ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Hatton Cross

Dates of hearing: 25 April 2007 & 26 April 2007

Determination notified:

Before

Senior Immigration Judge Gill
Designated Immigration Judge Digney
Mr. M. L. James

Between

SB Appellant

and

The Secretary of State for the Home Department Respondent

Representation:

For the Appellant: Ms. P. Chandran, of Counsel, instructed by Hammersmith & Fulham Community Law Centre (HFCLC).

For the Respondent: Mr. P. Patel, of Counsel, instructed by The Solicitor to HM Treasury.

DETERMINATION AND REASONS

1. *If individuals share a common background which is an immutable characteristic they cannot change and which defines the group by giving it a distinct identity in the society in question which has nothing to do with the actions of the future persecutors, then the group exists independently of the feared future act(s) of persecution. It is not necessary to show general discrimination as an identifying characteristic of the group.*

2. *"Former victims of trafficking" and "former victims of trafficking for sexual exploitation" are capable of being members of a particular social group within*

regulation 6(1)(d) because of their shared common background or past experience of having been trafficked.

3. *The word "and" in regulation 6(1)(d) of the Protection Regulations should be given its natural meaning.*

4. *In the context of Moldovan society, a woman who has been trafficked for the purposes of sexual exploitation is a member of a particular social group within regulation 6(1)(d), the particular social group in question being "former victims of trafficking for sexual exploitation". Whether a particular individual is at risk of persecution for membership of that group needs to be decided on the facts of the case.*

Background

1. This is an up-grade appeal under section 83(2) of the Nationality, Immigration and Asylum Act 2002 (as amended) by the Appellant, a national of Moldova in her twenties, against the decision of the Respondent of 4 October 2006 to refuse her application for asylum and to grant humanitarian protection for five years. The Appellant was granted limited leave until 3 October 2011. Under section 83(2), an appeal may only be brought on asylum grounds. Accordingly, Ms. Chandran confirmed that previous grounds under Articles 3 and 8 are not being pursued. The Respondent's decision was served on the Appellant on 27 October 2006, that is, after the coming into effect on 9 October 2006 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (the Protection Regulations) and Command paper 6918 (Cmnd 6918) which amended the Immigration Rules. These implement Council Directive 2004/83/EC of 28 April 2004 (the Qualification Directive).

Basis of claim

2. The Appellant had been trafficked into the United Kingdom for the purposes of sexual exploitation. She subsequently gave evidence against the person responsible for her sexual exploitation in the United Kingdom (who we will hereafter refer to as Z), which resulted in the successful prosecution of Z. Z received a term of imprisonment in excess of five years, for offences of controlling prostitution and false imprisonment. Z is now at large. The Appellant fears harm at the hands of Z, Z's family and Z's associates if she is returned to Moldova. The Respondent's "Reasons for refusal" letter dated 4 October 2006 sets out a detailed summary of the Appellant's evidence in relation to her asylum claim. No issue has been taken with that summary, nor is credibility in issue in this case. It is not only unnecessary but inadvisable for the Tribunal to set out the facts relating to the Appellant's case in any greater detail. In order to preserve anonymity, we will only refer to the subjective facts to the extent necessary for our determination of the issues in this case. This should not, however, be taken as an indication that we have not considered the subjective evidence fully, or that we have reached our decision in ignorance of any particular aspect of the subjective evidence.

3. At paragraph 29 of the refusal letter, the Respondent stated that the Appellant's case was considered to be exceptional. The reasons were the fact of Z's trial, that Z has a wide network of contacts throughout Eastern Europe and the Appellant had

given evidence that Z's associates are still in Moldova and that the trafficking operation is still ongoing. The combination of "the particular nature of this gang" and the Appellant's personal profile led the Respondent to conclude that the Appellant's case is "exceptional". However, the Respondent does not accept that, in general terms, there is insufficient protection for trafficked women or women at risk of trafficking in Moldova, nor does he accept that it would not be safe generally for such women to relocate internally. However, the Respondent does accept that, whilst the Moldovan authorities are willing to offer protection to the Appellant, they are unable to offer sufficient protection in her particular case, because of the exceptional facts of her case. Before us, Mr. Patel confirmed that the Respondent accepts that the Appellant would not be able to obtain sufficient protection in Moldova and that she would not be able to relocate safely in Moldova.

The hearing before us

4. At the hearing, the issues between the parties were agreed to be as follows:

   (a) whether the Appellant is a member of a particular social group;

   (b) whether the risk of any future persecution would be for a Geneva Convention reason or ground – i.e. whether the Appellant is at real risk of persecution *by reason of* her membership of the particular social group. This is the causation question.

Application to rely on an unreported determination

5. Ms. Chandran sought to rely on an unreported determination of the Immigration Appeal Tribunal (IAT) under reference: 00TH00728, notified on 17 May 2000. We will refer to this case as LD Ukraine. Ms. Chandran submitted that the Tribunal would be materially assisted by this decision, for the reasons set out in the "amended application" dated 24 April 2007 which was served with a cover letter from HFCLC of the same date. Ms. Chandran wished to rely on paragraphs 28 to 30 of LD Ukraine.

6. Mr. Patel objected to the application to rely on LD Ukraine, because paragraphs 17.8 and 17.9 of the Practice Directions had not been complied with. In his submission, the Tribunal would not be materially assisted by the decision in LD Ukraine, for the reasons given at paragraphs 52 to 54 of his skeleton argument.

7. We decided that we would admit the LD Ukraine decision *de bene esse*, as we considered it difficult to assess whether the decision would materially assist the Tribunal in isolation from the parties' substantive submissions on the issues before us.

8. We should mention that, at the commencement of the hearing on 25 April 2007, the parties were in agreement on one matter which had previously been in issue. This concerns the effect of a successful appeal on asylum grounds under section 83(2) on a previous grant of humanitarian protection. Mr. Patel explained that the Respondent's position is that, if the appeal is successful, the grant of humanitarian protection to the Appellant will convert to asylum status. In that event, the Respondent's practice is to issue a confirmatory letter. However, this would not result in any changes (whether in terms of conditions attached or the duration of the leave) to the limited leave of 5 years' duration, which has already been granted. Prior to the last date of the limited leave, the Appellant would be able to apply for indefinite leave to remain in the same way as she would have been able to if the protection-status granted to her had remained as humanitarian protection. Ms. Chandran confirmed her agreement to this. Accordingly, this matter was not pursued any further.

9. It was initially thought that this appeal would be heard with up-grade appeals by two Romanian nationals which raised the same legal questions we have set out at paragraph 4 above. To assist the Tribunal, the Treasury Solicitor undertook to serve a consolidated bundle of documents (agreed by both parties) for all three appeals. In the event, it was not possible to complete the hearings of the two Romanian cases, whereas the hearing in respect of the Appellant's appeal was concluded on 26 April 2007. This explains the presence of documentary material relating to Appellants "MM" and "EM" and background evidence relating to Romania in the bundles before us.

10. The Tribunal confirms receipt of a letter dated 30 April 2007 from HFCLC together with the skeleton argument of Mr. Nicholas Jariwala (who we understand is a Home Office Presenting Officer), referred to by the expert Ms. Rebecca Surtees in her "comments" dated 13 February 2007. The expert's evidence is relied upon to support the Appellant's argument that she is a member of a particular social group. We requested Mr. Jariwala's skeleton argument to be submitted because Ms. Surtees referred to it in her "comments".

Submissions

11. The parties' detailed submissions are set out in their respective skeleton arguments. The following is a summary of their main arguments.

12. Ms. Chandran suggested three possible "particular social groups", as follows:

    (i) women in Moldova;
    (ii) former victims of trafficking in Moldova; and
    (iii) victims of trafficking for the purposes of sexual exploitation.

13. Ms. Chandran submitted that discrimination does not need to be one of the identifying characteristics or features of a particular social group. Baroness Hale of Richmond in ex parte Hoxha [2005] UKHL 19 (at paragraph 37) said that women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment. Accordingly, in Ms. Chandran's submission, past experience of sexual violence is sufficient as an identifying characteristic. It is an immutable characteristic. Accordingly, the suggested groups (ii) and (iii) satisfy the definition of "particular social group". It is not being asserted on the Appellant's behalf that all members of suggested groups (ii) and (iii) would be at real risk of persecution in Moldova by reason of their membership of a particular social group.

14. Ms. Chandran relied on the fourth paragraph from the end of the opinion of Lord Hoffmann in R. v. IAT, ex parte Shah and Islam v. SSHD [1999] 2 AC 629, which we quote at paragraph 45 (vi) below. In Ms. Chandran's submission, this shows that there is no requirement for state complicity in discriminatory action by non-state actors of persecution. In other words, it is not necessary to show that there is institutionalised discrimination, or state-sanctioned or state-condoned discrimination. In the judgment of the House of Lords in Fornah v. SSHD, K. v. SSHD [2006] UKHL 46, their Lordships approved of the UNHCR's Guidelines on Membership of a Particular Social Group dated 7 May 2002 (the UNHCR's PSG Guidelines) (pages 1568 to 1572 of bundle 4). The crux of the Appellant's case rests on paragraph 101 of the opinion of Baroness Hale of Richmond in Fornah and K. Harm directed towards women is gender-specific harm. The Appellant was trafficked because she is a woman. She is at real risk of serious harm in Moldova because she gave evidence against her traffickers. That arose, she submitted, on account of having been trafficked because she was a woman living in Moldova.

15. Ms. Chandran further submitted that the mere fact that the Appellant has been trafficked does not mean that the particular social group that she belongs to is not independent of the feared persecution. The fact of having been trafficked is a historical fact. It is a common characteristic which she shares with other victims of trafficking and which is immutable.

16. In MP (Trafficking – sufficiency of protection) Romania [2005] UKIAT 00086 the Tribunal concluded that "people who have been trafficked" are not members of a particular social group. In Ms. Chandran's submission, the reasons the Tribunal gave at paragraph 95 of the determination for reaching this conclusion are wrong. Whilst it may be that the Respondent is correct to say that the Court of Appeal in RG (Ethiopia) v. SSHD [2006] EWCA Civ 339 was of the view that state complicity

or discrimination may be necessary in order to identify a particular social group, Ms. Chandran submitted that it would be going too far to suggest that discrimination must always be present.

17. Even if discrimination is a necessary identifying characteristic of a particular social group, Ms. Chandran submitted that the background evidence relating to Moldova shows that women are discriminated against in Moldova and that the suggested group (i) above also satisfies the definition of "particular social group". Ms. Chandran took us through the background evidence on which she relied and the expert evidence of Ms. Surtees. There is evidence of state complicity in the trafficking of women in Moldova. Efforts to protect women against trafficking are weak. The government relies heavily on the efforts of non-governmental organisations (NGOs), who cannot be regarded as actors of protection under regulation 4 of the Protection Regulations. There is a lot of evidence of corruption within the Moldovan government; indeed, very close to rampant corruption.

18. In any event, the mere act of singling a person out for persecution is an act of discrimination. Unwillingness on the part of the state to provide protection may be evidence of discrimination. However, even where a state is unable to provide protection, for example, because of lack of resources or inefficiency, this can be seen as tolerance by the state which enables the discriminatory treatment to be meted out. Ms. Chandran relied on the UNHCR's Guidelines on International Protection Concerning Gender-Related Persecution dated 7 May 2002 (the UNHCR's Gender Guidelines) (pages 1558 to 1572 of bundle 4) which she submitted had been accepted in Fornah and K.

