk of precarious employment'.³⁵

At the severe end of the continuum, the US Department of State *Trafficking in Persons Report* notes that 'victims of forced labour have been identified in domestic work, the restaurant industry, waste management, fishing, seasonal agriculture and car washing services'.³⁶ The identification and prosecution of labour trafficking cases has been problematic, however. Twenty-five victims of trafficking for the purposes of labour exploitation

Irish Labour Market (Dublin: Equality Authority and Economic and Social Research Institute, 2008); A. Barrett and D. Duffy, *Are Ireland's Immigrants Integrating into its Labour Market?* (Dublin: ESRI Working Paper Series No. 199, June 2007); F. McGinnity and M. Gijsberts, 'A Threat in the Air? Perceptions of Group Discrimination in the First Years After Migration: Comparing Polish Migrants in Germany, the Netherlands, the UK and Ireland' (2016) 16(2) *Ethnicities* 290–315.

³¹See also A. Barrett and Y. McCarthy, 'Immigrants in a Booming Economy: Analysing Their Earnings and Welfare Dependence' (2007) 21(4) *Labour* 789–808; T. Turner 'The Jobs Immigrants Do: Issues of Displacement and Marginalization in the Irish Labour Market' (2010) 24(2) *Work, Employment and Society* 318–336.

³²F. McGinnity, R. Grotti, O. Kenny and H. Russell, 'Who Experiences Discrimination in Ireland? Evidence From the QNHS Equality Modules' (Dublin: ESRI/IHREC 2017), available at <https://www.esri.ie/publications/who-experiences-discrimination-in-ireland-evidence-from-the-qnhs-equality-modules/> (last accessed 24 October 2019).

³³F. McGinnity and P. Lunn, 'Measuring Discrimination Facing Ethnic Minority Job Applicants: An Irish Experiment' (2011) 25(4) *Work, Employment and Society* 693–708.

³⁴Migrant Rights Centre Ireland, *Accessing Redress for Workplace Exploitation: The Experience of Migrant Workers* (Dublin: MRCI, 2012) 19.

³⁵K. Strauss and S. McGrath, 'Temporary Migration, Precarious Employment and Unfree Labour Relations: Exploring the "Continuum of Exploitation" in Canada's Temporary Foreign Worker Program' *supra* n 11, 202.

³⁶US Department of State, *Trafficking in Persons Report* (June 2018).

were identified in 2017,³⁷ but this would appear to be the tip of the iceberg, with the view of labour inspectors being that ‘you’re only ever about five miles from somebody in effective slavery in Ireland’.³⁸ Although the Irish authorities have identified 283 suspected trafficking victims in the last five years, there has not been a successful prosecution for trafficking offences in Ireland since 2013. These issues, *inter alia*, have been consistently highlighted by domestic non-governmental organisations and international bodies.³⁹ In 2017, the annual US Department of State Trafficking in Persons Report downgraded Ireland’s status from Tier 1 to Tier 2 among countries worldwide for its approach to trafficking, citing ‘chronic deficiencies in victim identification and referral’.⁴⁰

A. Enforcing Employment Law

The difficulties encountered by migrants in making employment rights claims are well-documented, and relate to their deportability as well as to the structure of employment law.⁴¹ In common law countries, including Ireland and England and Wales, the architecture of employment law centres on the contract of employment, which provides the gateway to most statutory employment protections. In the case of undocumented migrants (in

³⁷ Anti-Human Trafficking Unit, *Annual Report* (Dublin: AHTU, 2017) 8.

³⁸ G. Ní Aodha, ‘Some Foreign Nationals in Ireland Work in ‘Conditions That Are Close to Slavery’’ (*The Journal*, 11 February 2018), available at <http://www.thejournal.ie/working-conditions-close-to-slavery-3846399-Feb2018/> (last accessed 24 October 2019).

³⁹ The Group of Experts on Action against Trafficking in Human Beings, *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round* (Strasbourg: GRETA, 2015); The Group of Experts on Action against Trafficking in Human Beings, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings in Ireland: Second Evaluation Round* (Strasbourg: GRETA, 2017); Immigrant Council of Ireland, *Asylum Seeking Victims of Human Trafficking in Ireland: Legal and Practical Challenges* (Dublin: ICI, November 2011); Immigrant Council of Ireland, *Submission to the US State Department Trafficking in Persons Report 2017* (Dublin: ICI, January 2017); Irish Human Rights and Equality Commission, *Submission to GRETA in Advance of its Second Evaluation Round of Ireland* (Dublin: IHREC, September 2016); Office of the Special Representative and Co-Ordinator for Combating Trafficking in Human Beings, *Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision With Regard to Victims of Trafficking* (Vienna: OSCE, 2013).

⁴⁰ US Department of State, *Trafficking in Persons Report supra* n 36, 235.

⁴¹ V. Mantouvalou, ‘Organizing Against Abuse and Exclusion: The Associational Rights of Undocumented Workers’ in C. Costello and M. Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law supra* n 1, 381–398.

particular, those who knowingly participate in the illegal work, at the inception of the contract),⁴² the problem in accessing this protective regulation is that the contract of employment may be deemed void for illegality. In the UK and Ireland, the application of the private law doctrine of illegality in a manner which deprives undocumented workers of employment rights has been the focus of much attention.⁴³ The current legal position in Ireland is that undocumented workers cannot generally enforce employment rights due to the illegality underlying the contract of employment, although there were some *obiter dicta* comments in the recent Supreme Court judgment in *Hussein v The Labour Court*⁴⁴ to the effect that this might be reviewed in an appropriate case, in light of the principle of proportionality.⁴⁵ The Employment Permits (Amendment) Act 2014 mitigated some of the harshness of the pre-existing law in this area, by providing that the foreign national worker may take a civil claim for compensation against the employer, notwithstanding the illegality of the contract, where it can be proved that they took all reasonable steps to comply with the requirement to have an employment permit.⁴⁶ It further stipulates that the Minister may take such an action on behalf of the employee.⁴⁷ However, it is not clear whether this provision has ever been successfully relied upon by a claimant.

More broadly, the design of Irish immigration and employment enforcement mechanisms means that migrant workers are likely to fear either losing their work permit; not having their work permit renewed or being deported if detected while undocumented.⁴⁸ Employment and immigration enforcement are completely enmeshed in the Irish context. The labour inspectorate (Workplace Relations Commission, 'WRC') has enforcement

⁴² *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, per Peter Gibson LJ at 30.

⁴³ K. Bales, A. Bogg and T. Novitz, "'Voice" and "Choice" in Modern Working Practices: Problems with the Taylor Review' (2018) 47(1) *ILJ* 46–75; M. Zou, 'The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations' *supra* n 4; A. Bogg and S. Green, *Illegality After Patel v Mirza* (Bristol: Hart Publishing, 2018); E. Dewhurst, 'The Denial of Labour Rights to Irregular Immigrants under Irish Labour Law' (2012) 3(4) *European Labour Law Journal* 300–304; C. Murphy, 'Enforcing Employment Standards for Undocumented Migrant Domestic Workers in the UK and Ireland: Rethinking Illegality in Zones of Invisibility' (2015) 29(4) *Journal of Immigration, Asylum and Nationality Law* 349–371.

⁴⁴ [2012] IEHC 364; [2015] IESC 58.

⁴⁵ [2015] IESC 58, para. 52, per Murray J.

⁴⁶ Employment Permits (Amendment) Act 2014, s 4.

⁴⁷ Employment Permits (Amendment) Act 2014, s 4(5).

