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International protection for trafficked persons and those who fear being trafficked

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Introduction

Trafficking in persons is modern-day slavery and a grave human rights violation. It violates fundamental human rights enshrined in international law, including violations of the right to liberty and security of person, the right not to be held in slavery or servitude, and the right to be free from torture and cruel, inhumane or degrading treatment.¹ Enslavement, forced prostitution and rape experienced by trafficked persons may constitute a crime against humanity and a war crime in an armed conflict.² States have a primary responsibility to prevent trafficking in person and protect those affected by this serious human rights violation.

What is the scale of this human rights violation? Accurate statistics of human trafficking are almost impossible to collect because of its clandestine nature. While transnational trafficking (across international borders) tends to attract more attention, the magnitude of domestic trafficking (within the national border) is far greater in scale and more difficult to estimate than that across borders. Estimates of transnational trafficking per year range from 800,000³ to 2.5 million⁴.

Of those people trafficked across international borders each year, approximately 80 percent are women and girls, and up to 50 percent are children.⁵ The majority of them are trafficked into sexual exploitation.⁶ An indication of the scale of both transnational and domestic trafficking can be seen from the 2005 statistics of the International Labour Organization (ILO), which estimates that at least 12.3 million people in the world are exploited in forced labour.⁷ Other estimates range from 4 million to 27 million.⁸

Why does people-trafficking occur? The causes are complex and often reinforce each other. Viewing trafficking in persons as a global market, trafficked persons constitute the supply, and abusive employers, labour exploiters and sex buyers represent demand.⁹ The supply is encouraged by many factors, including poverty, the attraction

¹ A number of international and regional human rights treaties enshrines these rights, including: 1948 Universal Declaration of Human Rights, 1966 International Covenant on Civil and Political Rights, 1984 Convention against Torture, Cruel, Inhumane or Degrading Treatment, 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1969 American Convention on Human Rights, and 1981 African Charter on Human and People's Rights.

² 1998 Rome Statute of the International Criminal Court Articles 7 and 8 specify enslavement, rape, sexual slavery, enforced prostitution, or any other form of sexual violence of comparable gravity to be crimes against humanity and war crimes when knowingly committed as part of a widespread or systematic attack directed against any civilian population.

³ U.S. Department of State Office to Monitor and Combat Trafficking in Persons (2007) *Trafficking in Persons Report*. Washington DC., pp. 8, the figure is based on a study completed in 2006.

⁴ International Labour Office (secretariat of ILO) (2005) ILO Global Alliance Against Forced Labour, *Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005*, International Labour Conference 93th Session 2005, Report I(B), Geneva, para. 37 & 217, ILO Report does not define 'trafficking' but from the context it appears that it meant 'transnational trafficking' and did not include 'domestic trafficking'.

⁵ U.S. Department of State 2007, pp. 8. In 2004, the US State Department reported data that disaggregated transnational trafficking in persons by age and gender for the first time.

⁶ Ibid.

⁷ ILO 2005, para. 37.

⁸ U.S. Department of State 2007, pp. 8

⁹ Id, pp. 35.

of perceived standards of living elsewhere, lack of employment opportunities, discrimination against women, violence against women and children, corruption, political instability and armed conflict.¹⁰ The demand is driven by the growing need for cheap and exploitable labour and the sex industry. Human trafficking is an extremely lucrative business, with estimated profits ranging from US\$9.5 billion¹¹ to US\$30 billion¹² a year. While transnational trafficking is mostly an organized crime activity, domestic trafficking on the other hand does not necessarily involve organized criminal network. Instead (Rather), individuals are more likely to be responsible for forced and slave labour, or sexual exploitation.¹³ As with transnational trafficking, domestic trafficking is also mostly economically motivated.¹⁴

International efforts to combat human trafficking have been gaining momentum and international law related to trafficking has also been developing in recent years. The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (hereafter the Trafficking Protocol), supplementing the United Nations Convention against Transnational Organized Crime (hereafter the Convention against Transnational Crime), entered into force on 25 December 2003.¹⁵ In 2004, the Commission on Human Rights appointed a new Special Rapporteur on Trafficking in Human Beings, Especially Women and Children, Ms. Sigma Huda, to focus on the human rights aspects of the victims of trafficking in persons.¹⁶

On 16 June 2005, the Council of Europe Convention on Action against Trafficking in Human Beings was signed.¹⁷ Following this in 2006, the Council of Europe launched the Campaign to Combat Trafficking in Human Beings, aiming to raise awareness and solicit signatures and ratification of the Convention.¹⁸ On 26 July 2005, the European Court of Human Rights (ECtHR) ruled in a case of human trafficking, *Siliadin v. France*.¹⁹ The U.S. Department of State Office to Monitor and Combat Trafficking in Persons published Trafficking in Persons Report in June 2007, its seventh annual report.²⁰ International organizations, governments and civil societies are increasingly focusing on the issues of human trafficking, measures to prevent trafficking and protect the victims of trafficking.

While international efforts to prosecute traffickers are mounting, protection of trafficked persons is often criticized as lagging behind. States that emphasize

¹⁰ Ibid.

¹¹ U.S. Department of State 2006, pp. 13

¹² ILO 2005, para. 221.

¹³ U.S. Department of State 2006, pp. 13.

¹⁴ ILO 2005, para. 221, Huge profits are gained by exploiters of forced labour.

¹⁵ The Convention against Transnational Crime entered into force earlier on 29 September 2003.

¹⁶ Office of the United Nations High Commissioner for Human Rights, Special Rapporteur on trafficking in persons, especially in women and children, *Introduction* [internet] available at: <http://www.ohchr.org/english/issues/trafficking/> Accessed 10 August 2007.

¹⁷ Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.: 197.

¹⁸ Council of Europe, (2007) *Campaign to combat trafficking in human beings*, [Internet] Available at: http://www.coe.int/t/DG2/TRAFFICKING/campaign/default_en.asp Accessed 10 August 2007.

¹⁹ In *Siliadin v. France* (No. 73316/01), the ECtHR ruled in favour of the Togolese girl who was trafficked to France and was made to work for four years domestically as an unpaid maid. The Court found that the French government violated ECHR Article 4, the prohibition of slavery and forced labour, as it failed to comply with its positive obligation to put in place adequate criminal law provisions to prevent and effectively punish the perpetrators of slavery and forced labour.

²⁰ U.S. Department of State 2007.

prosecution of traffickers often do not make protection of trafficked persons a priority, unless the testimony of the trafficked person is necessary to prosecute the trafficker.²¹ Even then, such protection may be offered only if the trafficked person is willing to testify, and often only for a limited duration determined by the length of the prosecution. Such conditional approach fails to sufficiently protect persons who have already been seriously harmed.²²

Of a particular concern are the trafficked persons who are unable to return to their countries for fear of further human rights violations. They may fear retribution in the hands of the former traffickers, risk being re-trafficked, or be stigmatized or ostracized for having been involved in prostitution. This harm may amount to persecution and therefore the persons affected by trafficking could be refugees within the meaning of the 1951 Convention and 1967 Protocol relating to the Status of Refugees (hereafter 1951 Convention).

While not all trafficked persons would fall within the definition of a refugee under the 1951 Convention, the Trafficking Protocol stipulates the possibility. The Office of the UN High Commissioner for Human Rights (OHCHR) in its *Principles and Guidelines on Human Rights and Trafficking* recommends States to take appropriate measures to consider asylum applications by trafficked persons.²³ In April 2006, UN High Commissioner for Refugees (UNHCR) issued *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* (hereafter UNHCR Trafficking Guidelines).²⁴

Despite positive developments, several studies have shown that trafficked persons continue to face difficulties when applying for asylum.²⁵ According to these studies, it is often difficult to persuade the courts if trafficked persons are in need of international protection.²⁶ Main receiving countries are often reluctant to make a favourable determination based upon trafficking status alone.²⁷ Immigration authorities may lack knowledge of or adherence to their own gender guidelines.²⁸

This paper will examine asylum applications by trafficked persons and those in fear of being trafficked, in four English-speaking trafficking receiving countries, Australia,

²¹ Haynes DF (2004) 'Used, abused, arrested and deported: Extending immigration benefits to protect the victims of trafficking and to secure the prosecution of traffickers' *Human Rights Quarterly* 26 pp. 246-247.

²² Ibid.

²³ OHCHR. E/2002/68/Add.1, 2002.

²⁴ UNHCR HCR/GIP/06/07. 7 April 2006. Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=443b626b2>

²⁵ See for example: Burgoyne B & Darwin C (2006) 'Victims of Trafficking in the UK System', abridged version: 'UK victims of trafficking' *Forced Migration Review* 25, 43. Refugee Studies Centre in association with the Norwegian Refugee Council.

²⁶ Solicitors' International Human Rights Group (2006) *Submission to Joint Committee on Human Rights Inquiry into Human Trafficking, The United Kingdom Parliament*, March.

²⁷ Dechert LLP & Klasko, Rulon, Stock & Seltzer LLP (2004) *Comparative Report on the Application of Asylum Standards to Protect Women Trafficked for Sexual Exploitation. An Analysis of the Laws of the United States, France, Canada, Luxembourg and the United Kingdom*.

