

LJN: BI7099, Supreme Court, 08/03895

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Indication of contents:

Cassation brought by the Public Prosecution Department. Human trafficking. Article 273a (old) of the Criminal Code. 1. Abuse. 2. Exploitation. Re. 1. The history of the formation and case law (in particular, HR LJN AD5235) relating to Article 250a (old) of the Criminal Code (which is incorporated in Article 273a (old) of the Criminal Code) and Article 250ter (old) of the Criminal Code have not lost their importance. For this reason, pursuant to Article 273a (old) of the Criminal Code adequate proof of abuse has been submitted when it is established that the perpetrator must have been aware of the relevant factual circumstances of the person concerned from which the position of dominance arose or may be presumed to have arisen in the sense that these circumstances gave cause to the perpetrator's conditional intent. The same is applicable to situations in which the victim is in a vulnerable position as referred to in the provision. It should be noted that in addition to this requirement for intent, exploitation is governed by another more severe requirement for intent: the accused must have been aware that as a result of his acts the other person would or could have been exploited and that, consequently, this is also what the accused wished (according to HR NJ 1998, 610). In attaching the condition to the 1st requirement of intent that 'purposeful abuse' must be made the victim's vulnerability the Court of Appeal has imposed an excessively stringent requirement and, consequently, has given evidence of an incorrect conception of law. This is equally applicable to the extent that the Court of Appeal has required initiative and active acts on the part of the accused that extend beyond the wording of the Article, which refers to the terms "recruits, transports, transfers, accommodates or harbours". More specifically, neither the need for the accused to take the initiative nor the need for the accused to bring the victim into an exploitative situation – i.e. a situation which made exploitation feasible – are autonomous requirements. In addition, the fact that a number of victims had previously worked at one or more locations does not need to indicate their voluntary agreement or the absence of an exploitative situation (in accordance with HR LJN AB9475). The complaints relating to this have been put forward correctly. Re 2. The question whether – and, if yes, when – 'exploitation' is an issue within the meaning of Article 273a (old) of the Criminal Code cannot be answered in general terms as this depends largely on the circumstances of the specific case. In addition, in a case such as the present case factors such as the nature and duration of the work, the resultant limitations imposed on the persons involved and the resultant economic gain accruing to the employer are of significance. These and other relevant factors

should be weighed against the prevailing Dutch social standards as the frame of reference. Moreover, the victim does not actually need to be exploited to fulfil the description of the offence. In view of the Court of Appeal's not unreasonable conclusion that the victims were in a vulnerable position because they were illegally residing in the Netherlands (in accordance with HR LJN ZD1788) and, consequently, were in an exploitative situation the Court of Appeal's apparent opinion that (the purpose of) exploitation within the meaning of Article 273a (old) of the Criminal Code was not at issue was, without further motivation, which is absent, not explicable in view of the Court of Appeal's conclusions.

Location(s):

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NS 2009, 363
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Judgement

27 October 2009
Criminal Section
no. S 08/03895
KM

Ruling

on the appeal in cassation against a judgment by the Court of Appeal of 's-Hertogenbosch of 30 January 2008, number 20/001124-07, in the case against:
[the accused], born in [place of birth] on [date of birth] 1956, domiciled in [town or city].

1. Cassation proceedings

The appeal – that addressed solely the acquittal on the first count – was lodged by the Advocate General of the Court of Appeal. The Advocate General filed a document proposing a ground for cassation. This document is attached to and is part of this ruling. Advocate General Knigge concluded that the contested decision should be quashed and that the Supreme Court should take a decision based on Article 440 of the Code of Criminal Procedure that it deems to be appropriate.

2. Assessment of the ground for cassation

2.1. The ground for cassation complained against the Court of Appeal's acquittal of the accused on the first count. The ground for cassation includes the complaint that the Court of Appeal interpreted Article 273a (old) of the Criminal Code incorrectly, in particular the "abuse of the position of dominance arising from the factual circumstances" and "abuse of a vulnerable position" component parts derived from this provision and incorporated in the indictment. The ground for cassation also includes the complaint that the Court of Appeal gave insufficient motivation for its conclusion that "exploitation" was not an issue.

2.2.1. The accused was charged in the first count that:

"he, at one or more times during or around the period from 1 January 2006 to 22 August 2006, in Eindhoven or at any rate in the Netherlands, jointly and in conjunction with (an)other(s) or at any rate alone, did (repeatedly) by means of coercion, one or more acts of violence, threats of one or more acts of violence, deception or abuse of a position of dominance arising from the factual circumstances and/or abuse of a vulnerable position, recruit, transport, transfer, accommodate or harbour (an)other(s), named [victim 1] and/or [victim 2] and/or [victim 3] with the intention of exploiting that person/those persons, whereby by means of that coercion, those acts of violence, deception and/or abuse the accused had the aforementioned persons(s), (all of who) are illegally residing in the Netherlands, carry out work at restaurant [A] (where the accused was (one of) the manager(s)) for (about) eleven hours a day on (on average) six days a week in exchange for meals and lodging or for a very low monetary payment and/or accommodated him/them with (an)other(s) in a (small) room in the buildings in which restaurant [A] is housed and/or prevented him or them from leaving the building or seeking contact with the outside world."

2.2.2. The Court of Appeal acquitted the accused of the charge under the first count, citing the following grounds:

"In view of the content of the lawful evidence presented to the court of first instance the Court of Appeal does not agree with the conclusion that the accused committed the charges under the first and second counts, as a result of which the accused is acquitted of those charges. The Court of Appeal – in analogy with the court of first instance – cites the following grounds for its decision on the charges under the first count.

The accused was – briefly stated – charged with the recruitment, transport, transfer, accommodation or harbouring of another person for the purpose of the exploitation of that person.

Pursuant to the Act of 9 December 2004 (which came into force on 1 January 2005) Article 273a was inserted in the Criminal Code. This Article was then renumbered as Article 273f of the Criminal Code on 1 September 2006. This Article 273a replaces Article 250a of the Criminal Code.

The objective of Article 250a of the Criminal Code was to penalise all forms of sexual exploitation. This Article characterised exploitation as coercion in a broad sense or deception, as is apparent from the text of Article 250a, first paragraph, under a: compelling a person, abusing a position of dominance arising from the factual relationships to induce a person or deceiving a person to make him or herself available, etc.

The Explanatory Memorandum (Parliamentary Documents 2003/2004, 29291, no. 3) reveals that the legislative proposal (relating to articles including Article 273a) provides for the implementation of eight global legal instruments that include measures to combat human trafficking, including the UN Protocol of 15 November 2000 to prevent, suppress and punish trafficking in persons (Bulletin of Treaties 2004/35) and the Council Framework Decision of 19 July 2002 on combating trafficking in human beings (OJ L 203, 1 August 2002, pages 1-4). The description of human trafficking employed in Article 3 of the aforementioned UN Protocol is, briefly stated, as follows: "the recruitment, harbouring or receipt of persons by means of force, abuse of power or abuse of a position of vulnerability for the purpose of exploitation. Exploitation includes at least forced labour or services."

The descriptions of human trafficking in both Article 1 of the Council Framework Decision on combating trafficking in human beings and Article 273f of the Criminal Code are as compatible with the aforementioned description of human trafficking as possible.

The Explanatory Memorandum (page 16) reveals that the wording of the aforementioned Article 250a, first paragraph, is primarily addresses exploitation. The description of human trafficking adopted in the UN Protocol relates primarily to human trafficking activities. These

activities focus on the achievement of the ultimate objective: exploitation. These activities relate to a number of forms of conduct (recruitment, accommodation, etc.) accompanied by acts (coercion, abuse of power, etc.) for the purpose of exploitation.

In view of the above the Court of Appeal concludes that an assessment of the facts and circumstances of the case in question to determine whether these fall within the scope of penalisation according to the current Article 273f of the Criminal Code needs to begin by establishing whether the case relates to acts (recruitment, accommodation or harbouring) involving coercion, one or more acts of violence, threats of one or more acts of violence, deception, abuse of a position of dominance arising from the factual relationships or abuse of a vulnerable position. The Court of Appeal shall limit this establishment to the question – stated briefly – whether abuse of the aforementioned position of dominance or abuse of a weaker/vulnerable position is an issue, since neither the records of the case nor the hearings have manifested force, (threats of) one or more acts of violence or deception.

The Court of Appeal shares the opinion of the court of first instance that the above and the wording of Article 273f of the Criminal Code presupposes a certain degree of initiative and active acts on the part of the perpetrator(s) in making purposeful abuse of the weaker or vulnerable position of the victims. Only once this has been established is it possible to assess whether the acts were carried out for the purpose of exploitation.

Firstly, it can be established that the Chinese referred to in the indictment were in a vulnerable/weaker position as they were residing illegally in the Netherlands.

The Court of Appeal – in line with the court of first instance – then proceeds on the basis of the following five facts and circumstances derived from the records of the case and the hearings:

1. The illegal Chinese immigrants encountered in the Chinese restaurant [A] and heard as witnesses had themselves decided to come to the Netherlands.
2. They came to the Netherlands to earn money.
3. They applied to those present in the aforementioned Chinese restaurant with the request to work in the restaurant: a number of them also asked for meals and lodging and a number of them asked solely for meals and lodging. The last group then worked on a voluntary basis ([victim 2], [victim 4] and [victim 5]).
4. None of them had any money debts or other obligations towards those present in the restaurant.
5. They were all free to depart at any time they wished. A number of them had already worked at one or more other locations.

In view of the above the Court of Appeal is of the opinion that it is not possible to state that the accused and/or one or more others had taken the initiative or acted actively towards the aforementioned Chinese, for example by approaching them or persuading them to work in the restaurant. Rather, they responded to requests and, in a number of instances, pleas from the Chinese.

In view of these circumstances it is not possible to find proved that the accused and/or one or more others purposefully abused a position of dominance arising from the factual relationships with or the weaker/vulnerable position of the Chinese in accommodating or harbouring them.

In an obiter dictum the Court of Appeal – in line with the court of first instance – also considers the following.

The Explanatory Memorandum states that exploitation includes at least forced or compulsory labour or services, slavery or practices equivalent to slavery or servitude. These are all forms of modern slavery. These include employment by means of coercion or the abuse of the dependent position of a person who under the given circumstances does not have any reasonable choice other than to enter into a situation of exploitation, for example employment

during an extremely long working week for a disproportionately low wage and under poor working conditions.

Although the labour situation in this case could be deemed to be socially undesirable due to the long working days (11 to 13 hours), five days leave a month, accommodation with several beds in one bedroom and an income of between EUR 450 and 800 per month this does not, in the Court of Appeal's opinion, lead to the conclusion that an exploitative situation as referred to in Article 273f of the Criminal Code was an issue.

The Court of Appeal then takes into account that it has not been manifested that the working conditions were poor (other than the length of the working day), that it has been established that the entire wages were at the disposal of the persons concerned – since the meals and lodging were free – and that none of the Chinese, in view of the considerations stated above, could be stated to be in a situation such that they did not have a reasonable choice other than to work and/or stay at the restaurant [A].

The Advocate General has brought forward that the court has incorrectly deemed the aforementioned five facts and circumstances to be determinative in concluding that exploitation in the meaning of Article 273f of the Criminal Code is not an issue in the case in question (see pages 10-11 of the notes accompanying the closing arguments).

However, the Advocate General's standpoint is also based on an incorrect reading of the judgment being appealed. The Advocate General has incorrectly regarded the five aforementioned facts and circumstances as being supportive for the court's judgment that exploitation was not an issue, as the court has not based its interpretation of the meaning of exploitation on the aforementioned facts and circumstances but has taken into consideration that in the first instance a certain degree of initiative and active acts on the part of the accused is necessary in making purposeful abuse of the position of dominance arising from the factual relationships or of the weaker/vulnerable position of the victims is required before it is possible to assess whether the acts were carried out for the purposes of exploitation. In view of the aforementioned facts and circumstances, initiative and active acts as referred to above were not an issue in the case in question, as a result of which the court – other than in an obiter dictum – was not in a position to address the question whether the acts were carried out for the purposes of exploitation."