19. Ms. Chandran accepted that the social group: *"victims of trafficking for the purposes of sexual exploitation who have given evidence which secured the conviction of their traffickers*" falls foul of the requirement that the particular social group identified must exist independently of the persecution feared in the future. However, Ms. Chandran submitted that the Appellant is at real risk of persecution, not only because she testified against her trafficker, but also because she is a woman from Moldova. The background evidence shows that there is a high level of domestic and non-domestic violence against women in Moldova, that they are generally unprotected and are highly vulnerable to being trafficked for the purposes of sexual exploitation.

20. On the issue of causation, it is not necessary, Ms. Chandran submitted, for the Appellant to show that her membership of a particular social group is the primary reason for the future persecution. It is sufficient if it is an effective reason for any further persecution. Ms. Chandran accepted that discrimination is necessary to establish a causal nexus. In her submission, this was shown by the singling out of the Appellant for persecutory ill-treatment.

21. For the Respondent, Mr. Patel submitted that it is incorrect to say that women are always members of a particular social group. Even Baroness Hale did not go as far as to say that at paragraph 101 of the judgment in Fornah and K. Mr. Patel submitted that the legal precedents show that discrimination must be an identifying characteristic of a particular social group. Alternatively, discrimination must be present to establish causation. With regard to the former point, Mr. Patel submitted that the reason why women in Pakistan were considered by the House of Lords in Shah and Islam to be members of a particular social group was because societal

and institutionalised discrimination against women in Pakistan was deep-rooted. Not only did the state sanction discrimination against women, there was discriminatory legislation in Pakistan. Mr. Patel particularly relied on specific passages from the opinions in Shah and Islam, which we will deal with below. The reason why discrimination is a necessary identifying characteristic of a particular social group was explained by Lord Steyn by reference to the preambles to the Geneva Convention. The preambles show that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms and that counteracting discrimination was a fundamental purpose of the Convention.

22. Mr. Patel also relied on the judgment of the House of Lords in Fornah and K, referring us to specific passages which we will also deal with below, to the extent we consider necessary. In Mr. Patel's submission, if women are always a "particular social group", this would open the possible grounds of persecution under the Geneva Convention too wide. It is clear from the other four grounds of persecution that there must be discrimination of some form. It is clear from the speeches of Lord Steyn and Lord Hope in Shah and Islam that women are not particular social groups in all societies. However, women are a particular social group in Pakistan because of the societal and institutionalised discrimination against them which is sanctioned or condoned by the state.

23. In Fornah and K, the House of Lords held that differential treatment of women must exist for there to exist a particular social group based on gender. The practice of female genital mutilation (FGM) in Sierra Leone reinforces and expresses the inferior status of women, as compared with men, in Sierra Leonean society. Paragraph 19 of the judgment explains why the appellant K in Fornah and K was held to fear persecution by reason of her membership of a particular social group, namely her husband's family. Paragraph 45 of the judgment explains how the discrimination requirement was satisfied in reaching the conclusion that the fear of the appellant K was because of her membership of a particular social group. At paragraph 54 of the judgment, Lord Hope explained that discrimination involves the making of unfair or unjust distinctions, to the disadvantage of one group or class of people, as compared with others. Paragraph 86 of the judgment of Baroness Hale states that women must have an inferior status in the home society before it can be said that women in the country in question are a particular social group. Paragraph 93 of the judgment sets out the extent to which discrimination against women was prevalent in Sierra Leone. At paragraph 98 onwards, Baroness Hale considered the UNHCR's PSG Guidelines. It is clear, from paragraph 101, that Baroness Hale considered that the Guidelines stop short of saying directly that women are always a particular social group, although they make it clear that, if a woman is persecuted because she is a woman and women generally are assigned an inferior status in the society, then she should qualify for recognition as a refugee.

24. Mr. Patel referred us to the determination of the Tribunal in Montoya (01/TH/00161), in which the Tribunal had laid out a number of basic principles, approved of by the Court of Appeal and which should govern the assessment of a claim made in relation to a particular social group. The Tribunal stated that the "particular social group" ground is limited by the anti-discrimination notions inherent in the basic norms of International Human Rights Law; applying the *eiusdem generis* principle found in the other four grounds, the particular social group category must be concerned with discrimination directed against members of that group, because of a common immutable characteristic. In RG (Ethiopia), the Court of Appeal held it was

not necessary for the discriminatory treatment to be part of the law of the land. However, Mr. Patel submitted that it is clear from the judgment that it is, nevertheless, necessary to show that there is discrimination in society because it is necessary to be able to set the group apart.

25. Mr. Patel noted that Ms. Chandran had accepted that discrimination was necessary, although her position was that the discrimination did not have to be discrimination at the hands of the state and that discrimination at the hands of a non-state agent would qualify. In addition, Ms. Chandran contended that the act of persecution could itself amount to discrimination and satisfy the requirement for the group to be discriminated against. In Mr. Patel's submission, it had to be shown that the social group in question was discriminated against, in the sense explained by Lord Hope at paragraph 54 of the judgment in Fornah and K.

26. At paragraph 120 of the judgment in Fornah and K, Lord Brown explained that the group must exist independently of the feared persecution; the people in the qualifying group must share a common characteristic. This is the non-circularity requirement, which Mr. Patel submitted applies in the instant case.

27. In Mr. Patel's submission, the narrow social groups which have been suggested – i.e. group (ii) (former victims of trafficking in Moldova) and group (iii) (victims of trafficking for the purposes of sexual exploitation) – cannot succeed for the following reasons:

    (i) the group is defined by no more than the persecutory element of trafficking;

    (ii) the evidence does not establish the discriminatory treatment of victims of trafficking in relation to the lack of protection by the state authorities in Moldova;

    Alternatively, Mr. Patel submitted that causation is not established. The Appellant's fear of persecution arises because she is likely to be the subject of reprisals from Z (or Z's powerful family and associates) against whom the Appellant gave evidence to secure Z's conviction in the United Kingdom. In other words, it is not the fact of having been trafficked, or that the Appellant is a woman, which is the reason for the fear of persecution. The lack of protection against the fear is not on account of the Appellant's gender, or the fact that she has been trafficked. The state is unable to protect the Appellant, because of the powerful reach of Z or Z's family and associates. The necessary element of discrimination, either because the Appellant is a woman or because she is a former victim of trafficking, is missing. Accordingly, it has not been shown that the Appellant's membership of her particular social group is the effective reason for the lack of state protection.

28. In Mr. Patel's submission, a social group defined as: "former victims of trafficking who have given evidence against their traffickers" may overcome the causation difficulty. However, such an identification could not establish a particular social group as it would also fall foul of the principle that the group must not be solely defined by the fear of persecution.

29. Mr. Patel referred us to the judgment of the Court of Appeal in Chun Lan Lui [2005] EWCA Civ 249, in which case Lord Justice Rix reviewed the relevant jurisprudence of the US and Commonwealth jurisdictions. In particular, Mr. Patel relied on

paragraph 29 of the judgment. In Mr. Patel's submission, Lord Justice Rix concluded that discrimination was an important part of the identification of a particular social group.

30. Mr. Patel further submitted that the comments of the expert, Ms. Surtees, dated 13 February 2007 (at pages 441 to 443 of bundle 1), went against her opinion in her letter dated 13 February 2007 responding to Home Office submissions of 13 February 2007. In the first paragraph on page 441 of bundle 1, Ms. Surtees stated that it was not "Moldovan women per se that would qualify as members of a particular social group under the Geneva Convention, but rather Moldovan trafficking victims". In Mr. Patel's submission, this is a legal question and not for an expert to decide. Furthermore, this opinion goes against her later opinion, set out in a letter dated 25 April 2007 (page 443a of bundle 1), in which she said that, based on her experience, she was inclined to agree with the argument that "legislative, economic and social provisions in Moldova (and/or the lack of enforcement of these provisions) fail to provide women in Moldova" with effective protection from the harm of domestic and other gender-based violence. The fact that Ms. Surtees had changed her mind goes against her credibility. Mr. Patel submitted that the first opinion of Ms. Surtees was correct i.e. women in Moldova are not a social group, because the discrimination women face in Moldova is not the same as, or similar to, the discrimination faced by women in Pakistan (as found in *Shah and Islam),* or in Sierra Leone (as found in Fornah and K), or in Kenya (as found in P & M [2004] EWCA Civ 1640). In Mr. Patel's submission, it would be rare that women are persecuted by reason of their gender as women, as Lord Millett indicated in Shah and Islam. The circumstances in which women would be found to be persecuted by reason of their gender must be akin to the circumstances found to exist in Pakistan in Shah and Islam, or Sierra Leone in Fornah and K.

31. In Mr. Patel's submission, the Tribunal's reasoning at paragraphs 47 to 49 of MP Romania defeats the arguments relied upon on the Appellant's behalf. In response to the Tribunal's reasoning in MP Romania, the Appellant relies on the UNHCR's "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" dated April 2006 (the UNHCR's Trafficking Guidelines) (pages 1541 to 1557 of bundle 4) and the unreported case of LD Ukraine. Mr. Patel urged us not to admit LD Ukraine. In any event, he submitted that LD Ukraine does not assist. It concerned the situation for women in Ukraine in April 2000. Furthermore, the claimant in LD Ukraine feared being prostituted against her will. In the present case, the Appellant's fear is that she would be trafficked again or harmed by being trafficked again. The UNHCR's Trafficking Guidelines do not assist either, because they are guidance and not a substitute for proper consideration of the issue.

32. With regard to the background evidence, Mr. Patel submitted that the Moldovan authorities are making efforts to address problems of discrimination against women. However, progress is slow. The situation is not analogous to or as serious as the situation of women in Pakistan. Discrimination is not as deep-rooted as the discrimination which was found to exist against women in Pakistan in Shah and Islam and in Sierra Leone in Fornah and K. Mr. Patel submitted that the situation of women in Moldova is significantly different from the situation of women in Pakistan, or in Sierra Leone, and not significantly different from the situation of women in Romania as found in MP Romania.

33. In response, Ms. Chandran submitted that the Appellant does not fear indiscriminate violence. She fears being singled out for persecution. The act of being singled out for persecution is sufficient to amount to discrimination identifying the particular social group. In the opinion of Lord Hope in Fornah and K (paragraph 46 of the judgment), it would be a mistake to insist on recognition within society subjectively that the collection of individuals is a group that is set apart from the rest of the community. In his Lordship's opinion, it is sufficient for the individual to be seen objectively to have been singled out by the persecutor or persecutors for reasons of his or her membership of a particular social group, whose defining characteristics exist independently of the words or actions of the persecutor. If membership of a particular social group need only be one reason for the feared future persecution, then there is no need for the particular social group to be *the* effective reason for the feared persecution. It is sufficient if it is *an* effective reason. The Appellant is a victim of trafficking. She was trafficked only because she is a woman. She gave evidence against her trafficker because she had been trafficked. Accordingly, Ms. Chandran submitted that it was not possible to discount the Appellant's gender, or the fact that she had been trafficked, as an effective reason for the feared future persecution. The persecution she fears is that she would be re-trafficked, or that retaliatory action would be taken against her, because she had given evidence against her trafficker. She would be unprotected because of her gender as a woman. There is a prevalence of violence against women and a lack of legislation to outlaw violence against women. There are no enforcement measures. There are deeply-rooted patriarchal views in Moldova, which mean that women have an inferior position in society. As a group, women are discriminated against in Moldova because they lack protection against gender-based harm. The lack of protection perpetrates violence against women. Although there have been a number of convictions of traffickers, there is no protection offered by the Moldovan government through its own funding.