²⁸ Richards S, Steel M & Singer D (2006) *Hope betrayed: an analysis of women victims of trafficking and their claims for asylum*, POPPY Project and the Refugee Women's Resource Project at Asylum Aid, London.

Canada, the United Kingdom and the United States,²⁹ in conjunction with the UNHCR Trafficking Guidelines. It will also compare pertinent case law among the four countries.

It was found that these four countries do recognize, as refugees, the persons who experienced actual or threat of trafficking with fear of persecution upon returning home, with claims falling within the 1951 Convention. There were, however, inconsistencies among and within the case law of these four countries as well as diversions from the UNHCR Trafficking Guidelines.

Background

How can a trafficked person be a refugee? This section first summarizes international law related to trafficking, specifying the interrelation between smuggling and trafficking. It then examines the definition of trafficking and whether trafficked persons and those who fear being trafficked could fall within the definition of refugees and be entitled to international protection. Lastly it looks at trafficking in the context of gender-based asylum claims.

International law related to trafficking

Although trafficking in persons has attracted much attention in recent years and its manifestation has changed over time, it is not a new phenomenon.³⁰ An estimated 300 international agreements were adopted to suppress slavery between 1815 and 1957,³¹ although critics consider that none has been completely effective.³² Yet these instruments remain in force and are relevant to the contemporary understanding of trafficking and how best to combat it.³³ A number of conventions of International Labour Organization (ILO), which has a mandate to strengthen labour rights, addresses forced or child labour, some of the most relevant ones being No. 29, 105, and 182.³⁴

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families establishes legal framework for protection of the rights of all migrant workers.³⁵ The 1989 Convention on the Rights of the Child³⁶

²⁹ A combination of one civil and three common law countries.

³⁰ UNHCR Trafficking Guidelines 2006.

³¹ Including, for example, 1926 Slavery Convention, 1926 Protocol amending the Slavery Convention, 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, and 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

³² Weissbrodt D & Anti-Slavery International (2002) *Abolishing Slavery and Its Contemporary Forms*, OHCHR United Nations, New York and Geneva.

³³ UNHCR Trafficking Guidelines 2006, para. 2.

³⁴ Abolition of Forced Labour convention, No 105, 25 June 1957 (1959), 40th session ILO Conference.; Forced Labour Convention, No 29, 28 June 1930 (1932), 14th session ILO Conference.; Worst Forms of Child Labour Convention, No 182, 17 June 1999 (2000), 87th session ILO Conference.

³⁵ 18 December 1990 (2003), UNGA. 45/158, Preamble states that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers.

³⁶ 20 November 1989 (1990), 1577 UNTS 3, Article 11.

and its two Protocols³⁷ are fundamental treaties that address issues of trafficking of children. Trafficking for sexual exploitation discriminates against women and girls, which is clearly prohibited in the 1979 Convention on the Elimination of All Forms of Discrimination against Women.³⁸ The 2000 Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention against Transnational Crime (hereafter the Smuggling Protocol) entered into force on 1 January 2004.³⁹ Another supplement to the Convention against Transnational Crime, 2000 Trafficking Protocol, will be discussed in detail below. Regional treaties include the Council of Europe Convention on Action against Trafficking in Human Beings⁴⁰ and the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.⁴¹

*Trafficking vs. smuggling*⁴²

In some aspects, trafficking in persons resembles smuggling of migrants, but there are several significant differences.⁴³ The smuggling of migrants, while often performed in dangerous or degrading conditions, involves migrants who have consented to the smuggling.⁴⁴ Trafficked persons, on the other hand, have either never consented or, if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive actions of the traffickers, as seen in the definition of the Trafficking Protocol below.

Another major difference is that smuggling ends with the arrival of the migrants at their destination, while trafficking involves the ongoing exploitation of the trafficked persons in some manner to generate illicit profits for the traffickers.⁴⁵ Lastly, smuggling is always transnational, whereas trafficking may not be,⁴⁶ as seen also in the Trafficking Protocol definition. It is important to note that smuggled migrants are vulnerable to human trafficking.⁴⁷ Without prior knowledge they may fall prey to traffickers after arriving in the country of destination and become subject to their exploitations.

³⁷ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, A/RES/54/263 of 25 May 2000; and Optional Protocol to the Convention on the Rights of the Child in Armed Conflict, A/RES/54/263 of 25 May 2000

³⁸ Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (1981), 1259 UNTS 13, Article 6.

³⁹ Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, 15 November 2000 (2004), UNGA A/RES/55/25.

⁴⁰ Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.: 197, yet to be in force as of August 2007.

⁴¹ SAARC Eleventh Summit Meeting, January 2002.

⁴² The Article 3(A) of the Smuggling Protocol defines 'smuggling of migrants' as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'.

⁴³ United Nations Office on Drugs and Crime (UNODC), *Frequently Asked Questions*, [Internet] Available at:

http://www.unodc.org/unodc/trafficking_victim_consent.html Accessed on 10 August 2007.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ UNHCR (2005) *Combating Human Trafficking: Overview of UNHCR Anti-Trafficking Activities in Europe*, Bureau for Europe Policy Unit, Geneva.

The 2000 Trafficking Protocol

The Trafficking Protocol aims to prevent and combat trafficking in persons and to facilitate international cooperation, while providing for measures to protect and assist the victims of trafficking. As is the case with the parent Convention against Transnational Crime, the Trafficking Protocol is expected to standardize terminology, laws and practices of countries in this area of the law.⁴⁸ At the time of writing, 114 states are parties to the Protocol.⁴⁹ The four countries reviewed for their asylum cases, namely Australia, Canada, the U.K. and the U.S., all ratified the Trafficking Protocol.⁵⁰ The Protocol provides a definition of trafficking that stands today as the accepted international definition of trafficking.⁵¹ This definition has been adopted into the domestic law of several states and provides a foundation to anti-trafficking initiatives by governments and non-governmental organizations at local, national and international levels.⁵²

Definition of trafficking in persons

The Trafficking Protocol Article 3 defines trafficking in persons as follows:

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 payment 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;
- c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons”

⁴⁸ United Nations Headquarters, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.(New York, 15 November 2000) [Internet] available at: http://untreaty.un.org/English/TreatyEvent2003/Treaty_2.htm, accessed 17 August 2006.

⁴⁹ United Nations Office on Drugs and Crime (UNODC), Signatories to the UN Convention against Transnational Crime and its Protocols, [internet] Available at: http://www.unodc.org/unodc/crime_cicp_signatures.html accessed on 10 August 2007.

⁵⁰ UNODC [Internet] 2006, The dates of ratification are: Australia (14 September 2005); Canada (13 May 2002); the U.K. (9 February 2006); and the U.S. (3 November 2005).

⁵¹ Commission on Human Rights (2006) Integration of the Human Rights of Women and a Gender Perspective Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda. E/CN.4/2006/62.

⁵² Ibid.

even if this does not involve any of the means set forth in subparagraph (a) of this article;

d) “Child” shall mean any person under eighteen years of age.

According to the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Ms. Sigma Huda, the Protocol defines trafficking in four sets of elements: act, means, end result and victim status:

- 1) Act: recruitment, transportation, transfer, harbouring or receipt of persons;
- 2) Means: 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;
- 3) End result: exploitation, including, 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;
- 4) Victim status: A victim of trafficking will be either a child or an adult.⁵³

If a victim of trafficking is a child, then the means become irrelevant, and the questions of whether trafficking has occurred will be determined only by reference to the act and the end result. If s/he is an adult, at least one of the means listed above must have been used in order for the act to constitute trafficking.

It is important to note that both consent and border crossing are irrelevant in determining whether trafficking has occurred.⁵⁴ Article 3(b) specifies the irrelevance of consent. The Protocol definition also does not require that a trafficking victim is physically transported from one location to another. Trafficking in the victim's own home village or town is trafficking in the same way as trafficking that occurs across international borders.

International protection for trafficked persons or those with a fear of being trafficked

Not all trafficked persons require international protection or seek asylum, as they would be able to go back to their own country safely. Some, however, may be unable to return for fear of further serious human rights violations upon return such as re-trafficking or revenge by traffickers, without state protection. They would fall within the definition of a refugee according to Article 1A(2) of the 1951 Convention and

⁵³ Id, Special Rapporteur purposely used the term ‘end result’ instead of ‘purpose’, to avoid the question of mental state of a trafficker as a prerequisite to establishing that s/he has engaged in an act of trafficking. See Note 3.

⁵⁴ Id, Special Rapporteur elaborates the irrelevance of consent and of border crossing in her 2006 Report para 37-45.

hence be entitled to international protection. The saving clause in Article 14 of the Trafficking Protocol stipulates the possibility:

‘1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.’

The importance of availability of asylum systems for trafficked persons is highlighted in several UN and the Council of Europe documents. The 2002 UNHCR *Agenda for Protection*, endorsed by the Executive Committee of UNHCR and welcomed by the General Assembly, calls upon states to ensure that their asylum systems are open to receiving claims from individual victims of trafficking.⁵⁵ The Explanatory Report of the Council of Europe Convention states:

‘This paragraph is particularly concerned with the 1951 Convention and 1967 protocol relating to the Status of Refugees. The fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have appropriate access to fair and efficient asylum procedures. Parties shall also take whatever steps are necessary to ensure full respect for the principle of *non-refoulement*.’⁵⁶

In addition, Principles and Guidelines on Human Rights and Trafficking by the Office of the U.N. High Commissioner for Human Rights underline the importance of:

‘Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.’⁵⁷

Can a trafficked person be a refugee?

