Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

# Victims of Trafficking for Sexual Exploitation as Members of a 'Particular Social Group' under the Refugee Convention

## Question(s) at stake:

Whether "former victims of trafficking" and "former victims of trafficking for sexual exploitation" can be members of a "particular social group" (PSG) under the Refugee Convention. Whether the appellant is at risk of persecution in Moldova based on membership in such a group.

## Outcome of the ruling:

"Former victims of trafficking" and "former victims of trafficking for sexual exploitation" can form a PSG under the Refugee Convention. The shared background or experience of having been trafficked is an immutable characteristic that can identify the members of the group. Additionally, in order to qualify for a PSG, the group members must be "perceived as being different by the surrounding society" (para 106).

In the context of Moldovan society, the appellant is a member of a PSG, as a former victim of trafficking for sexual exploitation and would be at real risk of persecution by reason of such membership.

## Topic(s):

- Immigration and Asylum

## Keywords:

- Gender based persecution
- Grounds/Reasons of persecution
- Membership of a particular social group

- Real Risk of persecution
- Refugee status
- Trafficking

**Tag(s):**

- Discrimination

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**Country:**

United Kingdom

**Official citation:**

SB (PSG – Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 00002

**Link to the decision:**

https://tribunalsdecisions.service.gov.uk/utiac/37827

**ECLI:**

No ECLI number / ECLI number unknown

**Date:**

26 April 2007

**Jurisdiction / Court / Chamber:**

Asylum and Immigration Tribunal (AIT)

**Remedy / Procedural stage:**

Appeal to the AIT against a Home Office (HO) decision.

**Previous stages:**

- HO decision dated 4 October 2006.

### Subsequent stages:

- No information found.

### Branches / Areas of law:

Administrative law; Asylum law.

### Facts:

The appellant, a Moldovan national, was trafficked into the UK for sexual exploitation. Having given evidence against her trafficker, Z, the police was able to successful prosecute him. Z received a sentence of over five-year imprisonment for offences related to prostitution and false imprisonment. By the time of the current appeal, Z was no longer imprisoned. The appellant applied for asylum in the UK based on her fear that if she were returned to Moldova, she would face persecution at the hands of Z and/or Z's family, as well as associates of Z's trafficking network. (para. 2)

The appellant's application for refugee status was refused by the respondent and a humanitarian leave for five years was granted instead. (para. 1) In light of the particular circumstances surrounding the case – including that "Z has a wide network of contacts throughout Eastern Europe and the Appellant had given evidence that Z's associates were still in Moldova and that the trafficking operation was ongoing" – the respondent accepted that "the appellant would not be able to obtain sufficient protection in Moldova and that she would not be able to relocate safely in Moldova" (para. 3). However, the respondent considered the appellant's case to be exceptional and found that, generally speaking, there was sufficient protection for trafficked women in Moldova and internal relocation would be a safe and viable option for them. (ibid.)

The appellant appealed the HO decision to refuse her refugee status, arguing that she was a member of one or more of the following possible social groups within

the meaning of Regulation 6(1)(d) of the Protection Regulations: “(i) women in Moldova, (ii) former victims of trafficking in Moldova, (iii) victims of trafficking for the purposes of sexual exploitation” (para 12). Specifically, Regulation 6(1)(d) of the Protection Regulations, which transposes the Council Directive 204/83/C (Qualification Directive) into UK law, states that “a group shall be considered to form a particular social group where, for example:

(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.” (para. 41)

The appeal was considered in view of producing Country Guidance on the question of whether “former victims of trafficking” and “victims of trafficking for the purposes of sexual exploitation” can form a PSG in Moldova and on the question of whether they would be “at real risk of persecution *by reason of* [their] membership” to such PSG (para. 4).

## Ruling:

After hearing extensive evidence from country experts and considerable background information, the AIT allowed the appeal. The AIT’s ruling can be divided into two main parts, the first providing Country Guidance and the second dealing with the Appellant’s facts.

### Country Guidance

The most important conclusions are as follows:

1. “Regulation 6(1)(d) of the Protection Regulations” shall be interpreted to mean that where the PSG “relied upon is the broad one of gender or a group with gender-based identifying features, then discrimination in the wider sense against that gender must be shown to exist as an identifying feature of the group” (para. 112b). The usual meaning of the word “discrimination” should be used – i.e., “making unfair or unjust distinctions to the

disadvantage of one group or class of people as compared to others" (para. 43) – as opposed to a narrower interpretation of discrimination as a fear of future persecution (*Shah and Islam* [1999] and *Fornah and K* [2006] followed). (paras. 44, 45)

In addition, "there must be an absence of adequate state protection when the persecution is alleged to emanate from non-state actors of persecution", as stated in *RG Ethiopia* [2006] (paras. 53 (b), 112 (b)).