34. In other words, the Appellant's gender and the fact that she had been trafficked places her in her current position of having a well-founded fear of future persecution. The Appellant would also be at real risk of being re-trafficked, because she would stand out as an unprotected member of society as a person who has been trafficked. Victims of trafficking are discriminated against in Moldova in social as well as economic ways. The test is not whether there is deep-rooted discrimination against the group as an identifying characteristic, or in order to establish causation. Shah and Islam was decided before the UNHCR's Trafficking Guidelines. In Shah and Islam, the House of Lords was considering whether women as a gender are members of a particular social group in Pakistan.

35. In Ms. Chandran's submission, causation relates to the reason for the persecutory action and not the reason for the Appellant's fear. An effective reason for the persecutory action must be the Appellant's membership of a particular social group. There was no suggestion in Fornah and K that it was necessary for a family to be discriminated against before the family could be regarded as a particular social group. The perception of society that a family is a social group is enough.

36. Montoya was decided before the UNHCR's Trafficking Guidelines and before the Court of Appeal's adoption of the UNHCR's Gender Guidelines. It was decided before Fornah and K, in which the House of Lords considered that it was not necessary for both sub-paragraphs (i) and (ii) of Article 10.1(d) of the Qualification

Directive to be satisfied. We questioned whether the observations of their Lordships in Fornah and K as to whether it would be necessary to satisfy both sub-paragraphs (i) and (ii) of Article 10.1(d) of the Qualification Directive were, strictly speaking, anything other than obiter. However, neither Ms. Chandran nor Mr. Patel took the opportunity to address us on this point, beyond Ms. Chandran saying that she relied on the fact that their Lordships had said that they considered that it would not be necessary to satisfy both sub-paragraphs of Article 10.

37. In Ms. Chandran's submission, there is no authority to support the proposition that it is necessary for discrimination against women to be as deep-rooted in a particular society as the discrimination found to exist in Pakistan against women, before women in that society would be regarded as members of a particular social group.

38. We reserved our determination.

Consideration of the issues

39. Under regulation 2 of the Protection Regulations, a refugee is defined by reference to Article 1A(2) of the Geneva Convention (the United Nations' Convention Relating to the Status of Refugees), which defines a refugee as person who:

> "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country."

40. It is for the Appellant to show, to the standard of a reasonable degree of likelihood, that she has a well-founded fear of persecution for one of the qualifying reasons (regulation 5 (3)).

(A) "Particular social group"

41. Ms. Chandran referred us to Article 10 of the Qualification Directive. We informed her that we would consider regulation 6 of the Protection Regulations, unless she was able to point us to any errors in transposition of Article 10 into domestic legislation. She informed us that she was not aware of any errors of transposition. We have compared regulation 6 of the Protection Regulations with Article 10 of the Qualification Directive. Regulation 6(1)(d) reads:

> "(d) a group shall be considered to form a particular social group where, *for example:*
> (i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and*
> (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;"
>
> (our emphasis)

42. Article 10.1(d) of the Qualification Directive reads the same, except that the words "in particular" are used in place of the words "for example".

43. Two possible meanings of the word "discrimination" were advanced before us. In making his submission that discrimination is a necessary identifying characteristic of

a particular social group, Mr. Patel explained that he was referring to discrimination as explained by Lord Hoffmann in Shah and Islam in the following terms:

> "making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect…."

and also as explained by Lord Hope of Craighead in Fornah and K (paragraph 54) in the following terms:

> ''Discrimination involves making unfair or unjust distinctions to the disadvantage of one group or class of people as compared with others."

44. Ms. Chandran submitted that, if discrimination is a necessary identifying characteristic, then the Appellant contends either that women in Moldova are discriminated against in the sense employed by Mr. Patel or, alternatively, that the mere act of targeting an individual for ill-treatment is itself discrimination. Unless we indicate otherwise, we use the word "discrimination" in the remainder of this determination with the more usual meaning of the word, as suggested by Mr. Patel.

45. Mr. Patel relied heavily on the speeches in Shah and Islam and Fornah and K to support the proposition that discrimination is a necessary identifying characteristic of a particular social group. Both Ms. Chandran and Mr. Patel took us through the various speeches at length, each emphasising particular aspects of the speeches. It is therefore appropriate that we should refer to the speeches, and consider the arguments advanced, in some detail. We can see, from the following extracts of the speeches (in particular, the text we have underlined) why it may be said that domestic jurisprudence strongly points to a conclusion that discrimination in the wider sense (i.e. the more usual meaning of the word, as suggested by Mr. Patel, as opposed to discrimination in the form of the act(s) of future persecution feared) is a necessary identifying characteristic for a particular social group under the Geneva Convention:

From the speech of Lord Steyn in Shah and Islam.

(i) "……. *The distinctive feature of this case is that in Pakistan women are unprotected by the state: discrimination against women in Pakistan is partly tolerated by the state and partly sanctioned by the state*."

(ii) "*Women are also disadvantaged generally* in the criminal justice system because of their position in society……"

(iii) "For what may be a small minority, who are convicted of sexual immorality, there is the spectre of 100 lashes in public or stoning to death in public. *This brief description of the discrimination against women, which is tolerated and sanctioned by the state in Pakistan, is the defining factual framework of this case."*

From the speech of Lord Hoffmann in Shah and Islam:

(iv) "*In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect.* The obvious examples, based on the experience of the persecutions in Europe which would have been in

the minds of the delegates in 1951, were race, religion, nationality and political opinion. But *the inclusion of "particular social group" recognised that there might be different criteria for discrimination, in pari materiae with discrimination on the other grounds, which would be equally offensive to principles of human rights.* It is plausibly suggested that the delegates may have had in mind persecutions in Communist countries of people who were stigmatised as members of the bourgeoisie. But the concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the Convention may have had in mind. *In choosing to use the general term "particular social group" rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention*……."

(v) "To what social group, if any, did the appellants belong? To identify a social group, one must first identify the society of which it forms a part. In this case, the society is plainly that of Pakistan. Within that society, it seems to me that women form a social group of the kind contemplated by the Convention. *Discrimination against women in matters of fundamental human rights on the ground that they are women is plainly in pari materiae with discrimination on grounds of race.* It offends against their rights as human beings to equal treatment and respect."

(vi) "I am conscious, as the example which I have just given will suggest, that there are much more difficult cases in which the officers of the State *neither act as the agents of discriminatory persecution nor, on the basis of a discriminatory policy, allow* individuals to inflict persecution with impunity. In countries in which the power of the State is weak, there may be intermediate cases in which groups of people have power in particular areas *to persecute others on a discriminatory basis* and the State, on account of lack of resources or political will and *without its agents applying any discriminatory policy* of their own, is unable or unwilling to protect them. I do not intend to lay down any rule for such cases. They have to be considered by adjudicators on a case by case basis as they arise. *The distinguishing feature of the present case is the evidence of institutionalised discrimination against women by the police, the courts and the legal system, the central organs of the State."*

From the speech of Lord Hope of Craighead in Shah and Islam:

(vii) "…… a feature which is common to all five of the Convention reasons which are set out in the paragraph. The first preamble to the Convention explains that *one of its purposes was to give effect to the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.* This principle was affirmed in the Charter of the United Nations and in the Universal Declaration of Human Rights approved by the General Assembly of the United Nations on 10 December 1948. *If one is looking for a genus, in order to apply the eiusdem generis rule of construction to the phrase "particular social group," it is to be found in the fact that the other Convention reasons are all grounds on which a person may be discriminated against by society."*

From the opinion of Lord Millett *[His Lordship's dissent related to the question of causation and not whether the applicants in that case were members of a particular social group]*:

(viii) "Persecution may be indiscriminate. It may be for any reason or none. It is not, however, enough for an applicant for asylum to show that he or she has a well founded fear of persecution. *The persecution must be discriminatory and for a Convention reason.* By limiting the persecution in this way, the Convention contemplates that the possibility that there may be victims of persecution who do not qualify for refugee status. Furthermore, if the reason relied upon is membership of a particular social group, it is not enough that the applicant is a member of a particular social group and has a well founded fear of persecution. The applicant must be liable to persecution because he or she is a member of the social group in question."

(ix) "In interpreting the expression "membership of a particular social group" I derive assistance from article 2 of the Universal Declaration of Human Rights. This was adopted by the

General Assembly of the United Nations in December 1948, was still recent when the terms of the 1951 Convention were being settled, and is mentioned in the Preamble to the Convention. Article 2 prohibits the denial of the rights and freedoms set forth in the Declaration:

> "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (my emphasis)

The denial of human rights, however, is not the same as persecution, which involves the infliction of serious harm. *The 1951 Convention was concerned to afford refuge to the victims of certain kinds of discriminatory persecution,* but it was not directed to prohibit discrimination as such nor to grant refuge to the victims of discrimination. Moreover, while the delegates in Geneva were willing to extend refugee status to the victims of discriminatory persecution, they were unwilling to define the grounds of persecution which would qualify for refugee status as widely as the discriminatory denial of human rights condemned by the Universal Declaration. Discriminatory persecution "of any kind" would not suffice; the Convention grounds are defining, not merely illustrative as in the Universal Declaration. The inclusion of sex as a basis of discrimination in the Universal Declaration and the failure to include it as a ground of persecution in the 1951 Convention is noteworthy. It may be due to the fact that, while sexual discrimination was widely practised in 1951, and women are condemned to a subordinate and inferior status in many societies even today, it is difficult to imagine a society in which women are actually subjected to serious harm simply because they are women. But the words in article 2 which I have emphasised, "language . . . social origin, property, birth or other status", indicate to my mind the kind of characteristics which have commonly been shared by the victims of persecution and which the delegates must have had in mind when including the expression "membership of a particular social group". They are all matters of status rather than association; they have regard to the personal attributes of the victims rather than their behaviour."

From the speech of Lord Bingham of Cornhill in Fornah and K:

(x) "10. …… *It is well-established that the Convention must be interpreted in accordance with its broad humanitarian objective and having regard to the principles, expressed in the preamble, that human beings should enjoy fundamental rights and freedoms without discrimination……"*

(xi) "13. Certain important points of principle relevant to these appeals are to be derived from the opinions of the House [in *Shah and Islam*]. First, *the Convention is concerned* not with all cases of persecution but *with persecution which is based on discrimination*, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being: pp 651, 656. ……."

(xii) "31. ……. FGM may ensure a young woman's acceptance in Sierra Leonean society, but she is accepted on the basis of institutionalised inferiority……. FGM is an extreme expression of the discrimination to which all women in Sierra Leone are subject, as much those who have already undergone the process as those who have not. I find no difficulty in recognising women in Sierra Leone as a particular social group for purposes of article 1A(2)……."

(our emphasis)

46. In these two judgments, their Lordships emphasised two important points, as follows: firstly, that the Geneva Convention was concerned to afford protection against persecution which is based on discrimination; and, secondly, that the failure to include sex as a ground of persecution in the Geneva Convention, notwithstanding its inclusion as a basis of discrimination in article 2 of the Universal Declaration of Human Rights, may be due to the fact that it is difficult to envisage a society in which women are actually persecuted, simply because they are women.

However, the issues in Shah and Islam were whether, given the discrimination against women which exists in Pakistan (discrimination in the wider sense against women in Pakistan), the appellants in that case were members of a particular social group and whether any future persecution was by reason of their membership of a particular social group. The issue was not whether discrimination in the wider sense is a necessary identifying characteristic of a particular social group, whatever the social group is and whether or not it is a gender-based social group. It should be remembered that, in Shah and Islam, the social groups relied upon or considered by their Lordships were all gender-based, namely, "women in Pakistan", or "women who had offended against social mores or against whom there were imputations of sexual misconduct" (see paragraph 9 of the judgment in Fornah and K which usefully summarises the social groups considered in Shah and Islam). Similarly, the social groups relied upon or considered by their Lordships in Fornah and K were also gender-based, as follows:

> "young, single Sierra Leonean women" and "young Sierra Leonean women" (paragraph 9);
> "young single women in Sierra Leone who are at risk of circumcision" (paragraph 28);
> "young single women who have not been circumcised and who are, therefore, at risk of circumcision" and "women in Sierra Leone" (paragraph 31).

