

Recognizing victims of trafficking in human beings as refugees according to the 1951 UN Geneva Refugee Convention

Impact of a witness statement of a victim of trafficking in human beings on Refugee Status Determination Procedures

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Abstract

Individuals who have been trafficked and who fear being subjected to persecution upon return to their country of origin or individuals who fear being trafficked, whose claim to international protection falls within the refugee definition contained in the 1951 UN Refugee Convention and/or its 1967 Protocol relating to the Status of Refugees may be recognized as refugees and afforded the corresponding international protection as they may constitute a “particular social group” within the definition of a refugee. Considering the two-fold character of trafficking in human beings as organized crime on the one hand and acknowledging the human rights dimension of trafficking in human beings on the other hand, this paper seeks to analyse whether witness statements against a perpetrator by the victim to contribute to the prosecution of the perpetrator have an impact on refugee status determination procedures. In *VXAJ v Minister for Immigration & Anor* the Federal Magistrates Court of Australia found that the Refugee Tribunal has misapplied established legal principles through simply rejecting cases of trafficked women who have given evidence against traffickers as a “particular social group” according to Art 1A 1951 UN Refugee Convention. With this paper decisions of national Courts which held that refugee status has to be granted in cases of victims of trafficking for the purpose of sexual exploitation, who based their asylum claim on experienced trafficking along with claimed return risks due to a witness statement against the perpetrators are analysed. In this regard focus is laid on the question whether witness statements provided to the police to contribute to the prosecution of the perpetrator(s) impact refugee status determination procedures - and if yes, in what sense.

Methodology

Decisions of national Courts² dealing with cases of victims of trafficking in human beings (VTHB) for the purpose of sexual exploitation from Thailand, Nigeria and Moldova, who applied for asylum and who based their asylum claim *inter alia* on the fact that they gave evidence against the perpetrator to the police to contribute to the prosecution of the perpetrator, are analysed. Due to the limitations for this paper – considering the different five grounds according to Art 1A 1951 UN Refugee Convention – only cases dealing with questions related to the “membership of a particular social group” will be analysed. Furthermore, no in-depth country-specific assessment of risks of serious harm on return will

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² United Kingdom: UK Upper Tribunal (Immigration and Asylum Chamber), Austria: Federal Administrative Court (Bundesverwaltungsgericht), Germany: Administrative Court (Verwaltungsgericht) in Wiesbaden and Würzburg, France: National Court of Asylum (Court National du Droit d'Asile), Australia: Federal Magistrates Court.

be conducted as this will depend upon a number of factors and must be assessed on an individual case by case basis.

Human Rights dimension of trafficking in human beings

Trafficking in human beings is a serious crime and a gross violation of human rights. It is very often linked with organised crime. According to UNODC trafficking in persons for the purpose of sexual exploitation remain the majority of identified cases. In 2014 54 % of identified VTHB were trafficked for the purpose of sexual exploitation worldwide³.

With the UN Palermo Protocol⁴, the Council of Europe Anti-Trafficking Convention (CoE Convention)⁵ and the EU Directive 2011/36/EU⁶ important steps were taken to ensure state's obligation and responsibility to identify and protect VTHB and to ensure the prosecution of the perpetrators. In *Rantsev v. Cyprus and Russia* the European Court of Human Rights (ECHR) maintained Cyprus' failure to put in place an appropriate legal and administrative framework to combat trafficking and the failure of the police to take operational measures to protect the woman from trafficking, despite circumstances which had given rise to a credible suspicion that she might have been a victim of trafficking⁷.

Both the UN Palermo Protocol as well as the CoE Convention contain a saving clause which - in accordance with the 1969 Vienna Convention on the Law of Treaties - seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers. Art 14 of the UN Palermo Protocol and Art 40 para 4 CoE Convention are particularly concerned with the 1951 UN Refugee Convention and 1967 Protocol relating to the Status of Refugees⁸.

There is no universally defined or accepted definition of the concept of *well-founded fear of being persecuted*. According to the UNHCR Handbook *it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution*⁹. It is further outlined that other serious violations of human rights – for the same reasons – would also constitute persecution¹⁰:

³ UNODC, *Global Report on Trafficking in Persons 2016* (United Nations publication, Sales No. E.16.IV.6); p. 6.