2. Where PSG members "share a common background which is an immutable characteristic and which they cannot change (for instance, the sharing of a common past experience) or they ought not to be required to change, it may be that such common background defines the group by giving it a separate identity in the society in question" independently of the actions of the would-be persecutors (para 53 (c)). This reasoning is consistent with the House of Lords deliberations in *ex parte Hoxha* [2005]. (paras 54, 57 and 112(a)) In both of these cases, it is not necessary to show general discrimination as an identifying characteristic affecting the group. "If an element of discrimination is necessary", it can be established by "the feared act of persecution". (para. 53) This analysis is in line with* Fornah and K* [2006], *Skenderaj* [2002] and *Shah and Islam* [1999], all three of which held that a family is capable of being regarded as a social group even if there is no evidence of "discrimination in the wider sense against families as a social group" in the countries in question. (para. 49)
3. The adjunctive "and" in Regulation 6(1)(d) of the Protection Regulations should be interpreted in accordance with its natural meaning. Therefore, both limbs set out in Regulation 6(1)(d) must be met in order for a PSG to exist. (paras. 53(c) and 112(d))

The AIT reasoned that ruling otherwise would be inconsistent with *Shah and Islam* [1999], where the House of Lords emphasized that the question of whether a PSG exists must always be considered within the context of the society in question.

The question should be addressed by having regard to whether the group is perceived as being different by the surrounding people. On this point, the AIT departed from the UNHCR Guidelines which state that where members of a social group are found to share an "immutable characteristic", the "distinct social perception" element should not be required because it would place an unnecessary additional burden (UNHCR, PSG Guidelines, paras 9-11). The AIT reasoned that, unlike a House of Lords decision, the UNHCR Guidelines are persuasive but not binding. (paras 69, 72, 74)

4. Whether "women in Moldova" form a PSG was not addressed as the AIT found this unnecessary. (para 107)

5. The AIT focused only on "former victims of trafficking" and "former victims of trafficking for sexual exploitation", and found them capable of being members of a "particular social group". The groups satisfy the first limb of Regulation 6(1)(d) because their past experience of being trafficked is an immutable characteristic shared by their members. (paras. 56, 112(c))

However, in order to form a PSG, the groups must have a different identity in the society in question (the second limb of Regulation 6(1)(d)). (paras. 53(c), 112(d))

6. Based on the available country background evidence, individuals trafficked for purposes of forced labour or begging are not perceived differently by Moldovan society. Therefore, the second suggested social group of "former victims of trafficking", albeit capable of forming a PSG, is not a PSG in Moldova because it does not satisfy sub-paragraph (ii) of Regulation 6 (1)(d). (paras. 93, 110)

7. "Former victims of trafficking for sexual exploitation" have a distinct identity in Moldova, because the group is reasonably likely to be perceived as being different by the surrounding society. Hence, "former victims of trafficking for sexual exploitation" in Moldova are a PSG because the group satisfies both limbs of Regulation 6 (1)(d) (para. 106). The AIT pointed out that the shame

associated with sexual exploitation is such that most victims do not wish to reveal their trafficking experience to their family members. The fear of stigmatization and victims' concern that "members of their home communities will learn of their [trafficking] experiences" were found to act as barriers for victims of sexual exploitation to access long-term support services and to reintegrate in their home communities (paras. 98, 101).

8. Regarding the causation element of the refugee definition, the risk of ill-treatment related to being a member of a PSG is established when such ill-treatment is "at least *related* to the individual's past experience of having been trafficked" (paras. 79, 111).

In this case, "the group exists independently of the feared future act(s) of persecution" and causation is established (following Baroness Hale in *ex parte Hoxha* [2005] at paragraph 37) (paras. 1 and 53 (c)).

**Determination of the appellant's case**

Applying the Country Guidance to the facts of the appellant's case, the AIT allowed the appeal and held that SB is a member of a PSG, namely "former victims of trafficking for sexual exploitation" in Moldova.

