

Immigration Team Legal Bulletin

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Trafficking – recent cases

[AZ \(Trafficked women\) Thailand CG \[2010\] UKUT 118 \(IAC\)](#)

In the most recent country guidance case concerning trafficking, and specifically trafficked women, the Upper Tribunal confirmed that former victims of trafficking do constitute a particular social group, and that the shared past experience of being trafficked for sexual exploitation amounts to a common, immutable characteristic.

However, whether a former victim of trafficking is at risk of serious harm on return depends upon a number of case-specific factors including: age, marital status, domestic background, educational level, qualifications and work experience, as well as the availability of employment and a familial or other support network. Also significant are the state of mind of the applicant (on the basis that someone suffering ongoing trauma will be more vulnerable because of an inability to re-integrate into society), and the nature of the trafficking (i.e. the more individuals involved, the higher the risk as there will have been greater costs involved and the trafficker will want to make good his losses.)

The Tribunal confirm (at paragraph 150) that the evidence indicates that victims of trafficking are even more vulnerable to re-trafficking because they have already been through the business and know how to be compliant. In assessing whether the appellant would be at risk on return from those who trafficked her, the Tribunal took into the account the fact that the steps taken by the Thai government to combat trafficking were weakened by the evident complicity of some police officers and border officials.

The Tribunal also emphasise the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (the Trafficking Convention) which was ratified on the 17th December 2008, and refer specifically to a number of the requirements of the Convention. These include the provision of medical treatment, counselling, information and appropriate accommodation, as well as a provision not to impose penalties on victims for their involvement in unlawful activities, if they were compelled by their situation to do so.

[Rantsev v. Cyprus and Russia - 25965/04 \[2010\] ECHR 22](#)

As well as providing an example of the practical application of the Trafficking Convention and the duties upon states who have ratified it, this recent ECHR case also discusses the applicability of Article 4 to trafficking cases. It is only the second time that the Court has considered this, the first being the case of [Siliadin v France](#) (Application No. 73316/01), where France was found to have breached Article 4 in failing to put in place adequate preventative criminal law provisions and effectively punish perpetrators.

The facts of this case are particularly disturbing. Ms Rantseva was a Russian national who entered Cyprus with an “artiste” visa and work permit, applied for on her behalf by the owner of a cabaret where she subsequently worked. Shortly after her arrival she escaped the apartment where she was staying. Her ‘employer’, M.A traced her and took her to the police, informing them that she had contravened the terms of her visa. He wanted her to be arrested and expelled from Cyprus, so that he could bring another girl to work in the cabaret. Her name was not on any wanted list so the police would not take any action. Instead of releasing her however, they detained her and requested that M.A come to collect her which he did, taking her back to a colleague’s apartment. In the early hours of that morning Ms Rantseva was found dead on the street below the apartment. Her handbag was over her shoulder. The police found a bedspread looped through the railing of the smaller balcony adjoining the room in which Ms Rantseva had been staying. It certainly appeared that she had been attempting to escape.

The court found that Cyprus had procedurally but not substantively violated Article 2 (in respect of their procedural obligation to carry out an effective investigation), but the main focus of the Court’s assessment was on the alleged violation of Article 4 of the Convention, which provides that no one shall be held in slavery or servitude, or required to perform forced or compulsory labour.

Firstly the Court found that trafficking does fall within Article 4, going further than in [Siliadin](#) where it was concluded that the treatment suffered amounted to servitude and forced and compulsory labour, but not slavery. The Court stated that in view of its obligation to interpret the Convention in light of present-day conditions, it was unnecessary to identify which element of Article 4 was breached. Instead the Court concluded that trafficking itself falls within the scope of Article 4 of the Convention (paragraph 282).

The Court then stated that Article 4 requires member states to put in place adequate measures to ensure the practical and effective protection of the rights of victims or potential victims of trafficking, and that a State’s immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking. In addition the extent of Article 4 must be considered in the broader context of the obligations arising under the Trafficking Convention and the Palermo Protocol (see paragraphs 284 and 285).

In respect of the regime of “artiste” visas in Cyprus and the failures by the police to make inquiries as to whether she had been trafficked and to protect her rather than release her back into M.A’s custody, it was concluded that Ms Rantseva was not afforded practical and effective protection against trafficking. Russia was also found to have violated Article 4 in respect of their failure to undertake an adequate investigation to identify those who were involved in Ms Rantseva’s recruitment.