47. Both parties rely on the Court of Appeal's judgment in RG (Ethiopia) v. SSHD [2006] EWCA Civ 339. Mr. Patel contends that this judgment is further authority for the proposition that discrimination in the wider sense is a necessary identifying characteristic. Ms. Chandran contends that discrimination against women does not need to be part of the law of the land. In our view, it is important to remember the particular social group which was argued in RG (Ethiopia). In that case, the question was whether the Adjudicator was entitled to find that women and girls constituted a particular social group (see paragraphs 27, 44 and 46 of the judgment). In other words, the social group advanced was the broad one of gender. It was not argued on the appellant's behalf that her past experience of having been raped was the identifying feature of the particular social group to which she belonged.

48. If Mr. Patel is correct in saying that discrimination in the wider sense is always a necessary identifying characteristic of any particular social group, then it is not easy, at least at first glance, to understand why the family is capable of being regarded as a social group. We specifically put this point to Mr. Patel at the hearing, asking whether it was the case that there was evidence of discrimination in the wider sense against families in Iran from which K originated. Mr. Patel referred us to paragraph 19 of Lord Bingham in Fornah and K, from which we quote:

> "19. The persecution feared by the first appellant was said to be for reasons of her membership of a particular social group, namely her husband's family. In resisting her claim the Secretary of State did not seek to contend that a family cannot be a particular social group for purposes of the Convention. He accepted that it could, consistently with the submission of counsel on his behalf in *Skenderaj v Secretary of State for the Home Department* [2002] EWCA Civ 567, [2002] 4 All ER 555, para 21, that
>
> > "a family group could be a particular social group, since society recognises the family bond as distinct and attaches importance to it, but *only if society also sets it apart in such a way as to stigmatise or discriminate against it for that reason."*
>
> The Secretary of State's acceptance reflects a consensus very clearly established by earlier domestic authority such as *Secretary of State for the Home Department v Savchenkov* [1996] Imm AR 28, and also by international authority. In *Minister for Immigration and*

> *Multicultural Affairs v Sarrazola* [2001] FCA 263, paras 28-34, there was held to be little doubt that persecution by reason of being a member of a particular family could constitute persecution for reasons of membership of a particular social group. In *Thomas v Gonzales*, above, the conclusion was reached "that the harm suffered by the Thomases was not the result of random crime, but was perpetrated on account of their family membership, specifically on account of the family relationship with Boss Ronnie."
>
> (our emphasis)

49. Mr. Patel relies on the phrase we have underlined above in order to argue that discrimination is a necessary identifying feature of the family before the family could be regarded as a particular social group. At the same time, Mr. Patel argues that the form of discrimination which must be shown as an identifying characteristic of all social groups (including the family) is discrimination in the wider sense because (Mr. Patel argues) discrimination in the form of the feared future act of persecution would fall foul of the requirement that the social group must not be identified solely by the feared act(s) of future persecution. With respect, it is very difficult to see how these propositions can both be correct where the social group being advanced is the family, given that there was no evidence in Skenderaj (see paragraph 30 of that judgment) or in the case of K in Fornah and K that there was discrimination in the wider sense against families as a social group in the relevant countries or that there was discrimination in the wider sense in Iran against the family of which applicant K was a member. Mr. Patel also referred us to paragraph 45 of Fornah and K, which he submitted explains how the discrimination requirement was satisfied in reaching the conclusion that the fear of the appellant K was because of her membership of a particular social group. However, paragraph 45 of the judgment, which reads:

> 45. It is universally accepted that the family is a socially cognisable group in society: UNHCR *position on claims for refugee status under the 1951 Convention relating to the Status of Refugees based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud*, 17 March 2006, p 5. Article 23(1) of the 1966 International Covenant on Civil and Political Rights states that the family "is the natural and fundamental group unit of society and is entitled to protection by society and the State." The ties that bind members of a family together, whether by blood or by marriage, define the group. It is those ties that set it apart from the rest of society. Persecution of a person simply because he is a member of the same family as someone else is as arbitrary and capricious, and just as pernicious, as persecution for reasons of race or religion. As a social group the family falls naturally into the category of cases to which the Refugee Convention extends its protection.

does not show that any discrimination other than in the form of the feared act of persecution was relied upon. Accordingly, paragraph 45 does not help Mr. Patel. It may be that the answer lies in the fact that, given that the family is a quintessential social group or given that it already exists independently, it is not necessary to invoke any other characteristic or circumstance in order to define the group as a particular social group. Since the family exists as a social group independently of the actions of the persecutor, the imputation of circularity is avoided.

50. Mr. Patel also relied on the judgment of the Court of Appeal in Montoya. In Montoya, the Court referred to the summary by the IAT in the proceedings below in the same case of the basic principles that should govern an assessment of a claim based on the membership of a particular social group. One of these principles was stated by the IAT as follows:

> "(vi) the PSG ground is further limited by the Convention's integral reliance on anti-discrimination notions inherent in the basic norms of International Human Rights Law;

applying the *eiusdem generis* principle to the other 4 grounds, the PSG category must be concerned with discrimination directed against members of the group because of a common immutable characteristic;
a broad range of groups can *potentially* qualify as a PSG, including private landowners;"

51. We do not consider that the judgment in Montoya supports Mr. Patel's argument that discrimination in the wider sense must be shown to exist in order to identify a particular social group, for the following reasons:

(a) Mr. Patel submitted that the Court of Appeal in Montoya had approved of the IAT's "PSG guidelines". We do not consider that it can be said that the Court of Appeal did approve of these guidelines. At paragraph 15, Lord Justice Schiemann, who delivered the judgment of the Court, said:

> "15. We were addressed by both sides on the basis that the Tribunal's summary of the basic principles as set out in their paragraph 55B was a broadly correct summary of the existing law binding on this Court. This we are content to do."

In the end, the Court in Montoya did not decide whether Mr. Montoya was a member of a particular social group. Schiemann LJ said, at paragraph 26, that a possible approach in that case was to assume two matters in Mr. Montoya's favour; first, that he is a member of a particular social group; and, second, that he has a well-founded fear of being persecuted. Even on this basis, the Court concluded that Mr. Montoya had not established his claim because the necessary causal nexus was not established – see paragraphs 27 to 33 of the judgment. Accordingly, it is clear that the Court in Montoya did not find it necessary to decide whether the claimant was a member of a particular social group. In our view, it is for this reason that the Court was "content" to proceed on the basis that the IAT's summary of the basic principles in establishing whether a particular social group exists was a broadly correct summary of the case-law.

(b) Further, and in any event, there is nothing in the IAT's summary of "principle" (vi) which suggests that the IAT had in mind that discrimination in the wider sense was a necessary identifying characteristic of a particular social group, whatever the social group is and whether or not it is a gender-based group.

52. Another difficulty for Mr. Patel was the following extract from the speech of Baroness Hale of Richmond in ex parte Hoxha [2005] UKHL 19:

> "37. If what they fear is capable of amounting to persecution, is it for a Convention reason? It is certainly capable of being so. In *R v Immigration Appeal Tribunal and another, Ex p Shah [1999] 2 AC 629*, this House held that women in Pakistan constituted a particular social group, because they shared the common immutable characteristic of gender and were discriminated against as a group in matters of fundamental human rights, from which the State gave them no adequate protection. The fact of current persecution alone is not enough to constitute a social group: a group which is defined by nothing other than that its members are currently being persecuted would not qualify. But *women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment. They are certainly capable of constituting a particular social group under the Convention.*"

(our emphasis)

Although we acknowledge that Baroness Hale was specifically referring to women who have suffered sexual violence in the past, her formulation supports the proposition that it is possible for individuals who share a past experience to show that they are linked by an immutable characteristic (i.e. their common past experience) which is capable of being independent of and the cause of their current ill-treatment. This would be consistent with the wording of regulation 6(1)(d)(i), which refers to the sharing of a common background which cannot be changed.

53. In our view, the following propositions appear to emerge from the authorities:

(a) the family already exists in society as a social group; the ties which bind members of the family together define the group and set it apart from the rest of society. Accordingly, it is not necessary to invoke any other characteristic or circumstance in order to define the particular social group. If, contrary to our view, discrimination is necessary, then the feared future act(s) of persecution can provide the necessary discriminatory element without falling foul of the principle that the group must not be *solely* defined by the fear of persecution because the family already exists as a social group;

(b) where the particular social group being relied upon is the broad one of gender or where any further features to narrow the group are gender-based, then discrimination against the gender (i.e. discrimination in the wider sense) must be shown to exist. Further, in the words of Lord Justice Keene in RG (Ethiopia) (paragraphs 24 and 32), some degree of state involvement is important, although the P and M case, [2004] EWCA Civ 640, lessens the need for discrimination to be part of the law of the land before women can be regarded as a particular social group, if there is in practice a systematic lack of protection. In addition, there must be an absence of adequate protection when the persecution is alleged to emanate from non-state actors of persecution. These observations would apply to the first of the three suggested groups in this case – i.e. "women in Moldova". (It is possible for a particular social group involving men to be gender-based. If that is the case, discrimination in the wider sense must be shown to exist as an identifying characteristic of the particular social group);

(c) In cases where the members of a social group share a common background which is an immutable characteristic and which they cannot change (for example, the sharing of a common past experience) or they ought not to be required to change, it may be that such common background defines the group by giving it a distinct identity in the society in question (see, further, paragraphs 67 to 74 below) which has nothing to do with the actions of the would-be persecutors. If this is the case, then the group exists independently of the feared future act(s) of persecution and circularity is avoided (see paragraph 37 of the speech of Baroness Hale in ex parte Hoxha. If an element of discrimination is necessary, it can be provided by the feared act(s) of persecution without leading to circularity. In other words, a particular social group which shares a common background is defined not only by their description of the members but also, in part, by their place in society.

54. With regard to (c), it may be that, in some cases, the past experience or common background is not connected in any way with the gender of individuals who share the past experience or common background. In other cases, gender may have been

a reason or the reason for the past experience in question. We consider the following three examples: - “aristocrats”, “former victims of trafficking” and “former victims of trafficking for sexual exploitation”. A group of “aristocrats” may have a common background which is plainly not connected in any way to gender. In the case of “former victims of trafficking” and “former victims of trafficking for sexual exploitation”, the key feature that members of these groups share is their common background or past experience of having been trafficked or of having been trafficked for sexual exploitation. This common background or past experience is within the express terms of regulation 6(1)(d)(i) and also within paragraph 37 of the speech of Baroness Hale of Richmond in ex parte Hoxha. Given that, in our understanding, individuals may be trafficked for the purposes of sexual exploitation as well as for other purposes (such as for labour and for begging) and given, further, that there is evidence that men have also been trafficked, although on a smaller scale (see, for example, the reference to men who were trafficked for sexual and labour exploitation in Moldova in 2003 at page 454 of bundle 2), the second and third examples, of “former victims of trafficking” and “former victims of trafficking for sexual exploitation”, are not necessarily gender-based, nor do they have any gender-based features to narrow the group. Whilst it would clearly be the case that, in the case of an individual who was trafficked for the purposes of sexual exploitation, the individual's gender would have been an important aspect of the circumstances which gave rise to the individual being trafficked, this does not mean that the social group relied upon is the broad one of gender; it is still the past experience of having been trafficked which is the immutable characteristic which (depending on the country evidence) is capable of identifying the group and being independent of the future ill-treatment. It would then not be necessary to show, as an identifying characteristic, that there is discrimination in the wider sense against the former victims of trafficking in the society in question. To conclude otherwise would effectively result in imposing an additional and unjustified hurdle on individuals (men or women) who share a common background or past experience of having been trafficked for the purposes of sexual exploitation, but not on other groups of individuals who share a common background or past experience, such as (for example) aristocrats.