⁴⁸ See generally, S. Arnold, S. Whelan and E. Quinn, *Illegal Employment of Non-EU Nationals in Ireland* (Dublin: Economic and Social Research Institute, 6 July 2017).

functions under the Employment Permits Acts 2003–14 and as such is an extension of the immigration authorities.⁴⁹ Indeed, breaches of employment permit legislation comprised 17% of all breaches identified by the WRC in 2017, and queries relating to employment permits made up 37% of all calls to the information phone line.⁵⁰ The WRC has stated that although it has the power to prosecute both the employer and the employee for illegal employment, it ‘usually’ focuses on the employer.⁵¹ The problems inherent in the dual role of the WRC as labour and immigration inspectors are highlighted in the Department of Justice and Equality Anti-Human Trafficking Unit’s annual report for 2017, which describes intelligence-led operations with multi-agency teams (including the police and labour inspectors) targeting the nail bar industry. According to the report, although inspectors ‘identified employment law breaches at 35 premises, including 11 breaches of legislation concerning worker permits for non-EEA citizens, no evidence of human trafficking was detected.’⁵² It seems that if the WRC identifies compliance problems with work permits, it will often give the employer the opportunity to rectify the breach—which can result in undocumented employees losing their jobs.⁵³

Finally, the age-old issue of employment status has caused problems, particularly in certain sectors such as fishing. The hyper-precarity of migrant fishermen has been traditionally rooted in their status as ‘share fishermen’, an established practice in the industry but one which results in exclusion from protective employment and social welfare frameworks. Share fishermen receive a share of proceeds of a vessel’s catch rather than a regular wage. The Irish courts have confirmed on numerous occasions that share fishermen are employed under a contract for service as opposed to a contract of service, meaning that they are not ‘employees’ protected by employment rights and social insurance frameworks.⁵⁴ A key regulatory reform in this sector that seeks to reduce vulnerability to exploitation has been the requirement that fishers be employed under a contract of employment. However, as will be

⁴⁹Workplace Relations Commission, *Annual Report* (Dublin: WRC, 2017) 11.

⁵⁰*Ibid.*

⁵¹S. Arnold, S. Whelan and E. Quinn, *supra* n. 48, ix.

⁵²Anti-Human Trafficking Unit, *Annual Report supra* n 37, 19.

⁵³S. Arnold, S. Whelan and E. Quinn, *supra* n 48, 48.

⁵⁴*DPP v McLoughlin* [1986] 1 IR 355; *Griffin and Deasy v Minister for Social, Community and Family Affairs* [2002] 2 I.C.L.M.D; Inter Departmental Government Task Force, *Report of the Government Task Force on Non-EEA Workers in the Irish Fishing Fleet* (Dublin), December 2015, 15.

seen below, both fishers and employers have been highly critical of recent reforms.

B. Ireland's Anti-Trafficking Framework

Vulnerability to severe labour exploitation amongst migrant workers has been belatedly recognised by the Irish State in recent years, including through legislative initiatives designed to combat human trafficking and forced labour. The Criminal Law (Human Trafficking) Act 2008 ('2008 Act') is the centrepiece of Irish anti-trafficking legislation. Reflecting the approach taken in the international texts, the crime of trafficking under the 2008 Act has three constitutive elements—action, means and exploitation:

- the action of: procurement, recruitment, transportation, transport, harbouring or receipt of persons, providing accommodation or employment;
- by means of: the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability or 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 (including labour exploitation, sexual exploitation, the removal of organs or forced criminal activities engaged in for financial gain).

Under this definition, trafficking can take place entirely within Ireland: no cross-border element is required. 'Administrative Immigration Arrangements' supplement the primary legislation and give further detail of immigration-related support for non-EEA citizen victims. They provide for a 60-day period of recovery and reflection for victims; and a six-month temporary residence permit for victims who assist the authorities with investigation or prosecution.

'Labour exploitation' is specifically addressed in the 2008 Act. The narrow definition of labour exploitation contained in the Act includes subjecting a person to 'forced labour' (including begging); 'forcing him or her to render services to another' or the 'enslavement of the person or subjecting him or her to servitude or a similar condition or state'. 'Forced labour' was defined (for the first time) in 2013 as 'work or service which is exacted from a person under the menace of any penalty and for which the person has not offered himself or herself voluntarily'.⁵⁵ Unlike the approach taken in

⁵⁵Criminal Law (Human Trafficking) (Amendment) Act 2013, s 1 (c).

the UK in the Modern Slavery Act 2015, there are no separate specific offences of servitude and forced labour in Irish law, independent of the anti-trafficking regime; meaning that labour exploitation scenarios which do not satisfy the stringent three-part trafficking test of action-means-exploitation will not ground a prosecution. This is problematic from both a practical and a conceptual standpoint. As Coghlan and Wylie⁵⁶ argue in their empirically grounded research on trafficking for forced labour in Ireland, ‘Few cases ‘tick all the boxes’ of a rigid definition of trafficking, yet the exploitation of migrant workers is rife’. As Costello observes, the ‘distinct legal labels of ‘slavery’, ‘servitude’ and ‘forced labour’ are legal concepts embodying distinctive institutional forms of work relation’, whereas the focus on anti-trafficking measures introduces ‘a distinctive, potentially distortive’ focus on criminalisation, which obscures how the migration process and immigration law ‘create fertile conditions’ for forced labour and other forms of exploitation.⁵⁷

In legal terms, suspected victims of labour trafficking are treated very differently in Ireland to migrant workers who have been exposed to routine exploitation. Key practical benefits afforded to officially identified suspected victims of trafficking, for example, include permission to remain and work in Ireland and accommodation in the immediate aftermath of escaping exploitation.⁵⁸ Suspected victims of trafficking are referred to the Legal Aid Board, which provides basic legal advice (although not full legal representation) on seeking redress through the employment protection legislation.⁵⁹ The difference in treatment is particularly stark for exploited irregular migrant workers who, as explained in the previous section, will most likely be legally barred from enforcing employment rights.⁶⁰

⁵⁶D. Coghlan and G. Wylie, ‘Defining Trafficking/Denying Justice? Forced Labour in Ireland and the Consequences of Trafficking Discourse’ *supra* n 20.

⁵⁷C. Costello, ‘Migrants and Forced Labour: A Labour Law Response’, in *supra* n 4.

⁵⁸D. M. Doyle, C. Murphy, M. Murphy, P. Rojas-Coppari and R. J. Wechsler, “‘I Felt Like She Owns Me’’: Exploitation and Uncertainty in the Lives of Labour Trafficking Victims in Ireland’ *supra* n 8.

⁵⁹See <https://www.legalaidboard.ie/en/our-services/legal-aid-services/common-legal-problems/human-trafficking/> (last accessed 17 April 2019); also Immigrant Council of Ireland, *Asylum Seeking Victims of Human Trafficking in Ireland: Legal and Practical Challenges* *supra* n 39, 2.

⁶⁰J. Turek, ‘Human Security and Development Issues in Human Trafficking’ in Mary C. Burke (ed), *Human Trafficking: Interdisciplinary Perspectives* (New York: Routledge, 2013) 73–87; J. Fudge, ‘Modern Slavery, Unfree Labour and the Labour Market’ (2018) 27(4) *Social and Legal Studies* 414–434.

4. WORKERS' EXPERIENCES OF THE EMPLOYMENT PROTECTION FRAMEWORK: EXPLOITATION AND INEFFECTIVENESS

Our analysis draws on semi-structured interviews conducted with 23 people who had sought the assistance of the Migrant Rights Centre Ireland (MRCI) due to difficulties with their work. Trafficking indicators were identified by MRCI in the case of sixteen participants, with seven of these individuals going on to obtain official suspected victim of trafficking status. The interviews were arranged by MRCI and conducted on their premises, or at an alternative location nominated by the participant. Seventeen of the interviewees were female and had been engaged in domestic work. Interviews were also conducted with six male workers. Two of these interviewees worked in the services sector, with the other four participants employed in the fishing industry. The age range of the 23 participants varied from 19 to 55 years when they accessed the services of MRCI. Their countries of origin included Egypt, Ghana, India, Kenya, Malawi, Nigeria, Pakistan, South Africa, and the Philippines. All of the interviewees had left their exploitative situation by the time these interviews were conducted.