The real risk of serious harm from Z and his contacts that the Appellant was subject to was directly related to her past experience of having been trafficked because it arose as a result of the appellant giving evidence against her traffickers at Z's trial. Therefore, both limbs of Regulation 6 (1)(d) are satisfied in the appellant's case. (paras. 79, 111)

## Main quotations on cultural or religious diversity:

Referring to the expert report, the AIT quoted from it as follows:

- "Prostitution is socially stigmatised and most people do not differentiate between someone who has worked in prostitution and someone who was trafficked and forcibly sexually exploited. Both are stigmatised and face serious problems when dealing with family and community members and

when attempting to socially reintegrate. The issue of stigma also directly informs a victim's access to assistance, with some victims unwilling to accept services from anti-trafficking [sic] organization as they fear stigma associated with trafficking.

- Much reintegration depends on the support of the victim’s family. While accommodation is available in the short term, returning to one’s family is the most common strategy and often the only real option available to victims.
- Communities stigmatise returning victims, often labelling them as prostitutes rather than victims of exploitation, and victims may not feel comfortable returning home where they will face questions about their experience abroad. With communities increasingly aware of sex trafficking, there is often the assumption that any woman who has returned home from abroad has been working in prostitution. Community stigma can impede a victim’s ability to receive training, find employment, find housing options and socially reintegrate in the community.” (para. 102)
- The AIT also quoted the following: “In some areas the stigma associated with prostitution is so acute that it is almost impossible for the woman to lead a normal life. In Moldova, for example, service providers referred to a practice of identifying ‘prostitutes’ (and, by implication, often also trafficking victims) by painting the woman's gate in black. The tradition is closely connected with prostitution, with women working in prostitution seen as ‘dirty’. This organisation had assisted several victims who had been subjected to this ostracism” (para. 103)
- “Social stigmatisation is mentioned as one of the difficulties faced in any reintegration process, as well as one of the reasons for the phenomena of re-trafficking, described as a ‘prominent’ issue in Moldova. We are not told whether the practice in Moldova of ‘identifying prostitutes’ by painting the woman’s gate in black is widespread. Nevertheless, the existence of such a practice is indicative of societal attitudes towards prostitutes in Moldova. We note that the quote at our paragraph 103 suggests that the term ‘prostitutes’ by implication often includes trafficked victims, which is supported by the experience of the individual mentioned subsequently in the

same paragraph." (para. 105)

- "[W]e are persuaded that individuals who have been trafficked for the purposes of sexual exploitation are reasonably likely to be perceived as being different by the surrounding society if the fact that they had been trafficked for the purposes of sexual exploitation is known to the surrounding society." (para. 106)

## Main legal texts quoted in the decision:

### International Law

- Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)
- EU Council Directive 2004/83/EC on Minimum Standards for the Qualification Status of Third Country Nationals or Stateless Persons or Refugees or as Persons Who Otherwise Need International Protection (No longer in force; date of end of validity 21 Dec 2013; repealed by Directive 2011/95/EU) (the Qualification Directive)

### UK Domestic Law

- Borders, Citizenship and Immigration Act 2009
- Immigration Rules (adopted 23 May 1994, entered into force 1 October 1994)
- Refugee or Person in Need of International Protection (Qualification) Regulations SI2006/2525 (adopted 18 September 2006, entered into force 9 October 2006) (Protection Regulations)
- Statement of Changes in Immigration Rules CM6918 (the amended Immigration Rules)

## Cases cited in the decision:

### 'Particular social group' (PSG)

- *Ex Parte Hoxha* [2005] UKHL 19

- *JO (Internal Relocation – No Risk of Re-Trafficking) Nigeria* [2004] UKIAT 00251
- *MP (Romania)* [2005] UKIAT 0086

**Discrimination as an identifying characteristic of a PSG**

- *Fornah v SSHD, K v SSHD [2006]* UKHL 46
- *R v IAT, Ex Parte Shah and Islam v SSHD* [1999] 2 AC 629
- *RG (Ethiopia) v SSHD* [2006] EWCA Civ 339
- *SK (Albania)* [2003] UKIAT 00023
- *Skenderaj v Secretary of State for the Home Department* [2002] EWCA Civ 567
- *VD (Trafficking) Albania CG* [2004] UKAIT 00115

## Commentary

### Victims of Trafficking for Sexual Exploitation as Members of a 'Particular Social Group' under the Refugee Convention

Country Guidance (CG) cases, specific to the UK immigration system since 2001, are a unique fact-based form of assessment. They involve the evaluation of a large body of evidence related to the general social and political conditions in a specific country, as well as the particular circumstances of an individual case. They have a binding effect on subsequent cases concerning similar issues and factual evidence (Clayton and Firth 2018: 389; Thomas 2008).