2.3.1. Article 273a (old) of the Criminal Code on which the indictment was based was worded as follows at the time of the indictment:

"1. A person found guilty of human trafficking shall be sentenced to a term of imprisonment of a maximum of six years or punished by a fine in the fifth category:

1°. Any person who by means of coercion, violence or another act of violence or by threatening violence or another act of violence, by extortion, fraud, deception or abuse of a position of dominance arising from the factual circumstances, by abuse of a vulnerable position or by providing or receiving payments or advantages to obtain the consent of a person who has control over the other person to recruit, transport, transfer, accommodate or harbour the other person for the purposes of exploitation or the removal of the other person's organs; (...)

2. Exploitation includes at least the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or service, slavery or practices equivalent to slavery or servitude."

2.3.2. The information provided in the Explanatory Memorandum accompanying the legislative proposal that resulted in the Act of 9 December 2004, Bulletin of Acts, Orders and Decrees, 645, that introduced Article 273a of the Criminal Code includes the following:

"GENERAL

1. Introduction

The legislative proposal in question serves to implement a number of global and regional legal instruments to combat human smuggling, human trafficking, the exploitation of children and child pornography.

These are:

- (1) The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted in New York on 25 May 2000 (Bulletin of Treaties 2001, 63),
- (2) The United Nations Convention against Organized Crime, adopted in New York on 15 November 2000 (Bulletin of Treaties 2001, 68),
- (3) The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Organized Crime, adopted in New York on 15 November 2000 (Bulletin of Treaties 2001, 69),
- (4) The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Organized Crime, adopted in New York on 15 November 2000 (Bulletin of Treaties 2001, 70),
- (5) The Council Framework Decision of 19 July 2002 on combating trafficking in human beings, Brussels (OJ L 203),
- (6) The Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, Brussels (OJ L 328),
- (7) The Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, Brussels (OJ L 328),
- (8) and the Council Framework Decision on combating the sexual abuse and sexual exploitation of children adopted in Brussels on 2003 (.....).

(...)

Human trafficking is, stated briefly, coercing persons to make themselves available for the provision of (sexual) services or to make their organs available.

(...)

Human trafficking is (carried out for) exploitation. The penalisation of human trafficking always attaches paramount importance to the importance of the individual. This interest is the retention of the relevant person's physical and mental integrity and personal freedom. The state should provide criminal law-protection from infringements of the right to integrity and freedom.

(...)

Although human trafficking is often of a transnational nature, it does not necessarily need to be so: human trafficking can also take place within national borders. Victims of human trafficking in Europe are usually immigrants, often illegal immigrants. Human smuggling and human trafficking are usually forms of organised crime, although human smugglers and human traffickers can also operate outside criminal organisations. Both human smuggling and human trafficking are highly lucrative.

(...)

The most important amendments in the legislative proposal relate to the expansion of the scope of the penalisation of human smuggling and human trafficking. These amendments will update and increase the stringency of the human smuggling and human trafficking legislation. These amendments to the Dutch criminal law and the criminal law of countries that are or become a party to these instruments will lay firm foundations for a more effective criminal-law approach – both national and international – to these serious forms of (transnational) (and) (organised) crime.

(...)

4. Human trafficking

4.1. National

Dutch legislation lays down the penalisation of human trafficking in Article 250a of the Criminal Code. Prior to 1994, the penalisation of human trafficking laid down in Article 250ter (old) of the Criminal Code was limited to trafficking of women and male minors without a further description of the offence, with punishment in the form of imprisonment for five years. However, in 1994 the penal provision was modernised, supplemented with a description of the offence and rendered more stringent: the concept of human trafficking was introduced as a qualification in the wording of the Article and the maximum term of imprisonment was increased to a term of six years or, under aggravating circumstances, to a maximum of eight and ten years respectively (Article 250ter of the Criminal Code).

On 1 October 2000, at the time of the introduction of the legislation for the abolition of the general prohibition of brothels, Article 250ter of the Criminal Code was converted into Article 250a of the Criminal Code and the term ‘human trafficking’ was deleted from the Article. Article 250a is intended to penalise all forms of exploitation for prostitution and – from 1 October 2002 – other forms of sexual exploitation.

Exploitation is characterised by the presence of coercion, in the broader sense, or deception as laid down in the comprehensive formulation included in Article 250a, first paragraph, under 1^o: compelling a person, by means of violence or another act of violence or the threat of violence, or inducing a person, by means of the abuse of a position of dominance arising from the factual relationships or deception, to make him or herself available for the performance of sexual acts for payment, or carrying out any acts under the circumstances which the perpetrator knows or may reasonably be expected to know will result in the person making him or herself available for the performance of those acts.

(...)

4.2. International

(...)

The most important section of the UN Protocol on human trafficking is the definition of human trafficking in Article 3. This definition is as follows: the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, or the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The victim of trafficking in persons does not actually need to be exploited or have organs removed to fulfil the description of the offence.

The most striking element is the expansion of the scope of human trafficking. The purpose of human trafficking not only encompasses all forms of sexual exploitation but also extends to all other forms of modern slavery and to the removal of organs. In addition, a large number of acts (recruitment, etc.) and a large number of acts of violence (coercion, etc.) are included in the description.

(...)

COMMENTARY BY ARTICLE

The most important proposed amendments have already been reviewed in the general section of this Memorandum and, consequently, this commentary by article can remain concise.

(...)

Sections H and J

Article 250a of the Criminal Code addresses all forms of the exploitation of the prostitution of others, including that which Article 250ter (old) explicitly deemed to constitute human

trafficking. The Memorandum has already stated that partial revision of the morality legislation has expanded Article 250a of the Criminal Code.

The UN Protocol and the Council Framework Decision on combating trafficking in human beings relate to combating human trafficking for the purpose of the exploitation of persons. In view of this wide and general purport it is proposed that the conduct to be penalised pursuant to these instruments be incorporated in one new provision in Title XVIII of the Second Book which addresses crimes against personal freedom. It is proposed that all the conduct to be penalised be incorporated in the new provision and that these forms of conduct be qualified – pursuant to the recommendations of the Dutch National Rapporteur on Trafficking in Human Beings, the *Nederlandse Vereniging voor Rechtspraak* ('Dutch Association for the Judiciary') and the Council for the Judiciary – as human trafficking. Now this new provision also encompasses human trafficking for the purposes of sexual exploitation Article 250a no longer has autonomous significance.

The Public Prosecution Department has drawn attention to the major benefits of a merger of this nature.

The proposed Article 273a, first paragraph, addresses human trafficking in general, related forms of exploitation and gaining benefit therefrom. This provision offers sufficient scope within the maximum punishment of 6 years and fine of the fifth category to take account of the nature and seriousness of the various forms of conduct that are punishable. The most serious forms of exploitation include exploitation in which physical integrity is at jeopardy, such as sexual exploitation and the removal of organs.

The description of human trafficking in the UN Protocol and Council Framework Decision is of a construction that differs from the description of sexual exploitation in Article 250a, first paragraph, under 1°. This section addresses the use of specific means to coerce or induce a person to make him or herself available for the provision of sexual services. The wording of this provision relates primarily to exploitation. The description of human trafficking in both instruments is primarily focused on human trafficking activities. These activities address the achievement of the ultimate objective, exploitation or the removal of organs, and relate to a number of forms of conduct – recruitment, transport, etc. – accompanied by means – coercion, violence, etc. – for the purpose of exploitation. Exploitation encompasses at least a number of cited forms of exploitation: the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or service, slavery or practices equivalent to slavery or servitude. These are all forms of modern slavery and include employment by means of coercion or the abuse of the dependent position of a person who under the given circumstances does not have any reasonable choice other than to enter into a situation of exploitation, for example employment during an extremely long working week for a disproportionately low wage and under poor working conditions. Within this context it should be noted that the Research and Documentation Centre (Ministry of Security and Justice) shall carry out a study of the scope and forms of manifestation of modern forms of slavery in the Netherlands.

It is proposed that the systematics employed by both instruments be adopted in Article 273a, first paragraph, under 1°.

(...)

The second paragraph contains a further description of exploitation, which includes at least the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or service, slavery or practices equivalent to slavery or servitude.

It should be noted that Article 3, under b, of the UN Protocol and Article 1, second paragraph, of the Council Framework Directive state – as an obiter dictum – that the consent of the human trafficking victim for the intended or existing exploitation is not of relevance when one of the means of coercion has been used. These provisions do not need to result in explicit

legislation.

It should also be noted that the UN Protocol refers to “forced labour of services” while the Council Framework refers to “forced or compulsory labour or services”. The definitions of “compulsory” include mandatory, compelled or imposed and, consequently, the definitions are close to those of “forced”. Since the Council Framework Directive makes use of both terms it is recommended that both terms are included in the description of exploitation.”

(Parliamentary Documents II, 2003-2004, 29,291, no. 3)

2.4.1. As follows from the legislative history reviewed above, the legislator has opted to incorporate Article 250a (old) of the Criminal Code in Article 273a (old) of the Criminal Code. For this reason the history of the formation and case law of the provision and Article 250ter (old) of the Criminal Code that incorporate the penalisation in Article 250a (old) of the Criminal Code prior to its renumbering by the Act of 28 October 1999, Bulletin of Acts, Orders and Decrees, 264, to Article 250a (old) of the of the Criminal Code have not lost their importance.

2.4.2. For the history of this formation reference is made to the Explanatory Memorandum accompanying the legislative proposal that resulted in the Act of 9 December 1993, Bulletin of Acts, Orders and Decrees, 679:

"abuse of the position of dominance arising from the factual relationships" can be understood as: "when the prostitute is in a situation or comes into a situation that is other than the circumstances accepted by an assertive prostitute in the Netherlands. With this objectification of the component part relating to abuse, Article 250bis of the Criminal Code (new) offers protection to persons working at a sex establishment in an exploitative situation and provides for both administrative and judicial action against persons who keep others in a situation of this nature. This objectification of the abuse component part also provides for judicial action under the prevailing law against persons who make use of an exploitative position to bring someone into prostitution or make use of an exploitative situation to carry out acts with the intention of bringing someone into prostitution. Moreover, persons who make use of an exploitative situation to carry out any acts that they know or could reasonably have known would result in a person ending up in prostitution will also fall under the application of this proposed Article 250ter of the Criminal Code. The exploitative situations referred to above shall often involve persons such as persons arriving from abroad, persons who are addicted and very young persons."

and:

"The relevant prohibited forms of conduct, comprised of coercion by means of violence or other acts of violence, the abuse of a position of dominance arising from the factual relationships or deception, influence the will of the victim including the victim's freedom of choice in the sense that they result in the absence of voluntariness that also includes the absence of or impairment of the feasibility to make a carefully-considered choice. The fact that the victim had previously been involved in prostitution does not as such constitute an indication of voluntariness."

(Parliamentary Documents II, 1988-1989, 21,207, no. 3, p. 3 ff)

as well as the Memorandum of Reply:

"The Explanatory Memorandum uses the term 'exploitative situation' (...) to clarify the meaning of the concept of ‘abuse of a position of dominance arising from the factual relationships’ (...). The Memorandum states that an exploitative situation of this nature is an issue when the person involved is in a situation that is other than the circumstances accepted

by an assertive prostitute in the Netherlands.