It must be acknowledged that the perspectives of these interviewees are not necessarily representative of the experiences of all migrant workers subjected to labour exploitation in Ireland. They are drawn primarily from two sectors—domestic work and fishing—which are acknowledged to be particularly precarious due to the physical isolation of workers and the practical difficulties of enforcing employment regulation. EU workers were not represented in our sample. Moreover, those who contact MRCI for assistance and rehabilitation may be more empowered, informed or 'systematically different from those who do not'.⁶¹ This research has not heard these 'more complex testimonies',⁶² but as the EU Fundamental Rights Agency (FRA) has noted in its research in this area, '[t]his approach is justified given the difficulty in reaching exploited workers, who often remain isolated and

⁶¹G. Tyldum and A. Brunovskis, 'Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking' (2005) 43(2) *International Migration* 17–34, 25; V. Mantouvalou, "'Am I Free Now?'" Overseas Domestic Workers in Slavery' *supra* n 9, 339.

⁶²European Union Agency for Fundamental Rights, *Protecting Migrant Workers From Exploitation in the EU: Boosting Workplace Inspections* *supra* n 1, 5. L. Agustin, 'Migrants in the Mistress's House: Other Voices in the 'Trafficking' Debate' (2005) 12(1) *Social Politics* 96–117, 106.

Table 1. Socio-demographic data of research participants

Nationality/ Country of Origin	Indicators of Trafficking for Labour Exploitation identified by MRCI	Official Suspected VOT Status Obtained with Assistance of MRCI	Employment Complaint Lodged With Assistance of MRCI	Compensation Awarded	Compensation Recovered
Pakistan	Yes	No	Yes	Yes	Not yet (case ongoing)
South Africa	Yes	No	Yes	Yes	No
Philippines	Yes	Yes	Unknown	Unknown	Unknown
Philippines	Yes	No	Yes	Yes	Accepted settlement
Nigeria	Yes	No	Yes	No—case did not proceed as employers had left jurisdiction	N/A
Nigeria	Yes	No	Yes	Yes	No
Philippines	No	N/A	N/A	N/A	N/A
Nigeria	Yes	Yes	Yes	No—case did not proceed as employers left jurisdiction	N/A
Philippines	No	No	N/A	N/A	N/A

Table 1. Continued

Nationality/ Country of Origin	Indicators of Trafficking for Labour Exploitation identified by MRCI	Official Suspected VOT Status Obtained with Assistance of MRCI	Employment Complaint Lodged With Assistance of MRCI	Compensation Awarded	Compensation Recovered
South Africa	Yes	No	No— settlement reached	N/A	N/A
Malawi	Yes	No	Yes	Yes	Not yet (efforts ongoing)
Kenya	Yes	Yes	No	N/A	N/A
South Africa	Yes	Yes	No	N/A	N/A
Philippines	Yes	Yes	No	N/A	N/A
South Africa	Yes	Yes	No	N/A	N/A
South Africa	Yes	Yes	No	N/A	N/A
India	Yes	No	No	N/A	N/A
Egypt	No	No	No	N/A	N/A
Egypt	No	No	No	N/A	N/A
Ghana	No	No	No	N/A	N/A
Egypt	No	No	No	N/A	N/A
Pakistan	Yes	No	Yes	Yes	No (case ongoing)

invisible.⁶³ In the specific Irish context, the WRC considers that ‘non-EU nationals represent a hidden and hard to reach population.’⁶⁴ As such, this study represents an important first step in understanding the perspectives and experiences of migrant workers in Ireland in respect of labour rights.

A. Working Conditions and Types of Employment Law Violations Experienced

The workers in our sample reported a variety of employment issues which would constitute violations of the relevant legislation in terms of employment;⁶⁵ working time;⁶⁶ minimum wage;⁶⁷ paid annual leave;⁶⁸ equality⁶⁹ and dismissal.⁷⁰ These issues were referred to by participants whose experiences fell legally within both the ‘severe’ and ‘routine’ categories outlined above, although work scenarios occurring at the severe end of the spectrum demonstrated particularly intense and prolonged violations. Overall, similar to migrant workers in other jurisdictions, the workers interviewed for this study ‘experienced excessive and irregular working hours, underpayment of wages, non-payment of compensation for overtime or weekend work, control and isolation, poor living conditions.’⁷¹ In this regard, the widespread abuse of migrant workers within the Irish fishing industry has attracted particular attention in recent years.⁷² The experiences reported by the migrant fishermen interviewed for this study reinforce the findings of the Guardian newspaper with regard to excessive working hours, insufficient rest periods, and payment well below the minimum wage.⁷³ Interviewees reported, for example, working 20 hour days.⁷⁴ Pay rate contraventions were also evident in these cases,⁷⁵ and annual leave was non-existent. As one participant

⁶³European Union Agency for Fundamental Rights, *Protecting Migrant Workers From Exploitation in the EU: Boosting Workplace Inspections* *supra* n 1, 5.

⁶⁴S. Arnold, S. Whelan and E. Quinn, *supra* n 48, 19.

⁶⁵Terms of Employment (Information) Acts 1994–2014.

⁶⁶Organisation of Working Time Act 1997.

⁶⁷National Minimum Wage Act 2000. (National Minimum Wage Order, 2007).

⁶⁸Organisation of Working Time Act 1997, s 19.

⁶⁹Employment Equality Acts 1998–2015.

⁷⁰Unfair Dismissal Acts 1997–2015; Minimum Notice and Terms of Employment Act 1973.

⁷¹N. Ollus, ‘Forced Flexibility and Exploitation: Experiences of Migrant workers in the Cleaning Industry’ (2016) 6(1) *Nordic Journal of Working Life Studies* 25–45, 30.

⁷²C. Murphy, ‘Tackling Vulnerability to Labour Exploitation Through Regulation: The Case of Migrant Fishermen in Ireland’ *supra* n 1.

⁷³*ibid.*

⁷⁴Male, Ghana, T 22; Male, Egypt, T 23.

⁷⁵Male, Egypt, T 23.

observed, 'There is no any holiday pay in fishing, I've never seen one.'⁷⁶ Even after the introduction of the 'Atypical Working Scheme for non-EEA crew in the Fishing Fleet' in 2016, which sought to formalise and regularise the workers' immigration and employment status, there was consensus among those who were regularly in contact with these workers that the conditions had not improved.⁷⁷ In fact, one participant in our study noted that after obtaining a work permit: 'the payment reduced dramatically.'⁷⁸

Exploitative working conditions were not reserved for migrant workers in the fishing sector. Little is known about the exploitation of migrant workers in domestic households in Ireland⁷⁹ but the interviewees in this study revealed that it too consisted of 'hard work and long working hours, without a work schedule or holidays.'⁸⁰ The level of exploitation was captured by one woman whose tasks involved '[t]aking care of the children and taking care of the house. And doing everything, washing and all. Without any break, even when I am sick, I still be working.'⁸¹ She was not the only interviewee to be deprived of proper rest days. Numerous participants reported working seven days a week with no rest days or holidays.⁸² In this context, it is not surprising that these workers were both physically and emotionally exhausted. One interviewee recalled that he 'worked non-stop for four days without even sleeping' and that 'he was exhausted, he was really, really tired.'⁸³ Another interviewee summed it up succinctly, the 'work was too much. No day off, nothing for so many years.'⁸⁴ Furthermore, there were also instances where workers 'had to share rooms with the children they looked after.'⁸⁵ One of the domestic workers reported, for instance, that she 'worked 24 hours with the kids' and was required to 'sleep with the youngest one.'⁸⁶

⁷⁶ Male, Ghana, T 22.

