

**Submission to the call for input by the Special Rapporteur trafficking in persons,
especially women and children on ‘Trafficking in Persons and protection of refugees,
stateless persons and internally displaced persons (IDPs)’**

Dr Maja Grundler, Royal Holloway, University of London

17 February 2023

Introduction

This submission explores the nexus of trafficking in persons with the definition of a refugee in international law. It is based on in-depth research on trafficking-based asylum claims from the UK and Germany.¹ The submission focuses on asylum claims based on a risk of re-trafficking and highlights both promising and restrictive practices in decision-making. It explores how courts consider trafficked persons to be able to meet the 1951 Refugee Convention’s refugee definition,² while showing that in certain areas, a more principled analysis is required. As such, the submission also covers the topic of trafficking in persons for all purposes of exploitation as a form of persecution; the application of *non-refoulement* obligations to risks of trafficking in persons; and risk factors and vulnerabilities emerging when people flee to seek safety.

Vulnerabilities as indicators for risk of re-trafficking

Both UK and German courts rely on ‘indicators of vulnerability’³ in order to establish a risk of re-trafficking. These indicators can be summed up as young age, poverty, lack of employment opportunities and experience, having little education, having no family or other support networks in the country of origin, including being unmarried, or experiencing pressure from the family to earn money, having mental health issues, experiencing stigmatisation, and having illegitimate children.⁴ Some of these vulnerabilities will exist before the initial trafficking experience takes place, while others, specifically, mental health issues, stigma and having illegitimate children, are brought about by that experience. As a result, individuals who have

¹ Maja Grundler, ‘Protection for Irregularised Migrants? – Trafficking, Smuggling and Asylum’ (PhD thesis, unpublished) Queen Mary, University of London, 2022.

² Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1A(2).

³ *HD (Trafficked women) Nigeria CG* [2016] UKUT 00454 (IAC) [169].

⁴ See e.g. *HD* *ibid*; *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC); *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC); *TD and AD (trafficked women) CG* [2016] UKUT 92; *TDL v SSHD* [2021] UKUT (IAC) PA/00358/2020; *HC v SSHD* [2021] UKUT (IAC) PA/05060/2019; *SSHD v LVC* [2021] UKUT (IAC) PA/06804/2019; VG Würzburg, W 8 K 04.30919, 19.09.2005; VG Stuttgart, A 7 K 1405/12, 16.05.2014; VG Magdeburg, 6 A 40/19, 28.01.2020; VG Stuttgart, A 1 K 8819/18, 5770443, 16.11.2020.

previously been trafficked are even more vulnerable to re-trafficking. These vulnerabilities converge and make it very difficult for the trafficked person in question to earn a livelihood, thus leading to poverty and destitution and ultimately to a risk of re-trafficking.

While it is promising that courts enquire into the underlying reasons for the risk of re-trafficking, they have, at times, been reluctant to acknowledge that men can be vulnerable to re-trafficking, or have even cited male gender as a factor countering vulnerability.⁵ However, there are also promising judgements which acknowledge that these vulnerability indicators also apply to male claimants.⁶

State protection against re-trafficking

When it comes to the state protection enquiry, courts in the UK and Germany take into account two main factors: firstly, the question whether the country of origin has anti-trafficking legislation in place and applies this effectively and secondly, whether the country of origin offers reception and reintegration measures for returning trafficked persons.

The focus on the state of origin's willingness and ability to prevent, investigate and prosecute trafficking is problematic because this can lead to a finding of sufficiency of protection, even if, in practice, protection against re-trafficking is not effective. Thus, state protection has been found to be established based on the country of origin's mere efforts to combat trafficking.⁷ A promising development, however, is the fact that courts in more recent judgements have recognised the importance of '*effectiveness*' of protection, which must 'be judged by its ability to deter and/or to prevent the form of persecution of which there was a risk, *not just punishment of it after the event*'.⁸ In fact, the 2016 judgement in *HD* questions the relationship between anti-trafficking measures and protection against re-trafficking, stating that 'there was inadequate evidence [...] to support a finding that [the anti-trafficking] measures were having a significant effect either on the number of victims trafficked for the first time or on the risk of returned victims of trafficking being trafficked again'.⁹ The judgement states further that '[m]erely because Nigeria is "doing its best" to meet its international obligations to prevent

⁵ VG Arnsberg, 10 K 4818/02.A, 25.11.2004; VG Augsburg, Au 7 K 12.30184, 18.09.2012; *TT (Vietnam)* [2019] EWCA Civ 248, [2019] 2 WLUK 401.

⁶ *HC* (n 4) and *LVC* (n 4).

⁷ VG Aachen, 8 K 1220/02.A, 21.01.2004; *VD (Trafficking) Albania* CG [2004] UKIAT 00115; *MP (Trafficking – Sufficiency of Protection) Romania* [2005] UKIAT 00086; *AM and BM* (n 4); VG Aachen, 2 K 2521/18.A, 10.11.2020.