Examples of this situation include debts incurred in paying the costs of the journey to the Netherlands. The repayment obligation can be of a nature such that the prostituting person is compelled to continue to act as a prostitute. More in general, the absence of access to personal financial resources should be deemed to constitute an exploitative situation. The fact that the prostitute cannot does not have his or her passport at his or her disposal or his or her visa has expired also brings the person concerned into the dependent situation referred to above. Abuse of a position of dominance arising from the factual relationships can usually be derived from the circumstances. A person originating from a developing country or a person who is addicted to drugs will not usually be in a position to adopt an independent autonomous attitude comparable to that of an assertive Dutch prostitute."

and:

"Minors lack voluntariness when the prostitute does not have or has only a limited opportunity to make a carefully-considered choice as to continue his or her relationship with the proprietor. Any relationship originally entered into on a voluntary basis is not then of relevance (...)."

(Parliamentary Documents II, 1988-1989, 21 027, no. 5, p. 3 and 7)

2.4.3. For the case law reference needs to be made to HR 5 February 2002, LJN AD5235, NJ 2002, 546 relating to Article 250ter (old) of the Criminal Code that also cites the majority of the elements of the Act presented above. The Supreme Court's ruling included the following grounds:

"5.5. From this legislative history it is necessary to conclude that when a situation occurs – specified by the legislator as an exploitative situation – in which the prostitute does not have or has only a limited opportunity to make a carefully-considered choice as to continue his or her relationship with the proprietor – whereby one instance in which an exploitative situation can be assumed is stated as the instance in which the prostitute is illegally residing in the Netherlands – then the person who has brought the person concerned into prostitution cannot plead that that it was not his or her intent that the relevant person would surrender him or herself to prostitution on the basis of (the use of) the position of dominance that arose from the relevant factual relationships.

5.6. On the other hand, it will be necessary to hold that the perpetrator must have been aware of the relevant personal circumstances of the person concerned that gave rise to the position of dominance or may be presumed to have given rise to that position of dominance in the sense that those circumstances will have needed to result in at least the perpetrator's conditional intent as otherwise the highly personal circumstances of the person concerned that were not known to the accused and could not have been known to the accused would also be of relevance to this criminal offence. Consequently, in contrast to the provisions of Article 250ter, first paragraph, under 3°, of the Criminal Code in which the minor component part has been fully objectified the perpetrator will not be acquitted solely when it is held that there is an absence of all guilt relating to circumstances of this nature: it will be necessary to derive the aforementioned intent from the evidence."

This ruling also held that it may be assumed from the fact that the victim was residing illegally in the Netherlands that the victim was in a dependent position – which the legislator specifies as an exploitative situation – and that the question whether this very situation resulted in the success of the accused's endeavours to bring the person concerned into prostitution, or that the accused was aware of this is not of relevance. Nor is the question of relevance as to whether any other factors not known to the accused may have contributed to

the dependency of the person concerned.

2.5.1. In line with the aforementioned history of the formation and the aforementioned ruling, pursuant to Article 273a (old) of the Criminal Code adequate proof of “abuse” has been submitted when it is established that the perpetrator must have been aware of the relevant factual circumstances of the person concerned from which the position of dominance arose or may be presumed to have arisen, in the sense that these circumstances gave cause to the perpetrator’s conditional intent. The same is applicable to situations in which the victim is in a vulnerable position as referred to in the provision.

It should be noted that in addition to this requirement of intent another, more stringent, requirement of intent is applicable to the exploitation, namely the purpose of exploitation.

2.5.2. In attaching the condition to the first requirement of intent that ‘purposeful abuse’ must be made of the victim’s vulnerability the Court of Appeal has imposed an excessively stringent requirement and, consequently, has given evidence of an incorrect conception of law. This is equally applicable to the extent that the Court of Appeal has required the initiative and active acts on the part of the accused that extend beyond the wording of the Act, which refers to the terms “recruits, transports, transfers, accommodates or harbours”. More specifically, neither the need for the accused to take the initiative nor the need for the suspect to bring the victim into an exploitative situation – i.e. a situation which made exploitation feasible – are autonomous requirements. It should also be noted that the fact that a number of victims had previously worked at one or more locations, which the Court of Appeal took into account in its grounds, does not need to indicate their voluntary agreement or the absence of an exploitative situation (in accordance with HR 6 July 1999, LJN AB9475, NJ 1999, 701)

2.5.3. The first complaint is justified.

2.6.1. The following needs to be put first in the assessment of the complaint that the Court of Appeal gave insufficient motivation for its conclusion that “exploitation” was not an issue. The (purpose of) exploitation component part of Article 273a, first paragraph, (old) of the Criminal Code is not defined in the Act other than in the summary of a number of forms of exploitation, including forced or compulsory labour or services, contained in the first paragraph. The Explanatory Memorandum enclosed above under 2.3.2 reveals that this provision refers to a variety of modern forms of slavery and cites as an example employment during an extremely long working week for a disproportionately low wage and under poor working conditions. The question whether – and, if yes, when – ‘exploitation’ is an issue in the sense of the provision in question cannot be answered in general terms as this depends largely on the circumstances of the specific case. When answering the question in a case such as the present case factors such as the nature and duration of the work, the resultant limitations imposed on the persons involved and the resultant economic advantage accruing to the employer are of significance. These and other relevant factors should be weighed against the prevailing Dutch social standards as the frame of reference. In addition, the victim does not actually need to be exploited to fulfil the description of the offence.

2.6.2. In view of the Court of Appeal’s not unreasonable conclusion that the victims were in a vulnerable position because they were illegally residing in the Netherlands (in accordance with HR 18 April 2000, LJN ZD1788, NJ 2000, 443) and, consequently, were in an exploitative situation the Court of Appeal’s apparent opinion that (an intention of) exploitation within the meaning of Article 273a (old) of the Criminal Code was not at issue was, without further motivation, which is absent, is not explicable in view of the Court of

Appeal's conclusions that some of the victims employed in the accused's restaurant were working solely for meals and lodging and that others were working for a monthly income of between € 450 and € 800, that they were working between 11 and 13 hours a day and had no more than 5 days leave a month, and that they had to share their bedrooms with others.

2.6.3. The second complaint is also successful.

2.7. Consequently, the ground for cassation is correct.

3. Conclusion

In view of the above considerations the contested judgement – to the extent that it has been submitted to the Supreme Court for a ruling – cannot be upheld and that the following decision is required.

4. Decision

The Supreme Court:

quashes the contested judgment to the extent that it has been submitted for a ruling and remits the case to the Court of Appeal in 's-Hertogenbosch for the re-adjudication and settlement of the first count of the indictment in the existing appeal.

This ruling was delivered by Vice President A.J.A. van Dorst acting as President and Justices B.C. de Savornin Lohman, J. de Hullu, C.H.W.M. Sterk and M.A. Loth, in the presence of the Supreme Court Registrar, S.P. Bakker, and pronounced on 27 October 2009.

Conclusion

No. 08/03895

Mr. Knigge

Sessions: 2 June 2009

Conclusion in the case:

[accused](1)

1. In its judgement of 30 January 2008 the Court of Appeal has confirmed the court of first instance's acquittal of the accused of (the co-perpetration of) human trafficking and (the co-perpetration of) human smuggling, with supplements and improvements to the grounds.

2. The Deputy Advocate General of the Court of Appeal has lodged an appeal in cassation against this judgement. The counsel for the accused has contested the Public Prosecution Department's document in writing.

3. The ground for cassation complains that the Court of Appeal's acquittal of the accused on the first count (the co-perpetration of human trafficking) is based on an incorrect interpretation of the terms appearing in and derived from Article 273a (old; now 273f) of the Criminal Code, "abuse of the position of dominance arising from the factual circumstances" and "abuse of a vulnerable position", as a result of which the Court of Appeal has abandoned the basis of the indictment. Alternately, the author of the ground for cassation puts forward

that the acquittal referred to above has, in view of the explanation of the aforementioned statutory concepts, been based on incorrect, inadequate and/or inexplicable grounds.

4. The accused was charged in the first count that:

"he, at one or more times during or around the period from 1 January 2006 to 22 August 2006, in Eindhoven or at any rate in the Netherlands, jointly and in conjunction with (an)other(s) or at any rate alone, did (repeatedly) by means of coercion, one or more acts of violence, threats of one or more acts of violence, deception or abuse of a position of dominance arising from the factual circumstances and/or abuse of a vulnerable position, recruit, transport, transfer, accommodate or harbour (an)other(s), named [victim 1] and/or [victim 2] and/or [victim 3] with the intention of exploiting that person/those persons, whereby by means of that coercion, those acts of violence, deception and/or abuse the accused had the aforementioned persons(s), (all of who) are illegally residing in the Netherlands, carry out work at restaurant [A] (where the accused was (one of) the manager(s)) for (about) eleven hours a day on (on average) six days a week in exchange for meals and accommodation or for a very low monetary payment and/or accommodated him/them with (an)other(s) in a (small) room in the buildings in which restaurant [A] is housed and/or prevented him or them from leaving the building or seeking contact with the outside world;
(Article 273a, paragraph 1 of the Criminal Code)"

5. The Court of Appeal has acquitted the accused of the charge under the first count on the basis of the following primary grounds:

“The accused was – briefly stated – charged with the recruitment, transport, transfer, accommodation or harbouring another person for the purpose of the exploitation of that person.

Pursuant to the Act of 9 December 2004 (which came into force on 1 January 2005) Article 273a was inserted in the Criminal Code. This Article was then renumbered as Article 273f of the Criminal Code on 1 September 2006. This Article 273a replaces Article 250a of the Criminal Code.

The objective of Article 250a of the Criminal Code was to penalise all forms of sexual exploitation. This Article characterised exploitation as coercion in a broad sense or deception, as is apparent from the text of Article 250a, first paragraph, under a: compelling a person, abusing a position of dominance arising from the factual relationships to induce a person or deceiving a person to make him or herself available, etc.

The Explanatory Memorandum (Parliamentary Documents 2003/2004, 29291, no. 3) reveals that the legislative proposal (relating to articles including Article 273a) provides for the implementation of eight global legal instruments that include measures to combat human trafficking, including the UN Protocol of 15 November 2000 to prevent, suppress and punish trafficking in persons (Bulletin of Treaties 2004/35) and the Council Framework Decision of 19 July 2002 on combating trafficking in human beings (OJ L 203, 1 August 2002, pages 1-4).

The description of human trafficking employed in Article 3 of the aforementioned UN Protocol is, briefly stated, as follows: "the recruitment, harbouring or receipt of persons by means of force, abuse of power or abuse of a position of vulnerability for the purpose of exploitation. Exploitation includes at least forced labour or services."

The descriptions of human trafficking in both Article 1 of the Council Framework Decision on combating trafficking in human beings and Article 273f of the Criminal Code are as compatible with the aforementioned description of human trafficking as possible.

The Explanatory Memorandum (page 16) reveals that the wording of the aforementioned Article 250a, first paragraph, is primarily addresses exploitation.

The description of human trafficking adopted in the UN Protocol relates primarily to human trafficking activities. These activities focus on the achievement of the ultimate objective: exploitation.

These activities relate to a number of forms of conduct (recruitment, accommodation, etc.) accompanied by acts (coercion, abuse of power, etc.) for the purpose of exploitation.

In view of the above the Court of Appeal concludes that an assessment of the facts and circumstances of the case in question to determine whether these fall within the scope of penalisation according to the current Article 273f of the Criminal Code needs to begin by establishing whether the case relates to acts (recruitment, accommodation or harbouring) involving coercion, one or more acts of violence, threats of one or more acts of violence, deception, abuse of a position of dominance arising from the factual relationships or abuse of a vulnerable position. The Court of Appeal shall limit this establishment to the question – stated briefly – whether abuse of the aforementioned position of dominance or abuse of a weaker/vulnerable position is an issue, since neither the records of the case nor the hearings have manifested force, (threats of) one or more acts of violence or deception.