⁷⁷ C. Murphy, 'Tackling Vulnerability to Labour Exploitation Through Regulation: The Case of Migrant Fishermen in Ireland' *supra* n 1.

⁷⁸ Male, Egypt, T 21.

⁷⁹ Although see C. Murphy, 'The Enduring Vulnerability of Migrant Domestic Workers in Europe' *supra* n 6.

⁸⁰ D. Angeli, 'Migrant Domestic Workers and Human Trafficking in Greece: Expanding the Narrative' (2017) 15(2) *Journal of Immigrant and Refugee Studies* 187–203, 191.

⁸¹ Female, Nigeria, T 4.

⁸² Male, India, T 11; Female, Pakistan, T 9; Female, Malawi, T 7.

⁸³ Female, Nigeria, T 3.

⁸⁴ Female, South Africa, T 18.

⁸⁵ European Union Agency for Fundamental Rights, *Out of Sight: Migrant Women Exploited in Domestic Work* (Vienna: EUFRA, 2018) 5.

⁸⁶ Male, India, T 11.

Where severe forms of labour exploitation exist, ‘some form of coercion, or more commonly deception, is likely to be present’⁸⁷ and many of the workers in this study found the conditions to be different to what they had initially anticipated or had been promised. Although coercion or deception is often considered to be one of the defining distinguishing features of forced labour and trafficking,⁸⁸ the interviews demonstrated that these phenomena were not confined to those who had been formally identified as suspected victims of trafficking. One worker recalled that ‘I didn’t realise that that was going to be wow, six days of work, a minimum of 12 to 14 hours each day.’⁸⁹ Another noted that her job had been labelled ‘au pair’ even though she worked 12–14 hours per day.⁹⁰ One of the fishers interviewed noted that he had been promised a position on a particular type of vessel, which was reneged on once he arrived in the country.⁹¹

Another commonly reported problem, across the employment sectors and spanning the continuum of exploitation, related to payment. At the extreme end of the continuum, some workers were not paid at all.⁹² In 2016, the Low Pay Commission reported that ‘There is some evidence to suggest that illegal payment of sub-minimum wages occurs in Ireland and that migrant workers are particularly susceptible.’⁹³ This was borne out in this study by the interviewees, many of whom appeared to receive substantially less remuneration than they were legally entitled to under minimum wage legislation. One of the South African domestic workers noted that ‘She said she’d pay me €400 a month but I didn’t know em, as someone who is not from Ireland. I didn’t know what the minimum wage, Ireland was.’⁹⁴ Another participant also reported that ‘[i]n two and a half years, he got eh €5000 only.’⁹⁵ As mentioned above, in the fishing sector, adequate

⁸⁷J. Davies, ‘From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry’ *supra* n 8.

⁸⁸See, for example, Article 3(a) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime 2000; Criminal Law (Human Trafficking) Act 2008, s 4.

⁸⁹Female, South Africa, T 2.

⁹⁰Female, Nigeria, T 1.

⁹¹Male, Egypt, T 20.

⁹²Female, Nigeria, T 3; Female, Nigeria, T 1.

⁹³Low Pay Commission, *Recommendations for the National Minimum Wage* (Dublin: Low Pay Commission), July 2016, 46.

⁹⁴Female, South Africa, T 2.

⁹⁵Male, India, T 11.

payment seemed to become *more* of a problem after attempted government reforms, with the move from the share fisher model to employee rates. Employers interpreted their obligation as being to pay minimum wage for a standard working week, notwithstanding the number of hours worked; as one man remarked: 'it has decreased [our] position in terms of money because it's impossible to leave really. Gives me 350 per week it's really difficult.'⁹⁶

B. Means of Control: The Central Role of Deportability and Economic Dependency

It is well established that '[e]mployers can exert substantial control over workers through threats to their economic livelihood, and threats of deportation, if workers do not comply with the employers demands.'⁹⁷ In particular, as de Genova argues, 'it is deportability, and not deportation *per se*, that has historically rendered undocumented migrant labour a distinctly disposable commodity.'⁹⁸ As one woman remarked:

I know there are so many people who are in exploitation but they are scared to come out because there's not enough support. Some of them are illegal and they think that if they maybe come out they are going to be deported.⁹⁹

However, similar to the findings of other research, in the experience of those interviewed for this study, the 'threat of denunciation and deportation operated in both direct and indirect ways as a disciplining device in exploitative working relationships.'¹⁰⁰ One worker directly threatened was 'afraid . . . because they said I'm going to be deported',¹⁰¹ while another interviewee was explicitly threatened with being sent back to her country of origin after three years in Ireland.¹⁰² In others cases, workers had this fear of deportation instilled by the employer and felt that they had no choice but do whatever

⁹⁶Male, Egypt, T 21.

⁹⁷A. Quayson and A. Arhin (eds), *Labour Migration, Human Trafficking and Multinational Corporations: The Commodification of Illicit Flows* (New York: Routledge, 2012) 130.

⁹⁸N. De Genova, 'Migrant 'Illegality' and Deportability in Everyday Life' (2002) 31(1) *Annual Review of Anthropology* 419–447, 438.

⁹⁹Female, Malawi, T 7.

¹⁰⁰H. Lewis, P. Dwyer, S. Hodgkinson and L. Waite, *Precarious Lives: Forced Labour, Exploitation and Asylum* (Bristol: Bristol University Press, 2014) 100.

¹⁰¹Female, Philippines, T 13.

¹⁰²Female, South Africa, T 12.

they instructed. This fear ‘served to discipline workers not to challenge seriously exploitative labour relations’.¹⁰³ As one interviewee observed:

You know some people, if someone, if they bring in the country they have already put fear in you that if you talk to people about your situation they are going to deport you. They put that fear in you, you can’t talk to anybody. Even, I can’t talk to her. I can’t ask her any question. Whatever she has told me to do, that’s what I have to do.¹⁰⁴

Such threats of ‘deportation can lead to a situation where the migrant is not physically constrained to leave the worksite but subjectively perceives a lack of freedom of movement’.¹⁰⁵

Fears of not being paid for work done or of losing one’s job were also exploited by employers in the experiences of almost all the interviewees. The withholding of wages was utilised as a powerful means of control.¹⁰⁶ One woman pointed out:

She said well you can go, but I’m not going to pay you for the time that you’ve been here. That was almost a fourth week. It was almost a month. Then for that reason I felt that well maybe I should, I’m just being impatient, maybe I should just stay and things will get better maybe because what’s the point? It’s better for me to stay and be paid.

Similarly, workers reported that if they sought to pursue employment violations they would likely lose their job. The subtlety of this control technique was reflected in the comments of an interviewee working in the fishing industry: ‘So they are not restricting you [from talking to labour authorities] but you as a clever guy restrict yourself from that and save your job’.¹⁰⁷ Another fisher noted that because of the highly networked nature of the fishing community in Ireland, workers are forced to stay in their exploitative situations: they are worried that ‘they will not find somewhere else to work’.¹⁰⁸ These fishermen, akin to workers in other sectors and jurisdictions, ‘fear losing the job in which they are exploited’.¹⁰⁹

¹⁰³H. Lewis, P. Dwyer, S. Hodkinson and L. Waite, *Precarious Lives: Forced Labour*, *supra* note 100, 100.

¹⁰⁴Female, Nigeria, T 1.

¹⁰⁵B. Andrees, *Forced Labour and Trafficking in Europe: How People are Trapped in, Live Through and Come Out* (Geneva: ILO Working Paper 57, 2008) 25.

¹⁰⁶Male, Ghana, T 22. Female, Philippines, T 19.