⁸ *AZ* (n 4) [159]; emphasis added.

⁹ *HD* (n 3) [141]; see also 6 A 40/19 (n 4).

trafficking does not necessarily result in a finding that there is sufficiency of protection for those identified as being at risk of being trafficked'.¹⁰

Based on the above, the second type of state protection discussed in the case law, i.e. the provision of reception and reintegration measures for returned trafficked persons, appears to be the more promising approach. Rather than focusing on law enforcement efforts and therefore on traffickers, this approach focuses on trafficked persons themselves and their need to approach traffickers. The question is whether the state of origin is able (and willing) to provide reception and reintegration measures for trafficked persons, such as accommodation in dedicated shelters and financial reintegration support.¹¹ Where such measures are not available, a failure of state protection is established. For example, it is acknowledged that protection in shelters is not a viable option where traffickers specifically recruit individuals from such shelters,¹² where there are few shelters of low quality,¹³ where trafficked persons can only stay in shelters for a short period of time,¹⁴ or where the claimant is male, but shelters are only open to female trafficked persons.¹⁵

Yet, the enquiry into state protection focused on reception and reintegration measures also suffers from deficiencies. While it harks back to the future risk enquiry in seeking to counter vulnerability to re-trafficking, fails to investigate in more detail whether shelters for trafficked persons and reintegration assistance can really address trafficked persons' vulnerabilities. This is particularly obvious with regard to reintegration assistance. While financial reintegration support is seen as countering risk of re-trafficking, courts fail to enquire whether individuals will have access to such support in practice.¹⁶ What is more, reintegration assistance provided by international organisations such as IOM or the sending state is conceived of as a form of state protection.¹⁷ Thus, by providing integration support, the sending country effectively

¹⁰ *HD* *ibid* [172].

¹¹ *AM and BM* (n 4) [180]; *PO (Trafficked Women) Nigeria CG* [2009] UKAIT 00046 [201]; VG München, M 11 K 06.51323, 11.09.2007 [35]; VG Düsseldorf, 27 K 2264/18.A, 15.12.2020; VG Cottbus, 9 K 1516/18.A, 11.01.2021; *LTD v SSHD* [2015] UKUT (IAC) AA/13630/2011; *TSN v SSHD* [2019] UKUT (IAC) PA/07665/2017.

¹² *AM and BM* (n 4) [42], [63], [97] and [144].

¹³ A 7 K 1405/12 (n 4).

¹⁴ The UK Upper Tribunal has noted that 'vulnerability is not [...] reduced following a six week stay in a [...] shelter', see *HD* (n 3) [141]; Even a two-year stay in a shelter may be insufficient to reduce risk, see *MD v SSHD* [2021] UKUT (IAC) PA/12142/2019 [63].

¹⁵ *BT v SSHD* [2019] UKUT (IAC) PA/07306/2017 [45] and [50]; *TVP v SSHD* [2018] UKUT (IAC) PA/02997/2018 [24]; *HVT v SSHD* [2018] UKUT (IAC) PA/03104/2017 [6]; *HC* (n 4) [37].

¹⁶ 27 K 2264/18.A (n 11); 2 K 2521/18.A (n 7); 9 K 1516/18.A (n 11); *LTD* (n 11); *NX v SSHD* [2014] UKUT (IAC) AA/01621/2013.

¹⁷ *LTD* (n 11); *NX* (n 16); *TSN v SSHD* [2019] UKUT (IAC) PA/07665/2017.

acknowledges that there is a failure of state protection in the country of origin (since this country does not provide the requisite support). However, rather than granting refugee status based on this finding, sending countries seek to provide protection themselves by granting financial assistance. This goes against the principle that protection must be provided by the country of origin and that it needs to be durable and meaningful in character. What is more, as demonstrated by the case of *TSN*, reintegration support is unlikely to provide meaningful and durable protection against re-trafficking.¹⁸ *TSN* was first trafficked to the UK in 2009 and removed in 2014. By 2015, he was back in the UK, once again having been trafficked. The tribunal found that ‘the appellant had received money under the [Facilitated Returns Scheme] on a previous return to Vietnam but this had not assisted him as he had been re-trafficked’, and thus, found that he was eligible for refugee status.¹⁹

Refugee Convention nexus

In the case law analysed, the nexus element of the Refugee Convention itself is barely discussed, yet, trafficked persons are seen to be able to establish nexus by reference to either membership of the particular social group (PSG) ‘women’ (or variations thereof) or the PSG ‘trafficked persons’ (or variations thereof).²⁰

The courts tend to define variations of the PSG ‘women’ narrowly, which has been found to include ‘young females who have been victims of trafficking for sexual exploitation’;²¹ ‘women from the north east of Albania’;²² ‘single women who were affected by trafficking and have freed themselves of it’;²³ or ‘women returning to Nigeria, who have been victims of trafficking in the form of prostitution’.²⁴ The idea that it is necessary to identify a narrow PSG to establish nexus is flawed – indeed the size of the group is irrelevant.²⁵

While some variations of the PSG ‘trafficked persons’ are also defined narrowly, notably ‘former victims of trafficking who have freed themselves of it (and have testified against the

¹⁸ *TSN* *ibid.*

¹⁹ *ibid* [3].