The Court of Appeal shares the opinion of the court of first instance that the above and the wording of Article 273f of the Criminal Code presupposes a certain degree of initiative and active acts on the part of the perpetrator(s) in making purposeful abuse of the weaker or vulnerable position of the victims. Only once this has been established is it possible to assess whether the acts were carried out for the purpose of exploitation.

Firstly, it can be established that the Chinese referred to in the indictment were in a vulnerable/weaker position as they were residing illegally in the Netherlands.

The Court of Appeal – in line with the court of first instance – then proceeds on the basis of the following five facts and circumstances derived from the records of the case and the hearings:

1. The illegal Chinese immigrants encountered in the Chinese restaurant [A] and heard as witnesses had themselves decided to come to the Netherlands.
2. They came to the Netherlands to earn money.
3. They applied to those present in the aforementioned Chinese restaurant with the request to work in the restaurant: a number of them also asked for meals and lodging and a number of them asked solely for meals and lodging. The last group then worked on a voluntary basis ([victim 2], [victim 4] and [victim 5]).
4. None of them had any money debts or other obligations towards those present in the restaurant.
5. They were all free to depart at any time they wished. A number of them had already worked at one or more other locations.

In view of the above the Court of Appeal is of the opinion that it is not possible to state that the accused and/or one or more others had taken the initiative or acted actively towards the aforementioned Chinese, for example by approaching them or persuading them to work in the

restaurant. Rather, they responded to requests and, in a number of instances, pleas from the Chinese.

In view of these circumstances it is not possible to find proved that the accused and/or one or more others purposefully abused a position of dominance arising from the factual relationships with or the weaker/vulnerable position of the Chinese in accommodating or harbouring them.”

6. In addition, the Court of Appeal – in line with the court of first instance – has in an ‘obiter dictum’ given consideration to the following:

“The Explanatory Memorandum states that exploitation includes at least forced or compulsory labour or services, slavery or practices equivalent to slavery or servitude. These are all forms of modern slavery. These include employment by means of coercion or the abuse of the dependent position of a person who under the given circumstances does not have any reasonable choice other than to enter into a situation of exploitation, for example employment during an extremely long working week for a disproportionately low wage and under poor working conditions.

Although the labour situation in this case could be deemed to be socially undesirable due to the long working days (11 to 13 hours), five days leave a month, accommodation with several beds in one bedroom and an income of between EUR 450 and 800 per month this does not, in the Court of Appeal’s opinion, lead to the conclusion that an exploitative situation as referred to in Article 273f of the Criminal Code was an issue.

The Court of Appeal then takes into account that it has not been manifested that the working conditions were poor (other than the length of the working day), that it has been established that the entire wages were at the disposal of the persons concerned – since the meals and accommodation were free – and that none of the Chinese, in view of the considerations stated above, could be stated to be in a situation such that they did not have a reasonable choice other than to work and/or stay at the restaurant [A].”

7. In conclusion, the Court of Appeal responded to the arguments the Advocate General put forward during the hearing as follows:

“The Advocate General has brought forward that the court has incorrectly deemed the aforementioned five facts and circumstances to be determinative in concluding that exploitation in the meaning of Article 273f of the Criminal Code is not an issue in the case in question (see pages 10-11 of the notes accompanying the closing arguments).

However, the Advocate General's standpoint is also based on an incorrect reading of the judgment being appealed. The Advocate General has incorrectly regarded the five aforementioned facts and circumstances as being supportive for the court’s judgment that exploitation was not an issue, as the court has not based its interpretation of the meaning of exploitation on the aforementioned facts and circumstances but has taken into consideration that in the first instance a certain degree of initiative and active acts on the part of the accused is necessary in making purposeful abuse of the position of dominance arising from the factual relationships or of the weaker/vulnerable position of the victims is required before it is possible to assess whether the acts were carried out for the purposes of exploitation. In view of the aforementioned facts and circumstances, initiative and active acts as referred to above were not an issue in the case in question, as a result of which the court – other than in an obiter dictum – was not in a position to address the question whether the acts were carried out

for the purposes of exploitation."

8. In view of the above, the Court of Appeal based its acquittal on two grounds. The first, primary ground is embodied in the considerations presented above under 5 and the secondary ground on the "obiter dictum" consideration presented under 6. The ground for cassation contests both grounds. The appeal in cassation succeeds when neither ground is upheld in cassation.

9. I shall begin by discussing the complaint against the first, primary ground and then move on to the complaint against the ground embodied in the obiter dictum consideration. These discussions are preceded by a number of general comments that are of importance to the assessment of both complaints.

General comments

10. Article 273a (old) of the Criminal Code was introduced on 1 January 2005 to replace Article 250a of the Criminal Code, which had in turn replaced Article 250ter of the Criminal Code. On 31 August 2006 Article 273a (old) of the Criminal Code was renumbered to Article 273f of the Criminal Code. Although the following is focused on the explanation of the applicable article in this case, Article 273a (old) of the Criminal Code, it will be self-evident that the content is equally applicable to the identically-worded Article 273f of the Criminal Code.

11. The introduction of Article 273a in the Criminal Code served to implement a number of global and regional legal instruments.⁽²⁾ The description of the human trafficking offence in the international regulations is constructed from the conduct, means (coercion in the broad sense) and purpose of exploitation component parts. Article 3 of what is referred to as the 'Palermo Protocol' lays down the definition of human trafficking which is generally accepted at an international level. This definition is:

For the purposes of this Protocol:

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

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(...)

Art. 273a (old) of the Criminal Code is engrafted on this definition. The relevant sections are as follows:

1 . A person found guilty of human trafficking shall be sentenced to a term of imprisonment of a maximum of six years or punished by a fine in the fifth category:

1 °. Any person who by means of coercion, violence or another act of violence or by

threatening violence or another act of violence, by extortion, fraud, deception or abuse of a position of dominance arising from the factual circumstances, by abuse of a vulnerable position or by providing or receiving payments or advantages to obtain the consent of a person who has control over the other person to recruit, transport, transfer, accommodate or harbouring the other person for the purposes of exploitation or the removal of the other person's organs;

(...)

2. Exploitation includes at least the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or service, slavery or practices equivalent to slavery or servitude.

12. On the formation of this Article the legislator described the core of the offence as followed:

“Human trafficking is, stated briefly, coercing persons to make themselves available for the provision of (sexual) services or to make their organs available. (...) Human trafficking is (carried out for) exploitation. The penalisation of human trafficking always attaches paramount importance to the importance of the individual. The interest is the retention of the relevant person's physical and mental integrity and personal freedom.”(3)

13. This description relates to all forms of human trafficking that are rendered punishable in Article 273a (old) of the Criminal Code and, consequently, does not cover the entire scope: in fact, it does not tally with the manner in which the human trafficking offence is given shape in Article 273a paragraph 1, under 1e (old) of the Criminal Code. Since the international definition served as the model for the description, this description of the offence links coercion to relevantly neutral forms of conduct such as transporting and accommodating. Consequently, the victim needs to have been coerced to be transported or accommodated. For this reason, pursuant to the description of the offence the victim does not need to have been coerced to "make him or herself available to provide (sexual) services or to make his or her organs available". However, this differs from the reason for penalisation, which *is* based on this form of coercion. The ultimate objective is to prevent for as far as is possible people from being coerced to provide (sexual) services or making their organs available. This objective was expressed more aptly in the predecessors to Article 273a paragraph 1, under 1e (old) of the Criminal Code, i.e. articles 250ter and 250a of the Criminal Code. Article 250ter of the Criminal Code penalised, to the extent of relevance to this case, the use of violence (etc.) to bring another person to prostitution. Article 250a of the Criminal Code referred to the use of violence (etc.) to coerce another person to perform sexual acts with or for a third party for payment. These descriptions of the offence linked coercion directly to exploitation. In other words, the elimination of the victim's freedom of choice by means of the coercion exercised on the victim related to acting as a prostitute: the victim needed to have been coerced to act as a prostitute.(4)

14. The situation is different with transport and accommodation since coercing the victim to be transported or accommodated is an offence only when the purpose of that coercion is to exploit the victim or to remove his or her organs. However, this purpose is then sufficient: the coercion does not need to have resulted in the actual exploitation or the actual removal of organs, (5) whereby the perpetrator's aforementioned purpose is then sufficient. This would also appear to indicate that it is not necessary for the victim to be aware of the purpose: consequently, the description of the offence is also fulfilled when the victim has no idea of the perpetrator's purpose in transporting or accommodating the victim.

15. However, in my opinion it would appear to be necessary that there is a relationship between the perpetrator's conduct (the transport, transfer, etc.) and the perpetrator's purpose: the forced transport or forced accommodation must be instrumental for the intended exploitation. This can be illustrated by a somewhat far-fetched example: a brothel keeper who uses a degree of force in getting a woman he exploits out of his brothel because she does not wish to leave the building whilst it is being evacuated due to fire cannot be accused of transporting the woman out of the building or transferring her for the purpose of exploitation. Although the brothel keeper still has the purpose of exploiting the woman, his actions are not carried out with a view to that purpose: he would do the same with a customer who did not wish to leave the building.

16. At present, solely lower case law is available for the interpretation of Article 273 (old) of the Criminal Code and, more in particular, for the meaning of the "exploitation" component part.(6) A request for an explanation of the article of the Act has not been submitted to the Supreme Court before. For this reason it is understandable that the Supreme Court's ruling in this case is awaited with more than the customary interest.(7) At the same time it is necessary to draw attention to the fact that the Supreme Court carries out solely limited reviews of acquittals in cassation, as a result of which appeals in cassation are not the most appropriate means of obtaining clarity about the precise meaning of the description of the offence. The fact that the court could have arrived at a finding of fact on the grounds of the evidence in the records of the case does not as such render an acquittal inexplicable. The situation is no different when the Public Prosecution Department lodges an appeal by means of an explicitly substantiated standpoint based on the evidence.(8) However, this does not imply that an appeal in cassation against acquittal can succeed solely when the ground for cassation gives evidence of an incorrect conception of law. Nevertheless, when the emphasis is not placed on the appreciation of the available evidence but rather on the judicial conclusions the court has drawn from the established facts in the contested judgement then there would appear to be more scope for a review of the explicability.(9) In any case, "judicial" grounds for the acquittal of this nature offer the Supreme Court an opportunity to provide some clarity about the scope of the description of the offence in its considerations.

The primary ground: no "purposeful" abuse

17. The considerations presented under 5 reveal that the Court of Appeal – in analogy with the court of first instance – found the case not proved as the accused and co-accused had not “purposefully” abused the position of dominance arising from the factual circumstances or the vulnerable position of the Chinese residing illegally in the Netherlands on accommodating or harbouring them because they had not taken the initiative or acted actively towards the Chinese, for example by approaching them or persuading them to come to work at the restaurant. This was because the initiative was taken by the Chinese seeking work and accommodation in applying to the (co-)accused. The Court of Appeal based this decision on a requirement that is unrelated to the question as to whether the acts were carried out for the purpose of exploitation.

18. The ground for cassation addresses this requirement. The ground for cassation complains that in doing so the Court of Appeal imposes a requirement that is not provided for by Article 273a (old) of the Criminal Code and that the Court of Appeal has interpreted the terms ‘abuse of a position of dominance arising from the factual circumstances’ and ‘abuse of a vulnerable position’ derived from Article. 273a (old) of the Criminal Code, as a result of which the Court

of Appeal has abandoned the basis of the indictment.(10)

19. In the wording of Article 273a (old) of the Criminal Code the conduct component part can assume the form of recruitment, transport, transfer, accommodation or harbouring of another person, forms of conduct which differ from each other. For example, recruitment – attracting or taking on employees – requires some form of initiative and precedes setting the recruited employees to work, whilst accommodation – providing lodging – is feasible solely by agreeing to another person’s proposal and can continue during the period in which the person provided accommodation continues to work. Within this context I note from the legislative history that the legislator has not wished to assign a more limited meaning to the Dutch word for “accommodation” – which is derived from the Palermo Protocol that refers to "harbouring" – than the meaning assigned to the word in common parlance.