According to Article 1(A) of the 1951 Convention, the term 'refugee' shall apply to any person who 'owing to a well-founded fear of being persecuted for reasons of race,

⁵⁵ UNHCR (2002) *The Agenda for Protection*. A/AC.96/965/Add.1, 2002, Goal 2, Objective 2.

⁵⁶ Council of Europe (2005) *Council of Europe Convention on Action against Trafficking on Human Beings and its Explanatory Report*, Council of Europe Treaty Series No. 197, Warsaw, para. 377.

⁵⁷ OHCHR 2002.

religion, nationality, membership of a particular social group or political opinion, is outside his [or her] country of origin and is unable, or, owing to such fear is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.’

Can a trafficked person be a refugee? Trafficked persons and those who fear being trafficked can be defined as refugees under the 1951 Convention if they meet all the elements defined in Article 1(A).⁵⁸ If they have a well-founded fear of persecution based on one of the Convention grounds and their country of origin is unable or unwilling to provide protection against further re-trafficking or reprisals by traffickers, they are entitled to international refugee protection.⁵⁹ There is no reason why a victim of trafficking who fears returning home due to the real possibility of being re-trafficked, targeted for reprisals, or threatened with death, should not be granted refugee status where the state of origin is unable or unwilling to protect that person against such harm.⁶⁰ This will be described more in depth in the coming section.

Can refugees be trafficked? It is also important to note that refugees and internally displaced persons fleeing from persecution could be easy targets for traffickers. This is because the displacement and related vulnerability put refugees and internally displaced persons at a greater risk of exploitation and abuse.⁶¹ To access countries of asylum in an environment of tightening visa regimes and border controls, some refugees may resort to desperate and even illegal measures in their search for a safe country and of livelihoods and can fall prey to trafficking.

Trafficking and gender-based asylum claims

Trafficking is a gendered phenomenon, as seen in the percentage of internationally trafficked males and females in the introduction. Significant progress has been made to recognise gender-related asylum claims in the last twenty years.⁶² In 1985, the Executive Committee of UNHCR first recommended gender-based persecution be considered as grounds for refugee status because women who suffer it could be members of a “particular social group.”⁶³ From 1993 onwards, UNHCR and its Executive Committee encouraged states to develop their own guidelines on women asylum seekers.⁶⁴ In response, several countries developed immigration policy guidelines that recognized gender-based asylum claims.⁶⁵ Canada was the first, followed by the U.S., Australia and the U.K. In 2002, UNHCR issued *Guidelines on Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (hereafter

⁵⁸ UNHCR (2005) *Combating Human Trafficking: Overview of UNHCR Anti-Trafficking Activities in Europe*, Bureau for Europe Policy Unit, Geneva. Also see UNHCR Trafficking Guidelines 2006.

⁵⁹ Ibid.

⁶⁰ Edwards A (2003), ‘Age and gender dimensions in international refugee law’, in Feller E, Turk V, and Nicholson F (ed.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press., pp. 61.

⁶¹ UNHCR 2005.

⁶² Edwards A (2003)

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

UNHCR Gender Guidelines)⁶⁶ as well as *Guidelines on “Membership of a particular social group”* (hereafter UNHCR Membership Guidelines).⁶⁷ The issue of gender is extremely important in reviewing trafficking cases, which will be seen in the following case law analysis.

Case law analysis

This section analyses case law in Australia, Canada, the U.K. and the U.S. concerning asylum claims by trafficked persons or those who fear being trafficked.⁶⁸ A total of some 60 trafficking-related asylum cases from the four countries were examined. The largest number of trafficking-related asylum cases was found in Canada, followed by the U.S., the U.K., and Australia. It is important to note that only the reported cases were analysed for Australia, Canada, and the U.K.⁶⁹ while some unreported cases were included in the analysis of the U.S. cases.⁷⁰ Reflecting that trafficking is a gendered phenomenon, it is worth noting that, other than the Chinese minors from Fugian Province of China who were sent for labour in Canada⁷¹ and the Ukrainian man who was trafficked for labour by an international trafficking ring,⁷² applicants of trafficking-related asylum cases reviewed were all women and girls.

This section first examines trafficking, re-trafficking and reprisals, trauma, discrimination and ostracism as persecution, with attention to two particularities of the U.K. cases, which are age reasoning and heavy reliance on country reports. It then reviews agents of persecution, the inconsistency in gauging state protection, and difficulties in establishing inefficiency of state protection by the applicants. Next, it examines the five 1951 Convention grounds with an emphasis on the membership of a particular social group, on which most claims have been based. Lastly, it looks at statelessness in trafficking-related asylum cases.

Trafficking as persecution

Can trafficking as defined in Article 3 of the Trafficking Protocol amount to persecution? According to the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (hereafter UNHCR Handbook), what amounts to a well-

⁶⁶ UNHCR (2002) *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*. HCR/GIP/02/01.

⁶⁷ UNHCR (2002) *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*. HCR/GIP/02/02.

⁶⁸ UNHCR Trafficking Guidelines 2006.

⁶⁹ All cases are available at <http://www.austlii.edu.au/> (Australia), http://www.canlii.org/index_en.html (Canada) or <http://www.bailii.org/> (UK).

⁷⁰ Center for Gender and Refugee Studies at the University of California Hastings College of the Law (CGRS) keeps an extensive database of gender-related asylum claims, including unreported cases. Available at: <http://cgrs.uchastings.edu/> Several cases were kindly shared by Mr. Stephen Knight, Deputy Director of CGRS.

⁷¹ See for example, *Li v. Canada* (Minister of Citizenship and Immigration), IMM-932-00, Federal Court, 11 December 2000; *Bian v. Canada* (Minister of Citizenship and Immigration) IMM-1640-00, Federal Court, 1 December 2000; *Zhu (L.W.) v. Canada* (Minister of Citizenship and Immigration), IMM-2746-00, Federal Court, 13 August 2001.

⁷² *Decision of the Asylum Officer*, CGRS Case No. 3579 (Ukraine), 10 November 2005.

founded fear of persecution will depend on the particular circumstances of each case.⁷³ For trafficked persons and those who fear being trafficked, therefore, their asylum applications must be examined carefully to establish whether the harm feared as a result of the trafficking experience, or as a result of its anticipation, amounts to persecution in the individual case.⁷⁴ Persecution may involve serious violations of human rights, including a threat to life or freedom, as well as other kinds of serious harm.⁷⁵ The UNHCR Trafficking Guidelines list examples of acts that constitute serious violations of human rights which generally amount to persecution: abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, and the deprivation of medical treatment.⁷⁶

Case law in the four countries reviewed regarded trafficking itself, and/or combinations of above human rights violations in trafficking, amounted to persecution. For example, the Australian Federal Magistrate Court found that the risk of forced prostitution and being trafficked amounted to persecution.⁷⁷ The U.S. Board of Immigration Appeals supported the Immigration Judge's finding that being sent to a brothel to be forcibly prostituted constituted persecution.⁷⁸ These cases show a general consensus in considering trafficking as a human rights violation that could amount to persecution. There are however inconsistencies as well, as seen in the coming paragraphs.

Re-trafficking and reprisals as persecution

Asylum applicants may fear re-trafficking and reprisals from traffickers upon returning to their country. Does being re-trafficked or a target of reprisals amount to persecution? According to the UNHCR Trafficking Guidelines, re-trafficking usually amounts to persecution, in view of the serious violations often involved.⁷⁹ Reprisals would also amount to persecution as they usually involve acts of serious human rights violations. Among the cases reviewed, both the risks of re-trafficking and reprisals were considered by the courts of Australia, Canada, and the U.S., as found in the cases illustrated below. In the U.K., it is more difficult to convince the court that the applicant has a well-founded fear of persecution from being re-trafficked or a target of reprisals⁸⁰, which will be discussed later in the section.

In Canada, the Federal Court acknowledged a well-founded fear of persecution from being re-trafficked. A group of unaccompanied minors, part of some 200 persons mostly from Fujian province of China who arrived in British Columbia in the summer of 1999, applied for asylum. The Federal Court of Canada in *Bian v. Canada* rejected the argument by the Convention Refugee Determination Division that trafficking was

⁷³ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, re-edited 1992, Para. 51 and Trafficking Guidelines para. 14.

⁷⁴ UNHCR Trafficking Guidelines 2006 para. 15

⁷⁵ UNHCR Handbook 1979, Para. 51 and UNHCR Trafficking Guidelines 2006 para. 14.

⁷⁶ UNHCR Trafficking Guidelines 2006, para. 15

⁷⁷ *SZBFQ v. Minister of Immigration* [2005] FMCA 197

⁷⁸ *Matter of M-J-*, CGRS Case No. 364 (China), BIA 30 March 2001.

⁷⁹ UNHCR Trafficking Guidelines 2006, para. 17.

