



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/03104/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 19 September 2018

Promulgated

On 08 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR H V T

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Toal, Counsel instructed by Thompson & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Vietnam, appealed to the First-tier Tribunal against a decision made by the Secretary of State on 17th March 2017 to refuse his application for asylum or humanitarian protection. In a decision promulgated on 16th June 2018 First-tier Tribunal Judge IM Scott dismissed the appeal on asylum grounds but allowed the appeal on humanitarian protection grounds. The Appellant appeals to this Tribunal against the decision to refuse the appeal on asylum grounds with permission granted by First-tier Tribunal Judge O'Brien on 31st July 2018.

2. The Appellant's account was accepted by the judge. The Appellant claims that he was trafficked to the United Kingdom. His account is that, after his parents died in a flood in 1996, he and his sister worked on a farm. When she was 16 his sister became involved with a group of local gangsters who lent money for the Appellant to be sent abroad on the basis that he and his sister would pay back the money. He claims that in April 2010 he was taken to an airport and flown to Poland and then taken by lorry to the UK via France. He was taken to an apartment, forced to take drugs and to work as a prostitute having sex with men and women. He was not paid and was not allowed to leave and was beaten up any time he tried to resist. This continued until 2012 when he telephoned his sister who told him that she too was being forced to have sex to pay the debt. He escaped on 17th June 2012. He was taken in by a Vietnamese man and was arrested when the premises were raided and he then claimed asylum. The Appellant's case was referred to the National Referral Mechanism (NRM) and the Competent Authority made a decision on 16th March 2017 concluding that the Appellant is a victim of modern slavery.
3. In the Reasons for Refusal letter the Respondent accepted that the Appellant is a national of Vietnam. In light of the decision under the NRM the Respondent accepted that the Appellant had been trafficked to the UK for the purpose of sexual exploitation. The Respondent rejected the Appellant's claim that he owed money to the gangsters who had arranged his journey to the UK. The Respondent considered that former victims of trafficking were not members of a Particular Social Group (PSG) in Vietnam because, *"although they share an immutable (or innate) characteristic - having been a victim of trafficking - that cannot be changed, in view of their equality under the law and the general availability of state protection against trafficking, they are not perceived as different and do not have a distinct identity in Vietnamese society"*[paragraph 49 Reasons for Refusal letter]. Accordingly the Respondent concluded that the Appellant was not a member of a PSG and did not fall within the Refugee Convention.
4. The First-tier Tribunal Judge considered that the Appellant had maintained a coherent, consistent, detailed and plausible account and found that the Appellant's claim was credible [36]. The judge took into account the fact that the Appellant had been found to be a victim of trafficking for the purposes of sexual exploitation following a positive conclusive grounds decision under the National Referral Mechanism [37]. The judge also took into account the evidence of Dr Tran, a country expert, whose report was before the First-tier Tribunal. The judge went on at paragraph 39 of the decision to say:-

"While it is accepted that the Appellant has been a victim of trafficking, I am not satisfied that such victims form a particular social group in Vietnam. The weight of the background evidence supports the respondent's position that victims of trafficking are equal under the law in Vietnam; that there is in place a system of criminal law against trafficking; that victims of trafficking are not generally perceived as being different; and that they do not have a distinct identity in Vietnamese society."

The judge therefore found that there was no Convention reason and that accordingly the Appellant is not a refugee.

5. The judge went on to consider whether the Appellant was entitled to humanitarian protection. In so considering the judge took into account the Home Office Country Policy and Information Note entitled "Vietnam: Victims of trafficking" dated November 2016. The judge took into account a number of factors which indicated that the Appellant would be at an increased risk of being abused or re-trafficked in Vietnam. These included the fact that he has an outstanding debt owed to his traffickers; he lacks family support because his parents are deceased and his sister's whereabouts are unknown; he has no other support network, little education and no vocational skills; he has mental health problems caused by his experiences at the hands of his traffickers; and on return to Vietnam he would have no accommodation, no means of supporting himself and would be likely to living in conditions of destitution.
6. The judge accepted that there was in general a sufficiency of protection in Vietnam in that there is a system of criminal law which the authorities are willing and able to enforce and from which the Appellant is not excluded. However, the judge found in the circumstances of this case that the Appellant would be unable to obtain effective state protection. In addition to the factors which place him at an increased risk of harm, the judge took into account the evidence of Dr Tran that support in Vietnam for victims of trafficking concentrates on the needs of women and children and no such support exists for male victims. The judge took into account Dr Tran's evidence about the registration system, which would make it necessary for the Appellant to firstly return to his home area to re-register before being able to relocate and considered that this shows that there is a danger that this would bring him to the attention of the traffickers to whom he still owes money who would have a continuing adverse interest in him and would be able to trace him. In these circumstances the judge concluded that there were substantial grounds for believing that the Appellant would face a real risk of suffering serious harm on return to Vietnam and therefore allowed the appeal on humanitarian protection grounds.

