The nexus between human trafficking and asylum.
Can women trafficked for the purposes of sexual exploitation successfully claim asylum?

Melanie Oliver
E.MA Academic Year 2012-2013
Supervised by Professor Dr. Manfred Nowak & Dr. Julia Planitzer
University of Vienna - Ludwig Boltzmann Institute of Human Rights
Abstract

Can women trafficked for the purposes of sexual exploitation successfully claim asylum in accordance with the United Nations 1951 *Convention relating to the Status of Refugees* (the Refugee Convention)? This question surprisingly lacks definitive answers, in law and in practice.

There is no doubt that women trafficked for the purposes of sexual exploitation (VHT) require assistance, support and protection - but should this be provided through the asylum system or the trafficking system? This paper explores the nexus between the two systems and examines how they should be linked to ensure the most appropriate and effective protection for human trafficking victims with international protection needs.

The Refugee Convention protects people with a well-founded fear of being persecuted on account of their race, religion, nationality, political opinion or membership of a particular social group. VHT will usually claim asylum on this last ground. But some asylum authorities do not accept that women or VHT can constitute a particular social group and reject their asylum claims. How can the diverging approaches be reconciled to ensure these women are protected?

A critical issue is the lack of consistent definition of ‘particular social group’ for VHT. Four solutions are discussed in this paper, any of which could lead to consistent practices if agreement is reached amongst asylum-authorities. However in the absence of such agreement, VHT may continue to be deprived of reliable processes to protect them from future persecution. This paper proposes these solutions to bring convergence to the different applications of the Refugee Convention and ensure a fairer and more consistent application of the Refugee Convention to women who have been trafficked for the purposes of sexual exploitation.
Acknowledgments

I would like to express my gratitude to:

Professor Dr. Manfred Nowak and Dr. Julia Planitzer: for your valued expertise, support and insightful comments.

Mum and Dad: thank you for always supporting my projects, hopes and dreams - especially through these past long years of study. They say *happiness is having a large, loving, caring, close-knit family... in another city*. Thank you for being mine.

Ross Buchanan: *never let small minds convince you that your dreams are too big.* Thank you for teaching me such life lessons and for being my “panic button” responder!

My best friend Fiona Ireland: thank you for reassuring me when I was lost, for making me laugh, and for reminding me not to take myself too seriously. *Maybe we can’t stop the downpour, but we can always walk together in the rain.*

A special thanks to my first teacher, in life and technology: my brother Trent. Your technical assistance has been very much appreciated.
Acronyms

CGRS    Center for Gender and Refugee Studies (California)
ECHR    European Convention on Human Rights
ECtHR   European Court of Human Rights
EWCA    England and Wales Court of Appeal
FMCA    Federal Magistrate’s Court of Australia
GRETA   Group of Experts on Action against Trafficking in Human Beings
HCA     High Court of Australia
LRA     Lord’s Resistance Army
OSCE    Organisation for Security and Cooperation in Europe
PSG     Particular Social Group
RMJ     Refugee and Migrant Justice
RRTA    Refugee Review Tribunal of Australia
UK      United Kingdom
UKIAT   United Kingdom Immigration Appeal Tribunal
UKUT    United Kingdom Upper Tribunal
UN      United Nations
UNHCR   United Nations High Commissioner for Refugees
UNODC   United Nations Office on Drugs and Crime
US      United States
VCLT    Vienna Convention on the Law of Treaties
VHT     Victim/s of Human Trafficking (specifically, women trafficked for the purpose of sexual exploitation)
Table of Contents

Introduction ............................................................................................................................................. 1

Methodology ........................................................................................................................................... 2

Choice of Jurisdictions .......................................................................................................................... 2

Value of main approach and sources ................................................................................................. 3

1. Key definitional concepts and the nexus between human trafficking and asylum .................. 5
   1.1. VHT trafficked for the purposes of sexual exploitation .......................................................... 6
   1.2. Defining a refugee ..................................................................................................................... 6
   1.3. Defining human trafficking ..................................................................................................... 8
       1.3.1. Defining VHT ..................................................................................................................... 8
       1.3.2. The principle of non-punishment for VHT and asylum-seekers ........................................ 10
       1.3.3. Human trafficking is not human smuggling ................................................................. 12
       1.3.4. Who are these victims? .................................................................................................... 13
       1.3.5. Human trafficking is a form of gender-based violence ................................................ 15
   1.4. The nexus between human trafficking and refugee systems ................................................. 16
       1.4.1. Linking the systems to ensure VHT’s protection needs are assessed ............................... 17
       1.4.2. International push for the nexus to be established .......................................................... 18
       1.4.3. Prerequisite to identification: the existence of the two systems ...................................... 19
       1.4.4. The Norwegian example: linking the two systems .......................................................... 20
       1.4.5. Advantage for VHT in accessing the asylum system ...................................................... 21
   1.5. Conclusion .................................................................................................................................. 25