⁸⁰ See Burgoyne and Darwin 2006.

a criminal act that did not amount to persecution.⁸¹ It accepted without reservation the argument of applicants' counsel that 'the applicants had been persecuted on the basis of a Convention ground and, by reason of the debts incurred by their families in favour of the traffickers and the further debts that their families would likely incur as a result of fines imposed on the applicants and their families by reason of their illegal departure from China, *the applicants had a well-founded fear*, both subjectively and objectively, *that they would again be trafficked if they were returned to China*, and are thus "Convention refugees" (emphasis added)'.⁸² This decision by the Federal Court of Canada is important as it clearly recognises that re-trafficking amounts to persecution.

In the U.S., an Immigration Judge rejected an asylum application of a minor from Albania who was kidnapped, raped and threatened to be trafficked because it was merely "personal" and "criminal" acts,⁸³ which shows an inconsistency in considering trafficking amounting to persecution. In the U.S., however, another Immigration Judge found the likelihood of revenge by the trafficking ring and re-trafficking of a woman from northern Thailand amounted to persecution.⁸⁴

An expert's analysis on a Russian woman who fled from forced prostitution that she was likely to be re-trafficked or be subjected to ritualized execution as a reprisal contributed to establishing her well-founded fear of persecution and the granting of asylum.⁸⁵ The Australian Refugee Review Tribunal granted asylum to a Thai woman with a well-founded fear of being persecuted by the brothel owner from whom she had escaped.⁸⁶ The above cases show in general a consensus in considering re-trafficking and reprisals amounting to persecution with occasional decisions that consider trafficking as a criminal act that does not amount to persecution. As mentioned in the case of Fujian minors, some decisions have been reversed upon appeal.

The U.K. found, in a few cases, well-founded fear of persecution from re-trafficking and reprisals. The Immigration Appeal Tribunal⁸⁷ accepted that trafficking could amount to persecution in the absence of state protection in a case of a Ukrainian woman who was forced into prostitution.⁸⁸ A well-founded fear of persecution was recognised for an Albanian woman who was "married" but actually sold by her poor family to a criminal who planned to sell her as a prostitute in Italy.⁸⁹ In this case, the Immigration Appeal Tribunal granted her asylum for it found insufficient state

⁸¹ *Bian v. Canada (Minister of Citizenship and Immigration)* (2000) IMM-1640-00, 1 December 2000, Federal Court of Canada

⁸² See *Id.*, para. 46; and *Li v. Canada (Minister of Citizenship and Immigration)* (2000), IMM-932-00, 11 December 2000, Federal Court of Canada, para. 26.

⁸³ Women Without Borders and CGRS, *Defend asylum for survivors of trafficking* [Internet], available at: <http://www.thepetitionsite.com/takeaction/830584745?tl=1156421747> accessed on 10 August 2007.

⁸⁴ *Decision of the Immigration Judge*, CGRS Case No. 560 (Thailand) 18 June 2001

⁸⁵ *Matter of O-*, CGRS Case No. 275 (Russia), BIA April 2003

⁸⁶ RRT, N03/47757, 11 May 2004.

⁸⁷ The two-tier Immigration Appeals Authority (IAA) system in the U.K. with the Immigration Appeals Tribunal (IAT) became the unified one-tier Asylum & Immigration Tribunal (AIT) system in April 2005 under the Asylum and Immigration (Treatment of Claimants) Act 2004.

⁸⁸ *Secretary of State for the Home Department v Lyudmyla Dzhygun (Immigration Appeals Tribunal)* Appeal no. CC-50627-99 (00TH00728) 17 May 2000.

⁸⁹ SK (Prostitution) Albania UKIAT [2003] 00023, 7 Jul 2003.

protection against the man who would surely hunt the woman in a country too small for an internal relocation. These were among the few cases where the U.K. found well-founded fear of persecution from re-trafficking and reprisals.

In the U.K., the risk of re-trafficking or revenge by former traffickers has rarely been the basis for granting asylum.⁹⁰ It is difficult to convince the court that such a risk is serious enough to amount to persecution, and the court tended to regard the risk of re-trafficking to be minimal or internal relocation to be available. The U.K. courts often considered that women beyond the age usually targeted by traffickers unlikely to be re-trafficked, hence viewed their fear of future persecution as unfounded.⁹¹

Among such women was an ethnic Kyrgyz in Tajikistan who was abducted and raped.⁹² Since she was 28 years old, although she received threats of re-trafficking, the Immigration Appeal Tribunal concluded that, for her age, she was not likely to be re-trafficked upon returning to her country.⁹³ The Tribunal also dismissed a claim by a 30-year-old trafficked Albanian woman that she was at real risk of being re-trafficked.⁹⁴ For its reasoning the Tribunal cited a reference from the U.K. government's Country Information Policy Unit Country Report on Albania that the majority of girls trafficked were between 14 and 17. The Tribunal concluded:

‘It must be noted that the Appellant was nearly 28 years old when she was abducted by the traffickers. Given what we have said about the much younger age group which is increasingly the main source of interest to traffickers, what happened to the Appellant has to be viewed as an unusual occurrence, and not one which shows that women of her age are at real risk. Given that she is now 30 years old, the risk of any such abduction must be even less.’⁹⁵

A risk of re-trafficking for a 27-year-old Romanian woman who was twice kidnapped and forced into prostitution was also rejected by the same Tribunal.⁹⁶ To help her case, a senior advisor on anti-trafficking for the Organization for Security and Co-operation in Europe (OSCE) testified as an expert that trafficked individuals to Western Europe could be into their 30s, as the age profile of those trafficked depended on the destination. Nevertheless, the Tribunal concluded:

‘The country information does not support the contention that the Appellant now falls within the profile of the majority of women trafficked for prostitution. The majority of victims are between 18 and 24. She is nearly 28 years of age and, although we accept Miss Scanlan’s evidence that this does not put her totally outside the danger zone, it is a risk reducing factor.’⁹⁷

⁹⁰ See Burgoyne and Darwin 2006.

⁹¹ See also, Burgoyne and Darwin 2006.

⁹² NA (Kyrgyz woman) Takijistan CG [2004] UKIAT 00133.

⁹³ Ibid.

⁹⁴ VD Albania CG [2004] UKIAT 00115.

⁹⁵ VD Albania CG [2004] UKIAT 00115. para. 18.

⁹⁶ MP (Trafficking-Sufficiency of Protection) Romania [2005] UKIAT 00086, 21 April 2005.

⁹⁷ Id. Para. 100.

This “beyond the ages normally targeted for trafficking = negligible risk of being re-trafficked” reasoning was particular to the U.K. cases and was not seen in cases from Australia, Canada, or the U.S. In the U.S., for example, an Albanian woman who was abducted and forced into prostitution in Italy was, at the time of her asylum application, also 28 years old and furthermore, married.⁹⁸ Yet the U.S. Immigration Court granted her asylum based ‘on past persecution and fear of future persecution’ without any mention of her age being too old to be re-trafficked.

This decision was supported by an expert testimony that the applicant had a real possibility of being re-trafficked upon returning to Albania, as the re-trafficking rate was as much as half among those women who were rescued.⁹⁹ The Australian Refugee Review Tribunal cited the same country information as the U.K. Immigration Appeal Tribunal that trafficked Albanians were increasingly children between 14 and 17 and noted that the asylum applicant was in her fifties, but only to conclude that she was not likely to be sold by her family or to succumb to false promises of marriage.¹⁰⁰

The U.K. cases reviewed also tended not to allow appeals on the basis that victims may be at risk of revenge by their traffickers.¹⁰¹ An abused Nigerian girl was trafficked by a woman from her village and forced to work as a child prostitute in Europe.¹⁰² When the minor escaped in Italy, the Nigerian trafficker tracked her down, severely beat her and demanded the debt of US\$40,000. Yet the U.K. Immigration Appeal Tribunal concluded that if the girl was relocated internally, Nigeria is large enough that there is no risk that the traffickers would hunt the girl, without considering the existence of collaborators in Nigeria. The Tribunal rejected the girl’s asylum appeal ‘because there was no proper evidential basis for concluding that she faced or faces a real risk of serious harm.’¹⁰³

Heavy reliance of existing country reports

The U.K. Immigration Appeal Tribunal tended to assume that if there was no country report on revenge, no such risks existed.¹⁰⁴ It often relied heavily on country reports of the Country Policy Information Unit or those of the U.S. State Department. The Tribunal dismissed the claim of a woman from Kosovo that she would be at risk of re-trafficking upon return because those who abducted her would think that she would inform the authorities.¹⁰⁵ The Tribunal pointed out that there is no country information to support the proposal that such revenge may occur.

Another heavy reliance is seen in the earlier-mentioned case of the 27-year-old Romanian woman. The OSCE senior advisor on anti-trafficking, testified as an expert that the appellant was at a significant risk of being re-trafficked or revenged because she had been trafficked twice and escaped.¹⁰⁶ The expert stated that the woman could

⁹⁸ *Decision of the Immigration Judge*, CGRS Case No. 3438 (Albania) A79-607-478, 20 December 2005

⁹⁹ *Ibid.*

¹⁰⁰ RRT V01/13062, 16 March 2004.

¹⁰¹ See Burgoyne and Darwin 2006.