⁴ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

⁵ Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings*, 16 May 2005, CETS 197.

⁶ European Union: Council of the European Union, *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 15 April 2011, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU.

⁷ *Rantsev v Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010; see also: *V.F. c. la France*, Requête no 7196/10, Council of Europe: European Court of Human Rights, 29 November 2011: the ECHR declared the application of a Nigerian applicant inadmissible and considered that the information provided by the applicant was not sufficient to prove that the police knew or should have known when they made the order for her deportation that the applicant was a VTHB.

⁸ Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16.5.2005, no 40.

⁹ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, no 51.

¹⁰ *Grahl-Madsen* proposed the notion of “unendurability” as in order to correctly interpret the concept of persecution (Grahl-Madsen, A., *The Status of Refugees in International Law: Refugee character*, A. W. Sijthoff, 1966); Art 9 para 2 EU Qualification Directive 2011/95/EU provides a non-exhaustive set of examples and connects the interpretation of persecution to the human rights framework; *Nykänen* pleads for a broad human rights based interpretation of “persecution” emphasizing the importance of the CERD, CRD and the CEDAW to upheld states’ obligations to protect in the private sphere

Sexual exploitation as a form of gender-based violence might constitute persecution¹¹. Nowak¹² as well as McGregor¹³ demonstrate that cases of trafficking in human beings might amount to torture or other inhumane and degrading treatment. In *Rantsev v. Cyprus and Russia* the ECHR found that *trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention*¹⁴. The ECHR further considers that *trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership*¹⁵.

The above mentioned examples demonstrate the human rights dimension of trafficking in human beings for the purpose of sexual exploitation. Thus, trafficking in human beings might be qualified as persecution according to Art 1A 1951 UN Refugee Convention if the nexus to one of the convention grounds can be established.

Furthermore, with *Rantsev v. Cyprus and Russia* the ECHR links human rights law with international criminal law, referring to *Kunarac*¹⁶ of the International Criminal Tribunal for the Former Yugoslavia (ICTY) with the conclusion that the traditional concept of “slavery” has evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership.

Establishing the nexus to the membership of a “particular social group” in cases of VTHB

The evolution of the concept of the membership of a “particular social group” (PSG) as one of the five grounds enumerated in Art 1A (2) of the 1951 UN Refugee Convention has advanced

considering the “Due-Diligence Principle” - which is of particular relevance for women or children - in addition to the international Bill of Human Rights (Nykänen, E. (2012): *Fragmented state power and forced migration. A study on non-state actors in refugee law*, Leiden [Holland], Boston: Martinus Nijhoff Publishers); Hathaway and Foster translate the concept of “being persecuted” as *the sustained or systematic denial of basic human rights demonstrative of a failure of state protection* and consider that “persecution” comprises two elements: serious harm and failure of state protection connecting it to the international human rights framework (Hathaway, J. C.; Foster, M. (2014): *The law of refugee status*, 2nd edition, Cambridge University Press).

¹¹ The General Recommendation No. 19, the Declaration on the Elimination of Violence against Women and the Vienna Declaration and Programme of Action and the Beijing Declaration and Platform of Action contributed to recognizing that women are particularly vulnerable to violence in the private sphere in the hands of private actors. The advancement of the “Due Diligence Principle” and case law strengthened awareness on state’s responsibility for securing human rights and protecting individuals from violations perpetrated by non-state actors; see also ECHR, *Opuz v. Turkey*, Appl No. 33401/02 09.09.2009; UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), judgment of 10.01.2005, Case no. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2005); CEDAW, judgment of 06.06.2007, Case no. CEDAW/C/39/D/5/2005; CEDAW, judgment of 06.08.2007, Case no. 6/2005, UN Doc. CEDAW/C/39/D/6/2005 (1.10.2007).

¹² OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings in partnership with the Ludwig Boltzmann Institute of Human Rights and the Helen Bamber Foundation, *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment*, Occasional Paper Series no. 5 (June 2013); see also: UN Human Rights Council: *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development : report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Manfred Nowak, 15.1.2008 A/HRC/7/3.