20. For this reason no argument can be derived from the word “accommodation” for the requirement of taking the initiative and acting actively that was imposed by the Court of Appeal. If I understand things correctly I also observe that the Court of Appeal does not base this requirement on the word “accommodation”, but on accommodation by means of the “abuse” (of a position of dominance or of a vulnerable position). The Court of Appeal interprets this as the need for purposeful abuse of a position of dominance or vulnerable position. This purposefulness requirement in turn gives cause for the need for the perpetrator to have taken the initiative and to have acted actively.

21. The wording of the Article does not, in any case, support this interpretation: the word "purposeful" is not used in Article 273a paragraph 1 (old) of the Criminal Code. The purpose required of the perpetrator relates to exploitation, not to abuse. Consequently, when viewed from a grammatical perspective there is no argument for the imposition of an extra requirement that accommodation is provided for the purpose of making abuse of the circumstances. For this reason, if the required act (the abuse made of the special position in which the other person finds him or herself) has an objective then that objective is accommodating the person (which in turn needs to be provided for the purpose of exploitation): the converse, that the objective of accommodation is to provide for abuse, is not the case.

22. Abuse can be made of the circumstances solely when the perpetrator is in some manner aware of the circumstances. Within the criminal law context of Article 273a (old) of the Criminal Code there is no reason to require more than conditional intent. In my opinion the author of the ground for cassation is correct in referring to HR 5 February 2002, NJ 2002, 546, a ruling relating to Article 250ter (old) of the Criminal Code which, via Article 250a (old) of the Criminal Code, was the predecessor of Article 273a (old) of the Criminal Code. The Supreme Court’s considerations of the component part of Article 250ter (old) of the Criminal Code, "abuse of a position of dominance arising from the factual relationships" [in bringing a person to prostitution], were as follows:

“5.5 From the legislative history it is necessary to conclude that when a situation occurs – specified by the legislator as an exploitative situation – in which the prostitute does not have or has only a limited opportunity to make a carefully-considered choice as to continue his or her relationship with the proprietor – whereby one instance in which an exploitative situation can be assumed is stated as the instance in which the prostitute is illegally residing in the Netherlands – then the person who has brought the person concerned into prostitution cannot plead that that it was not his or her intent that the relevant person would surrender him or

herself to prostitution on the basis of (the use of) the position of dominance that arose from the relevant factual relationships.

5.6. On the other hand, it will be necessary to hold that the perpetrator must have been aware of the relevant personal circumstances of the person concerned that gave rise to the position of dominance or may be presumed to have given rise to that position of dominance in the sense that those circumstances will have needed to result in at least the perpetrator's conditional intent as otherwise the highly personal circumstances of the person concerned that were not known to the accused and could not have been known to the accused would also be of relevance to this criminal offence. Consequently, in contrast to the provisions of Article 250ter, first paragraph, under 3°, of the Criminal Code in which the minor component part has been fully objectified the perpetrator will not be acquitted solely when it is held that there is an absence of all guilt relating to circumstances of this nature: it will be necessary to derive the aforementioned intent from the evidence."

23. Consequently, the Supreme Court held that conditional intent was sufficient. The Supreme Court did not impose the requirement that the abuse was "purposeful", let alone that "abuse" was an issue only when the perpetrator took the initiative and actively approached the victim.

24. On introducing Article 273a (old) of the Criminal Code the legislator implemented international regulations which, as is demonstrated by the objectives of the Palermo Protocol, address issues including the effective combat of human trafficking and the protection of victims,(11) without amendments to offences that were already penalised in Article 250a (old) of the Criminal Code.(12) As a result, neither ratio legis nor the legislative history of Article 273a (old) of the Criminal Code provide support for the imposition of the requirement that the perpetrator has taken the initiative and acted actively.

25. Within this context I wish to note the following. Imposing the requirement that the perpetrator has taken the initiative actually smuggles in via the back door a criterion that Article 3, under b, of the Palermo Protocol was designed to shut out of the front door. Taken literally, the Court of Appeal's judgment is not in conflict with the aforementioned Article 3, under b: pursuant to this provision, the victim's consent is of no relevance solely when use is made of the means of coercion referred to in the provision. The Court of Appeal held that means of coercion were not an issue (as a result of which Article 3, under b, of the Palermo Protocol was not applicable). However, denying abuse of a vulnerable position on the ground that the victims had applied voluntarily has enfeebled the penalisation even further than the erosion that Article 3, under b, of the Palermo Protocol was designed to avoid.

26. This can be illustrated and clarified with the statement that the Advocate General made during the hearing before the Court of Appeal. Prior to her closing speech the Advocate General stated that:

"The Chinese cultural background plays a major role in this case. In the Chinese culture there is always an evident boss. You listen to the boss. The employees arrived in the Netherlands via human smuggling and, as a result, could not simply return to their mother country. The Court of Appeal might appreciate more information about this."

The Advocate General also supplemented her written closing speech with the following:

"Human smuggling usually involves a Chinese who enjoys a certain status and who uses

forged passports to take people to another country."

The Advocate General's closing speech included the following:

"All the victims came to the Netherlands via human smugglers, people who are referred to as snakeheads. In practice, and in my opinion this is generally known in the Chinese community in the Netherlands, these immigrants are in debt – sometimes a personal debt, but much more frequently a debt owed by the immigrant's family in China. This debt needs to be repaid. This imposes great pressure on the victims, who feel compelled to accept any work they can. Consequently, in this instance the debt is not owed to the employer, but to an intermediary: however, it contributes towards their lack of freedom, i.e. their multiple dependency.

(...)

The aforementioned position of an unknown person in an unknown country, who has been uprooted, puts him or her in a position in which no work means no home and often no food.

(...)

In this instance the majority of the victims are smuggled to the West, including the Netherlands, by people who are referred to as 'snakeheads'. They ensure that a debt is incurred, sometimes by the victim but more often by the victim's family who remain in China. As a result, the illegal immigrants in the Netherlands have only one choice – to earn money in one way or another. Without a source of income they have no means of support in the Netherlands and, moreover, know that their family can be threatened. This is generally known in the Chinese community in the Netherlands."

The Advocate General supplemented this with the following:

"In relation to the second case that is stated (LJN BB5303, page 9 ff) it can be noted that the Chinese in the case in question were unable to return to their mother country. Many of them did not have the money to do so and if they did return to their mother country then a large debt and, moreover, an angry family would be awaiting them.

(...)

As the victims were unable to return to China on their departure from restaurant [A] they would have found themselves in a new position of abuse."

27. If the Advocate General's statements are correct then little is left of the voluntariness that the Court of Appeal relied on so heavily. If the victims had nowhere to go and, in fact, had no choice then it is ironic to refer to free will. In its considerations presented under 5 the Court of Appeal held that "the Chinese referred to in the indictment were in a vulnerable/weaker position as they were residing illegally in the Netherlands". The fact that these Chinese pleaded, as it were, to be allowed to work at [A] emphasises the hopelessness of their situation all the more, rather than providing an argument for deeming abuse of this situation unpunishable: in fact, the reverse is the case, as people who are in a position that is so vulnerable that exploiters do not even need to take the initiative to exploit them deserve the protection provided by criminal law more than anyone else.

28. I conclude that the Court of Appeal's imposition of the requirement that the perpetrators need to take the initiative and actively approach their victims gives evidence of an incorrect conception of law. Consequently, the complaints against the first, primary ground for the acquittal hit the mark.

The second ground: no exploitation

29. I now move on to the question whether the alternative ground – presented above under 6 – can support the acquittal delivered by the Court of Appeal.

30. The author of the ground for cassation is of the opinion that the Court of Appeal incorrectly or otherwise on inexplicable grounds held that no exploitation took place in the restaurant in considering that although the working days were long, there were few days' leave, the employees shared bedrooms and were paid between € 450 and € 800 a month, it had not been established that other working conditions were poor, the wages were at the disposal of the employees and it was not possible to state that they did not have a reasonable choice other than to work and stay at the restaurant.

31. The ground for appeal then raises the question as to the correct interpretation of (the purpose of) exploitation in Article 273a (old) of the Criminal Code. This gives rise to three questions of interpretation that I shall first discuss in more general terms. I shall then review whether the Court of Appeal's grounds give evidence of an incorrect conception of law and whether they can withstand a review of explicability.

32. The interpretation of the term exploitation should, in analogy with the complaint against the primary ground for acquittal, be viewed from the perspective of the legislative history of the formation of Article 273a (old) of the Criminal Code and the international legal instruments on which the Article is based. The second paragraph of Article 273a (old) of the Criminal Court lists a number of forms of intended exploitation associated with human trafficking. This list is not exhaustive. The information contained in the Explanatory Memorandum includes the following:(13)

"Exploitation encompasses at least a number of cited forms of exploitation: the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or service, slavery or practices equivalent to slavery or servitude. These are all forms of modern slavery and include employment by means of coercion or the abuse of the dependent position of a person who under the given circumstances does not have any reasonable choice other than to enter into a situation of exploitation, for example employment during an extremely long working week for a disproportionately low wage and under poor working conditions."

The legislator has also based this definition on the aforementioned Palermo Protocol and the Council Framework Decision engrafted on the Protocol.(14) Article 3 under (a) of the Palermo Protocol includes the prescription that:

"Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;"

The Explanatory Memorandum also draw attention (p.19) to the fact that both instruments stipulate that the victim's consent to the existing or intended exploitation is not of relevance when one of the means of coercion stated in the description of the offence is used (see also 11). According to the Explanatory Memorandum this relates to an "obiter dictum" addition, as a result of which this does not need to be laid down explicitly in the Article.

33. The court is left with this relatively summary explanation.(15) Although the Explanatory

Memorandum does not refer to Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms and this Article is not included in the (preambles of the) Palermo Protocol and the Council Framework Decision, it is logical to base the interpretation of the "forced or compulsory labour or service, slavery or practices equivalent to slavery or servitude" on this article in the Convention which uses virtually identical terminology. (16) Article 4 of the Convention states, to the extent of relevance here, that:

- "1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour."

The Dutch version of this article in the Convention is a literal translation:

- "1. Niemand mag in slavernij of dienstbaarheid worden gehouden.
2. Niemand mag gedwongen worden dwangarbeid of verplichte arbeid te verrichten."

34. The case law of the European Court on Human Rights (ECHR) on this Article is extremely limited. The ECHR established the first violation of Article 4 of the Convention in 2005, in the case of *Siliadin v. France* (17). *Siliadin* was a fifteen-year-old Togolese, an illegal immigrant in France, who was on her own and carried out virtually unpaid domestic for four years, seven days a week, for a family who kept her in poor accommodation and limited her freedom of movement. The judgement in *Siliadin v. France* indicated the ECHR's recognition of the problem of modern slavery and made a contribution to the doctrine of positive obligation.(18) However, in this instance the most important point is that the Court's judgment has clarified the meaning of the terms slavery, servitude and forced or compulsory labour. The ECHR's considerations on forced or compulsory labour were as follows:

"117. It remains to be ascertained whether there was "forced or compulsory" labour. This brings to mind the idea of physical or mental constraint. What there has to be is work "exacted ... under the menace of any penalty" and also performed against the will of the person concerned, that is work for which he "has not offered himself voluntarily" (see *Van der Musselle*, cited above, p. 17, § 34).

118. The Court notes that, in the instant case, although the applicant was not threatened by a "penalty", the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat.

She was an adolescent girl in a foreign land, unlawfully present on French territory and in fear of arrest by the police. Indeed, Mr and Mrs B. nurtured that fear and led her to believe that her status would be regularised (see paragraph 22 above).