The grounds of appeal

7. Three grounds are put forward in the Grounds of Appeal. There is no challenge to the finding that the Appellant is entitled to humanitarian protection, however the Appellant contends that the judge erred in his approach to the issue as to whether victims of trafficking are a PSG in Vietnam.
8. The first ground contends that the judge failed to consider material evidence. Reliance is placed Dr Tran's report, which the First-tier Tribunal Judge found to be reliable, which states that there is evidence that criminals and traffickers have corrupt links to local authority officials which are not investigated or pursued by the Government; that Vietnam does not fully comply with the minimum standards of the Trafficking Victim Protection Act 2000; that enforcement of the judicial system with regards

to trafficking is identified as “overloaded and powerless” amounting to a “serious problem”; and that victims of human trafficking are treated as criminals rather than victims. It is contended that there is strong evidence in Dr Tran’s report to show that victims of trafficking are perceived as different and do have a distinct identity in Vietnamese society. Part 7 of Dr Tran’s report is highlighted which states that a victim of trafficking, particularly sex trafficking, “faces strong and unfair persecution and treatment from wider society. They are likely to face frequent verbal abuse from society”. Male victims are likely to be regarded as “sick” or “disgusting” characters and it states that the social stigma is considered one of the most challenging and difficult issues facing victims of trafficking (paragraph 7.7 to 7.8). It is contended that the First-tier Tribunal Judge made no reference to this evidence and that it is unclear whether it has been taken into account. It is contended that deficiencies in an existing legal regime to assist traffickers and complicity of enforcement officers and state officials negate arguments based on legal regimes being able to deal with trafficking (**HC & RC (Trafficked women) China CG [2009] UKAIT 00027**).

9. The argument put forward in the second ground relies on the decision in **Liu v Secretary of State for the Home Department [2005] EWCA Civ 249** which states at paragraph 30 that assessing the effectiveness of protection goes to the risk of persecution rather than the definition of a particular social group. Accordingly, it is contended that the judge took irrelevant matters into account in referring to the existence of a criminal justice system addressing trafficking. It is contended that the decision in **Liu** indicates that the particular characteristic can be identified by wider society through discrimination, recognition or perception from surrounding society of the characteristic or objective observations of the characteristic. It is submitted that this is all that needs to be shown for a group within an immutable characteristic to satisfy the definition of a PSG. It is contended that, in taking matters such as the criminal justice system into account, the judge addressed the risk of persecution and in doing so blurred these discrete issues. It is contended that, whether a victim has avenues of redress does not alter whether they are a member of a particular social group but rather has an impact on the risk on return.
10. The third ground contends that the judge failed to give adequate reasons why he felt that background evidence weighed in favour of the respondent’s assessment of whether the Appellant is a member of a PSG.

The submissions

11. In his skeleton argument Mr Toal highlighted that the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI 2006/2525 (the Qualification Regulations) provides at Regulation 6.1:-

“In deciding whether a person is a refugee:

...

- (d) 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”.

He relied on **SB (PSG - Protection Regulations-Reg 6) Moldova CG [2008] UKIAT 00002** where the Tribunal held at paragraph 56 that trafficking and former victims of trafficking for sexual exploitation are capable of being members of a particular social group because of their shared common background or past experience of having been trafficked. However, the Tribunal emphasised that in order for former victims of trafficking or former victims of trafficking for sexual exploitation to be members of a particular social group, the group in question must have a distinct identity in the society in question.