55. Furthermore, both men and women can be trafficked for the purposes of sexual exploitation. Both men and women can be victims of sexual violence. If discrimination in the wider sense is a necessary identifying characteristic of a social group whose members share a common background, it is difficult to see how men who have been subjected to sexual violence can be members of a particular social group by virtue of sharing a past experience. It is very difficult to how a man would be able to show that members of his gender are discriminated against in the wider sense in a particular society. We do not think that it would be suggested, in the case of a male who is a former victim of trafficking for sexual exploitation, that discrimination against men (in the wider sense) in the country in question must be shown to exist as a necessary identifying characteristic of the group. There is, therefore, no reason to insist that former victims of trafficking for sexual exploitation who happen to be women must establish that women are discriminated against in their country. The imposition of such a requirement runs the risk of being based on an assumption that only women would fall into this group. It would also conflate the characteristic which identifies the social group (i.e. that they share a common background or past experience) with their gender.

56. Accordingly, in our view, and subject to what we say at paragraphs 67 to 74, former victims of trafficking and former victims of trafficking for sexual exploitation *are capable* of being members of a particular social group because of their shared common background or past experience of having been trafficked. However, we emphasise that, in order for "former victims of trafficking" or "former victims of trafficking for sexual exploitation" to be members of a particular social group, the group in question must have a distinct identity in the society in question. It should also be noted that our third example ("former victims of trafficking for sexual exploitation") is not precisely the same as the third possibility advanced on the Appellant's behalf ("victims of trafficking for the purposes of sexual exploitation"). Our use of the word "former" makes it at once clear that it is the common background or past experience which is the common characteristic of the group, whereas Ms. Chandran's formulation of the third possibility does not make that clear and runs the danger of being interpreted as a group which relies on the feared future persecution as the identifying characteristic.

57. Mr. Patel contended that the second suggested group falls foul of the principle that the group must exist independently of the feared persecution. We do not agree, because that confuses the individual's past experience (which cannot be changed) with the reason for the feared future acts of persecution. Baroness Hale of Richmond explained in ex parte Hoxha that earlier persecution of one sort may lead to later persecution of a different sort (see paragraph 30) and that women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment (see paragraph 37).

58. Mr. Patel relied on Chun Lan Liu v. SSHD [2005] EWCA Civ 249, in which Rix LJ reviewed US and Commonwealth authorities. Mr. Patel submitted that Rix LJ concluded that discrimination must be an identifying characteristic of a particular social group. The relevant paragraphs are paragraphs 29 and 30 of the judgment, which we will quote:

> "29. In my judgment, there are at least two strands apparent in this jurisprudence. The first relates to what *can amount* to a defining characteristic of a particular social group. In this connection Acosta, Ward [(1993) 2 SCR 689] and Cheung [Cheung v. Canada (Minister of Employment & Immigration) (1993) 2 FC 314] are of particular interest and are probably saying much the same thing. In Islam and Shah Lord Hoffmann adopted the language of Acosta (at 651e/f):
>
> > *"where it was said that a social group for the purposes of the Convention was one distinguished by:*
> >
> > > *"an immutable characteristic…[a characteristic] that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed."*
> >
> > *This was true of the other four grounds enumerated in the Convention. It is because they are either immutable or part of an individual's fundamental right to choose for himself that discrimination on such grounds is contrary to principles of human rights."*
>
> 30. The second strand relates to how the characteristic and thus the particular social group in question may be identified. ***It may be identified by discrimination and even in part by means of discrimination amounting to persecution***: but that will not matter as long as such persecution is not the sole means of definition or identification. It may be identified by the recognition or perception of the surrounding society in general that the group in question

> shares a particular characteristic. Or it may be that the distinguishing characteristic and thus the group in question may simply be objectively observable, irrespective of the insight of the general society in which it is placed. It may be said that these concepts have not yet been fully worked out in the jurisprudence.

(our emphasis)

59. However, in our view, what we have said at paragraphs 53 to 57 above is consistent with the judgment in Chun Lan Liu. We do not consider that this judgment supports Mr. Patel's argument, that discrimination in the wider sense must be shown to exist against the social group. There is nothing to suggest that Rix LJ was referring to discrimination in the wider sense.

60. Mr. Patel also relied on paragraph 95 of MP Romania, the relevant part of which reads:

> "95) ……. The social group was "people who had been trafficked". The required immutable characteristic, which could not be changed, was the fact that she had been trafficked. It was because she was a member of that social group that she would be targeted. Alternatively, causation was made out because she would be denied the protection generally available in Romania because she was someone who had been trafficked. We note that he did not seek to argue that there was a particular social group of "women in Romania" or even "women in Romania who have been trafficked". We find that the Adjudicator was right to conclude that the Appellant did not fall within a particular social group. Firstly, "people who have been trafficked" falls foul of the principle that the group must exist independently of the persecution it fears. Such a group is defined by no more than the persecutory element of trafficking. Secondly, for reasons to which we will return in connection with sufficiency of protection, the country material before us does not establish discriminatory treatment of the victims of trafficking by the Romanian state analogous to that of women in Pakistan."

61. We are of the view that the first reason which the Tribunal gave confuses an individual's past experience with the reason for the future act(s) of persecution. The second reason confuses the characteristic of the social group relied upon (i.e. the common past experience) with the gender of those who share that common characteristic. Accordingly, we concluded that MP Romania does not assist the Respondent, as it was wrongly decided.

62. Paragraph 50 of Mr. Patel's skeleton argument also refers to the Tribunal's Determination in JO (internal relocation – no risk of re-trafficking) Nigeria [2004] UKIAT 00251. At paragraph 18 of JO Nigeria, the Tribunal said that it agreed that trafficked women do not qualify as a particular social group, because what defines them is, essentially, the fact of persecution. We make two points in this regard. Firstly, this remark was clearly made by way of obiter. Secondly, and in any event, we are of the view that this reasoning is wrong because it conflates the individual's past experience with the reason for the future acts of persecution.

63. We will now deal briefly with the IAT determinations to which we have been referred:

(i) SK (Albania) [2003] UKIAT 00023 does not assist the Appellant because, as Mr. Patel contends and as explained by the Tribunal in VD (Trafficking) Albania CG [2004] UKIAT 00115, the SK Albania case turned on its own particular facts; and

(ii) VD Albania does not help because that was a case about the risk of being trafficked in the future. The Tribunal did not consider whether the appellant was a member of a particular social group.

64. Having said all this, we admit that the judgment of the Court of Appeal in Skenderaj gives us some difficulty. We were rather surprised that we were not referred specifically to the judgment. The claimant in that case (Mr. Skenderaj) was a member of a land-owning family in Albania involved in a blood feud with a neighbouring family. In that case, the Court of Appeal considered the issue whether discrimination is a necessary identifying characteristic of a particular social group. This was referred to at paragraph 19 of the judgment as a "live issue" in that case. We set out the following extracts from the judgment of Lord Justice Auld, who delivered the judgment of the Court:

> "19. ……We acknowledge that the protection provided by the refugee test as a whole is undoubtedly inspired by anti-discrimination notions; see, e.g., *Refugee Appeal No 71427/199* and *ex p. Shah*. But *we have held back on them for the moment because they have been live issues in this appeal and because we believe it is open to question whether, in a non-state persecution case as here, it is a necessary defining characteristic of a particular social group.* …….
>
> 23. Now that we have identified the area of dispute on this issue, we return to *ex p. Shah*. *There was clear discrimination of Pakistani women in that case, but we doubt whether that factor was necessary to the House of Lords' determination that they or some of them constituted a particular social group. The main reason for the resort to anti-discriminatory principles was to dismiss the notion that cohesiveness was a necessary element of such a group.* Given the approach of the US Board of Immigration and Appeals in *Acosta* and of the reasoning of La Forest J. in the Supreme Court of Canada in *Attorney-General of Canada v. Ward* [1993] 2 SCR 689 on which their Lordships drew heavily in *ex p. Shah*, *it may be that, on this part of the refugee test at least, discrimination was not an essential.* Thus, as Lords Steyn and Hoffmann mentioned, at 1026e-h and 1033b-h respectively, in *Acosta*, the Board said that a particular social group was one distinguished by an immutable characteristic; and in *Ward*, La Forest J. said simply, and by reference, to the whole refugee concept, that it could include individuals fearing persecution on "such bases as gender, linguistic background and sexual orientation".
>
> 24. *Lord Hope seemingly did not regard the notion of discrimination as essential to the definition of a particular social group, as distinct from the whole concept of refugee status.* He said, at 1038e-g and1039c-d:
>
> > "In general terms a social group may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society. The concept of a group means that we [are] dealing here with people who are grouped together because they share a characteristic not shared by others, not with individuals. The word 'social' means that we are being asked to identify a group of people which is recognised as a particular group by society. …
> >
> > The rule that the group must exist independently of the persecution is useful, because persecution alone cannot be used to define the group. But it must not be applied outside its proper context. This point has been well made by *Goodwin-Gill* … He observes at pp 47-48 that the importance, and therefore the identity, of a social group is an open-ended one, which can be expanded in favour of a variety of different classes susceptible to persecution … Persecution may be but one facet of broader policies and perspectives, all of which contribute to the group and add to its pre-existing characteristics."
>
> 25. Lord Millett, in his dissenting speech (which turned on the reason for persecution of the women applicants), clearly found a degree of difficulty in the overlap of the two concepts of discrimination and persecution, a difficulty which, with respect, we share. *Persecution of members of a particular social group only qualifies as persecution for a Convention reason if it is for reasons of such membership, which of necessity must be discriminatory. It is otiose and circular that the group should have to be defined by some discriminatory element before*

consideration of whether it is persecuted for that reason. Providing that there is a social group in the Acosta sense, the discrimination is to be found in the persecution. Lord Millett said, at1043f-g and 1044d-e:

> "… it is not enough for the applicant for asylum to establish that he or she is a member of a particular social group and is liable to persecution. The applicant must also establish that he or she is liable to persecution because he or she is a member of the group. The applicant must be the subject of attack, not for himself or herself alone, but because he or she is one of those jointly condemned in the eyes of their persecutors for possession of the characteristic which is common to the group. …
> Whether the social group is taken to be that contended for by the appellants, however, or the wider one of Pakistani women who are perceived to have transgressed social norms, the result is the same. *No cognisable social group exists independently of the social conditions on which the persecution is founded. The social group which the appellants identify is defined by the persecution, or accurately (but just as fatally) by the discrimination which founds the persecution.* It is an artificial construct called into being to meet the exigencies of the case. [my emphasis].