¹⁰⁷Male, Ghana, T 22.

¹⁰⁸Male, Egypt, T 23.

¹⁰⁹N. Ollus, ‘Forced Flexibility and Exploitation: Experiences of Migrant Workers in the Cleaning Industry’ *supra* n 71, 36.

Other forms of control included confiscating passports and control over movement and activities.¹¹⁰ Unlike the threats of deportation and job loss which were experienced by most interviewees, this was a particular feature of severely exploitative work situations. One employer asked the domestic worker: 'If I can trust you with my own house which has so much in it, why wouldn't you trust me with just your passport?' One worker said, for example, that she 'was not allowed to call, visit, or talk to anyone',¹¹¹ while in another case, access to technology was completely denied: 'I was not allowed to use the, even if the family had four computers, I was not allowed to use'.¹¹² This was further compounded by a 'lack of social networks, and of local language knowledge'¹¹³ and 'limited or no freedom of movement outside the workplace'.¹¹⁴ Numerous interviewees described not being allowed to go out without the employer.¹¹⁵ In one instance, an interviewee described the presence of CCTV cameras both inside and outside of their place of employment: '[e]very time the boss is watching for the camera, so I think what I can do'.¹¹⁶ All the participants felt that they had 'no real and acceptable alternative' but to submit to the constant monitoring, surveillance and abuse.¹¹⁷ As one interviewee put it, 'I felt trapped ... I had no connection to the outside world'.¹¹⁸ Conversely, the empowering feeling of being able to leave the situation and obtain another job was noted by a fisher who had been in Ireland for 10 years.¹¹⁹

In certain sectors, employers provide 'accommodation and food so a migrant worker feels that if they left the job they would be left hungry and homeless'.¹²⁰ This was of particular concern to the migrant fishers interviewed

¹¹⁰D. Bélanger, 'Labor Migration and Trafficking Among Vietnamese Migrants in Asia' (2014) 653 *The American Academy of Political & Social Science: AAPSS* 87–106, 88; M. Potter and J. Hamilton, 'Picking on Vulnerable Migrants: Precarity and the Mushroom Industry in Northern Ireland' *supra* n 2, 397.

¹¹¹Female, South Africa, T 12.

¹¹²Female, South Africa, T 2.

¹¹³B. C. Magalhaes, 'Mind the Protection (Policy) Gap: Trafficking and Labor Exploitation in Migrant Domestic Work in Belgium' (2017) 15(2) *Journal of Immigrant and Refugee Studies* 122–139, 122.

¹¹⁴D. Bélanger, 'Labor Migration and Trafficking Among Vietnamese Migrants in Asia' *supra* n 110, 88. M. Potter and J. Hamilton, 'Picking on Vulnerable Migrants: Precarity and the Mushroom Industry in Northern Ireland' *supra* n 2, 397.

¹¹⁵Female, Philippines, T 13; Female, Philippines, T 19.

¹¹⁶Male, India, T 10.

¹¹⁷V. Stoyanova, 'The Crisis of a Definition: Human Trafficking in Bulgarian Law' (2013) 5(1) *Amsterdam Law Forum* 64–79, 66.

¹¹⁸Female, South Africa, T 2.

¹¹⁹Male, Ghana, T 22.

¹²⁰Migrant Rights Centre Ireland, *Accessing Redress for Workplace Exploitation: The Experience of Migrant Workers supra* n 34, 17.

in this study.¹²¹ One fisher noted that ‘Yeah, we depend on the employer for food, clothes and safety, our wellbeing, gloves for work.’¹²² These participants were also subjected to racial and verbal abuse on fishing vessels. The ‘connection between exploitation and racism is complex,’¹²³ but certain employers were reported to be ‘aggressive’ and ‘very racist.’¹²⁴ One interviewee reported that the employer became angry when Muslim fishers said that they did not eat pork, for example.¹²⁵ This interviewee stated: ‘I used to see some Muslim guys, like be on a trip four, five days, eight days trip eating biscuits, bread and butter drinking more tea to fill their belly.’¹²⁶ This type of psychological abuse was not limited to the fishing industry. A domestic worker, for instance, reported that her employer did not trust one of her colleagues ‘because she is Romanian.’¹²⁷ Of course, it is not uncommon that ‘coming from a particular national or ethnic background can constitute grounds for discrimination,’¹²⁸ but the lack of apparent physical coercion in these cases perhaps ‘points to the need to place the emphasis on the element of exploitation itself, rather than the means of coercion.’¹²⁹

C. Barriers to Reporting Labour Exploitation

In 2018, the EU FRA pointed out that a key barrier to migrant workers seeking support from the authorities is simply that ‘workers may not be aware of their rights.’¹³⁰ This was a common feature of the interviews across the categories. Many interviewees had little or no knowledge of employment rights or the immigration system in Ireland on arrival.¹³¹ The participants were forthright about their lack of knowledge, with one stating: ‘to be honest, when I came here there was no information. I didn’t even know

¹²¹For an NGO perspective, see Migrant Rights Centre Ireland, *Left High and Dry: The Experience of Migrant Workers in the Irish Fishing Industry* supra n 2.

¹²²Male, Ghana, T 22.

¹²³Migrant Rights Centre Ireland, *Accessing Redress for Workplace Exploitation: The Experience of Migrant Workers*, supra n 120, 19.

¹²⁴Male, Egypt, T 23.

¹²⁵Male, Ghana, T 22.

¹²⁶Male, Ghana, T 22.

¹²⁷Female, South Africa, T 2.

¹²⁸M. R. Berket, ‘Labour Exploitation and Trafficking for Labour Exploitation- Trends and Challenges for Policy-Making’ (2015) 16 *ERA Forum* 359–377, 366.

¹²⁹*Ibid.*, 364.

¹³⁰European Union Agency for Fundamental Rights, *Out of Sight: Migrant Women Exploited in Domestic Work* supra n 85, 1.

¹³¹Female, Philippines, T 13.

anything about visa, about legislation.¹³² None of the participants reported receiving any information about their employment rights either before arriving in Ireland or on arrival. Some noted that 'illiteracy' was a particular problem for some workers, who signed documents and contracts without being aware of the terms.¹³³

Skrivankova notes that 'the NGO sector plays a vital intermediary role engaging victims in the first instance and empowering them to access mechanisms to achieve justice'.¹³⁴ The interviews revealed a working relationship between the police, the employment enforcement authorities and the NGO in question (MRCI), which helped to ameliorate the information gap for some workers. Similar to other jurisdictions, 'civil society groups have played a crucial role in the development and implementation of the right to compensation'¹³⁵ and the participants in this study were only enabled to report their issues to the WRC and seek redress through the advice and support of MRCI.¹³⁶ Tellingly, all participants reported that it was MRCI (rather than labour inspectors or any other state body) who first gave them information on their employment rights and encouraged them to seek redress. As one interviewee noted:

It's only when I came out of the situation . . . I came to know everything about the employee rights, about the immigration. The MRCI that make me to know everything. To know about employment issue.¹³⁷

In some cases, the immigration police had advised the victim to contact MRCI,¹³⁸ and vice versa.¹³⁹ One participant reported that she had come into contact with the labour inspectorate through Sunday meetings organised by the NGO, at which the inspectors were giving information on work-related rights. These informal contacts are clearly valuable; however, a more planned and formal collaboration between the Gardaí, labour

¹³²Female, Nigeria, T 3.

¹³³Male, Ghana, T 22 and Male, Egypt, T 21.

¹³⁴R. Mooney, *Severe Forms of Labour Exploitation: Supporting Victims of Severe Forms of Labour Exploitation in Having Access to Justice in EU Member States* (Vienna: FRANET, 2014) 46.