12. Mr Toal also relied on the decision in **AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC)** where the Tribunal held at paragraph 141 that the shared past experience of being trafficked for sexual exploitation amounts to a common immutable characteristic. He also referred to **AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC)** where the Tribunal held at paragraph 166 that victims of trafficking in Albania would be members of a particular social group. He relied too on paragraph 30 of **Liu** (above). This indicates that a particular social group may be identified by the recognition or perception of the surrounding society in general, that the group in question shares a particular characteristic or the distinguishing characteristic in the group in question, and thus the group in question may simply be objectively observable irrespective of the insight of the general society in which it is placed.
13. In his skeleton argument Mr Toal contended that the First-tier Tribunal Judge erred in finding at paragraph 39 that victims of trafficking in Vietnam are not a particular social group. He contended that it is not necessary to demonstrate want of equality under the law to establish the existence of a PSG, that the existence and efficacy of the system of criminal law against trafficking is relevant to the efficacy of protection rather than the existence of a PSG, and that the weight of the background evidence compels the conclusion that victims of trafficking are perceived as different and possessed of a distinct identity. It is submitted that as a victim of trafficking or as a victim of trafficking for sexual exploitation, the Appellant, along with other such victims, has a common immutable characteristic, namely his experience of having been trafficked, and that shared possession of that characteristic establishes the existence of the particular social group and that the Tribunal erred in law by failing to treat

that as a relevant, if not decisive, consideration for the purpose of deciding whether victims of trafficking are a particular social group.

14. At the hearing before me Mr Toal accepted that the issues identified by the judge whereby victims of trafficking are not generally perceived as being different and they do not have a distinct identity in Vietnamese society [39] are a relevant consideration, but in his submission the conclusions are perverse because the only conclusion open to the judge on the basis of the evidence was that victims of trafficking have a distinct identity. He contended that the evidence in the Home Office Country Information and Policy Note (CIPN) shows positive and negative features, measures to support victims of trafficking and societal stigmatisation, all of which demonstrate that victims are identifiable and identified in Vietnam, therefore in his submission the Appellant satisfied the second limb of the definition of particular social group.

15. It is further contended in the skeleton argument that on the Tribunal's finding of fact it was bound to conclude that the Appellant had a well-founded fear of being persecuted for reasons of his membership of the particular social group of victims of trafficking (for sexual exploitation in particular). This is because of the findings at paragraph 42 that the Appellant has an outstanding debt owed to his traffickers and for that reason would be at an increased risk of being abused or re-trafficked and that he has mental health problems as a result of his experiences as well as the finding at paragraph 45 that there is a real risk that the Appellant returning to his home area would bring him to the attention of traffickers to whom he still owes money who have a continuing adverse interest in him and would be able to trace him. It is contended that the debt referred to as a cause of the risk to the Appellant is an integral, inherent component of his experience of being trafficked. Reliance is placed on the decision in **Sivakumar v Secretary of State for the Home Department [2003] UKHL 14** paragraph 41 where Lord Rodger said:-

“So long as the decision-maker is satisfied that one of the reasons why the persecutor ill-treated the applicant was a Convention reason and the applicant's reasonable fear relates to persecution for that reason, that will be sufficient.”

16. Mr Toal relied upon paragraphs 7.2 to 7.4. of the expert report from Dr Tran and submitted that on this evidence the only reasonable conclusion open to the judge was that the Appellant was a member of a particular social group. He referred to 6.1.5 of the CIPN and submitted that these factors contributed to the risk of being re-trafficked. He submitted that here at least two of the reasons for the fear are directly related to the Appellant's membership of a particular social group. He submitted that the appeal should be allowed on Refugee Convention grounds.

17. Mr Tufan submitted that for someone to be a member of a particular social group they have to share an innate characteristic and must be at risk arising from that and must be for a lack of sufficiency of protection as set out in the CIPN. He referred to the case of **Nguyen (Anti-Trafficking**

Convention: respondent's duties) [2015] UKUT 00170 (IAC)
 paragraph 52 where the Tribunal said:-

"...It has not been shown that the background evidence indicates that returning without her partner and with the children would place her at risk of breach of her Article 3 rights or that even if she is a member of a particular social group of trafficked women from Vietnam, she faces a real risk of harm on that account. It is speculative and no more to suggest that she would face a real risk of coming across her previous traffickers or that as a woman in the circumstances in which she would return she faced a real risk of being trafficked by someone else. We do not understand it to have been suggested that she would be unable to make contact again with her brothers, born respectively in 1989 and 1991, or with her sister born in 1993. There is evidence, in the US State Department Report of 2010, referred to in paragraph 50 above, to support the respondent's conclusion in the decision letter that there is a sufficiency of protection provided by the authorities in Vietnam. Accordingly we find that she has not shown a real risk on return to Vietnam of persecution or a breach of her human rights."