Homosexuality and the Refugee Convention

[HJ \(Iran\) and HT \(Cameroon\) v Secretary of State for the Home Department \[2010\] UKSC 31](#)

In a judgment given on the 7th July 2010 the Supreme Court unanimously overturned the Court of Appeal's application of the 'reasonable tolerability' test, i.e. questioning whether discretion in relation to sexual identity was something that an appellant could reasonably be expected to tolerate, and if so, finding that there would be no risk of persecution. It was found that this test, formulated and subsequently applied by the Court of Appeal, was based on a misunderstanding of the two authorities on which it was based. Dealing with the flaws of such a test using a helpful example Sir John Dyson SJC observes (at paragraph 118):

"Even if it could be imagined that Anne Frank, as an asylum seeker, would not objectively have been at risk of being discovered in the attic, she would nevertheless have had a well-founded fear of serious harm, a fear not eliminated by her decision to conceal her identity as a Jew and live in the attic."

The judgment has already been widely reported and therefore a full analysis is perhaps not necessary, but the following points are made:

(i) Lords Collins, Walker and Sir John Dyson SJC specifically refer to the test set out by Lord Rodger at paragraph 182 as being the appropriate test, though at paragraph 35 Lord Hope reformulates this test into his own words.

(ii) The test to be applied is therefore set out at paragraph 82 of Lord Rodger's judgment and it appears to constitute four stages.

(iii) The first and second stages are: whether a tribunal is satisfied that the appellant is gay or would be treated as being gay, and if so, whether it is satisfied that gay people living openly would be liable to persecution in the country of nationality. If those stages are satisfied, the tribunal must then go on to consider the third stage, whether the appellant would in fact live openly and thereby be exposed to a real risk of persecution, or whether he would in fact live discreetly and so avoid persecution. If it is found that the appellant would live discreetly the tribunal must then question his reasons for doing so (the fourth stage). If it is simply because of social pressures including family disapproval, not wanting to embarrass his family and friends etc, then he will have no well founded fear of persecution. If however the tribunal concludes that the material reason would be a fear of persecution, then his appeal should be accepted.

It is noted in relation to the fourth stage, that the question of *why* an appellant chooses to live discreetly may in reality (in the vast majority of cases) result in a finding that the material reason would be a fear of persecution. It is presumed that there would be very few cases where an appellant, in a situation where it has been found that he would be at risk of persecution were his sexual identity discovered, nonetheless chooses to live discreetly not because of this factor but because of social pressures including family disapproval etc.

Finally, in referring to this important judgment mention simply must be made of Lord Rodger's somewhat surprising comments at paragraph 78. After making reference to the fact that sexual identity is not just limited to engaging in particular sexual acts or particular forms of physical contact, but the wide spectrum of conduct going well beyond that designed to attract sexual partners and maintain relationships with them, he then states:

"To illustrate the point with trivial stereotypical examples from British Society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates."

Somewhat controversial stereotypes aside, the decision certainly represents a welcome departure from the artificial and flawed 'reasonable tolerability' test.

Maintenance requirement decision

[Pankina v Secretary of State for the Home Department \[2010\] EWCA Civ 719](#)

Finally, the Court of Appeal (LJ Sedley giving the leading judgment) deals with a seemingly simple point which has been the subject of countless immigration appeals. In this case which dealt with a number of linked appeals, the Court determined the nature of the policy guidance referred to in the immigration rules, in respect of obtaining leave to remain as a Tier 1 migrant. By rule 245Z applicants must meet a series of requirements which are detailed in Appendix C, one of which is to have £800 and to provide 'the specified documents'. According to rule 245AA the 'specified documents' are those specified by the SS in the points based policy guidance. The current policy guidance (updated in November 2008) states that the applicant must have a balance of at least £800 for a three month period prior to the date of application.

Having conducted an in-depth analysis of the constitutional status of the immigration rules, the Court hold that the three-month criterion (i.e. the policy guidance) forms no part of the rules, and that the only relevant criterion is the requirement in Appendix C that an applicant should have £800 *at the time of application*.

In addition the Court considered the applicability of Article 8 to such cases, confirming that the rules must be operated in conformity with s.6 of the Human Rights Act, and therefore in exercising her powers, whether within or outside the rules of practice for the time being in force, the Home Secretary must have regard and give effect to applicants' Convention rights.

Katy Ayres, July 2010

Post-script. *In an entirely unsporting manner, the SSHD has from 23.7.10 reversed the effect of the judgment in [Pankina](#) by amending para 1A of Appendix C of the immigration rules, so as to insert the requirements to have funds for specified periods into the immigration rules themselves, rather than in an associated policy guidance document (see HC382, issued 22.7.10). However, the benefit of [Pankina](#) should still be felt in appeals against decisions made before 23.7.10.*