¹⁰² JO Nigeria [2004] UKIAT 00251.

¹⁰³ *Id.*, para. 20.

¹⁰⁴ See Burgoyne and Darwin 2006.

¹⁰⁵ ZG Kosovo (Catholic, Woman, Kidnapping, Prostitution) [2002] UKIAT 06307, para 12.

¹⁰⁶ MP (Trafficking-Sufficiency of Protection) Romania [2005] UKIAT 00086, 21 April 2005, para. 65.

be found by traffickers even outside her home area.¹⁰⁷ She further testified that although trafficked women were mostly safe at shelters, some had been re-trafficked after they left, and this figure was as high as 40% at some shelters.¹⁰⁸ While the Tribunal accepted her evidence as a helpful overview, it still considered that it had more up-to-date and detailed information. The Tribunal reasoned that although the appellant was kidnapped, since the country information stated that it occurs rarely, there was a little chance that she would be targeted again.¹⁰⁹

Such heavy reliance on country information and disregard for testimonies by the applicants and experts may be problematic in recognizing those with serious fear of real harm. A country report, although it may have been commissioned by a reputable agency, may not have been updated or may contain data from an unclear source.¹¹⁰ One report on the analysis of asylum claims by victims of trafficking in the U.K. recommended the Home Office to ‘update country of origin information to take into account the lack of effective protection and the risk on return faced by victims of trafficking based on credible evidence from a variety of sources’.¹¹¹ While the country reports are vital in assessing the risks of persecution in the country of origin, it is essential to review the existing country reports and testimonies in a balanced manner.

Trauma, discrimination and ostracism as persecution

Could trauma from the experience of trafficking, discrimination and/or ostracism amount to persecution? Even if the trafficking experience of the asylum applicant is not likely to be repeated, the UNHCR Trafficking Guidelines point out that it may still be appropriate to recognize the individual concerned as a refugee if there are compelling reasons arising out of previous persecution.¹¹² Victims of trafficking, just like some refugees, may find returning to the country of origin intolerable due to the psychological trauma inflicted by the persecution suffered during the past experiences. Those who were trafficked into prostitution may also fear discrimination and ostracism by the family, the local community, or the local authorities upon return. The UNHCR Trafficking Guidelines point out that ‘in the individual case, severe ostracism, discrimination or punishment may rise to the level of persecution, in particular if aggravated by the trauma suffered during, and as a result of, the trafficking process.’¹¹³

Victims who have experienced atrocious and traumatic events were granted asylum in the U.S. For example, an Albanian woman with severe trauma who was abducted and forced into prostitution in Italy was recognised as a refugee by the U.S. Immigration

¹⁰⁷ Id, para. 66.

¹⁰⁸ Id, para 75.

¹⁰⁹ Id, para. 98.

¹¹⁰ The OSCE senior advisor in her testimony disagreed with information contained in the IOM report used by the UK Tribunal as country information and had access to data that the writers of the US State Dept report did not.

¹¹¹ Richards S, Steel M & Singer D (2006) Hope betrayed: an analysis of women victims of trafficking and their claims for asylum, POPPY Project and the Refugee Women’s Resource Project at Asylum Aid, London.

¹¹² UNHCR Trafficking Guidelines, para. 16.

¹¹³ Id, para. 18.

Judge.¹¹⁴ An expert diagnosed the applicant to be suffering from severe post traumatic stress disorder and depression as a result of the incidents in her life, and indicated as one of the reasons for not returning to Albania to be a lack of acceptance from others, including her own family.

It has been difficult to convince the tribunals that the discrimination and ostracism amounted to persecution when the applicant did not experience severe harm from trafficking itself. In Australia, the Federal Magistrate Court dismissed an asylum application by a Nepali woman who was discriminated against and harassed for an attempted trafficking.¹¹⁵ She was tricked by a village elder, trafficked up to the border for prostitution in India, saved by a police officer, but upon returning to her village, she was labelled a prostitute. As a result, she was unable to marry and was subject to severe harassment and discrimination, while receiving no protection from the police against her harassers. In this case the Court agreed with the Refugee Review Tribunal's finding that the discrimination suffered by the applicant did not amount to persecution and dismissed the appeal.

No U.K. cases examined considered asylum for the applicants on the basis that they experienced particularly atrocious experiences and ongoing traumatic psychological effects which would render return to the country of origin intolerable. Even in cases where trafficking experiences in the past were atrocious, victims were denied asylum on the basis that no risk of persecution is foreseen upon return. A Kyrgyz woman's appeal was dismissed despite a report from a clinical psychologist diagnosing post-traumatic stress disorder and a major depressive disorder resulting from the assault and rape, and a claim that there would be a constant exacerbation of the symptoms in her own country.¹¹⁶ In the case of an earlier mentioned woman from Kosovo, although the Tribunal found the applicant credible that she was kidnapped from her home at gunpoint in front of her family, the Tribunal concluded that she had no risk upon return to her home area because:

‘There are crucial differences between what happened to the Appellant when she was first abducted and now. Then she and her family were taken by surprise. She was abducted and her family were threatened in circumstances where it was not possible to contact the police quickly enough to obtain assistance. All of them must have been very shocked. On return the situation would be very different. It would be open to the Appellant to go to the authorities and make a complaint against her abductors and the local man who identified her with a view to possible prosecution and to seek future protection.’¹¹⁷

It is hard to imagine that a woman with a severe psychological trauma, who fears being re-trafficked to keep her quiet, would go to the state authorities to complain about her armed abductors. In addition, the Tribunal unfortunately did not consider a possibility that, by trying to prosecute them in a small conservative community, she could face serious discrimination and social stigma for having been a prostitute.

¹¹⁴ *Decision of the Immigration Judge*, CGRS Case No. 3438 (Albania) A79-607-478, 20 December 2005

¹¹⁵ *SZAQK v. Minister for Immigration*, [2005] FMCA 407.

¹¹⁶ *NA (Kyrgyz woman) Takijistan CG* [2004] UKIAT 00133.

¹¹⁷ *ZG Kosovo (Catholic, Woman, Kidnapping, Prostitution)* [2002] UKIAT 06307, para 18.

Furthermore, U.K. Immigration Appeal Tribunal considered none of the following combinations of atrocious experiences of trafficking traumatic enough to influence the assessment of whether any future harm feared by the applicant would amount to persecution: threats to be trafficked, assaults, abduction and gang-rape¹¹⁸; abduction from home at gunpoint in front of family members, rape and being trafficked abroad¹¹⁹; or kidnapping, rape and forced prostitution, physical punishments after escaping and being sold abroad.¹²⁰ The challenge is for the U.K. decision-makers to reflect whether trauma suffered, discrimination and ostracism feared by an applicant could amount to persecution, in line with the UNHCR Trafficking Guidelines.

Agents of persecution

Can non-state actors be considered agents of persecution for the purposes of refugee status determination? For actual or potential victims of trafficking, agents of persecution are often non-state actors. Within the refugee definition, both state and non-state actors are recognized as agents of persecution.¹²¹ The UNHCR Handbook clarifies that, while persecution is usually related to action by the authorities of a country, it can also emanate from local populations when the persecutory acts are knowingly tolerated by the authorities, or where the authorities refuse, or are unable, to offer effective protection.¹²²

In the four countries examined, persecution at the hands of non-state actors has been accepted in situations where the state is unable or unwilling to offer effective protection.¹²³ Among the cases reviewed from Australia, Canada, the U.K. and the U.S., asylum was granted to applicants who demonstrated, based on one of the Convention grounds, a well-founded fear of being trafficked by non-state agents with insufficiency of state protection. Examples of non-state actors recognized as agents of persecution in trafficking-related asylum applications are: a brothel owner from whom the Applicant escaped (Australia),¹²⁴ an organized crime syndicate (Canada),¹²⁵ the man to whom the parents sold the applicant (U.K.),¹²⁶ and parents (Canada and U.S.).¹²⁷ This shows that non-state actors, who are often the ones committing serious human rights abuses in trafficking, have been widely recognized as agents of persecution when state protection was deemed insufficient.

¹¹⁸ *Kacaj v Secretary of State for the Home Department* [2002] EWCA Civ 314, 14 March 2002.

¹¹⁹ ZG Kosovo [2002] UKIAT 06307.

¹²⁰ MP (Trafficking-Sufficiency of Protection) Romania [2005] UKIAT 00086

¹²¹ See UNHCR Guidelines on Gender-Related Persecution, para.19, and UNHCR Trafficking Protocol 2006 para. 21.

¹²² UNHCR Handbook 1979, para. 65.

¹²³ See, for example, *In re Kasinga* (1996) Interim Dec 3278, US BIA; *Horvath v. Secretary of State for the Home Department*, House of Lords, (2000) 3 All ER 577; *Canada (Attorney General) v. Ward*, Supreme court of Canada (1993) 2 SCR 689; *Minister for Immigration and Multicultural Affairs v. Ibrahim*, High court of Australia (2000) HCA 55, 26 Oct 2000; Edwards A (2003).

¹²⁴ RRT N03/47757, 11 May 2004.

¹²⁵ CRDD V95-02904, 26 November 1997.