¹³ McGregor, L. (2014): *Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings*. In: *Human Rights Quarterly* 36, pp. 210–241.

¹⁴ ECHR *Rantsev vs. Cyprus and Russia*, no 281-282.

¹⁵ ECHR *Rantsev vs. Cyprus and Russia*, no 282; see also: ECHR *L.E. v. Greece*, Requête no 71545/12, 21.01.2016; ECHR *M. and others v. Italy and Bulgaria*, Application no. 40020/03, 31.12.2012; ECHR *V.F. v. la France*, Requête no 7196/10, 29.11.2011; ECHR *Siliadin v. France*, Application no. 73316/01, 26.07.2005.

¹⁶ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001: in assessing whether a situation amounts to a contemporary form of slavery, the Tribunal held that relevant factors included whether there was control of a person’s movement or physical environment, whether there was an element of psychological control, whether measures were taken to prevent or deter escape and whether there was control of sexuality and forced labour.

the understanding of the refugee definition as a whole. Two different approaches had been developed on how to determine what constitutes a PSG within the meaning of the 1951 Convention:

The “*protected characteristics*” approach (sometimes referred to as an “*immutability*” approach or *eiusdem generis* approach), examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as gender) or unalterable for other reasons (such as the historical fact of a past association, occupation or status)¹⁷.

The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the “*social perception*” approach¹⁸. The characteristic in common to group members may be any attribute which makes the group cognizable in society.

According to the UNHCR Guidelines No 2 the two approaches ought to be reconciled¹⁹.

Case Summaries

Nigeria²⁰

All women shared a similar social background. In *W211 1425426*, *W251 1430035* and *W252 1425354* the women faced inhuman treatment and severe violence already in their country of origin and tried to seek help by a woman who pretended to offer relief through a journey to Europe - who later turned out to be the “*Madam*” – key person in the trafficking network. In *W251 1430053* and *W211 1425426* family members or persons of trust personally knew the perpetrators and initiated the contact. Apart from *W211 1425426* the women did not have a proper educational background²¹. The appellants were approached by the perpetrator in Edo State (Benin City). In *W252 1425354*, *W2K 1430213*, *3K 1465/09.WI.A* and *W2K 1430213* the women were underage when being approached by the “*Madam*”. The “*Madam*” initiated the preparation of the journey to Europe, including the issuance of (fake) passports. In all cases the women or girls had to surpass a traditional “*Juju*”-ceremony²² - aiming at preventing them to approach the police and to ensure that the “*costs*” for the journey to Europe will be paid back. In *W252 1425354*, *W251 1430035*, *W211 1425426* the women claimed that they still fear the power of the “*Juju*” when returned to Nigeria. In *W252 1425354* the “*Juju*”

¹⁷ The “*protected characteristics*” approach was developed and elaborated through the case *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993.

¹⁸ The “*social perception*” approach has been established in primarily Australian jurisprudence through the case *A and Another v Minister for Immigration and Ethnic Affairs and Another*, [1997], Australia: High Court, 24 February 1997: The High Court of Australia here adopts the understanding that a PSG “*is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large*”.

¹⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, para. 10, available at: <http://www.refworld.org/docid/3d36f23f4.html>.

²⁰ *Austria*: Federal Administrative Court (Bundesverwaltungsgericht): case no.: *W211 1425426*, decision of 11.04.2016; case no.: *W252 1425354*, decision of 15.05.2017, case no.: *W251 1430035*, decision of 24.05.2017; *France*: French National Court of Asylum (Court National du Droit d’Asile, CNDA): case no.: J.E.F. 10012810, decision of 24.03.15; *Germany*: Administrative Court Wiesbaden (Verwaltungsgericht): case no.: *3K 1465/09.WI.A*, decision of 14.03.2011; Administrative Court Wiesbaden (Verwaltungsgericht) Würzburg: case no.: *W2K 1430213*, decision of 17.11.2015.

²¹ In *W211 1425426* the appellant graduated high school.