The CG case of *SB* is a landmark case for victims of trafficking (VoTs). It was the first in the UK to hold that VoTs can form a PSG within the scope of the Refugee Convention. This has important positive implications for trafficked individuals for whom membership of a PSG is the most commonly used ground for claiming asylum.

Nevertheless, the *SB* decision presents several limitations for a VoT claiming asylum. Firstly, only trafficked persons originating from certain countries will be recognized as constituting a PSG. This is because the AIT reiterated that both limbs of the Regulation 6(1)(d) of the Protection Regulations must be satisfied for

a PSG to be established. Specifically, whereas all VoTs satisfy the first limb of Regulation 6(1)(d) (the past experience of being trafficked is an "immutable characteristic" because it is fundamental to their identity and it cannot be changed), to also satisfy the second limb of the Regulation, VoTs must establish a "distinct social perception" of the group. This places an obligation on decision makers to undertake a careful assessment of the cultural and social realities within the context of the group's home country and community.

In *SB*, the AIT engaged with extensive cultural norms and social attitudes towards VoTs in Moldova, and found that individuals who had been sexually exploited in the past are reasonably likely to be subject to high levels of social stigmatization and ostracism. It therefore concluded that "former victims of trafficking for sexual exploitation", as a social group, have "a distinct identity in Moldova" given that they are "reasonable likely to be perceived differently by the surrounding society" (para. 106). This approach has been criticized for creating additional hurdles which can exclude VoTs from refugee status where a real risk of future act(s) of persecution is established (Christensen 2011; Juss 2015).

Secondly, by reasoning that "discrimination is […] a necessary identifying characteristic [for] a gender-based social group" to form a PSG (para. 66), the AIT departed from the UNHCR's position set out in its 2002 Gender Guidelines. Specifically, while the UNHCR Guidelines acknowledge that discrimination "may be a relevant factor in determining the visibility of the group", it does not suggest that discrimination should be a compulsory element in establishing a gender-based social group as a PSG (UNHCR Gender Guidelines, para 31). The AIT's requirement for proving discrimination shows concern with an "over-inclusive" meaning of gender for the purposes of establishing a PSG and is seen as yet another obstacle placed before VoTs in their path to secure refugee status (Christensen 2011: 15).

Lastly, it must be remembered that once PSG membership is established, VoTs must also show that such membership is the primary reason for their fear of persecution. This requirement for a causal link between the Convention ground

and the feared persecution was reviewed and confirmed in SB. In practice, proving causation is often difficult for trafficked persons who are regularly targeted because of their gender and various factors that increase their vulnerability to being trafficked (Pomeroy 2011: 464-465). With SB, establishing causation seems to have become less constraining because the AIT held that the Convention ground need not be the sole reason, so long as it is one of the reasons, for the fear of persecution. However, in SB, causation was established because the appellant had testified against her trafficker who was now at large and whose influence continued to be strong across Moldova. This means that she faced a real risk of retaliation from AZ. This leaves open the question of whether VoTs who have not cooperated with the police in the same way as the appellant would be able to prove causation and receive the protection they are after (note that in accordance to Article 11 of the Directive 2011/36/EU all victims of trafficking are entitled to protection regardless of their willingness to cooperate with the authorities).

Notwithstanding its limitations, SB sets an authoritative precedent for the judiciary to take into account cultural evidence related to social norms, attitudes, and practices. It remains good law, paving the way for VoTs from other countries to also receive PSG recognition, including VoTs in cases such as,

- *AM and BM (Trafficked Women) Albania CG* [2010] (see CUREDI41UK001 for a separate analysis),
- *AZ (Trafficked Women) Thailand CG* [2010] and
- *HD (Trafficked Women) Nigeria CG* [2016] (see CUREDI41UK004).

## Literature related to the main issue(s) at stake:

### UNHCR guidelines:

- UNHCR ‘Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ (Geneva 2002) (UNHCR Gender Guidelines)

- UNHCR ‘Guidelines on International Protection: “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’ (Geneva 2002) (UNHCR PSG Guidelines)
- UNHCR ‘Guidelines on International Protection: 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’ (Geneva 2006) (UNHCR Trafficking Guidelines)

**Academic literature:**


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## Disclaimer

NB: In the recent case of DH (Particular Social Group: Mental Health: Afghanistan), Re [2020] UKUT 223, the Upper Tribunal departed from its guidance in SB by holding that a PSG can be established on the basis of either an innate or common characteristic of fundamental importance or social perception, rather than requiring both.


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