¹²⁶ VD (Trafficking) Albania CG [2004] UKIAT 00115, 26 May 2004

¹²⁷ See for example, *Decision of the Immigration Judge*, U.S. Immigration Court, Chicago, Illinois, 13 March 1998, and CRDD VA0-02635 22 March 2001.

State protection against trafficking

To examine claims for asylum by those who suffered or fear trafficking, courts often used available country reports to assess the availability of state protection against trafficking. In Australia, the courts have consistently denied trafficking-related asylum applications from Albania on the basis that state protection is available. Canadian courts noted increased efforts to combat trafficking by governments in asylum cases of women fearing trafficking from Estonia, Lithuania and Albania and denied asylum to these applicants on the grounds of availability of state protection.¹²⁸ What is of a concern is a seeming gap between the reports of mounting efforts by states to tackle trafficking and the actual effectiveness of such efforts.

The U.K. courts have been unpredictable in determining sufficiency of state protection. For one Albanian woman who was abducted by masked men, gang-raped and threatened with prostitution, but received no help from the police, the Court of Appeals agreed with the Immigration Appeal Tribunal that “[t]he abduction and rape was regarded as criminal conduct against which the Albanian authorities were able and willing to provide effective protection,”¹²⁹ and commented that “actions are being taken to stem such lawlessness and the police are *undoubtedly* willing to provide protection”(emphasis added).¹³⁰ However, for another Albanian woman who was sold by her family to a criminal thug in a form of a marriage, the Immigration Appeal Tribunal concluded, more than a year after the above case, that the state protection was insufficient.¹³¹

In general, the U.K. courts relied heavily on country reports as mentioned earlier in the section. In determining availability of state protection, for example, the U.K. Immigration Appeal Tribunal dismissed the claim by an ethnic Kyrgyz woman that her country Tajikistan had insufficiency of state protection, stating: “.. rape of the kind experienced by the Appellant is *regarded very seriously* by the authorities [of Tajikistan] (emphasis added).” In the U.S., where asylum applicants have been trafficked with no state assistance or with complicity of the agents of the state, lack of state protection supported the applicant’s asylum claims.¹³²

Must state protection be sought?

Trafficked persons and those who fear being trafficked may not be able or willing to seek protection from the state, as they may suspect the state to be part of, or at least to condone, the acts of trafficking. Did the asylum applicants have to seek state protection in order to demonstrate that it had failed? The Canadian Supreme Court in *Canada (Attorney General) v. Ward* held that a refugee claimant need only seek state protection in situations where state protection might reasonably be forthcoming. Justice la Forest stated:

‘It would seem to defeat the purpose of international protection if a claimant were required to risk his or her life seeking

¹²⁸ *Naivelt v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1261.

¹²⁹ *Kacaj v Secretary of State for the Home Department* [2002] EWCA Civ 314, 14 March 2002.

¹³⁰ *Ibid.*

¹³¹ *SK Albania UKIAT* [2003] 00023, 7 Jul 2003.

¹³² See, for example, CGRS Cases No. 275 and No. 3579

ineffective protection of a State, merely to demonstrate that ineffectiveness.¹³³

This approach of *Ward*¹³⁴ is followed in *Celaj v. Gonzales* in the U.S.¹³⁵ In this case, the U.S. Court of Appeals for the Second Circuit noted a country report that stated that “the Albanian police were often directly or indirectly involved”, and concluded that not seeking the police’s protection after an attempted kidnapping would not necessarily mean that the applicant failed to establish that the police was unable or unwilling to protect her.¹³⁶

Still, where there is not an obvious failure of state protection, the burden of proof is on the applicant.¹³⁷ Given that the 1951 Convention applies only where national protection is unavailable, applicants must establish that there were no remedies which were meaningful, accessible, and effective in the country of origin. The Federal Court of Canada considered the *Ward* decision but held that the Estonian woman’s failure to take steps to access police assistance after receiving extortion demands and death threats was unreasonable.¹³⁸ The failure of the applicants to seek state protection tended to be considered more reasonable when an agent of a state was one of the traffickers.

1951 Convention grounds

In order to be entitled to international protection as a refugee, an asylum applicant must demonstrate that his/her well-founded fear of persecution is based on one of the five 1951 Convention grounds, namely, race, religion, nationality, membership of a particular social group and political opinion. Almost all of the trafficking cases examined were under only one ground, membership of a particular social group. Only a few asylum claims were made under the combinations of grounds, including the membership of a particular social group. The below examines the five convention grounds, pertinent UNHCR Guidelines, and trafficking-related asylum claims under the concerned ground.

Race

Depending on the circumstances, a state may be unable or unwilling to protect a certain racial group, making the members of that racial group vulnerable to traffickers. UNHCR Trafficking Guidelines stress that certain racial or ethnic groups may also be targeted for trafficking in situations of armed conflict in which exploitation or victimization of the groups may be a deliberate policy.¹³⁹ Women and girls of a particular race may be higher in demand in the sex trade.¹⁴⁰

¹³³ *Canada (Attorney General) v. Ward* [1993] 2 S.C.R.689, para. 49.

¹³⁴ *Canada (Attorney General) v. Ward* [1993] 2 S.C.R.689.

¹³⁵ *Celaj v. Gonzales*, No. 04-2382-AG, U.S. Court of Appeals, 8 June 2006.

¹³⁶ *Ibid.*

¹³⁷ Crawley, Heaven. *Refugees and Gender: Law and Process*, Jordan Publishing Limited, Bristol, 2001, 3.4.5.

¹³⁸ *Naivelt* 2004.

¹³⁹ UNHCR Trafficking Guidelines 2006, para. 34.

¹⁴⁰ UNHCR Trafficking Guidelines 2006, para. 34.

In line with the Guidelines, the Australian Refugee Review Tribunal granted asylum to a Shan woman from Burma trafficked to Thailand for prostitution on grounds of her ethnicity/race and membership of a particular social group.¹⁴¹ The woman was abducted from her village home by Burmese army officers when she was still a child, held at a military camp as a child sex slave, and taken by traffickers to Thailand for forced prostitution.

The Refugee Review Tribunal noted the Applicant's account of past persecution of rape, abduction by the Burmese military and forced prostitution which was consistent with independent reports of treatment of Shan women.¹⁴² It also acknowledged the applicant's submission that the Burmese military has systematically raped ethnic Shan women and girls, and that the Burmese military was also at least indirectly involved in the procurement and trafficking of women into prostitution in Thailand and other neighbouring countries.¹⁴³ This led to the recognition of her well-founded fear of persecution for reason of race.

An ethnic Kyrgyz woman's claim that she was targeted for kidnapping and other abuses because she was a member of the minority Kyrgyz in Tajikistan was rejected in the U.K.¹⁴⁴ The Immigration and Appeal Tribunal concluded that no report showed that discrimination against the Kyrgyz minority was so severe that it constituted persecution.¹⁴⁵ It appears difficult to claim successfully for asylum under this ground without thorough documentation on such discrimination and resulting persecution.

Religion

The UNHCR Trafficking Guidelines specify that individuals who belong to a particular religious community may be targeted by traffickers for their vulnerability.¹⁴⁶ The state may also be reluctant to protect certain religious groups.

In the U.S., a Hindu woman from a low caste that would have forced her into a life of prostitution was recognised as a refugee based on her religion and membership of a particular social group.¹⁴⁷ A Catholic Albanian woman's claim that she was abducted from her home in Kosovo and trafficked to Belgium because of her religion, was rejected by the U.K. Immigration Appeal Tribunal for having no nexus to persecution.¹⁴⁸ These were the only two claims on the ground of religion found among the trafficking-related asylum claims.

Nationality

According to UNHCR Handbook, the term "nationality" in the context of refugee status determination has a wider meaning than "citizenship"¹⁴⁹ It also refers to

¹⁴¹ RRT N03/45573 (2003) 24 February.

¹⁴² *Id.*, para. 25.

¹⁴³ *Id.*, Para. 26.

¹⁴⁴ NA (Kyrgyz woman) Tajikistan CG [2004] UKIAT 00133.

¹⁴⁵ *Ibid.*

¹⁴⁶ UNHCR Trafficking Guidelines 2006, para. 35.

¹⁴⁷ *Decision of the Asylum Officer*, CGRS Case No. 365.

¹⁴⁸ ZG Kosovo (Catholic, Woman, Kidnapping, Prostitution) [2002] UKIAT 06307.

¹⁴⁹ UNHCR Handbook 1992, para. 74.

membership of an ethnic or linguistic group and may overlap with the term "race".¹⁵⁰ Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a particular national (ethnic, linguistic) group. The UNHCR Trafficking Guidelines point out that trafficking may be chosen as a method to persecute members of a particular national group.¹⁵¹

In Canada, a minority Bravanese woman from Somalia established a well-founded fear of persecution on the grounds of her nationality (member of the Bravanese clan), as well as a member of a particular social group (young women without male protection).¹⁵² As she was from the south of Somalia where the situation was unstable and the government was non-existent, she feared forced labour and sexual slavery if returned.¹⁵³ The finding that nationality could include belonging to an ethnic group is in line with the Guidelines. The fact that it was the only case found where the nationality was claimed to be the ground for persecution, shows the uncommonness of this ground among the trafficking-related asylum cases.