18. Mr Tufan submitted that there is a general sufficiency of protection in Vietnam. He submitted that in this case the judge was very generous in his interpretation of the risk to the Appellant, but he accepted that the judge's findings had not been challenged. In practical terms he submitted that there was no material difference to the Appellant going forward. The Appellant here fears gangsters. He submitted that the second element required that the Appellant to show membership of a particular social group does not bite. He accepted that if I was with Mr Toal in his submissions that I could remake the decision by allowing the appeal on asylum grounds.
19. In response Mr Toal submitted that the issues in relation to sufficiency of protection were separate from those of whether the Appellant was a member of a particular social group. In any event sufficiency of protection has been decided in the Appellant's favour at paragraph 45. He submitted that the decision in **Nguyen** had been reported not because of a sufficiency of protection issue, but in relation to the Council of Europe Convention on Action against Trafficking in Human Beings and paragraph 52 related to the facts only and took the case no further.
20. At the hearing I reserved my decision which I now give as follows.

Error of Law

21. It is clear from the case law that a victim of trafficking could be a member of a PSG (**HC & RC (Trafficked Women) China CG, Hoxha [2005] UKHL 19, SB**). The definition of PSG in the Qualification Regulations requires, *inter alia*, that members of the group share an innate characteristic or a common background that cannot be changed, *and* that the group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. In **AZ (Trafficked**

women) Thailand the Tribunal found that the shared experience of being trafficked for sexual exploitation amounts to a common immutable characteristic. The Tribunal referred to the UNHCR guidelines which state that it is the past trafficking experience that would constitute one of the elements defining the group in such cases, rather than the future persecution now feared [141].

22. It is the Secretary of State's case as set out at paragraphs 42-50 of the Reasons for Refusal letter that the victims of trafficking are not a PSG in Vietnam because, whilst victims of trafficking do share a characteristic which cannot be changed, they are not perceived as different and do not have a distinct identity in Vietnam. This view was accepted and adopted by the First-tier Tribunal Judge. The judge found that "The weight of the background evidence supports the respondent's position that victims of trafficking are equal under the law in Vietnam; that there is in place a system of criminal law against trafficking; that victims of trafficking are not generally perceived as being different; and that they do not have a distinct identity in Vietnamese society. Although the judge set out extracts from the expert's report and the CPIN he did not specify which parts of the background evidence supported this conclusion.
23. I agree with Mr Toal's submission that the first two issues identified by the judge, that is equality and the system of criminal law, go to the issue of risk of persecution and sufficiency of protection rather than identification of victims of trafficking as a PSG. Thus the issue is whether there was evidence before the judge to support the conclusion that victims of trafficking are not generally perceived as being different and that they do not have a distinct identity in Vietnamese society.
24. I have considered the evidence which was before the judge which, it is not in dispute, was the CPIN and Dr Tran's expert report. The judge summarised Dr Tran's report at paragraph 33 (b) and at paragraph 37 the judge indicated that the Appellant's account was consistent with Dr Tran's report. It seems clear that the judge accepted Dr Tran's report.
25. At paragraph 7.2 of his report Dr Tran states that Vietnamese society has a very negative attitude towards sex workers or people who have been sexually abused, whether forced or otherwise, and whether or not they are human trafficking victims. People avoid contact with victims who were sexually abused as they think they have poor characters. At 7.3 Dr Tran states that verbal abuse within and from the community is a common means of enforcing group norms and signifying dishonour and/or social stigma. It states that parents might not allow their sons or daughters to marry such women or men, even if they understand that they are fundamentally victims, and that forms of abuse are common in rural areas and in major cities, and that this can lead to further sexual abuse as these victims are extremely vulnerable as a result of their stigmatisation and cannot easily find support and protection from society. At 7.4 of the report Dr Tran states that the sexual abuse victim is hardly able to start their normal life such as finding work or starting a family in their home town, and that parents, siblings and relatives can feel shame for the family if

somebody in their family has worked as a sex slave or has been sexually abused and that the victim may be blamed for their circumstances. The judge made no specific reference to this evidence at paragraph 39.