²⁰ *SB (PSG - Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 [56]; *HD* (n 3) [9]; *ES (s82 NIA 2002, Negative NRM)* [2018] UKUT 335 (IAC) [60]; *TD and AD* (n 4) [119].

²¹ *AZ* (n 4) [140].

²² *SK (prostitution) Albania* [2003] UKIAT 00023 [14].

²³ *VG Augsburg*, Au 7 K 16.31586, 21.07.2017; see also A 7 K 1405/12 (n 4); *VG Wiesbaden*, 3 K 1465/09.WI.A, 14.03.2011; *VG Würzburg*, W 2 K 14.30213, 17.11.2015.

²⁴ *VG Köln*, 2 K 5595/18.A, 28.05.2019; see also A 1 K 8819/18 (n 4).

²⁵ James C Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd edn (CUP 2014) 367.

traffickers) and are returning to Nigeria;²⁶ courts have come to accept that nexus can be established simply by membership of the PSG ‘former victims of trafficking and former victims of trafficking for sexual exploitation’;²⁷ ‘former victim of trafficking’;²⁸ or ‘victim of human trafficking.’²⁹

Interestingly, as the narrow variations of the PSG ‘women’ show, it is not so much the applicants’ female gender which links to the persecution feared, but their additional characteristics, mainly the fact of having been trafficked previously. As such, while the PSG ‘women’ may be problematic in excluding male applicants, the way these PSGs are framed shows an awareness of the importance of a prior trafficking experience, so that male claimants are also be able to establish nexus as ‘trafficked persons’.

Indeed, the courts see the status of trafficked person as an innate characteristic, while, at times, struggling with the question whether this status also leads to differential social perception, particularly with regard to persons trafficked not for sexual, but for labour exploitation.³⁰ Nevertheless, it appears that it is the experience of having been trafficked which is seen to connect to the fear of re-trafficking. Although the courts do not explicitly state this, the nexus analysis therefore links back to the future risk enquiry, as the experience of having been trafficked leads to vulnerabilities, which, in turn, explain that having been trafficked previously leads to renewed trafficking. As such, the PSG ‘persons in vulnerable situations’ may be the more appropriate nexus ground, which would capture the real reason why trafficked persons are at disproportionately high risk of re-trafficking.³¹

Conclusion

An in-depth analysis of trafficking-based asylum claims from the UK and Germany shows both promising and restrictive practices regarding the nexus of trafficking in persons with the definition of a refugee in international law. Overall, it is promising that trafficked persons are

²⁶ 3 K 1465/09.WI.A (n 23) p 12.

²⁷ *SB* (n 20) [56].

²⁸ *HD* (n 3) [9].

²⁹ *ES* (n 20) [60].

³⁰ *SB* (n 20) [93]; *TVP* (n 15) [63].

³¹ Foster calls this the predicament approach to establishing nexus, see Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) 277. ‘Persons in vulnerable situations’ may form a PSG since vulnerabilities can be conceived of as innate at the time of refugee status determination and ‘vulnerable’ persons may be perceived as being different from surrounding society, the stigma experienced by trafficked persons and other irregular migrants serving as an example for this.

able to claim refugee status, however, due to shortcomings in the analysis of trafficked persons' asylum claims, some individuals may be wrongly excluded from protection.

The most promising practice in decision-making on asylum claims based on a risk of re-trafficking is courts' reliance on vulnerability indicators in the future risk analysis. This allows for a comprehensive overview of why such a risk transpires and, importantly, for an understanding of heightened risk as a result of a prior trafficking experience.

Returning to the vulnerability analysis in the context of the state protection and nexus enquiries could aid courts in a more principled analysis of trafficked persons' asylum claims. The vulnerability indicators identified are clearly also relevant to the state protection enquiry as they allow an assessment of whether the state of origin is able to effectively address these vulnerabilities to counter the risk of re-trafficking. Since the relevant vulnerabilities explain why an individual is at risk of being re-trafficked, they are also capable of explaining why trafficked persons are at disproportionately high risk of being re-trafficked and can therefore be relied on when establishing nexus. In order to avoid protection gaps, a more principled analysis of trafficked persons' asylum claims is required and vulnerability reasoning can guide such an analysis.