26. *We also draw strength in this regard from the judgment of the High Court of Australia in Chen, where one of the issues was whether black children in China constituted a particular social group. The Court was firmly of the view that discrimination is not an essential defining characteristic of a particular social group:*

> "22 …the group constituted by children born in those circumstances is defined other than by reference to the discriminatory treatment or persecution that they fear. And so much was recognised by the Tribunal in its finding that a 'child is a black child' irrespective of what persecution may or may not befall him or her.
> 23 The circumstance that 'black children' receive adverse treatment in China is descriptive of their situation and, as McHugh J pointed out in *Applicant A*, that may facilitate their recognition as a social group for the purposes of the Convention *but it does not define it*. Accordingly, there was no error in the Tribunal's finding that, for the purposes of the Convention, the appellant is a member of a particular social group." [our emphasis]

27. There is plenty of scope for giving effect to anti-discriminatory principles underlying the protection of refugees when considering whether membership of such a group attracts persecution of all or, as in *Shah*, *some* of them. *Put another way, it is not necessary to insist upon discrimination as a defining element of a particular social group to satisfy McHugh J's proposition in Applicant A, at 401, that the latter must exist independently of, and not be defined by, persecution."*

(our emphasis)

65. As can be seen, Auld LJ expressed some doubts as to whether discrimination of women in Pakistan was necessary to the House of Lords' determination in Shah and Islam that they or some of them constituted a particular social group. It is clear that Auld LJ was referring to discrimination in the wider sense. In his Lordship's view, the main reason for the resort to the anti-discriminatory principles was to dismiss the notion that cohesiveness was a necessary element of such a group (paragraph 23 of the judgment). His Lordship's analysis of the judgment in Shah and Islam was that discrimination was not always an essential requirement for the identifying of a particular social group, although it was clearly part of the reasoning as to particular social group in that case. Again, it is clear that Auld LJ was referring to discrimination in the wider sense. Giving his conclusion on the question whether Mr. Skenderaj was a member of a particular social group, Auld LJ said:

> "30. In our view, on the evidence accepted by the adjudicator and not challenged before the Tribunal, *Mr. Skenderaj has not made out his claim that he was a member of a particular social group* so as to engage the other elements of the test of a refugee in Article 1A(2). *We*

say that, not for the reason principally relied on by Miss Grey that there was no setting apart or stigmatisation of, or discrimination against, the family outside the persecution alleged since, for the reasons we have given, we do not regard that as a necessary part of the definition of a particular social group, particularly in a non-state persecution case. We say it because, as Miss Grey also submitted, the Skenderaj family was not regarded as a distinct group by Albanian society any more than, no doubt, most other families in the country.

31. If, contrary to our view, some element of discrimination is required to establish the Skenderaj family as particular social group, it could not be found in the state's non-intervention, since that would arise, if at all, only as a result of the private persecution and then in the context of the second limb of the definition of refugee concerned with lack of protection. Nor could it be found in the other family's persecutory attitude since, again, it is impermissible to rely on persecution to establish the group for Convention purposes where no other distinguishing feature other than that it is a family is made out. As Miss Grey observed, unless every land-owning family in Albania were to constitute a particular social group, which is not Mr. Skenderaj's case, only the start of a feud can mark such a family group out."

In other words, Auld LJ was saying that, if discrimination (and, in this regard, it should be remembered that his Lordship was referring to discrimination in the wider sense) is a necessary identifying characteristic of a particular social group, then private landowners are unlikely to qualify as members of particular social group.

66. Whilst this judgment causes us some difficulty, our analysis is in line with the judgments of their Lordships in Shah and Islam and Fornah and K. Accordingly, if Auld LJ was saying that discrimination is not a necessary identifying characteristic of a gender-based social group, then we must respectfully disagree. Furthermore, the final sentence of paragraph 30 of the judgment appears to be at odds with Fornah and K.

67. We now turn to consider whether a social group based on common background must satisfy any requirement in addition to their common background, or past experience, in order to qualify as a social group. This depends upon an interpretation of regulation 6(1)(d), in particular, the words "for example" and the adjunctive "and" between sub-paragraphs (i) and (ii) of regulation 6(1)(d). To assist the reader, we will quote regulation 6(1)(d) again at this point:

"(d) a group shall be considered to form a particular social group where, *for example:*
(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and*
(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;"

(our emphasis)

68. In Fornah and K, the House of Lords made observations on Article 10 of the Qualification Directive. Lord Bingham suggested (paragraph 16) that it was not necessary for a group to satisfy the criteria in sub-paragraph (i) as well as the criteria in sub-paragraph (ii) of Article 10.1 of the Qualification Directive, because such an interpretation would propound a more stringent test than is warranted by international authority. At paragraph 15 of the judgment in Fornah and K, Lord Bingham referred to the UNHCR's PSG Guidelines thus: that the UNHCR's PSG Guidelines were "clearly based" on a careful reading of the international authorities, provide a very accurate and helpful distillation of their effect". Lord Hope in Fornah and K also suggested (see paragraph 46) that it is not necessary to show there is recognition within the society in question subjectively that the collection of

individuals is a group that is set apart from the rest of community. Lord Brown of Eaton-Under-Heywood accepted the definition of a particular social group in paragraph 11 of the UNHCR's PSG Guidelines, according to which a particular social group:

> "……. is a group of persons who share a common characteristic other than their risk of being persecuted, ***or*** who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."

(our emphasis)

69. In other words, it appears that Lord Brown also considered that it was not always necessary to show that a group is perceived as a group by society. However, the observations of their Lordships were obiter, although very persuasive, because it is clear that their Lordships did not decide the cases under regulation 6(1)(d) or Article 10.1(d) of the Qualification Directive. We did raise the point at the hearing, although neither party took the opportunity to advance any arguments in this regard (see our paragraph 36 above). It seems to us that to conclude that it is not necessary to satisfy sub-paragraphs (i) and (ii) of regulation 6(1)(d) would not be consistent with the fact that the House of Lords has also insisted, in Fornah and K and as well as in Shah and Islam, that the determination of the question as to whether a particular social group exists in a society must always be considered within the context of the society in question.

70. We turn now to consider the wording of regulation 6(1)(d) itself. The words "for example" which introduce sub-paragraphs (i) and (ii) of regulation 6(1)(d) may cast some light on the meaning to be given to the word "and" between sub-paragraphs (i) and (ii) of regulation 6(1)(d). There are two possible interpretations of the words "for example", as follows:

    (a) that sub-paragraphs (i) and (ii) of regulation 6(1)(d) are *separate* examples of situations in which a group shall be considered to form part of a particular social group and that the reason for the use of the adjunctive "and" between sub-paragraphs (i) and (ii) of regulation 6(1)(d) is that it was intended to provide the reader with two separate examples, each of which would qualify as social groups under the Protection Regulations; and

    (b) that the adjunctive "and", as well as the words "for example", were used advisedly and intentionally, to mean that any particular social group must satisfy two criteria, the second of which (i.e. sub-paragraph (ii) of regulation 6(1)(d)) is always necessary whereas the first would be satisfied if an individual falls within any one or more of the five examples of particular social groups given in sub-paragraph (i) of regulations 6(1)(d). On this interpretation, given that the five examples are only examples, a particular social group may be shown to exist in other circumstances subject to eiusdem generis principle of interpretation, by reference to the five examples given in sub-paragraph (i) of regulation 6(1)(d).

71. Interpretation (a) would be supported by the obiter remarks of their Lordships in Fornah and K concerning Article 10 of the Qualification Directive. However, it would not only do violence to the adjunctive "and" (this was not an argument which weighed heavily with us) but it would also be inconsistent with the insistence in the

jurisprudence we have considered that the question as to whether a group is a particular social group for the purposes of the Geneva Convention must always be considered in the context of the society in question (this argument did weigh heavily with us). On the other hand, interpretation (b) would give meaning not only to the words "for example" and to the adjunctive "and", it would also be consistent with the insistence that the question whether a particular social group exists must be considered in the context of the society in question.

72. In the end, we decided that the fact that it was emphasised in Shah and Islam and also Fornah and K that the question as to whether a group is a particular social group for the purposes of the Geneva Convention must be decided in the context of the society in question is decisive. If sub-paragraphs (i) and (ii) are alternatives, then it may be said that it is possible to identify a particular social group without reference to evidence relating to any particular country. For example, it may be said that "former victims of trafficking" or "former victims of trafficking for sexual exploitation" are, per se, members of a particular social group without the need to consider the evidence relating to the society in question, which does not seem to us to make sense. It is possible that "former victims of trafficking for sexual exploitation" may be members of a particular social group in one country, but not in another. If it is necessary to conduct any examination of the evidence relating to the society in which a social group is said to exist, it is difficult to see how anything short of satisfying the requirement in sub-paragraph (ii) of regulation 6(1)(d) would be consistent with the jurisprudence we have considered. Another example which supports our conclusion is the example of the left-handed men used by McHugh J in Applicant A v. Minister for Immigration and Ethnic Affairs 71 A.L.J.R. 381, 402, to explain the limits of the principle that a particular social group must exist independently of the persecution feared. We can use the same example, to support our conclusion as to the correct interpretation of regulation 6(1)(d). In many societies, the attribute of being left-handed does not lead to any persecutory action. However, if in any particular society, left-handed people are persecuted because they are left-handed, then (and here we borrow from, and quote, the words of McHugh J himself, see paragraph 79 of the judgment in Fornah and K):

> "…..they would no doubt be quickly recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group."

73. Whilst an application of interpretation (b) would lead to this conclusion, an application of interpretation (a) could lead to the conclusion that left-handed people may be a particular social group without any need to examine the evidence relating to the society in question. In our view, that cannot be correct.

74. Accordingly, and not without a great deal of hesitation having regard to the observations of Lord Bingham, Lord Hope and Lord Brown in Fornah and K, we concluded that the adjunctive "and" between sub-paragraphs (i) and (ii) of regulation 6(1)(d) means what it says: for a particular social group to exist, sub-paragraph (ii) of regulation 6(1)(d) must always be satisfied. In order for a particular social group to exist, the group must have a distinct identity in the relevant society because it is perceived as being different by the surrounding society. We emphasise both that the particular social group must have a distinct identity as well as the requirement that the distinct identity of the group must arise because the group is perceived as being different by the surrounding society. Although it would not be necessary for the whole of a given society to perceive the group to be

different from it, it is not necessary for us to lay any guidelines in this respect in this case.

(B) Causation

75. Article 9.3 of the Qualification Directive states:

> "In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1."

and regulation 5(3) of the Protection Regulations states:

> "(3) An act of persecution must be committed for at least one of the reasons in Article 1A of the Geneva Convention."

76. It was accepted before us that a simple "but for" test of causation is inappropriate. The answer to the causation question involves the application of common sense notions, rather than mechanical rules. It was also accepted that the ground on which the claimant relied need not be the only reason, or even the primary reason, for the apprehended persecution, although (in Ms. Chandran's submission) it must be *an* effective reason and (in Mr. Patel's submission) it must be *the* effective reason. In Fornah and K, Lord Bingham said at paragraph 17 that it is enough if the ground relied upon is *an* effective reason for the further acts of persecution.

77. Mr. Patel also submitted that, if discrimination in the wider sense is not the identifying characteristic of the social group in question, discrimination must be shown to be present to establish causation, i.e. that the lack of protection against non-state actors of persecution is due either to the Appellant's gender (if the wide group of women in the country is relied upon) or the fact of having been trafficked (if the second suggested group of "former victims of trafficking" or the third suggested group of "victims of trafficking for the purposes of sexual exploitation" is relied upon). In our view, this contention is not consistent with paragraph 102 of the judgment in Fornah and K at which Baroness Hale of Richmond quoted from paragraph 21 of the UNHCR's PSG Guidelines, as follows:

> "102. In cases where there is a risk of being persecuted at the hands of a non-State actor (eg husband, partner or other non-State actor) ***for reasons which are related to*** one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established."