Accordingly, the Court considers that the first criterion was met, especially since the applicant was a minor at the relevant time, a point which the Court emphasises.

119. As to whether she performed this work of her own free will, it is clear from the facts of the case that it cannot seriously be maintained that she did. On the contrary, it is evident that she was not given any choice.

120. In these circumstances, the Court considers that the applicant was, at the least, subjected to forced labour within the meaning of Article 4 of the Convention at a time when she was a minor."

The ECHR's considerations on slavery and servitude included the following:

"122. 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".

123. 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". [...]

124. 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).

[...]

126. 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.

127. 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.

128. 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.

129. 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.

35. The first question of interpretation that needs to be answered for the assessment of the means is the question whether the ECHR's definitions of the concepts of slavery, servitude and forced or compulsory labour also determine the scope of Article 273a paragraph 1, under 1e (old) of the Criminal Code. In other words, is labour exploitation that Article 273a (old) of the Criminal Code was intended to combat an issue solely when the working conditions violate Article 4 of the Convention?

36. A step in the direction of an answer in the affirmative was taken by an article Korvinus, the then National Rapporteur on Trafficking in Human Beings, wrote with others that was published in the *Trema* journal for the judiciary in 2006.⁽¹⁹⁾ In this article Korvinus exhibits concern about an excessively broad interpretation of Article 273a (old) of the Criminal Code. She states – as such, correctly – that neither all abuse in relation to labour nor all illegal employment is to be qualified as exploitation in the meaning of the Article in the Criminal Code. She then argues that when interpreting Article 273a of the Criminal Code "paramount importance is to be attached to the protection of fundamental human rights". This apparently follows from the legislative history and the direct relationship this reveals with the Palermo

Protocol and the Council Framework Decision which make use of terms derived from Article 4 Convention for the Protection of Human Rights and Fundamental Freedoms and Article 4 of the Universal Declaration of Human Rights. Additional arguments for a restrictive interpretation of the Article are derived from the severe threat of punishment and the incorporation of the offence in Title XVIII of the Criminal Code, 'Crimes against personal freedom'. This leads to the argument that Article 273a (old) of the Criminal Code addresses solely excesses, whereby an excess is defined as "as an infringement of fundamental human rights". According to Korvinus, undesirable labour situations constitute exploitation in the meaning of Article 273a (old) of the Criminal Code solely "when they are accompanied by an infringement of fundamental rights such as human dignity, physical integrity or personal freedom of the individual concerned".

37. This same viewpoint is expressed in the Fifth Report of the National Rapporteur on Trafficking in Human Beings that was published in 2007:(20)

"At its core, 273f Criminal Code contemplates the criminalisation of *excessive* abuse of individuals in an employment or service provision relationship, along with all conduct amounting to putting anyone into such a position. (...) In light of international legislation, it is important whether the fundamental human rights of the victim have been violated (or under threat of violation) by the conduct in question. If that is the case, then there is excessive abuse which can be classified as exploitation within the meaning of THB [human trafficking]."

38. The adoption of this standpoint would appear to have had a great influence on the administration of justice to date. For example, in its considerations the Court of Zwolle-Lelystad stated that it "could agree entirely" with the (further detailing) of the criterion for exploitation stated in the Fifth Report of the National Rapporteur. In the Sixth Report the National Rapporteur stated that "the case law up to now confirms that Article 273f of the Dutch Criminal Code only relates to excessive abuses in employment situations".(21)

39. In view of the fairly indefinite content of the concept of exploitation the warning against an excessively broad interpretation of the concept was not incomprehensible. However, the question is then whether the National Rapporteur's urge to restrict the interpretation might not have gone a little too far. The argument that exploitation can be an issue solely when human rights have been violated implies that labour exploitation is restricted to violations of Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms: however, it can then be noted that this is at loggerheads with the text of Article 273a, paragraph 2, (old) of the Criminal Code, as this paragraph of the Article states that exploitation also extends to "practices equivalent to slavery or servitude". These, then, are practices that cannot be deemed to constitute slavery or servitude (and which, consequently, do not fall under Article 4 of the Convention) but do share some of their characteristics. Moreover, this paragraph of the Article states that exploitation includes (the Dutch words for) "at least" the forms of exploitation cited in the paragraph. Consequently, this paragraph of the Article is not limited to these forms of exploitation: this paragraph of the Article lists the practices that are "in any case" included in forms of exploitation.(22)

40. The Dutch words for "at least" correspond with the words "at a minimum" used in the Palermo Protocol and the words "at least" used in the Council Framework Decision. These legal instruments use these words to express the ability of the states or member states to exercise their discretion in deciding whether to expand the penalisation beyond the mandatory forms pursuant to the instruments.(23) In view of Article 1, paragraph 1, of the Criminal Code

it is unfortunate that the legislator has adopted this element of the international definition and has not – instead – indicated which elements of the penalisation are broader than the penalisation required pursuant to the international definition. Nevertheless, it would appear that the legislator did not wish to adhere all too narrowly to the international definition.

41. In my opinion the invocation of the incorporation of the offence in Title XVIII of the Criminal Code, 'Crimes against personal freedom' by the aforementioned article of Korvinus et al. is not very convincing. The predecessor of Article 273a (old) of the Criminal Code, Article 250a (old) of the Criminal Code, was incorporated in Title XIV, 'Crimes against morality'. The reason for the relocation to Title XVIII of the Criminal Code lay in the expansion of the penalisation to include non-sexual forms of exploitation.⁽²⁴⁾ Consequently, this does not provide an argument for a restrictive interpretation of the Act. The mere fact that Article 273a (old) of the Criminal Code refers to (means of) coercion justifies its incorporation in Title XVIII. For this reason, for example, Article 284 of the Criminal Code (coercion; maximum imprisonment of nine months) is incorporated in this Title. For this reason the incorporation of this Article in this Title does not need to be justified by a restricted interpretation of the term "exploitation": in particular, this incorporation does not give reason for the argument that Article 273a (old) of the Criminal Code should be interpreted as requiring physical or a comparable form of deprivation of liberty. I will return to this later.

42. All in all, little is left of the invocation of the legislative history. As already stated under 12, the Explanatory Memorandum emphasises the interests of the individual in the penalisation. According to the Explanatory Memorandum, this interest is "the retention of the relevant person's physical and mental integrity and personal freedom". However, this does not need to be interpreted as implying that exploitation needs to be accompanied by deprivation of freedom. As every form of coercion infringes personal freedom. The Explanatory Memorandum also makes the following comment about Article 273a (old) of the Criminal Code:⁽²⁵⁾

"This provision offers sufficient scope within the maximum punishment of 6 years and fine of the fifth category to take account of the nature and seriousness of various forms of conduct that are punishable. The most serious forms of exploitation include exploitation in which physical integrity is at jeopardy, such as sexual exploitation and the removal of organs."

Consequently, the Explanatory Memorandum actually recognises that the penalised forms of conduct not only vary in nature but also in seriousness. Sexual exploitation and exploitation for the purpose of the removal of organs are forms of exploitation that are generally regarded as more serious than exploitation in a labour situation. From this perspective the threat of punishment does not provide any arguments for the restriction of the latter form of exploitation to "excesses", as the various forms of exploitation do not need to be equally serious.

43. The above brings me to the following conclusion. Although violations of Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms form the core of exploitation in labour situations, Article 4 of the Convention does not limit the penalisation. In other words, when slavery, servitude or forced or compulsory labour are an issue within the meaning of Article 4 of the Convention then exploitation is also an issue within the meaning of Article 273a (old) of the Criminal Code. However, this is not applicable to the reverse: even when a violation of Article 4 of the Convention is not an issue it is still possible that labour exploitation is an issue. I would then wish to interpret Article 273, paragraph 2, (old) of

the Criminal Code in a manner such that the phrase "at least" relates to other forms of exploitation that are not stated in so many words, for example the coercion of persons to take part in irresponsible medical experiments. When viewed from this perspective the delineation of the penalisation of exploitation in labour situations should be sought in the interpretation of "practices equivalent to slavery or servitude". When an equivalent practice is not an issue then labour exploitation as referred to in Article 273a (old) of the Criminal Code. The meaning of "at least" is then at most that the question as to whether an equivalent practice is an issue should not be addressed in all too forced a manner: equivalent does *not* imply that it must be possible to equate the seriousness of the relevant practice with a violation of Article 4 of the Convention. Equivalence is an issue when forms of exploitation share important points in common. However, equivalence also implies inequality and, consequently, differences. One of these differences can lie in the seriousness of the exploitation.

44. This brings me to a second question of interpretation that is of importance to the assessment of the means, namely the wretchedness of the working conditions required to conclude that exploitation is an issue. The Explanatory Memorandum cites no more than an example: an extremely long working week for a disproportionately low wage and under poor working conditions (see above, under 32). Self-evidently the question is then what should be understood by "extremely", "disproportionately" and "poor": which standard should be employed to make this assessment? Should the standard be the labour situation in the third-world country where the employee was press-ganged? If so, then this will rapidly lead to the conclusion that things weren't actually that bad for the employees. Or should the Netherlands be the standard – in part in view of the country's prevailing regulations – for an assessment as to whether the situation can be deemed to comply with normal, acceptable terms and conditions of employment? If so, then the working hours, wages and working conditions will much more readily be assessed as "extremely" long, "disproportionately" low and "poor".

45. The National Rapporteur has adopted the standpoint that the point of departure or benchmark for an assessment of exploitation should be the situation accepted by an assertive Dutch employee. This standpoint would appear to be based on the Supreme Court's ruling of 5 February 2002, NJ 2002, 546, referred to earlier, and on the ruling's presentation of the legislative history of Article 250ter (old) of the Criminal Code.⁽²⁶⁾ According to the Explanatory Memorandum to that Article an "exploitative situation" (which referred to "abuse of a position of dominance arising from the factual relationships") was an issue when "when the prostitute is in a situation or comes into a situation that is other than the circumstances accepted by an assertive prostitute in the Netherlands".⁽²⁷⁾ The question is then whether the aforementioned ruling and this legislative history offer support for the National Rapporteur's standpoint. Article 250ter (old) of the Criminal Code related solely to sexual exploitation. The "terms and conditions of employment" governing the victim during his or her work are not then of relevance to the punishability: a woman who is coerced to become a prostitute and earns as much (or more) as her assertive colleague and enjoys better working conditions is still a victim of sexual exploitation. Consequently, the Explanatory Memorandum did not address a comparison of the terms and conditions of employment: the issue was the assertiveness of the prostitute or, to be more precise, the circumstances that enable the prostitute to *be* assertive. In other words, the comparison related to the question whether the victim was in a dependent position that made abuse feasible. In the Supreme Court's words, the question was when a situation "in which the prostitute does not have or has only a limited opportunity to make a carefully-considered choice as to continue his or her relationship with the proprietor" was an issue. This can, for example, be the case when he or she – in contrast to the assertive colleague – is illegally residing in the Netherlands.

46. In my opinion all the above does not provide an argument for the National Rapporteur's standpoint. Nevertheless, this standpoint would appear to be correct. Firstly, when the Dutch legislator uses the Dutch words for terms such as "extremely", "disproportionately" or "poor" it will be self-evident that the legislator has adopted the Dutch situation as the benchmark. Secondly, in my opinion this standpoint is in agreement with ratio legis. The purpose of the human trafficker is not – or at least, not primarily – to have the victim work in miserable conditions: the purpose is to make money. Employees who are press-ganged under false pretences and have one-sided contracts that compel them to accept terms and conditions of employment far below the acceptable standard in the country in which they are set to work with the objective of accruing an economic gain. This is then an argument for the inclusion of the amount of the economic gain in the definition of "exploitation". When viewed from a linguistic perspective the emphasis is also placed on gain, since exploitation presumes that the "exploiter" benefits.