²² In temples priests practice different cults related to the goddess Ayelala. She became the guarantor of contractual relations and is invoked to kill all those who do not respect their commitments. The goddess administers justice and protects morality. Ayelala’s shrines are strongly implanted in Edo State, particularly in Benin City and can be considered as parallel customary justice system. See: European Union: European Asylum Support Office (EASO), EASO Country of Origin Information Report. Nigeria - Sex Trafficking of women, October 2015, p. 228.

ceremony was held upon arrival in Austria in *W251 1430035* the "Juju" was "renewed" upon arrival in Italy. Upon their arrival in a European country, the women were forced to work as prostitutes in order to pay back the costs that were invested in them, being deprived of their fundamental rights. Severe physical and psychological violence against the women was inflicted (e.g. rapes, beatings, intimidation, psychological violence, etc.).

Even being under the influence of the "Juju", in all cases the women were able to free themselves and gave witness statements to the investigative authorities in the receiving country.

Moldova

In *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of State for the Home Department*²³ the appellant had been trafficked into the UK for the purpose of sexual exploitation. She subsequently gave evidence against the person responsible for her sexual exploitation in the UK, which resulted in the successful prosecution of the perpetrator who received a term of imprisonment. The appellant fears harm at the hands the perpetrator and his network (family and associates) if she is returned to Moldova.

Thailand

In *VXAJ v. Minister for Immigration and Another*²⁴ one of five sex workers of Thai nationality applied for a protection visa on asylum grounds on the basis that she assisted with the prosecution and feared for her own life and that of her family if she was forced to return to Thailand. The women entered an agreement to work as sex workers in Australia engaged through a broker in Thailand, with each woman incurring a debt to be paid off by working at the brothel. The Thai recruiters, from whom the contracts had been purchased, were paid for each of the women. On arrival in Australia, the women were advised that they would be known as "contract girls", to distinguish them from other sex workers. Their passports and return airline tickets were taken. The women had been told to remain indoors, they were not allowed to keep their earnings being under control and deprived of their fundamental rights.

In *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*²⁵ the UK Upper Tribunal deals with the case of a woman with a very instable social background (young, single mother, no family support, poor educational background) who was forced to work in prostitution in the UK. The woman was working in the tourism industry in Thailand when being approached by the perpetrator with whom she later was engaged in a relationship before leaving Thailand. A week after having arrived in the UK, the appellant was told she had to repay for the investment the perpetrator had made in her by bringing her to the UK and she was kept in three brothels on a rotating basis where she was forced into prostitution for eight months. She was afraid to refuse as the perpetrator threatened her to harm her and/or her child if she resisted. She further experienced severe and ongoing physical violence as well. After an unsuccessful attempt to escape the perpetrator threatened

²³ *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of State for the Home Department*, CG [2008] UKAIT 00002, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 26 November 2007

²⁴ *VXAJ v. Minister for Immigration and Another*, [2006] FMCA 234, Australia: Federal Magistrates Court, 20 April 2006; see also the judgment of the Court convicting the perpetrator: *R. v. Tang*, [2008] HCA 39, Australia: High Court, 28 August 2008: the Australian High Court upheld the judgment of the Victorian County Court that addressed allegations that, at various times between 10 August 2002 and 31 May 2003, the main perpetrator possessed the five women as slaves.

²⁵ *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*, CG [2010] UKUT 118 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 8 April 2010.

to kill her. Finally she managed to flee, was detained and – while in detention she shared her experiences with the authorities and was referred to the UK Human Trafficking Centre.

Analysis of cases in view of the nexus to a particular social group and the impact of a witness statement

According to the UNHCR Trafficking Guidelines No 7, trafficked women may base membership of a PSG on the fact of having previously been trafficked²⁶. In line with the protected characteristics approach it can be argued that the experience is a historic fact common to all victims and unchangeable²⁷. This position was supported by Baroness Hale of Richmond who, in the case of *Ex parte Hoxha*, explained that *women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment*²⁸.

In *VXAJ v Minister for Immigration & Anor* the Federal Magistrates Court of Australia found that the Tribunal has misapplied established legal principles through simply rejecting cases of trafficked women who have given evidence against traffickers as a PSG. The Court found that the Tribunal erred when treating these facts as simply *providing the context and not the means to identify whether a PSG existed*²⁹.