(our emphasis)

78. We note that regulation 5(3) employs the words *"for at least one of the reasons ….."* and, although we would not directly apply the Qualification Directive especially as it has not been suggested that there are any errors of transposition, we note also that Article 9.3 of the Qualification Directive uses the words *"there must be a connection between the [Geneva Convention reasons] and the acts of persecution ….."* We do not consider that there is any material difference between the two. In the Geneva Convention, the causative element is provided for by the words *"for reasons of…."* in the phrase *"owing to well-founded fear of being persecuted for reasons of……."* in Article 1A(2). At paragraph 102 of the judgment in ex parte Hoxha, Baroness

Hale quotes the phrase *"for reasons which are related to one of the Convention grounds…"* which appears in paragraph 21 of the UNHCR's PSG Guidelines. We have concerns about moving from the words *"for reasons of…."* in the Geneva Convention to the words *"for reasons which are related to…".* In saying that paragraph 21 of the UNHCR's PSG Guidelines is consistent with or directly derived from the decision in Shah and Islam, Baroness Hale was (in our view) focusing on the question whether the absence of state protection must be for a Geneva Convention ground, and not whether there was a difference in meaning between *"for reasons of…"* and *"for reasons which are related to…"*

79. It is not necessary for us to decide whether the phrase used in the Geneva Convention is materially different from the phrase used in paragraph 21 of the UNHCR's PSG Guidelines, or whether these phrases are materially different from the phrase used in regulation 5(3). On any of these formulations, our decision would be the same, for the following reason: In his speech in Shah and Islam dealing with the issue of causation, of Lord Hoffman said that "*.....there are much more difficult cases in which the officers of the State neither act as the agents of discriminatory persecution nor, on the basis of a discriminatory policy, allow individuals to inflict persecution with impunity. In countries in which the power of the State is weak, there may be intermediate cases in which groups of people have power in particular areas to persecute others on a discriminatory basis and the State, on account of lack of resources or political will and without its agents applying any discriminatory policy of their own, is unable or unwilling to protect them"* (see the quote at our paragraph 45(vi) above). His Lordship considered that such cases would have to be decided on a case by case basis. In the context of Moldova and having regard to the background evidence as to state-protection generally, we are prepared to assume that anyone who is at a heightened risk of ill-treatment (and it should be remembered, in this regard, that the Respondent accepts that the Appellant is at real risk of serious harm at the hands of Z and Z's associates) which is shown to be at least *related* to the individual's past experience of having been trafficked constitutes harm for a Geneva Convention reason provided that the individual is a member of a social group which is defined independently of the feared act of future persecution. We would not want to be read as implying that the same would apply in another country with a better protection system, or that state-protection is generally insufficient or inadequate in Moldova.

(C) Country evidence relating to Moldova

80. In considering the Appellant's appeal, we will need to apply the general legal principles with regard to the identification of a particular social group in the context of the background evidence in Moldova.

81. The first point we should make is that, in this appeal, we are not concerned with the secessionist region which lies east of Dniester River along the border with Ukraine which declared itself independent in 1990. This region is known as the "Transdniester Moldovan Republic" or "Transnistria". Although this is not an internationally recognised state, the Moldovan government has no authority in Transnistria (see the U.S. State Department (USSD) Report on Moldova for 2006 dated 6 March 2007 on page 753 of bundle 2 (the 2006 USSD Human Rights Practices Report)). All references we make to Moldova exclude the secessionist region, unless otherwise indicated.

82. We have been supplied with a large number of background documents for Moldova. It is not possible to refer to them all, although we make it clear that we have considered the documents we have been referred to. In general terms, we make the observation that the background evidence shows that trafficking is a particular problem in Moldova, albeit more so in the breakaway region of Transnistria. We also make the general observation that the background evidence also shows that corruption within the state sector is a problem in Moldova, although the government is taking steps to address the problem.

83. Before moving on to consider the background evidence in any detail, we will make some general observations about Ms. Surtees. We acknowledge that her curriculum vitae shows that she has worked on the issue of trafficking in various capacities since 1998 and has had experience in South-eastern Europe including Moldova, Southeast Asia and West Africa. In 2004 and 2005, she managed the Regional Clearing Project Point Programme (RCP) established through the organisation for Security and Co-operation in Europe (OSCE) under its Stability Pact for South-eastern Europe Task Force on Trafficking in Human Beings which was tasked with improving trafficking programmes and polices in the South-eastern European region, with particular attention to the assistance and protection needs of trafficking victims. We note that Moldova was one of the RCP's project countries and that Ms. Surtees conducted field research there in late 2004 and was in regular contact with non-governmental organisations (NGOs) and international organisations in the country for the duration of the project. We note that she is currently engaged in two anti-trafficking research projects which include Moldova, the first is a study of traffickers and trafficking patterns and the second is a study about why some trafficking victims decline assistance and protection services. We therefore acknowledge that Ms. Surtees has relevant experience and knowledge to give an opinion about the situation of trafficking victims in Moldova.

84. Having said this, we agree with Mr. Patel that the fact that Ms. Surtees changed her opinion on the question as to whether women are a particular social group in Moldova reduces the weight to be given to her opinion on the situation of trafficked victims. Her initial opinion on the question as to whether women in Moldova are a particular social group was clearly that it is not the case that women, per se, would qualify as members of a particular social group, but rather that Moldovan trafficking victims would (see her "comments" dated 13 February 2007, page 441 of bundle 1). However, on 25 April 2007, she changed her mind, saying that she is not an expert on the country of Moldova, but a trafficking specialist with knowledge of the situation of trafficking victims in Moldova. The relevant paragraph of her letter dated 25 April 2007 reads:

> "……In my comments of February 13, I noted that while the Home Office had listed examples of legal and policy initiatives which suggest gender equality in Moldova, my experience was that the implementation of these laws and polices was generally weak. As such, based on my experience in the country, I am inclined to agree with the argument that legislative, economic and social provision in Moldova (and/or the lack of enforcement of these provisions) fail to provide 'women in Moldova' with effective protection from the harm of domestic and other gender-based violence."

85. In changing her opinion, Ms. Surtees relies on the same material (i.e. the examples of legal and policy initiatives listed by the Home Office) and her experience of their implementation. There was nothing before us to indicate that the evidence from the Home Office on which Ms. Surtees relied was any different as at 25 April 2007 to

the evidence which was before her less than a fortnight earlier, on 13 February, nor was there anything to indicate that the experience of Ms. Surtees was any different on the date of her first opinion to her experience as at the date of the changed opinion. Accordingly, we do not consider that we have been given any satisfactory explanation for this change of opinion. This does not inspire confidence in her opinion as to the situation faced by trafficked victims in Moldova. This tended the persuade us to attach less weight to her opinion as to the situation faced by trafficking victims in Moldova. On the other hand, she is the author of the Second Annual Report on Victims of Trafficking in South-eastern Europe 2005 of the International Organisation for Migration (the IOM) referred to at paragraph 92 below. Although she was not the author of the more useful IOM research report referred to at paragraphs 94 to 100 below, the contents of the Second Annual Report on Victims of Trafficking in South-eastern Europe 2005 indicate that her opinion as to the situation of trafficked victims in Moldova cannot be dismissed simply because she changed her opinion within the space of a fortnight on the question as to whether women are a particular social group in Moldova. Accordingly, we accord some weight to her opinion, though this is a little reduced for the reasons we have given.

86. Moldova is described in the Home Office Operational Guidance Note on Moldova dated 9 October 2006 as Europe's poorest nation (page 795 of bundle 2). The USSD Report entitled '2006 Trafficking in Persons Report: Moldova country Narrative' dated 5 June 2006 (pages 772 to 773 of bundle 2) (the 2006 USSD Trafficking Report) and the 2006 USSD Human Rights Practices Report (pages 752 to 771 of bundle 2) give a fair picture of the background situation in Moldova. The earlier of the two documents is the 2006 USSD Trafficking Report, extracts of which we set out below:

> "Moldova is a major source country for trafficking in women and girls for the purpose of sexual exploitation. Victims are trafficked throughout Europe and the Middle East, increasingly to Turkey, Israel, the U.A.E., and Russia. To a lesser extent, Moldova serves as a transit country to European destinations for victims trafficked from other former Soviet states. Reports of internal trafficking of girls from rural areas to Chisinau continued. The small breakaway region of Transnistria in eastern Moldova is outside the central government's control and remained a significant source and transit area for trafficking in persons.
>
> The Government of Moldova does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so. In 2005, the government continued to improve its law enforcement response, increasing trafficking investigations and convicting more traffickers. It passed comprehensive anti-trafficking legislation and updated and improved its National Action Plan. However, the government showed a lack of anti-trafficking leadership by depending almost exclusively on NGOs to carry out its work on prevention and protection. The government, through its National Committee on Trafficking in Persons, should implement the new National Action Plan, devote increased resources to prevention, and provide victims with protection and assistance.
>
> ***Prosecution***
>
> The Government of Moldova made modest progress in its efforts to punish acts of trafficking over the last year. Although the Moldovan criminal code contains specific penalties for trafficking, some prosecutors continued to use lighter pimping charges. In December 2005, the government passed comprehensive anti-trafficking legislation, criminalizing both sexual exploitation and forced labor trafficking. However, successful implementation of the law remains unclear without a commitment of resources from the government. The government increased its law enforcement efforts, investigating 386 cases of trafficking in 2005. Of the

314 cases referred for prosecution, 58 traffickers were convicted, an increase from 23 convictions in 2004. Only 36 traffickers received actual imprisonment; the rest paid fines or were granted amnesty. Unfortunately, the government increased its use of suspended sentences in 2005. Although some suspended sentences resulted from inadequate investigations, others continued to be related to judicial corruption. During the reporting period, the government disbanded the Ministry of Interior's Anti-Trafficking Unit and replaced it with a new inter-agency Center to Combat Trafficking in Persons. Allegations of trafficking related corruption among some law enforcement officials continued, although the government did not take action. In 2005, the government sentenced a police officer accused of collaborating with a Turkish trafficker to 10 years in prison. A former Moldovan policeman charged with trafficking women to the U.A.E. remains free on bail pending completion of his trial after deportation from the Emirates.

Protection

The Government of Moldova's efforts to protect and reintegrate trafficking victims remained weak throughout the reporting period. The government did not fund NGOs providing shelter and assistance to trafficking victims, but it continued to cooperate with them on a limited basis. In June 2005, the Moldovan Parliament amended a law on employment and social protection to allow trafficking victims and other vulnerable populations to receive government benefits; however, the government did not report providing any benefits to trafficking victims. Contrary to what was stated in last year's Report, the government did not provide space in state buildings for a rehabilitation center run by IOM [the International Organization for Migration]. The government's witness protection law remained inadequately implemented and thus, while in some cases police posted guards outside witnesses' homes, many victims did not feel secure enough to testify against their traffickers. No progress was made in the development of a formal referral system; however, the police informally referred 88 victims to IOM during the reporting period. Overall, IOM reported assisting 464 victims during the reporting period. In January 2006, the government, in partnership with IOM, launched a program to build the capacity of Moldovan consular officers abroad to assist potential and actual victims of trafficking.

Prevention

NGOs and international organizations continued to conduct the bulk of anti-trafficking prevention and education campaigns in 2005, with periodic participation from the government. NGO prevention efforts included outreach to potential victims of trafficking in the mass media and in rural areas as well as education efforts in schools. The National Committee on Trafficking in Persons continued to meet to review the government's anti-trafficking efforts, but met less often during the reporting period. In August 2005, the government approved a new National Action Plan based on regional best practices, developed with the active guidance of a local NGO."