¹³⁵Office for Democratic Institutions and Human Rights, *Compensation for Trafficking and Exploited Persons in the OSCE Region* (Warsaw: OSCE, 2008) 11.

¹³⁶Female, Pakistan, T 9.

¹³⁷Female, Nigeria, T 1.

¹³⁸Female, Nigeria, T 1.

¹³⁹Female, Philippines, T 13.

inspectors, NGOs and the immigration authorities would help to ensure that migrant workers feel comfortable reporting poor working conditions, breaches of employment law and other offences irrespective of their legal status or lack thereof. At present, in contrast, MRCI has expressed the view that joint inspections of the WRC and the Gardaí (usually undertaken where there is a suspected risk of trafficking) may actually ‘undermine the confidence of a non-EU national who is working illegally to report an exploitative employment situation to a WRC Inspector’.¹⁴⁰ Such a multi-agency strategy would, thus, require the authorities to identify all victims of labour exploitation without discrimination, regardless of their immigration status or nationality.¹⁴¹ In practice, this would require a ‘fire-wall’ between labour inspectors and immigration authorities, in line with international best practice.¹⁴²

The level of control which employers exercised over their passage to Ireland, their initial entry, and their immigration status also appeared to act as a barrier to reporting exploitation. In one case, the employer originally told the worker that she and some other workers would be going to Britain but then changed this to Ireland.¹⁴³ In the majority of cases, the employers handled immigration visas issues and the employees had little input. This is encapsulated in the words of one participant: ‘when they brought me here they told me that they are going to do everything for me. I didn’t know I was undocumented’.¹⁴⁴ Another participant reported that on entering the country and obtaining the visa, the employer presented her passport on her behalf, allowing him to maintain control of the passports and the interaction with the immigration authorities. She wondered, ‘Why you didn’t ask the owner of the passport to show their passport?’ She felt that the dealings with the authorities were ‘very easy’ for him ‘because he’s Irish’.¹⁴⁵ One employer also insisted on accompanying the worker each time she went to report to

¹⁴⁰S. Arnold, S. Whelan and E. Quinn, *supra* n 48, 33.

¹⁴¹Immigrant Council of Ireland, *Submission to the US State Department Trafficking in Persons Report 2017* *supra* n 39, 3.

¹⁴²European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011) 11; G. Noll, ‘The Laws of Undocumented Migration’ (2010) 12 *European Journal of Migration and Law* 143–147. In respect of forced labour, see Article 2(c), International Labour Organisation *Protocol of 2014 to the Forced Labour Convention, 1930* (Entry into force: 09 Nov 2016) Adoption: Geneva, 103rd ILC session (11 Jun 2014).

¹⁴³Female, Kenya, T 6.

¹⁴⁴Female, Malawi, T 7.

¹⁴⁵Female, Philippines, T 8.

the immigration authorities, meaning that she felt that she could not speak to them openly.¹⁴⁶ This suggests that it would be useful for Ireland to adopt the practice of other jurisdictions whereby workers are interviewed in private, on arrival and periodically during the duration of their work permit, to advise them of rights and entitlements and of whom to contact in case of labour rights issues or other difficulties.¹⁴⁷

The impact of the means of control—particularly threats related to immigration status and physical proximity to the employer—on the ability of the worker to report severe labour exploitation to the police is starkly illustrated in the case of one of the participants. Here, the police visited the house in which she worked for immigration-related reasons and asked the victim questions about her immigration status. The employer instructed the victim to lie and tell the police that they were related—which she did. The police left the house without further action. When the victim subsequently escaped her situation, she met the same police officers again. She states: ‘They said ‘we sensed that there was, something was going on, but we didn’t figure out what was it’’. The participant’s view is that they should have talked to her in private, away from her employer.¹⁴⁸ Another interviewee reported that the police had visited his workplace to check on a broken window, but that ‘the manager say to me I can’t talk to the police as I have no visa’.¹⁴⁹

D. Experiences of Labour Inspections

The ILO describes labour inspections as a ‘core function’¹⁵⁰ of the labour administration system: labour inspectorates supervise the enforcement of legal provisions relating to workers’ rights, while also providing information, advice, and training.¹⁵¹ In its multi-jurisdiction study, the EU FRA shows that ‘in many cases labour inspectors will be better placed to uncover exploitation than the police because they understand labour market operations’.¹⁵²

¹⁴⁶Female, Malawi, T 7.

¹⁴⁷S. Mullally and C. Murphy, ‘Migrant Domestic Workers in the UK: Enacting Exemptions, Exclusions, and Rights’ (2014) 36 *Human Rights Quarterly* 397–427.

¹⁴⁸Female, Malawi, T 7.

¹⁴⁹Male, India, T 10.

¹⁵⁰International Labour Organisation, *Labour Administration and Labour Inspection*, Report V, International Labour Conference, 100th Session (Geneva: ILO, 2011) 4.

¹⁵¹*Ibid.*, 59.

¹⁵²K. Skrivankova, *Forced Labour in the United Kingdom* (York: Joseph Rowntree Foundation, June 2014) 13.

The WRC is the main labour inspection body in Ireland and has identified certain sectors such as car washes, nail bars and the fishing industry as areas of special interest for targeted inspections.¹⁵³ 2,741 unannounced inspections out of a total of 4,750 inspections were conducted by the WRC in 2017 across all industrial sectors, including agriculture, construction, contract cleaning, domestic work, electrical, equine, fisheries, food and drink, hair and beauty, health, nursing and childcare, hotel, manufacturing, professional services, security, transport, wholesale and retail and other sectors.¹⁵⁴ There was a further 6 per cent increase in inspections during 2018, consisting of over 5,000 inspections.¹⁵⁵ However, in this sample, inspections were rare. The present study supports the findings of the EU FRA that workplace inspections are ‘virtually non-existent in the domestic work sector’, and that ‘domestic workers do not experience workplace inspections’.¹⁵⁶ None of the domestic workers in our sample were identified through the work of the labour inspectorate, nor did any of them report interaction with the labour enforcement machinery until after they had escaped their exploitative situation.

Moreover, the interviews show that even where workers came into contact with labour inspectors, the method of inspection used is inadequate to uncover evidence of exploitation of migrant workers, whether it be severe or routine. The fishers in our sample had some limited experience of inspections, which largely appeared ineffective. The workers were unsure about the nature of the inspections being conducted and the identity of the state body undertaking these inspections, but one participant recalled their *modus operandi*:

yes, there has been an inspection, only one, eh since he was working on the boat. Em, they came on the boat, they ask him how many hours he works, if he gets any rest breaks, if he eats properly, if he sleeps properly, all this kind of things.¹⁵⁷

The WRC is empowered to enter fishing vessels by virtue of the Workplace Commissions Act 2015, but had scant experience of doing so prior to the adoption of the ‘Atypical Working Scheme’ in 2016.¹⁵⁸ Since the Scheme

¹⁵³ Workplace Relations Commission, *Annual Report 2017* (Dublin: WRC, 2018) 32.

¹⁵⁴ *Ibid.*

¹⁵⁵ Workplace Relations Commission, *Work Programme* (Dublin: WRC, 2019) 7.

¹⁵⁶ European Union Agency For Fundamental Rights, *Protecting Migrant Workers From Exploitation in the EU: Boosting Workplace Inspections supra* n 1, 18.

¹⁵⁷ Male, Egypt, T 21.