47. This brings me to the following two comments. Firstly, a fixation solely on the victim's situation does no justice to the concept of (the purpose of) exploitation: it is also necessary to examine the profit that the perpetrator accrues from the situation.(28) This emphasises that the question whether "equivalent practices" are an issue should not examine solely "excesses", situations in which the victim's circumstances are as "bad" as in the case of forced labour, slavery or servitude, otherwise a large part of the exploitation will remain unexplored.

48. The second comment is in the continuation of the first. The comparison with the Dutch situation renders exploitation a relative concept: what the Netherlands understands as exploitation does not need to be understood as exploitation in another country. This relative approach diverges from the ECHR's definitions of the terms of forced labour, slavery and servitude. In the Siliadin case the ECHR defined these terms on the basis of power, coercion and deprivation of freedom. As a result, the victim's terms and conditions of employment do not play an autonomous role: keeping a slave still violates Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms even when the slave is cosseted and costs money rather than makes money. The result is a fairly absolute (bound neither by time nor place) definition of the aforementioned terms, which is compatible with the fact that they represent violations of a fundamental human right.(29) When viewed from this perspective, the fact that the Dutch legislator *does* understand exploitation as a relative concept and defines the concept in terms that are accompanied by a comparison of terms and conditions of employment provides an extra argument for the statement that exploitation extends further than violations of Article 4 of the Convention.

49. The third question of interpretation that requires an answer is the question whether, and if so to what extent, the victim's consent and the options left available to the victim play a role in assessing whether (the purpose of) exploitation is an issue. As indicated earlier, Article 3(b) of the Palermo Protocol states that the victim's consent to the intended exploitation is not of relevance when it has been established that means of coercion referred to in Article 3(a) have been used. The legislator was of the opinion that this was self-explanatory and did not deem it necessary to lay this down explicitly in the Article. On this ground it could be possible to defend the argument that the victim's will (or absence of will) is an issue solely for the question relating to the conduct: whether, for example, the victim's vulnerable position was abused for transport or accommodation. When this question has been answered in the affirmative then pursuant to this interpretation the victim's will is of no relevance to the question as to whether the conduct (the transport or accommodation) was for the purpose of

exploitation. The question is then solely whether the (intended) terms or conditions of employment were so poor that the victim's work would yield a disproportionately large profit.

50. However, in my opinion this approach is not readily tenable. Firstly, I draw attention to the fact that a lack of consent would appear to be an integral element of the definition of forced labour. According to the ECHR's ruling in the Siliadin case, it is necessary that the work is carried out "against the will of the person concerned" (§ 117). Consequently, it is possible to state that when the perpetrator's purpose is forced labour then the victim's consent to the employment is by very definition of importance. Similar comments can be made with respect to slavery and servitude, when the victim has by very definition virtually no freedom. The Explanatory Memorandum refers to sexual exploitation as an infringement of physical integrity. An infringement of this nature is an issue solely when the sexual services are not provided out of free will.⁽³⁰⁾ Consequently, the lack of freedom of will would appear to be a characteristic of the exploitation.

51. In addition, this characteristic would appear to provide the reason for penalisation: the legislator's intention is to combat *forced* prostitution, *forced* labour and the *involuntary* removal of organs. Within this context it should be noted that under the operation of Article 250ter (old) of the Criminal Code and Article 250a (old) of the Criminal Code the involuntary nature of exploitation was, as we have observed, an element of what the legislator referred to as an "exploitative situation". This was due to the fact that the description of the offence linked coercion directly to the exploitation (see above, under 13). Article 273a (old) of the Criminal Code was of a different construction as the legislator wished to extend the penalisation to include future exploitation (that had yet to take place). This was not due to the legislator's change of attitude towards exploitation and exploitative situations, as is confirmed by the excerpt from the Explanatory Memorandum presented under 32 that clarifies what should be understood by exploitation and refers to the abuse of the dependent position of a person "who under the given circumstances does not have any reasonable choice other than to enter into a situation of exploitation". The abuse and lack of freedom of choice do not then relate to the conduct (transport or accommodation), but rather to the perpetrator's intended "situation of exploitation".

52. In conclusion, I note that the fact that the application of coercion referred to in Article 273a (old) of the Criminal Code relating to neutral forms of conduct such as transport and accommodation results in something improper: the unlinking of the use of coercion and exploitation that would seem to be invited by this construction has something artificial – and in some instances is not even possible. A voluntary organisation that offers accommodation to people in a vulnerable position for exclusively charitable reasons (and, consequently, without the purpose of exploitation) cannot reasonably be accused of abusing their vulnerable position. For this reason the question whether abuse is an issue cannot be viewed in isolation from the question whether exploitation is an issue. This is also applicable to freedom of will. Although the person involved may have no other practical choice other than to accept the accommodation offered by the volunteer organisation it would, nevertheless, be senseless to state that taking the helping hand is involuntary. The lack of freedom of choice is of relevance only when the accommodation is intended for the purpose of coerced (involuntary) exploitation.

53. The above brings me to the conclusion that the perpetrator's purpose needs to be to bring the victim into a situation of exploitation, i.e. a situation in which the victim "does not have any reasonable choice other" to allow him or herself to be exploited.⁽³¹⁾ This is applicable to

all forms of exploitation and, consequently, also to exploitation comprised of practices equivalent to slavery and servitude. These practices shall at least need to exhibit the involuntariness of slavery and servitude. It will then be sufficient that the victim does not, from an objective view, have any (freedom of) choice. When this is the case – and this is the meaning of the "superfluous" Article 3(b) of the Palermo Protocol – then the possible consent of the victim is no longer of relevance as the victim cannot then have any freedom of choice (32)

54. It should be noted that Article 273a (old) of the Criminal Code lumps all forms of exploitation together relating to involuntariness with respect to the conduct, i.e. the question whether coercion or abuse has been used to transport or accommodate the victim. No distinction is made between the degree of lack of freedom that is required. In view of the close relationship between involuntariness with respect to conduct and the lack of freedom inherent to exploitation it would not be logical to require a greater degree of lack of freedom for exploitation than for conduct. For the same reason it is not logical to make a distinction within this context and allow the required degree of lack of freedom to depend on the form of exploitation in question: nor does the Explanatory Memorandum do so. The criterion to be fulfilled that the person "does not have any reasonable choice other" referred to in the excerpt relates to all forms of exploitation. Consequently this would appear to be the standard to be employed for all forms of exploitation.

55. The National Rapporteur has adopted the standpoint that exploitation implies a certain degree of lack of freedom, although the question is then whether this element might not have been somewhat over-accentuated. Within this context the following passage is of importance:(33)

"The involuntary nature of the exploitative situation lurks in the impossibility of getting out of it. This is impossible in cases where measures are used which directly restrict physical freedom (for example being locked up or watched). If the victim is controlled by his or her exploiter(s) by means other than physical restraint, escape might be possible in practical terms, but the victim's subjective assessment of the situation may impede him or her from escaping. The facts and circumstances should then confirm that it was reasonable for the victim to assume that he or she could not escape from the situation by his or her own efforts."

Although this was probably not the intention, the comparison with the unlawful physical deprivation of freedom would appear to require a lack of freedom equal to that of the deprivation of liberty. It suggests that when there is no physical restraint to escape then the impediment to escape is formed by the victim's subjective assessment. This impediment will then need to be established, a need that would appear to result in stringent requirements for proof – and this, whilst the Supreme Court as demonstrated in NJ 2002, 546 followed in the legislator's tracks by holding that an exploitative situation may be assumed when the victim is illegally residing in the Netherlands. In addition, the emphasis on the absence of physical restraint invites, as it were, the conclusion that the victim had apparently decided to stay. This is at loggerheads with Article 3 (b) of the Palermo Protocol.

56. It cannot be denied that there can be great differences in the degree of freedom left to the victim. Forced labour and slavery are by definition accompanied by little freedom. However, this does not provide an argument to elevate this extreme form of lack of freedom to a necessary element of all forms of exploitation. This is no different when the exploitation relates to "practices equivalent to slavery or servitude". The National Rapporteur is of the

opinion that numerous factors determine whether this is an issue.(34) The Public Prosecution Department has adopted a list of indicators.(35) The precise value of these factors or indicators does not need to be discussed here. However, I note that these factors or indicators would appear to be concentrated at two poles. The first pole is the employee's dependency and the degree of lack of freedom accompanying the employment. The second pole relates to the (poor) terms and conditions of employment and the resultant economic gain accruing to the employer. It is possible to refer to communicating vessels: the importance of the economic gain decreases with decreasing freedom. An employee who is chained to the workplace and locked up at night (so that the work approaches or is tantamount to forced labour) is being exploited even when his wage is quite acceptable. Conversely, when the employee retains a great deal of freedom of movement the grounds for exploitation will need to be sought in the wretched terms and conditions of employment and the resultant economic gain. As noted earlier, the concepts of forced labour, slavery and servitude are defined entirely in terms of power, coercion and lack of freedom (see above, under 48). Consequently, these concepts are unipolar. However, in view of the fact that the equivalent practices *are bi-polar* forms of exploitation in which other factors make a contribution there is no reason to require the same degree of lack of freedom that characterises forced labour, slavery and servitude.

57. Next, the question whether the Court of Appeal's obiter dictum opinion presented under 5 gives witness of an incorrect conception of law or is inexplicable.

58. The Court of Appeal holds that the working conditions did not constitute an "exploitative situation". It should be noted that Article 273a, paragraph 1, under 1e (old) of the Criminal Code does not actually require exploitation to have taken place: the Article requires no more than that the perpetrator acted for the purpose of exploitation. Consequently, the Court of Appeal's judgment should be understood as its conclusion that the perpetrator's purpose lay in the actual working situation. Since the Court of Appeal was of the opinion that this working situation did not constitute exploitation the purpose of exploitation was not an issue.

59. The Court of Appeal's opinion that the purpose of exploitation was not an issue was in part based on its conclusion "that none of the Chinese, in view of the considerations stated above, could be stated to be in a situation such that they did not have a reasonable choice other than to work and/or stay at the restaurant [A]". The Court of Appeal's examination of the question whether the employment was involuntary was, as such, correct. The Court of Appeal's attention to "the considerations stated above" is not then inexplicable. Paragraph 52 argued that the question whether the abuse of a vulnerable position is an issue cannot be viewed in isolation from the question whether the purpose of exploitation was an issue. This is particularly applicable when – such as the case in question – the accommodation and employment coincided in time and place. Is it conceivable that that Chinese voluntarily worked in [A] if they were compelled to make use of the accommodation – which the Court of Appeal deemed to constitute part of their wages – as a result of the abuse of the circumstances?

60. As I concluded under 28, "the considerations stated above" gives witness of an incorrect conception of law on a not unimportant point. The question is then whether this incorrect conception of law via the invocation of "the considerations stated above" has impacted the Court of Appeal's judgment that exploitation was not an issue. I am of the opinion that the Court of Appeal's judgment that it has not been proven that the accused accommodated the relevant Chinese by means of the purposeful abuse of their vulnerable position (the primary ground for acquittal) should be understood as meaning that abuse of this nature was not an

issue solely because the accused had not taken the initiative. Consequently, the Court of Appeal held that the Chinese employees use of the accommodation was involuntary (they had no other choice) but that the abuse of the situation was not purposeful. In arriving at this opinion it is appropriate that the Court of Appeal gave greatest importance to the fact that “the Chinese referred to in the indictment were in a vulnerable/weaker position as they were residing illegally in the Netherlands”. The Supreme Court has ruled, under the operation of Article 250ter (old) of the Supreme Court that this was sufficient to assume an "exploitative situation" (see under 22).