Membership of a particular social group

As mentioned earlier, the vast majority of asylum applicants with a fear of trafficking claim that their persecution is based on their membership of a particular social group. This section discusses the definition of this Convention ground in relation to trafficking, social groups identified for applicants of trafficking-related asylum cases, and whether an experience of trafficking could be considered as a characteristic of a particular social group.

Individuals who fear being trafficked may qualify as refugees if they can demonstrate that their fear of persecution is based on their membership of a particular social group. Among the five grounds enumerated in Article 1A(2) of the Refugee Convention, 'membership of a particular social group' has evolved with time and been invoked with increasing frequency with states recognizing various particular social groups such as women, tribes, occupational groups, and homosexuals.¹⁵⁴

The UNHCR Membership Guidelines shed some light on the interpretation of a well-founded fear of persecution based on a membership of a particular social group as follows: Members of a particular social group often share a common characteristic that is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.¹⁵⁵ This characteristic must be other than their risk of being persecuted. Society may also perceive a group of certain persons as a particular social group.¹⁵⁶

Not all members of the group must be at risk of being persecuted in order for an asylum applicant to establish the existence of the particular social group. Further, the size of the purported social group is irrelevant in determining the existence of the

¹⁵⁰ UNHCR Handbook 1992, para. 74.

¹⁵¹ UNHCR Trafficking Guidelines, para. 36.

¹⁵² RPD MA3-08450 et al., Berger, 8 April 2004.

¹⁵³ Ibid.

¹⁵⁴ UNHCR Membership Guidelines 2002, para. 1.

¹⁵⁵ Id., para. 11.

¹⁵⁶ Id., para. 11.

particular social group.¹⁵⁷ For example, ‘women’ is a clear a social group with innate and immutable characteristics, and who are often treated differently to men.¹⁵⁸ Equally, men, children or either of their subsets may constitute a particular social group.¹⁵⁹ The UNHCR Trafficking Guidelines emphasize that characteristics of certain social subsets of women that may make them vulnerable to traffickers may also be considered particular social groups.

Among the trafficking-related asylum claims in the four countries examined, the courts in Australia and Canada tended not to shy away from recognizing members of sizeable social groups as refugees, such as ‘women’,¹⁶⁰ ‘children’,¹⁶¹ ‘sex workers’,¹⁶² and ‘young women in Albania’.¹⁶³ Other particular social groups include: ‘young women from Northeastern Albania’,¹⁶⁴ and ‘Hindu woman from lower caste’.¹⁶⁵ The U.K. Immigration Appeal Tribunal also acknowledged that ‘Nigerian women’ could constitute a particular social group.¹⁶⁶ The U.S. courts in general have been hesitant to recognise a large social group, even though size does not matter in determining the existence of a particular social group.

Experience of trafficking as a characteristic of a particular social group

The UNHCR Trafficking Guidelines specify that the experience of having been trafficked may also be a characteristic of a particular social group that is unchangeable, common and historic.¹⁶⁷ Those who have been subjected to trafficking may also be perceived by society as a cognisable group within the society.¹⁶⁸ Particular social groups nevertheless cannot be defined only by the persecution that members of the group suffer or by a common fear of being persecuted.¹⁶⁹ In these cases, the past trafficking experience constitutes one of the elements defining the group, rather than the future persecution feared in the form of ostracism, punishment, reprisals or re-trafficking.¹⁷⁰

In the case law of the four countries reviewed, several courts struggled with the notion that a particular social group cannot be defined solely by the persecution. While some concluded that since trafficking is a persecution, trafficked persons cannot be a particular social group, some of such decisions were reversed on appeals to reflect that the experience of having been trafficked could be a characteristic of a particular social group. Some of the most creative social groups were identified by the

¹⁵⁷ Id., para. 18.

¹⁵⁸ Id., para. 12.

¹⁵⁹ UNHCR Trafficking Guidelines 2006, para. 38.

¹⁶⁰ The Federal Court of Australia extensively noted the error of law by the RRT that ‘women’ did not constitute a particular social group in *SZBFQ v. Minister of Immigration* [2005] FMCA 197 (10 June 2005); An example from Canada is drawn from *Re G.V.P.*, CRDD T98-06186 Bousfield, Milliner (dissenting) (CGRS Summary), 2 Nov 1999.

¹⁶¹ VAO-02635, 22 Mar 2001.

¹⁶² RRT N03/47757, 11 May 2004.

¹⁶³ RRT V01/13868, 6 Sep 2002.

¹⁶⁴ SK (Prostitution) Albania UKIAT [2003] 00023, 7 Jul 2003.

¹⁶⁵ CGRS Case No. 365

¹⁶⁶ JO Nigeria (internal relocation – no risk of re-trafficking) [2004] UKIAT 00251

¹⁶⁷ UNHCR Trafficking Guidelines 2006. Para. 39.

¹⁶⁸ Ibid.

¹⁶⁹ UNHCR Membership Guidelines 2002, para. 14

¹⁷⁰ UNHCR Trafficking Guidelines 2006, at 39.

jurisprudence of Canada. In Canada, the experience of having been trafficked has been incorporated in the characteristics of social groups as in:

- impoverished women from the former Soviet Union recruited for exploitation in the international sex trade;¹⁷¹
- young Fujianese citizens (especially girls) who travel unaccompanied, following exploitative agreements between their parents or other family members and criminal smugglers of Chinese migrants;¹⁷² and
- new citizens of Israel who are women recently arrived from elements of the former Soviet Union and who are not yet well integrated into Israeli society, despite the generous support offered by the Israeli government, who are lured into prostitution and threatened and exploited by individuals not connected to government, and who can demonstrate indifference to their plight by front-line authorities to whom they would normally be expected to turn for protection.¹⁷³

Narrower identification of a particular social group was used in earlier cases of trafficking, but in later cases Canadian courts have recognized particular social groups widely. In the U.S., recognized particular groups with actual or potential experiences of trafficking include:

- abused, unwanted children sold into labour by their parents,¹⁷⁴
- an ethnic group in Thailand, which has been forced into indentured servitude and deprived of the right of citizenship,¹⁷⁵
- Hindu women born into a low caste that would have forced them into a life of prostitution,¹⁷⁶
- women in China who oppose coerced involvement in government sanctioned prostitution,¹⁷⁷ and
- young women in Albania threatened with abduction and being forced into prostitution.¹⁷⁸

For the earlier mentioned case of a Shan woman from Burma, Australian Refugee Review Tribunal considered ‘Shan women’, ‘trafficked Shan women’, ‘women who have been working in prostitution in countries neighbouring Burma’, and ‘women who have left or been forced to leave Burma illegally’ could all constitute a particular social group within the meaning of the Refugee Convention.¹⁷⁹

¹⁷¹ CRDD V95-02904, 26 Nov 1997.

¹⁷² *Chen v. Canada (Minister of Citizenship and Immigration)*, IMM-478-03, 2003 FC 1059 (CanLII), 12 Sep 2003.

¹⁷³ *Litvinov, Svetlana v. S.C.C.(F.C.T.D., no. IMM-7488-93)*, Gibson, June 30, 1994, at 4. It was indicated that the group “might be” defined in this way.

¹⁷⁴ *Decision of the Immigration Judge*, U.S. Immigration Court, Chicago, Illinois, 13 March 1998.

¹⁷⁵ *Decision of the Immigration Judge*, CGRS Case No. 560 (Thailand) 18 June 2001.

¹⁷⁶ *Decision of the Asylum Officer*, CGRS Case No. 365

¹⁷⁷ *Matter of M-J-*, CGRS Case No. 364, BIA, 30 Mar 2001.

¹⁷⁸ *Decision of the Immigration Judge*, CGRS Case No. 330 2000

¹⁷⁹ RRT N03/45573 (2003) 24 February, para. 70-74.

In the U.K., recognition of the experience of having been trafficked as a characteristic of a particular social group has been inconsistent. The Immigration Appeal Tribunal recognized a particular social group of ‘women in the Ukraine forced into prostitution against their will,’ which ‘exists independently of the persecution [the group] fears’¹⁸⁰ However, regarding a Nigerian girl who was forced into child prostitution, the same Tribunal stated that ‘trafficked women do not qualify as a PSG, since what defines them is essentially the fact of persecution.’¹⁸¹

While it accepted the argument that ‘Nigerian women’ could constitute a social group, the Tribunal unfortunately did not consider combining these two unchangeable, common and historic characteristics of the women who are ‘trafficked’ and ‘Nigerian’. The Tribunal’s conclusion that trafficked women do not qualify as a particular social group, without acknowledging that the experience of having been trafficked may also be a characteristic of a particular social group, not only differs from its earlier decision but also diverts from the UNHCR Guidelines. Some critiques of the U.K. case law have also noted its inconsistency in the application of membership of a particular social group.¹⁸² As shown by these cases in the U.K., identification of particular social groups appears limited as compared to case law of Australia, Canada or the U.S.

Political opinion

The UNHCR Trafficking Guidelines note that individuals with certain actual or perceived political views may be more vulnerable to traffickers, because of the reluctance of the state to protect them.¹⁸³ Depending on circumstances, those who have particular political opinions may be targeted by criminals related to politically opposing groups that may use trafficking as a method of persecution.