Referring to the position in *Hoxha*, in the case of *SB Moldova* it was determined that “*former victims of trafficking*” and “*former victims of trafficking for sexual exploitation*” are capable of being members of a PSG because of their shared common background or past experience of having been trafficked³⁰. The UK Upper Tribunal concluded that the appellant is at real risk of serious harm because of the combination of the “*particular nature of the gang*” and the “*appellant’s personal profile*” (as a victim of trafficking in human beings who had given evidence in the trial against the perpetrator). It was therefore considered that the appellant is at a heightened risk of ill-treatment³¹. The consideration to determine a membership of a PSG as “*victims of trafficking for the purposes of sexual exploitation who have given evidence which secured the conviction of their traffickers*” was rejected as it falls foul of the requirement that the PSG identified must exist independently of the persecution feared in the future³². In this case the appellant set out a detailed summary and evidence (including the witness statement provided to the police) in relation to the asylum claim. However, the UK Upper Tribunal didn’t raise any objections to the summary, considered that there were no doubts on

²⁶ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 7: The Application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006, HCR/GIP/06/07, no 37-39.

²⁷ UNHCR Guidelines No. 7; in an earlier case (*MP [Trafficking - Sufficiency of Protection] Romania v. Secretary of State for the Home Department*, [2005] UKIAT 00086, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 21 April 2005) the same PSG (“*women in Romania who have been trafficked*”) was rejected on the basis that this construction falls foul of the principle that the group must exist independently of persecution.

²⁸ *Regina v. Special Adjudicator, Ex parte Hoxha (FC)*, [2005] UKHL 19, United Kingdom: House of Lords (Judicial Committee), 10 March 2005, no 623.

²⁹ *VXAJ v. Minister for Immigration and Another*, [2006] FMCA 234, Australia: Federal Magistrates Court, 20 April 2006, no 37-47. This case was remitted to the Australian Refugee Tribunal for re-determination.

³⁰ *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of State for the Home Department*, CG [2008] UKAIT 00002, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 26 November 2007.

³¹ *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of State for the Home Department*, no 112 and 184.

³² *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of State for the Home Department*, no 56.

the credibility of the claim and emphasized that it is *not only unnecessary but inadvisable for the Tribunal to set out the facts relating to the appellant's case in any greater detail*³³.

The German Administrative Court (Verwaltungsgericht) Wiesbaden in the case *3K 1465/09.WI.A* and the German Administrative Court (Verwaltungsgericht) Würzburg in a more recent case *W 2 K 14.30213* considers that "returning women who were VTHB and who escaped/freed themselves (and who reported the case to the criminal police)" are capable of being member of a PSG, referring to the risk of retaliation because of the testimonial statement against the perpetrators to the police and remaining open "debts", which led to harassment of family members in the above mentioned cases.

This approach again provides support for the construction of a PSG based on past experience on the one hand but on the other hand again falls foul of the requirement that the PSG identified must exist independently of the persecution feared in the future. In both cases solely the mere fact that the appellant gave a witness statement to the police was considered in the assessment of the asylum claim but the statements were not analysed or assessed in greater detail by the Administrative Courts.

The French National Court of Asylum (Court National de Droit d'Asile, CNDA) in the case *J.E.F. 10012810*³⁴ follows this approach and reasoning. The CNDA found that victims of trafficking from the Edo State share a common background and distinct identity which falls within the definition of a PSG. Even though the CNDA considered that the appellant gave a witness statement to the French police, the CNDA focuses primarily on the community's perception of trafficked victims in its assessment of whether they constitute a PSG.

The most recent developments on how to conceptualize a PSG in cases of VTHB come from the Austrian Federal Administrative Court (Bundesverwaltungsgericht). Beginning with the case *W211 1425426* the Court held that former victims of human trafficking for the purpose of sexual exploitation (from Nigeria) may constitute a PSG of "victims of systematically organized human trafficking" based on country of origin information which indicates that Nigeria cannot ensure sufficient protection in terms of accommodation, assistance and safety to returning VTHB³⁵. Return risks for former VTHB from Nigeria are as well analysed in great detail by the UK Upper Tribunal in *HD (Trafficked women) Nigeria*³⁶.