¹⁵⁸ C. Murphy, ‘Tackling Vulnerability to Labour Exploitation Through Regulation: The Case of Migrant Fishermen in Ireland’ *supra* n 1.

was adopted, the WRC has inspected over 95% of the relevant vessels.¹⁵⁹ However, the inspection work of the WRC is limited both in scope and method. Due to a fragmented enforcement regime for the fishing sector, the WRC has jurisdiction to inspect documents relating to working time, but not those relating to rest periods.¹⁶⁰ In addition, the WRC does not have jurisdiction to directly assess the living conditions of migrant workers (which also belongs to the Marine Survey Office), or investigate situations of harassment or discrimination which go beyond the statutory functions of the WRC. In addition, the WRC's method of inspection is largely based on records kept (or not kept, as the case may be) by the vessel owner.¹⁶¹ Crew members are also interviewed (where possible, in private away from the vessel), and the WRC also carries out surveillance of relevant vessels and parties.¹⁶² However, records, interviews and surveillance on land may not give an accurate picture of what is actually happening on the vessel out at sea. This is particularly the case where records are very deficient; or where fishers have poor English and no interpreter is provided. Identifying the actual crew members of the vessel when boarding at harbours can be problematic, as can the lack of knowledge about when a particular boat may land.¹⁶³ The next phase of the WRC inspections will involve inspections at sea,¹⁶⁴ which may help to address some of these issues. However, despite planned improvements to the inspection process, fundamental issues remain, as encapsulated in the perception of one interviewee that the inspectors' main aim was to uncover illegal immigration rather than violations of workers' rights. This worker's key recommendation for reform was that there would be more of a focus on employment conditions and the health of the workers.¹⁶⁵

¹⁵⁹ Workplace Relations Commission, *Report on WRC Enforcement of the Atypical Worker Permission Scheme in the Irish Sea Fishing Fleet* (Dublin: WRC June, 2017) 3.

¹⁶⁰ The Marine Survey Office is responsible for enforcing legislation relating to the rest periods and maximum working time provisions for sea fishermen. European Communities (Workers on Board Sea-Going Fishing Vessels) (Organisation of Working Time) Regulations 2003 (S.I. No. 709/2003). The Memorandum of Understanding specifically states (at 5): 'WRC inspectors are not authorised officers under the legislation and have no role in its enforcement.'

¹⁶¹ Workplace Relations Commission, *Annual Report* (Dublin: WRC, 2016) 24.

¹⁶² *Ibid.*

¹⁶³ *Atypical Permission Scheme for non-EEA Workers on Irish Fishing Vessels: Report of the Risk Profiling and Inspection Group* (October 2016) 10–11.

¹⁶⁴ C. Murphy, 'Tackling Vulnerability to Labour Exploitation Through Regulation: The Case of Migrant Fishermen in Ireland' *supra* n 4.

¹⁶⁵ Male, Ghana, T22.

The EU FRA found that ‘employers have developed quite extensive strategies to deal with inspections and to cover up severe violations of labour laws on working conditions’,¹⁶⁶ but it appears from our research that these strategies did not need to be particularly elaborate to conceal labour violations from inspectors. The employees in question on the inspected vessels simply did not want to ‘come forward during inspections’ due to ‘fear of personal consequences, as well as distrust in the capabilities and capacities of inspection and monitoring authorities.’¹⁶⁷ One participant noted, for instance, that ‘when the inspection came, he had to lie’ and that he ‘didn’t feel to tell them the truth right on the boat while the employer was upstairs’, with another noting that the skipper would be ‘standing there’ during inspections.¹⁶⁸ Another interviewee also remarked that his employer would not be pleased if he spoke freely with representatives from labour unions: ‘he wouldn’t be happy anyway, I know that.’¹⁶⁹ In one case, the worker was not sure what type of inspector had been on the boat, but the inspector in question ‘only talked to the employer.’¹⁷⁰ In another case, there was no interpreter present,¹⁷¹ consistent with the fact that the WRC does not employ interpreters to assist them with their work.

In terms of suggested changes which might improve the inspection system, one worker noted that the inspections would only be effective if inspectors could guarantee workers that they would not lose their job.¹⁷² Another had concerns that the inspector would tell the employer if he reported problems—for him, workers should be facilitated to easily make anonymous complaints.¹⁷³ Despite the overall lack of inclusion in and understanding of the inspection process among those who had witnessed it, some could see the merit in these inspections from a regulatory perspective: ‘the inspection is, em, was a good way to understand who was working on the board and to understand exactly, not to understand exactly how the boat works, but to know who is there if they have a visa, if they have a safe pass, or the documentation.’¹⁷⁴

¹⁶⁶European Union Agency For Fundamental Rights, *Protecting Migrant Workers From Exploitation in the EU: Boosting Workplace Inspections*, *supra* n 156, 7.

¹⁶⁷*Ibid* 21–22.

¹⁶⁸Male, Egypt, T 21.

¹⁶⁹Male, Egypt, T 23.

¹⁷⁰Male, Egypt, T 20.

¹⁷¹Male, Egypt, T 20.

¹⁷²Male, Egypt, T 23.

¹⁷³Male, Egypt, T 21.

¹⁷⁴Male, Egypt, T 20.

E. Seeking Redress

In the case of eight participants, MRCI had assisted them to seek redress through the employment enforcement machinery. However, the challenges involved in seeking redress are borne out in the experiences of the participants. The process was described as 'slow' by four interviewees.¹⁷⁵ Overall, the enforcement of employment rights for undocumented workers and difficulties with enforcing awards were the two most common issues which affected participants who had experienced both severe and routine labour exploitation. In relation to undocumented workers, many of those interviewed appear to have been constantly in and out of 'legality', with the necessary permissions in place for some of the period during which they had worked and been exploited. The legal uncertainty as to the enforceability of employment rights for undocumented workers was directly reflected in the varying experiences of the participants. One individual stated that she had been through a process with the WRC who had told her 'we are going to help you from the time you are a student, work as a student up to the time you were into only one year so.'¹⁷⁶ However, other participants were awarded money even though completely undocumented.¹⁷⁷ Although it was sometimes difficult to ascertain the precise sequence of events in the cases involving the interviewees, victim of trafficking status did not appear to bear weight within tribunal proceedings on this question of enforceability.¹⁷⁸ Finally, it is well-known that serious issues relating to the enforceability of employment claims in cases involving diplomatic immunity, and this was an issue which blocked compensation for one worker we interviewed.¹⁷⁹

Where the enforceability hurdle was overcome and compensation awarded, there were severe difficulties in obtaining the sum owed from the employer. In Ireland, as in other countries, 'efforts to enforce court-ordered compensation are lacking and if the offenders do not comply with orders, there is no alternative pathway for the victim to obtain compensation'.¹⁸⁰ As one interviewee put it, '[e]ven though when you get that court order, there

¹⁷⁵Female, Nigeria, T 1; Female, South Africa, T 2; Female, South Africa, T 5; Female, Philippines, T 19.

¹⁷⁶Female, South Africa, T 5.

¹⁷⁷Female, Pakistan, T 9; Female, Malawi, T 7.

¹⁷⁸Female, South Africa, T 5.

¹⁷⁹Female, Philippines, T 19.

¹⁸⁰United Nations, *Providing Effective Remedies for Victims of Trafficking in Persons* (New York: ICAT, Issue Paper 2016) 19.

is no support again to get exactly what you want'.¹⁸¹ She was not the only participant who pointed to the enforcement difficulties. Another worker stated that '[w]hen she gets the letter that says oh you owe [victim name] this much em, you have to pay her within this time and then she chooses to ignore the letter and nothing. If she didn't do it, then they're, there was supposed to be some sort of consequences'.¹⁸² One chef, whose compensation award of €92,634.42 was upheld by the Irish Supreme Court, is 'still waiting for this amount'.¹⁸³ Although two of the participants received settlements, none of the workers interviewed appeared to have successfully received the full amount owed to them (at the time of writing), even if awarded by a tribunal or court. In one situation, the case was now closed because 'they couldn't get in touch with employer',¹⁸⁴ while in another the interviewee was awarded compensation by the Labour Court but 'did not receive the money . . . because the person who employed me left the country'.¹⁸⁵ Other employers had simply decided not to pay the award.¹⁸⁶ This, again, is not just an Irish phenomenon. The 'actual receipt of a compensation payment' is also 'extremely rare' in other jurisdictions.¹⁸⁷ In respect of the specific category of victims of labour trafficking, Irish anti-trafficking policy aims 'to ensure that all victims are aware of and have access to existing compensation schemes' and that 'guides for victims contain information outlining rights to compensation'.¹⁸⁸ Although MRCI has been successful in helping labour trafficking victims obtain recompense through the Labour Court for breaches of their employment rights, these awards constitute repayment of some of the monies owed as opposed to compensation for criminal damages incurred. To date, no labour trafficking victim has accessed the existing criminal compensation mechanisms in Ireland and significant barriers persist.¹⁸⁹ This is despite the reality that receiving compensation is not only important

¹⁸¹Female, Nigeria, T 4.