26. The CPIN of September 2018 (which Mr Tufan submitted and accepted is the same as that which was before the First-tier Tribunal Judge) states at paragraph 5.1.8:-

“5.1.8 The USSD TiP Report 2018, stated:

‘Vietnamese women and children are subjected to sex trafficking abroad; many are misled by fraudulent employment opportunities and sold to brothel operators on the borders of China, Cambodia, and Laos, and elsewhere in Asia, including Thailand, Malaysia, Republic of Korea, Taiwan, and Singapore. Some Vietnamese women who travel abroad for internationally brokered marriages or jobs in restaurants, massage parlors, and karaoke bars—including to China, Japan, Korea, Malaysia, Saudi Arabia, Singapore, and Taiwan—are subjected to domestic servitude or forced prostitution. Pronounced social stigma associated with prostitution, especially in Vietnam’s rural areas, complicates protective service provision for female victims of sexual exploitation, and places them at higher risk of recidivism. False advertising, debt bondage, passport confiscation, and threats of deportation are tactics commonly used to compel Vietnamese victims into servitude.’ “

27. The CPIN report states at 8.1.2:-

“8.1.2 The 2017 DFAT Report stated that ‘DFAT is aware of some assistance provided to victims of sex trafficking by the Government in the form of a one off cash payment of up to VND1.5 million, healthcare, training, legal aid and counselling. However, staffing levels and effectiveness of assistance reportedly varies by location and many victims are reluctant to return and accept assistance for fear of being stigmatised by authorities, their family and community.’”

28. Section 8.4 deals with the risk of re-trafficking and states:-

“8.4.1 The Asia Foundation noted that:

‘Even when these victims manage to return to Vietnam, they face tremendous difficulty in reintegrating into their communities. Stigmatized by society and traumatized by their experience, they generally do not have the education and skills necessary for gainful employment. These women are at a high risk of being re-trafficked. [...] Because many trafficking victims actually know their traffickers, the need for communities to reach out to their members is critical. [...] Because of official condemnation of illegal prostitution as well as a prohibition on emigrating without notifying authorities, many survivors of trafficking are left with few avenues to receive assistance. Often, they are reluctant to seek help for fear of further abuse by traffickers, debt bondage, punishment from government

authorities for illegal border crossing, or stigma from being labelled a prostitute. This isolation and fear leaves them vulnerable to re-trafficking.’

...

8.4.4 The USSD TiP Report 2018 noted that ‘Endemic social stigma associated with victimhood and concerns over retribution in their local communities likely further discouraged many victims from seeking or benefiting from protection services.’”

29. In my view the evidence set out above (which was before the judge) shows that victims of trafficking, more particularly victims of trafficking for sexual exploitation, do have a distinct identity in Vietnam and are perceived as being different by surrounding society.
30. In these circumstances the judge made a material error at paragraph 39. Contrary to the judge’s conclusion, the evidence shows that victims of trafficking for sexual exploitation are perceived as being different and are subject to social stigmatisation. In these circumstances I set aside the decision of the judge to dismiss the asylum appeal on the basis of the absence of a Convention reason based on the finding that the Appellant is not a member of a Particular Social Group.
31. Not all victims of trafficking for sexual exploitation will be at risk on return. However, in unchallenged findings, the First-tier Tribunal Judge found that this Appellant is at increased risk of being abused or re-trafficked due to the factors set out at paragraph 42. Although the judge found that there is in general a sufficiency of protection in Vietnam, he found that this Appellant would be unable to obtain effective state protection [44]. The judge found that there was no viable internal relocation option for this Appellant [45]. Mr Tufan accepted that if I found that the Appellant was a member of a PSG the appeal should be allowed on asylum grounds.
32. In light of my finding that the Appellant is a member of a PSG I remake the decision by allowing the appeal on asylum grounds.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside.

I remake the decision by allowing it on asylum grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant

and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 1st October 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 1st October 2018

Deputy Upper Tribunal Judge Grimes