In *W211 1425426* the Austrian Federal Administrative Court considers that members of this PSG are returning VTHB who were able to free themselves. The Court emphasizes the impact of the appellant's witness statement to the police and her active contribution to successful police investigations - which made it possible to identify members of the trafficking network. The Court considers a reasonable risk of retaliation. In this context the Court refers to the fact that also the criminal police confirmed the likelihood of retaliation acts due to the appellant's contribution in a statement to the Court. The appellant's family members were threatened by perpetrators in Nigeria after the appellant freed herself from the perpetrator without paying back her "debts". The Court thus concludes that retaliation against family members impacts the appropriateness of the appellant to reintegrate to the family network which would thus reduce her opportunities to safely reintegrate to the society. Therefore the Court further

³³ SB (PSG - Protection Regulations - Reg 6) *Moldova v. Secretary of State for the Home Department*, no 2.

³⁴ French National Court of Asylum - Court National du Droit d'Asile (CNDA), *J.E.F. 10012810*, 24.03.2015; this case is a referral back to the CNDA from the Council of State. In this decision reference is made to the location the appellant originated from (Edo State in Nigeria) as specific characteristic and thus part of the definition of the PSG. Given that most Nigerian women who were victims of trafficking for sexual exploitation originate from Edo State or Delta State the region the appellant came from indeed can be recognized as a special characteristic. The CNDA found that victims of trafficking from the Edo State share a common background.

³⁵ Austrian Federal Administrative Court (Bundesverwaltungsgericht), *W211 1425426*, 11.04.2016.

³⁶ UK Upper Tribunal, *HD (Trafficked women) Nigeria* CG, [2016] UKUT 00454 (IAC), United Kingdom, 17.10.2016, no 83 ff.

concludes that there is no available internal flight alternative. In the judgment reference is made to the assessment of the police on the overall credibility of the victim which in return impacted the credibility assessment of the asylum claim. The Court particularly refers to consistent and plausible statements provided by the appellant in both, the criminal procedure and the asylum procedure. The police's conclusion that the appellant indeed is a victim of trafficking in human beings for the purpose of sexual exploitation and the police's assessment on prevailing return risks were determinative for the Court's decision to grant refugee status.

In more recent cases *W252 1425354*³⁷ and *W251 1430035*³⁸ emphasis was laid on the assessment of individual, personal factors influencing real risks of serious harm upon return as former VTHB by the Court. In *W252 1425354* factors such as the appellant's social status as single mother, her educational level and her instable mental health condition as well as the fact that she was underage when she was sexually exploited along with the appellant's contribution to police investigations against the perpetrators and the remaining "open debts" led the Court to the conclusion that retaliation acts would be likely upon return and an internal flight alternative in Nigeria would not be available for the appellant due to her social status and personal circumstances.

The legal reasoning on the risk of retaliation as serious harm upon return, as well as the findings that no internal flight alternative is available due to the personal circumstances are similar in *W251 1430035* whereas in this case the woman was not sexually exploited in the receiving country Austria but in Italy. The appellant gave a witness statement to the Austrian police³⁹. In the credibility assessment the Court however refers to the detailed statements of the appellant in the asylum procedure being consistent with the information provided to the police.

With regard to the focus on personal circumstances to be considered when assessing real risks of serious harm in case of return to the country of origin, *W252 1425354* can be compared with *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*. The UK Upper Tribunal establishes the nexus to a PSG ("*young females who have been victims of trafficking for sexual exploitation*") and highlights that the appellant is a particularly vulnerable young woman, which is why she is not in the same position as other women being returned to Thailand. The Tribunal refers to re-trafficking risks in case of return due to her limited education, difficulties to reintegrate because of the fact that it would be difficult to explain her long absence and with a clearly fragile state of mind⁴⁰. The Tribunal concludes that there would not be an internal flight alternative due to her fragile state of mind and insufficient assistance and accommodation for her as a former VTHB considering that in Thailand focus is mainly on providing short-term assistance to those who have been trafficked *into* the country⁴¹. In this case the UK Upper Tribunal merely vaguely refers to the fact that information was provided by the appellant via the UK Human Trafficking Centre in the credibility assessment of the decision⁴².

³⁷ Austrian Federal Administrative Court (Bundesverwaltungsgericht), *W252 1425354*, 15.05.2017.