61. If this interpretation of the Court of Appeal’s considerations is correct then in my opinion the Court of Appeal’s "obiter dictum" judgment that the employment was not involuntary is in conflict with its judgment that the use of the accommodation was involuntary. The required degree of involuntariness for the conduct (the accommodation) and the intended exploitation (see above under 54) is identical whilst the accommodation and the employment certainly cannot be viewed in isolation from each other. In any case, the Court of Appeal’s judgment that the employment was not involuntary is inexplicable in view of the Court of Appeal’s conclusion that the employees were in a vulnerable position.

62. The Court of Appeal’s apparent intention in invoking "the considerations stated above", the circumstances under 1 to 5 inclusive, does not change the situation. It is difficult to conclude from the circumstances – taking account of the fact that the relevant Chinese were in a vulnerable position – that they had any other reasonable choice. As noted under 27, the fact that the Chinese applied voluntarily is more of a confirmation of the predicament in which they found themselves. Adopting this as the ground to deny abuse of the vulnerable position, as argued under 25, does not do justice to Article 3 (b) of the Palermo Protocol. Consequently, when viewed from this perspective the Court of Appeal’s incorrect conception of law has indeed impacted the Court of Appeal’s obiter dictum judgment.

63. Since the judgment that (the purpose of) exploitation was not an issue was in part based on the inexplicable conclusion that the employment was voluntary this judgment is also inexplicable. I then note that it is plausible that this inexplicable conclusion played a role in the appreciation of the evidence in a judgement – such as that of the Court of Appeal – that involuntariness was not an issue rapidly puts an end to the matter, since it means that exploitation cannot then be an issue. It is not then necessary to devote comprehensive attention to an assessment of the wretchedness of the employees’ situation, the degree of their lack of freedom or the poorness of the terms and conditions of employment. It is then possible to pass over the arguments the Advocate General put forward at the hearings without stating further reasons.

64. This approach would probably have been more acceptable if the facts about the terms and conditions of employment considered by the Court of Appeal had exhibited a high degree of obviousness. However, in my opinion this is not the case. The decision reached on the basis of the facts summarised by the Court of Appeal (working days of between 11 and 13 hours), five days’ leave a month, a number of beds in a bedroom, an income of between € 450 and € 800 a month) "does not (...) lead to the conclusion" that exploitation was an issue is correct to the extent that this indicates that the facts do not compel the judgment that the employees were exploited, as this judgment is in part determined by the particulars of the case. However, should the purport be that the circumstances that were outlined do not, in general, constitute an exploitative situation then, in my opinion, this is not correct. As the Advocate General calculated during the hearing, the facts established by the Court of Appeal yield an hourly

wage of between € 1.48 and € 3, while the 2006 minimum wage was € 7.34 per hour. Consequently, the economic gain which the accused accrued from their employment was substantial. This is not changed greatly when – as the Court of Appeal did – the costs of food and lodging are added to their wages. Although I do not wish to doubt the quality of the food served at [A], I doubt whether the costs the accused incurred in serving meals were very high, even if the employees were not served with what remained from the food cooked on the relevant day. A similar comment can be made about the cost of the accommodation. In view of the facts established by the Court of Appeal (a number of beds in one bedroom) the costs the accused incurred in providing accommodation must have been low. Consequently, in my opinion the Court of Appeal devoted excessive attention to the position of the employees and too little attention to the profit accruing to the employer.

65. The above takes no account of the fact that – as established by the Court of Appeal – a number of the Chinese encountered in the restaurant had requested solely food and lodging and, consequently – if I understand correctly – did not receive a wage. I do not understand the reasons for the Court of Appeal’s conclusion that these Chinese worked voluntarily: this does not follow from the fact that they did not receive a wage.

66. I conclude that the Court of Appeal’s judgment that (the purpose of) exploitation was not an issue inclines to an incorrect conception of law and in any case, in view of the considerations the Court of Appeal stated under 4 and 5, is not explicable as such.

67. The ground for cassation is well-founded.

68. I have not encountered any grounds for the Supreme Court’s ex officio quashing of the judgment.

69. This conclusion extends to the quashing of the contested judgment that relates to the first count of the indictment and to the Supreme Court’s decision based on Article 440 of the Code of Criminal Procedure that it deems to be appropriate.

The Procurator General
of the Supreme Court of the Netherlands

AG

1 This case is associated with case 08/03894, on which I shall also deliver my conclusion today.

2 Parliamentary Documents 2003-2004, 29 291, no. 3, p.1. The Explanatory Memorandum’s references include the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Organized Crime, adopted in New York on 15 November 2000 (Bulletin of Treaties 2001, 69) (what is referred to as the Palermo Protocol) and the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, Brussels (OJ L 203) (hereinafter referred to as the Council Framework Decision).

3 Explanatory Memorandum, Parliamentary Documents 2003-2004, 29 291, no. 3, p. 2.

4 This penalisation returned, in an amended form, in Article 273a, paragraph 1, under 4e,

(old) of the Criminal Code, Explanatory Memorandum, Parliamentary Documents 2003-2004, 29 291, no. 3, p. 18.

5 This also follows from the UN (2004) Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, p. 269: "The offence defined in article 3 of the Protocol [see above under 11, Knigge] is completed at a very early stage. No exploitation needs to take place."

6 Reference can be made to the Court of The Hague, 21 November 2006, LJN AZ2707 (acquittal); the Court of The Hague, 5 October 2007, LJN BB5303 (acquittal); the Court of Zwolle-Lelystad, 29 April 2006, LJN BD0846 (acquittal), the Court of The Hague, 14 December 2007, LJN BC1195 and LJN BC0775 (conviction) and the Court of Leeuwarden, 10 February 2009, LJN BH2373. According to the letter referred to in the next footnote an appeal has been lodged against the last three convictions.

7 See in this connection the letter about human trafficking that State Secretary Albayrak submitted to the House of Representatives of the States-General on 11 May 2009.

Parliamentary Documents 2008-2009, 28638, no. 41, p. 9.

8 See, for example, HR 5 February 2008, NJ 2008, 422.

9 See, for example, HR 21 April 2009, LJN BG8951 and HR 12 May 2009, LJN BG1483.

10 The requirement that the perpetrator took the initiative and acted actively was also imposed by the Court of Zwolle-Lelystad, 29 April 2006, LJN BD0846. It should be noted that in this case the Court held that the requirement was met.

11 Explanatory Memorandum, Parliamentary Documents 2003-2004, 29 291, no. 3, p. 10.

12 As a result the old case law has retained its value. See Explanatory Memorandum, Parliamentary Documents 2003-2004, 29 291, no. 3, p. 13; Dettmeijer-Vermeulen (2007), Fifth Report on Trafficking in Human Beings, pp. 20-21. Although the penalisation of Article 250ter, paragraph 1, under 1e (via Article 250a of the Criminal Code) has been continued in Article 273a, paragraph 1, under 4e (old) of the Criminal Code and not in Article 273a, paragraph 1, under 1e (old) of the Criminal Code, the issue here is the interpretation of the component part contained in both variants (under 1e and under 4e).

13 Explanatory Memorandum, Parliamentary Documents 2003-2004, 29 291, no. 3, p. 18.

14 The principles and definitions of the Council Framework Decision do not differ materially, to the extent of relevance here, from those of the Palermo Protocol. For this reason I have not reviewed the EU legislation in this document.

15 For the uncertainty about the penal provision see H. de Jonge van Ellemeet. 'Slecht werkgeverschap of 'moderne slavernij. Handhaving van een nader af te bakenen verbod', Justitiële Verkenningen 33(7), p. 108.

16 In this sense, also A.G. Korvinus et al. (2006). 'Mensenhandel: het begrip uitbuiting in art. 273a Sr.' Trema, 29(7), pp. 286-290.

17 EHCR 26 July 2005, application no. 73316/01, Siliadin v. France. This EHCR judgment also refers to the relationship between Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Palermo Protocol, alongside instruments including ILO Convention No. 29 concerning Forced or Compulsory Labour (1930).

18 R.A. Lawson in his note to the judgment, *Journaal Vreemdelingenrecht* 2005/425 (LJN AU 4068).

19 A.G. Korvinus et al. (2006). 'Mensenhandel: het begrip uitbuiting in art. 273a Sr.' Trema, 29(7), pp. 286-290.

20 C.E. Dettmeijer-Vermeulen et al. (2007). Fifth Report on Trafficking in Human Beings, p. 21.

21 C.E. Dettmeijer-Vermeulen et al. (2008). Sixth Report on Trafficking in Human Beings, p. 2.

22 Explanatory Memorandum, p. 19.

23 The UN (2004) Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, p. 267, which states: "Prominent among these is the obligation to establish criminal offences: all States parties to the Protocol are obliged by article 5 to criminalize trafficking, either as a single criminal offence or a combination of offences that cover, at a minimum, the full range of conduct covered by the definition."

24 Explanatory Memorandum, p. 17.

25 Explanatory Memorandum, p. 18.

26 Dettmeijer-Vermeulen (2007), op cit, p. 22, 23.

27 I then note that the purport of the National Rapporteur's argument is to stress the difference from sexual exploitation, as a result of which not every variance from what an assertive employee finds acceptable constitutes labour exploitation in the meaning of Article 273a (old) of the Criminal Code. Nevertheless, a comparison with the labour situation in the Netherlands as the point of departure or benchmark is referred to as being as "usable". See the statement on p. 23 that conditions are excessive when they are regarded as unacceptable in terms of the prevailing standards adopted by the Dutch society and legal system.

28 The National Rapporteur also refers to this as a relevant factor. See Dettmeijer-Vermeulen (2007), op cit, p. 23.

29 In this context I refer to § 90 of the ruling: "With regard to the violation of Article 4 of the Convention, the applicant noted from the outset that the right not to be held in servitude laid down in this provision was an absolute one, in the same way as the right not to be compelled to perform forced or compulsory labour".

30 The same is also applicable, at least to a certain extent, to the removal of organs. When a person freely decides to donate a kidney to, for example, a blood relation and the kidney is removed *lege artis* then this cannot readily be referred to as an infringement of physical integrity. It should be noted that the legislator does not regard the removal of organs as a form of exploitation: this forms a separate category.

31 This terminology is derived from the Explanatory Memorandum. In my opinion there is no substantive difference from the formulation employed by the Supreme Court in HR 5 February 2002, NJ 2002, 546 (a situation "in which the prostitute does not have or has only a limited opportunity to make a carefully-considered choice as to continue his or her relationship with the proprietor").

32 It is conceivable that the ECHR's standpoint on forced labour should be referred to in these terms, since it is striking to note that although the ECHR would appear to regard consent as an independent requirement, little remains on its application. § 119 of the Siliadin ruling addresses the question whether Siliadin carried out her work "of her own free will" (*my – Knigge – italics*). This was not the case, as it was evident "that she was not given any choice". Consequently, the lack of consent is inherent in the situation of coercion. If I understand correctly, I note that the ECHR in any case defines lack of freedom objectively for slavery and servitude. Slavery is an issue once the person in question has been degraded to an object. The slave's satisfaction with his or her lot is of no relevance. For that matter, I am of the opinion that the ECHR's standpoint on this issue cannot be decisive for the penalisation ex Article 273a (old) of the Criminal Code. If the ECHR were to require consent then this would be overruled by Article 3 (b) of the Palermo Protocol. Moreover, "equivalent practices" also fall under Article. 273a (old) of the Criminal Code.

33 See Dettmeijer-Vermeulen (2007), op cit, p. 23, 24.

34 Dettmeijer-Vermeulen (2007), op cit, pp. 23-24.

35 See Annex 3 to the *Aanwijzing mensenhandel van het College van procureurs-generaal*, Netherlands Government Gazette 2006, 58, registration number 2006A002, adopted on 6 March 2006 and entry into force on 1 April 2006 (followed with a rectification and an amendment), succeeded by the *Aanwijzing mensenhandel*, Netherlands Government Gazette

2008, 253, rectification number 2008A022, 17 November 2008, entry into force on 1 January 2009.