2. The applicability of the Refugee Convention to VHT ................................................................. 26
   2.1. Persecution ............................................................................................................................... 28
       2.1.1. Types of persecution ...................................................................................................... 31
           2.1.1.1. Physical and mental suffering ............................................................................... 31
           2.1.1.2. Re-trafficking and reprisals ............................................................................... 33
           2.1.1.3. Ostracism and discrimination ............................................................................. 35
           2.1.1.4. Other forms of persecution: ‘continued persecution’ ........................................... 38
       2.1.2. Fear of persecution must be well founded ................................................................. 40
       2.1.3. Persecution distinguished from criminal acts .............................................................. 43
2.2. Nexus – ‘for reasons of’ ........................................................................................................................................................................... 46
2.3. Unavailability of State protection .................................................................................................................................................... 50
  2.3.1. Test to determine a state’s ability and willingness to protect .................................................................................................. 50
  2.3.2. State as persecutor ........................................................................................................................................................................ 52
  2.3.3. Non-state actor as persecutor ..................................................................................................................................................... 53
  2.3.4. VHT-specific considerations in determining availability of state protection ............................................................................. 54
2.4 Conclusion.................................................................................................................................................................................................. 56

3. The most relevant ground under Article 1A(2): Particular Social Group ........................................... 59
  3.1. Article 1A(2)’s application to VHT ................................................................................................................................................... 59
  3.2. Defining ‘Particular Social Group’ .................................................................................................................................................. 60
  3.3. Gender based asylum claims: Particular Social Group .................................................................................................................. 62
    3.3.1 Rationale behind the refusals to accept these social groups ..................................................................................................... 65
    3.3.2 Fear of misapplying the Refugee Convention and the ‘living instrument’ debate ............ 66
      3.3.2.1 The changing protection needs of women ................................................................................................................................. 69
    3.3.3 Solution one: ‘women’ as a particular social group ................................................................................................................... 70
      3.3.3.1 Rejecting ‘women’ as a particular social group .......................................................................................................................... 72
      3.3.3.2 Fear of flooding the asylum system with women asylum-seekers? ..................................................................................... 74
    3.3.4 Solution two: VHT as a particular social group: define the group narrowly ............... 75
    3.3.5 Solution three: VHT: a particular social group defined by the past trafficking experience 78
    3.3.6 Solution four: domestic legislation that recognises VHT as a particular social group ...... 82
  3.4 Conclusion.................................................................................................................................................................................................. 82

4. Other grounds under Article 1A(2): Race, Religion, Nationality, Political Opinion................. 84
  4.1 Double-pronged potential for persecution................................................................................................................................. 84
  4.2 Race or nationality ............................................................................................................................................................................... 84
  4.3 Religion ........................................................................................................................................................................................................ 86
  4.4 Political opinion ........................................................................................................................................................................................................ 88
  4.5 Conclusion.................................................................................................................................................................................................. 89

5. Practical Obstacles in accessing the asylum system................................................................. 91
  5.1 Lack of knowledge within the trafficking and asylum systems of VHT-specific issues, including non-penalisation ......................................................................................................................................................................................... 92
  5.2 Lack of training of authorities ......................................................................................................................................................... 94
### 5.3 Access to information

5.4 Importance of legal advice

5.5 Conclusion

6. Conclusion

7. Bibliography

#### i. Books

#### ii. Articles

#### iii. Reports and research papers

#### iv. United Nations Documents

#### v. Internet resources

#### vi. Conventions and other instruments

#### vii. Case law
The nexus between human trafficking and asylum: can women trafficked for the purposes of sexual exploitation successfully claim asylum?

Oliver, Melanie

https://doi.org/20.500.11825/620

Downloaded from Open Knowledge Repository, Global Campus’ institutional repository