³⁸ Austrian Federal Administrative Court (Bundesverwaltungsgericht), *W251 1430035*, 24.05.2017.

³⁹ The Austrian police discontinued investigations arguing that it would be Italy's responsibility to conduct investigations.

⁴⁰ *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*, no 146-148.

⁴¹ *Ibid.* no 164.

⁴² *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*, no 109.

Conclusions

In the cases analysed the Courts acknowledged trafficking in human beings for the purpose of sexual exploitation as "persecution" according to Art 1 1951 UN Refugee Convention and established the nexus to a "particular social group" – determining the PSG as group of "former victims of trafficking" or "former victims of trafficking for sexual exploitation" or most recently, the group "victims of systematically organized trafficking in human beings". There seems to be a tendency to reject the PSG of "victims of trafficking for the purposes of sexual exploitation who have given evidence which secured the conviction of their traffickers" as this group does not exist independently of the persecution feared.

In all analyzed decisions reference was made to the fact that the appellant as VTHB gave a witness statement to the police to free herself and/or to contribute to the prosecution of the perpetrator(s).

However, the analysis of the decisions shows that the fact that a witness statement was provided to the police is considered differently and inconsistently in refugee status determination procedures.

Apart from referring to the mere fact that a statement was provided to the police no further assessments of the witness statement or on possible outcomes due to the victim's contribution to police investigations were conducted in the analysed decisions of the German Administrative Courts (*3K 1465/09.WI.A, W 2 K 14.30213*), the analyzed decision of the French National Court of Asylum (*J.E.F. 10012810*) and in the decisions of the UK Upper Tribunal (*HD (Nigeria), AZ (Thailand) and SB (Moldova)*) whereas in *SB (Moldova)* the UK Upper Tribunal considered it even inadvisable to set out the facts relating to the appellant's case in any greater detail as the credibility of the claim was not in doubt.

In one decision of the Austrian Federal Administrative Court (*W211 1425426*) the Court followed a different approach: the detailed witness statement and her active contribution to successful police investigations were determinative and relevant for granting refugee status as well as for the conclusions on prevailing return risks.

The stronger a VTHB was able to contribute to police investigations the stronger the Court or Tribunal was able to establish the likelihood of retaliation acts against the VTHB or her family (*SB (Moldova) v. Secretary of State for the Home Department, W211 1425426, VXAJ v Minister for Immigration & Anor*) if returned to the country of origin.

It is necessary to ensure due consideration of the different nature of criminal prosecution and refugee status determination procedures along with different principles on the procedural limb (e.g. related to the standard of proof, *in dubio pro reo* principle vs. analysis of probabilities) and the different role of a VTHB in the respective procedure.

Furthermore it is crucial to bear in mind the difficult circumstances of a VTHB who might still be in a difficult psycho-social situation, who might still try to overcome the feeling of shame or trauma. Therefore due consideration of specific attitudes a VTHB might show in different interview situations is important⁴³.

The analysis of the decisions also shows that the impact traditions and customs might have on the victim's willingness to report the experienced harm to the police should not be underestimated. The power of a "Juju" as an instrument of psychological violence aiming at hindering the VTHB to give a statement to the police for instance might have a strong influence on the victim's behavior towards authorities. Consequently the fear of "supernatural

⁴³ In this context the Swiss Federal Administrative Court (Bundesverwaltungsgericht) Bern in the judgment D-6806/2013, 18.07.2016, outlined the need to consider the specific attitudes a VTHB might show in interviews, resulting from shame or trauma.

retaliation” became clear in the decisions analyzed dealing with asylum applications of VTHB from Nigeria.

Refugee status determination procedures of VTHB who provided a witness statement to the police clearly demonstrate the two-fold character of trafficking in human beings - the criminal law dimension on the one hand and the human rights dimension on the other hand. As shown in the analyzed cases, the fact that a VTHB freed herself and gave a statement to the police led to findings that reasonable return risks might prevail whereas other aspects such as personal circumstances or customs were considered in the assessment of return risks and availability of an internal flight alternative as well. Particularly the UK Upper Tribunal in *HD (Nigeria)* provides an in-depth guidance on assessing return risks due to the personal circumstances of the VTHB.

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