The U.S. Board of Immigration Appeals recognized a Chinese woman who escaped forced prostitution in China as a refugee. The woman demonstrated a well-founded fear of persecution “on account of imputed political opinion or membership in a particular social group of women in China who oppose coerced involvement in government sanctioned prostitution.”¹⁸⁴ This was the only case found where asylum was granted on the ground of an imputed political opinion of a trafficked applicant.

Among the cases examined, eight Albanian women (3 in Canada, 2 in the U.K. and 3 in the U.S.) claimed a fear of persecution such as kidnapping and forced prostitution because of their actual or perceived affiliation with the Democratic Party of Albania. The results show difficulties to demonstrate a fear of persecution on the basis of their political opinion.

The courts in Canada, the U.K and the U.S. found the risks of persecution to be unrelated to the women’s affiliation to the Democratic Party of Albania, for the asylum applicants failed to convince the courts that their traffickers or potential

¹⁸⁰ SSHD v. Dzhygun [00/TH/00728] CC-50627-99, 17 May 2000.

¹⁸¹ JO Nigeria (internal relocation – no risk of re-trafficking) [2004] UKIAT 00251, 10 Sep 2004, para. 18.

¹⁸² See Burgoyne and Darwin 2006.

¹⁸³ UNHCR Trafficking Guidelines 2006, para. 40.

¹⁸⁴ *Matter of M-J*- 2001.

traffickers were politically motivated rather than profit-motivated.¹⁸⁵ Only one Albanian woman who was a member of the Democratic Party was granted asylum by a U.S. Immigration Judge for the fear of persecution based on her political opinion and membership of a particular social group.¹⁸⁶ The Immigration Judge took into account that her traffickers specifically told her that they targeted her because of her activities in the Democratic Party when they kidnapped her and forced her into prostitution in Italy.

Statelessness and trafficking

A stateless person is vulnerable to trafficking for the lack of state protection. The UNHCR Trafficking Guidelines specify that while being stateless alone does not make an individual a refugee, the stateless person would be considered a refugee if unable to return to his or her habitual residence for fear of persecution on a Convention ground.¹⁸⁷ The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness set out the legal framework for the rights of a stateless person and obligations of states to avoid actions that would result in statelessness.¹⁸⁸

The UNHCR Trafficking Guidelines point out that a victim of trafficking may have difficulties proving citizenship after having his or her documents destroyed, although this does not mean that the person is stateless. Among the cases reviewed, while many victims of trafficking had lost their identity documents as many refugees do, no case was found where inability to prove citizenship of a trafficking victim affected his or her asylum decisions.

Only two trafficking-related cases of asylum applications by stateless persons were found among the cases examined, one in the U.S. and the other in Australia. The applications were both made by stateless women from Thailand who were subjected to sexual exploitation. Both were recognized as refugees in respective countries.

In the U.S., a stateless woman from northern Thailand was trafficked to the U.S. She was granted asylum on the ground that she was a member of a particular social group, an ethnic group in Thailand, who has been forced into indentured servitude and deprived of the right of citizenship.¹⁸⁹ Testimonies by experts that explained situations of those who live in Thailand but lack Thai citizenship strongly contributed to the positive outcome of the case.

The experts explained that people who lack Thai citizenship or legal residency status are not allowed to get primary school diplomas, thereby limited in employment opportunities, and they can neither obtain a passport through legal channels nor turn to the police or other officials for protection without risking deportation. The Court

¹⁸⁵ See for example, *Nikis v. Ashcroft*, No. 03- 4642 and *Muca v. Ashcroft*, No. 03- 4729.

¹⁸⁶ Decision of the Immigration Judge, A79-607-478; CGRS Case No. 3438, Immigration Court, 20 Dec 2005.

¹⁸⁷ UNHCR Trafficking Guidelines 2006, para. 44.

¹⁸⁸ UNHCR Trafficking Guidelines 2006 para. 41.

¹⁸⁹ *Decision of the Immigration Judge*, CGRS Case No. 560 (Thailand) 18 June 2001.

acknowledged that the combination of these factors exacerbated women's vulnerability to trafficking when they showed an interest in working abroad.¹⁹⁰

In Australia, the Refugee Review Tribunal recognized a similarly stateless trafficked woman from Thailand as a refugee.¹⁹¹ She was sold into a Thai brothel as an infant, and did not know her nationality.¹⁹² When considering her asylum, the Refugee Review Tribunal held that she had a well-founded fear of persecution based on her membership of a particular social group, sex workers in Thailand. The Refugee Review Tribunal found that the state protection would be unavailable not only because she testified that local police were receiving bribes from the brothel but also because she was stateless and did not have the right to reside in the country. The Tribunal granted her asylum specifically in the light of the Convention on Stateless Persons and the Convention on the Reduction of Statelessness.

The above confirms that, although the number of relevant cases is small, when a stateless person becomes a victim of trafficking and applies for asylum, courts tend to take into consideration the specific vulnerability emanating from the statelessness.

Conclusion

Reviewing trafficking-related asylum cases in Australia, Canada, the U.K. and the U.S. has found case law that has been gradually expanding but with inconsistencies. It is noteworthy that case law in all the four countries has recognized that trafficking, re-trafficking and reprisals could amount to persecution. Yet, some tribunals still considered trafficking as a mere criminal activity and, without considering whether the acts involved amounted to persecution, rejected asylum claims. Several tribunals also did not regard the experience of trafficking as a potential characteristic of a particular social group, noting simply that persecution alone cannot define the group. Such decisions were however a minority and some of them were reversed on appeal. Further efforts are needed to improve initial decision-making by equipping immigration authorities with sound decisions in line with the UNHCR Trafficking Guidelines.

Among the countries reviewed, the U.K. was least likely to be convinced that the applicant affected by trafficking needed international protection. The U.K. case law was found to be the least generous or flexible in its interpretation of the 1951 Convention for those suffering from trafficking. It is a concern that U.K. courts' approaches have sometimes been different from those by the courts in the other three countries reviewed. No other country used the reasoning that appellants had minimal risk of being re-trafficked simply because they were over the normally targeted age group.

Applicants with ages beyond the normally targeted age group, who had suffered similar human rights violations as the rejected ones in the U.K., have been recognized

¹⁹⁰ See Refugee Women's Resource Project - Asylum Aid (2001) *Women's Asylum News*. Issue 12, July.

¹⁹¹ RRT N03/47757 (11 May 2004).

¹⁹² She was told by her caretaker that she was born in a province on the border of Thailand and a neighbouring country, where a large proportion of the population of the province are from the neighbouring country.

as refugees in other countries reviewed. It is also a concern that the U.K courts depended heavily on country reports to the extent that what was not found in the report was considered non-existent. While the country reports are vital in assessing the risks of persecution in the country of origin, it is also necessary to review the existing country reports and testimonies in a balanced manner. Reflecting these points would be a challenge for practitioners and decision-makers in the U.K. in the future.

As several studies have indicated, this study also found that trafficked persons face difficulties and unpredictability when applying for asylum. The various rejected cases show that it is often difficult to persuade the courts if trafficked persons and those who fear being trafficked are in need of international protection. The reason for this difficulty may be due to the fact that trafficking is a gendered phenomenon and that there is still deep resistance to the full inclusion of women within the protection of the 1951 Convention.¹⁹³

One of the multiple reasons for hostility toward gender-based asylum claims may include a fear of opening floodgates, even though a possible increase in the number of refugees cannot be a reason for denying their asylum.¹⁹⁴ The lack of acknowledgement or adherence by immigration authorities to their own gender guidelines may also be a contributing factor.

Trafficking is a serious human rights violation which may include abduction, incarceration, rape, enslavement, enforced prostitution, forced labour, physical beatings, and starvation, all of which can amount to persecution. There is no reason why anybody, who fears returning home due to the real possibility of being re-trafficked or targeted for reprisals, should not be granted refugee status where the state of origin is unable or unwilling to protect that person against such harm.

As effects of globalization continue to expand, the nature of trafficking becomes more complex. To protect those targeted by trafficking, asylum is an essential measure and may be the only option available in countries where there is no other means of protection.¹⁹⁵ The importance of making the asylum procedures available to these persons cannot be over-emphasized. The adoption of the UNHCR Trafficking Guidelines would therefore be essential in the provision of international protection for trafficked persons and those who fear being trafficked. As states have the primary responsibility to prevent trafficking in person and protect those affected by this serious human rights violation, the challenge is on the decision-makers of each state to ensure trafficked persons' full access to fair and efficient asylum procedures.

¹⁹³ See Musalo K & Knight S (2002) 'Unequal Protection' Bulletin of the Atomic Scientists November/December, 57-61.

¹⁹⁴ Ibid.

¹⁹⁵ In the U.S., 'T-visa' provides protection and temporary residence under the 2000 Victims of Trafficking and Violence Protection Act. In countries such as those in South Eastern Europe, asylum is the only protection measure available for trafficked persons. In the U.K., temporary protection is provided to women (over 18) who have been trafficked only for the purpose of sexual exploitation with strict criteria for inclusion. Since it is restricted, applying for asylum is currently the only realistic recourse they have (Burgoyne & Darwin, 2006).