¹⁸²Female, South Africa, T 2.

¹⁸³Male, India, T 11.

¹⁸⁴Female, Nigeria, T 1.

¹⁸⁵Female, Nigeria, T 4.

¹⁸⁶Female, Malawi, T 7.

¹⁸⁷K. Thompson and A. Jernow, *Compensation for Trafficked and Exploited Persons in the OSCE Region* (Warsaw: OSCE, 2008) 10.

¹⁸⁸Department of Justice and Equality (DJE), *Second National Action Plan to Prevent and Combat Human Trafficking* (Dublin: DJE, 2016) 87.

¹⁸⁹The Group of Experts on Action against Trafficking in Human Beings, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings in Ireland: Second Evaluation Round supra* n 39, 45–6.

in terms of the financial component that assists trafficking victims in rebuilding their lives, but also in terms of alleviating practical concerns such as obtaining appropriate long-term accommodation.¹⁹⁰

Some participants who had experienced employment tribunals and/or the Labour Court reported feelings of anger, fear and confusion arising from their interaction with the system.¹⁹¹ One interviewee—who had been identified as a victim of trafficking—described her experiences in particular depth. She explained that it took a lot of confidence to be able to go through the claim process ‘and face employer in court who was, was ready to jump across the commissioners table in, in choke you’.¹⁹² She reported that the employer attempted to intimidate her during the hearing by stepping on the strap of her bag, accused her of stealing and denied that the employee had worked for her at all. She felt frustrated with both the difficulties involved in obtaining documentary or witness evidence (especially as a domestic worker living in the employer’s home),¹⁹³ and the extent of the burden of proof which she felt was on the claimant:

First hearing, the commissioner said there wasn’t enough evidence, need more. I just felt it’s so unfair that someone does something this unfair to you and then you continue to be the one that is, who is not bringing enough.

Overall, although her evidence was found to be ‘reliable and credible’, she was ‘terrified’ by the ‘whole process’. She ‘didn’t know what the setting would be like’ (although she had been briefed by MRCI) and found the courts difficult to understand. In particular, it was difficult ‘when they were just reading through very technical stuff that I had no understanding of’. She suggested that it would make it easier for those seeking redress if there was ‘some sort of orientation or induction of some sort to say this is what to expect . . . Or even if, for example if I had seen even a video . . . Showing me what the actual setting would be like and what happens, people debating’.¹⁹⁴

5. CONCLUSION

This article has explored how migrant workers subjected to severe and routine exploitation experience the Irish labour law framework in practice,

¹⁹⁰Female, South Africa, T 14.

¹⁹¹Female, South Africa, T 2.

¹⁹²Female, South Africa, T 2.

¹⁹³Female, South Africa, T 2.

¹⁹⁴Female, South Africa, T 2.

drawing on interviews with 23 workers together with scholarly literature, legal analysis and policy documents. From a legal perspective, the participants' situations reflected a continuum of exploitation, from relatively minor employment violations in some cases, to forced labour and trafficking in others. The treatment endured by victims of trafficking was particularly severe: common features of these situations were that individuals were physically deprived of liberty, had travel and personal documents seized and received little or no payment for work performed. However, overall, the precarity caused by deportability, together with the overlapping issue of economic dependence, were the central common elements of the broader context of the work relationship for *all* interviewees. This precarity and dependence was utilised by employers to consolidate relations of subordination and deter communication with criminal or labour enforcement authorities. The study thus supports previous work (in particular, that of Mantouvalou and Anderson) which insists that vulnerability to exploitation is, in part, created by a person's irregular or precarious migration status.

These empirical findings also enhance the existing theoretical literature by reinforcing the case against a simplistic understanding of labour exploitation, as neatly summarised by Anderson and Andrisajevic:

'Whether migrant or not, workers cannot be divided into two entirely separate and distinct groups - those who are trafficked involuntarily into the misery of slavery-like conditions in an illegal or unregulated economic sector, and those who voluntarily and legally work in the happy and protected world of the formal economy. Violence, confinement, coercion, deception and exploitation can and do occur within both legally regulated and irregular systems of work, and within legal and illegal systems of migration.'¹⁹⁵

Far from enshrining this type of sophisticated understanding, however, the Irish system is dogged by a reliance on simple binary oppositions (legal/undocumented; victim of trafficking/worker; criminal/civil; employee/self-employed) which render it unable to effectively protect the employment rights of all migrant workers, particularly those in an irregular immigration situation. This exists in conjunction with the systemic problems that affect all workers (e.g. enforcement of awards and the ineffectiveness of the inspection regime).

¹⁹⁵B. Anderson and R. Andrijasevic, 'Sex, Slaves and Citizens: the Politics of Anti-trafficking' (2008) 40 *Soundings* 135–145, 141.

This study indicates that Irish labour law is currently ineffective to address vulnerability to labour exploitation and provide satisfactory remedies. The intertwinement of employment and immigration enforcement; the absence of workers' knowledge of employment rights prior to leaving their exploitative situation; the ineffectiveness of inspections to act as a deterrent or detect labour violations; the uncertain impact of undocumented status on employment rights and the inability to enforce employment awards, all point to a failure of employment protections for migrant workers in Ireland. The findings from the interviews strongly support Costello's recommendations that an ideal labour law approach would insulate labour rights from migration status and develop better institutional protections for labour rights.¹⁹⁶ We also suggest that these recommendations are equally applicable to both severe and routine labour exploitation. Finally, it should be noted that the special features of the criminal law approach to labour trafficking are not currently functioning in the Irish context: none of the participants received criminal compensation and none of the traffickers in question were prosecuted. This reflects the serious deficiencies identified in the Modern Slavery Act 2015, for example.

Despite the usefulness of workers' perspectives for developing evidence-based protections, the Irish State's position, as expressed in the course of a recent High Court hearing on the immigration scheme for workers in the fishing industry, demonstrates just how far we appear to be from meaningful reform. In rejecting the International Transport Workers' Federation's application for an interim injunction to restrain the further issue or renewal of permits under the relevant immigration scheme (on the basis that the scheme facilitates trafficking for the purposes of forced labour), O'Connor J focussed on the statements of various State bodies that such an injunction would result in a regulatory void, sparking a chain reaction involving undocumented status, a lack of employment protection, and deportation for fishers currently availing of the scheme. The implicit message from the State authorities and the Court was that any regulation was better than no regulation. This reflects a deep official resistance to acknowledging the extent of labour exploitation amongst migrant workers in Ireland, although it should be acknowledged that a fresh series of reforms was agreed through mediation following the court hearing. By enabling a more nuanced understanding of workers' needs and perspectives, it is hoped that this study will contribute to the debate on how to develop better regulatory and institutional protections for their labour rights.

¹⁹⁶C. Costello, 'Migrants and Forced Labour: A Labour Law Response' *supra* n 4.