87. In this report, Moldova was assigned a 'Tier 2' rating. The various tiers are described in the following terms (page 773 of bundle 2).

"THE TIERS

TIER 1: Countries whose governments fully comply with the Act's minimum standards. [detailed on p. 288]

TIER 2: Countries whose governments do not fully comply with the Act's minimum standards but are making significant efforts to bring themselves into compliance with those standards.

TIER 2 SPECIAL WATCH LIST: Countries whose governments do not fully comply with the Act's minimum standards but are making significant efforts to bring themselves into compliance with those standards, and:

a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; or

b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or

c) The determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.

TIER 3: Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so."

88. It is relevant to note that, whilst Moldova was assigned a Tier 2 rating, it was not assigned to the "Tier 2 Special Watch List".

89. The section entitled: "Trafficking in Persons" in the 2006 USSD Human Rights Practices Report (page 767 of bundle 2) reads:

"Trafficking in Persons

The law prohibits trafficking in persons and it carries criminal penalties. However, trafficking remained a serious problem and the country is a major source for trafficked persons, particularly women and girls for sexual exploitation.

To a lesser extent the country is also a transit point for trafficking victims, and there were reports of some internal trafficking of girls from rural areas to the capital.

A significant amount of trafficking continued to occur in the breakaway region of Transnistria, which is outside of the government's control. The separatist region remained a significant source and transit area for trafficking in persons.

Women and children were trafficked for sexual exploitation, and men and children were trafficked to Russia and neighboring countries for forced labor and begging. The country was also a transit point for victims trafficked from Ukraine. Victims were increasingly trafficked to Russia and countries of the Middle East, such as Turkey, Israel, and the United Arab Emirates (UAE). According to International Organization for Migration (IOM), 12 percent of the trafficking victims it assisted were minors under 18 years of age. The IOM also noted that the percentages of victims trafficked from rural and urban areas closely corresponded to residence statistics from the country's 2004 census. Most victims had suffered some form of sexual or physical abuse at home and were willing to face significant risk to escape abuse.

The government's newly-formed Center to Combat Trafficking in Persons (CCTIP) stated that information indicated that men were trafficked for agricultural and construction work to the Baltic States and to the Commonwealth of Independent States (CIS). There also were reports that women were trafficked to Lebanon, Greece, Macedonia, Serbia (including Kosovo), and Montenegro, Bosnia and Herzegovina, Poland, Croatia, the Czech Republic, Belarus, France, the United Kingdom, and Austria.

……

The law provides criminal penalties for trafficking ranging from seven years to life imprisonment depending on the circumstances and severity of the offense.

During the first 11 months of the year, authorities opened 333 trafficking-related investigations. According to CCTIP, during the year authorities convicted 62 persons for trafficking, 85 for pimping, 13 for organizing begging, seven for trafficking in children, four for organizing illegal migration, and two for forced labor. Of the 173 convictions, 67 persons were sent to prison, 36 received a suspended sentence, 59 were fined, and 11 were amnestied or acquitted.

During the first eight months of the year the interior ministry reported that it conducted 35 raids to inspect 143 travel and employment agencies; it withdrew the licenses of four for suspected trafficking.

In 2005 the government merged the interior ministry's antitrafficking section into a new national entity, the CCTIP, which is composed of senior officials from all relevant government ministries and includes prosecutors, analysts, and investigators. There is also a multiagency task force under the leadership of the prosecutor general's office to monitor trafficking law enforcement activities, coordinate intelligence, provide witness protection, and provide advice on prosecuting complex cases.

During the year the government improved cooperation with other member countries of the Southeast European Cooperative Initiative, Interpol, and with other trafficking destination countries such as Italy, the United Arab Emirates (UAE), and Turkey, resulting in a number of convictions.

On February 8, the government ratified an agreement with Turkey to combat trafficking as part of a broad effort to fight illegal drug trafficking, international terrorism, and other organized crime.

There have been longstanding reports of involvement by some government officials in trafficking. On October 18, the Ministry of Interior dismissed several senior officials for trafficking, including a former CCTIP deputy director, Ion Bejan, who was under investigation on charges of protecting a major trafficker. According to the interior ministry, other government investigators and prosecutors were also involved in the protection scheme and are under investigation. The ministry also reported that, in the first 11 months of the year, it investigated and eradicated 39 trafficking networks. Turkey was the destination country in 14 of the cases; UAE in five; Russia in five; the Kosovo region of Serbia in three; and other countries in the remaining 12.

Elsewhere in the country, widespread corruption and lack of resources prevented adequate border control and monitoring of traffickers, particularly in areas near Transnistria. Observers alleged that corrupt low and high-level Moldovan government officials were either involved in or routinely ignored trafficking crimes. In September trafficking charges levied in November 2004 against a former policeman who was deported from the UAE back to the country were downgraded to pimping; he was amnestied. The prosecutor and the victims' lawyer appealed the court decision.

On June 20, police arrested Alexander Covali, an alleged leader of a trafficking ring. He was charged with trafficking after police found confined women on his properties. He was released on bail and arrested again on August 4 when an investigation revealed that he had received police protection. He remained in jail in year's end awaiting a court hearing.

On December 27, Ion Gusin was convicted of trafficking in persons and sentenced to 22 years in jail for his role as pimp and translator for a foreign sex tourist.

On October 20, the finance ministry created a special fund to pay for free social services for trafficking victims, including modest medical and psychiatric services, new identity documents and residence permits, legal counseling, vocational training, and professional counseling. The fund is part of a comprehensive trafficking in persons law passed by parliament in October 2005.

The government had no other programs to assist victims. Several NGOs offered repatriation assistance, temporary housing, and medical care for victims, as well as job training. The NGO Save the Children worked with trafficking victims, particularly repatriated girls. The NGO La Strada Moldova provided informational and educational services as well as a national toll-free hotline.

During the first eight months of the year IOM assisted 193 returned trafficking victims, the majority of whom had been trafficked to Turkey, Russia, and the UAE.

The government took some steps to prevent the trafficking of persons and to assist victims through its network of national antitrafficking committees. Local committees in each region of the country and officials from a variety of ministries and local governments were required to present reports on their antitrafficking efforts. In August 2005 the government approved a

> new national action plan for combating trafficking in persons, which was developed in conjunction with international organizations.
>
> Local NGOs operated public school programs to educate young women about the dangers of prostitution. During the year, the IOM continued its information program aimed at providing information to help citizens going abroad to avoid exploitation."

90. Overall, we consider that the 2006 USSD Human Rights Practices Report confirms the 2006 USSD Trafficking Report. It also shows that, since the 2006 Trafficking Report, the Moldovan government has taken further steps to prosecute traffickers, as indicated by the re-arrest on 4 August 2006 of Alexander Covali and conviction on 27 December of Ion Gusin. In addition, there is reference to the creation of a special fund to pay for free social services for victims of trafficking.

91. The report of Amnesty International for 2006 dated 23 May 2006 (pages 775 to 776 of bundle 2) refers to Moldova having reportedly increased the number of convictions for trafficking in human beings. However, we also note that the report states that protection for the victims of trafficking remained inadequate and the government did not implement a 1998 witness protection law.

92. The Moldova section of the Second Annual Report on Victims of Trafficking in South-eastern Europe 2005 of the IOM begins at page 446 of bundle 2. This report gives some pointers as to the general profile of potential victims of trafficking. Victims are generally aged between 18 years and 25 years. This has been fairly consistent since the year 2000 (page 454 of bundle 2). Unmarried women accounted for the majority of assisted Moldovan victims trafficked for sexual exploitation as well as an increasing percentage of victims over time (page 458 of bundle 2). The economic composition of Moldovan victims of sexual exploitation changed in recent years, with more victims describing themselves as coming from either "very poor" to "average" economic backgrounds (page 460 of bundle 2). Violence within the home appears to serve as an important catalyst for *some* migration / trafficking (page 461 of bundle 2). The vast majority of victims lived with their families at the time of recruitment – a fact which the report states is not surprising given that so many victims were unmarried at recruitment and that most unmarried women in Moldova live with their families until marriage (page 463 of bundle 2). On this basis, the report suggests that "not only does living with one's family seemingly not protect many victims, various family configurations and dynamics may in fact impel women to migrate and face the risk of being trafficked". At page 478, the report states:

> "Overall, it is reasonable to assert that re-trafficking is a common phenomenon in a source country like Moldova. Many victims report attempting to migrate again shortly after return because of the need to earn money, lack of opportunity or problems in the home. Another contributor to re-trafficking may also be the difficulties faced in reintegration, including stigma and shame associated with sexual exploitation as well as dissatisfaction with the material conditions at home……."

93. Overall, the victims of trafficking were mainly women, although children were also trafficked. As we have said at paragraph 54 above, there was also some evidence of men having been trafficked. This IOM report, which relates to the year 2005, indicates that individuals were trafficked mainly for sexual exploitation. However, the later and more recent IOM report indicates that only a small proportion of the overall numbers of trafficked individuals have been trafficked for the purposes of sexual exploitation (see below). In this appeal, we are not concerned with deciding

whether individuals who have been trafficked *for purposes other than sexual exploitation* are members of a particular social group. In any event, on the whole of the evidence before us (including the evidence referred to after this paragraph), we do not consider that the evidence before us shows that individuals who have been trafficked for the purposes of labour, or begging, are perceived differently by the surrounding society. There was just no evidence on this. Accordingly, the second of the suggested groups – "former victims of trafficking" – does not satisfy regulation 6(1)(d)(ii) of the Protection Regulations.

94. More recently, the IOM carried out research, partly to devise estimates on the numbers of trafficked people in five Eastern European countries (Belarus, Bulgaria, Moldova, Romania and Ukraine). This report is entitled: 'Research Shows Significant Figures on Human Trafficking' dated 16 February 2007 (pages 777 to 793 of bundle 2). We have found this report particularly helpful, partly because it is a recent report and partly because of the detail supplied within the report. The report claims that an estimated 225,000 people have fallen victim to the crime, with the Ukraine having the largest number of estimated victims (about 117,000 people). The figures for the other countries were: Moldova (57,000 people), Romania (28,000 people), Belarus (14,000 people) and Bulgaria (9,500 people) (page 777 of bundle 2). In other words, we note that Moldova was second in this list of five countries. The point is also made in this report that sensitivities and stigma attached to sexual exploitation may have resulted in an underestimation of figures related to this type of human trafficking. The information in the second column on table 10 on page 37 of the report (page 790 of bundle 2) indicates that the figure of 57,000 for Moldova does not include the secessionist Transnistra region. The estimated numbers of victims in each of the five countries must be considered against the population statistics for those countries, which are given at table 5 on page 35 of the report (page 788 of bundle 2). On the basis of these figures, the estimated numbers of trafficking victims as percentages of the general population in each of the five countries are as follows:

Moldova	1.28 % of the general population of Moldova
Ukraine	0.25 % of the general population of the Ukraine
Belarus	0.14 % of the general population of Belarus
Bulgaria	0.128 % of the general population of Bulgaria
Romania	0.125 % of the general population of Romania

95. In other words, if the estimated numbers of trafficking victims are expressed as percentages of the general population for these countries, the figure for Moldova is five times that for the Ukraine, 9.14 times that in Belarus, ten times that in Bulgaria and just over ten times that in Romania. We therefore acknowledge that, after adjusting for population size in the relevant countries, Moldova in fact tops the table of these five problem countries. This deduction is consistent with the information at table 4 on page 33 of the report (page 786 of bundle 2).

96. The information in table 1 on page 28 of the report (page 781 of bundle 2) shows that, for the five countries mentioned, Moldova has the highest proportion of the population which perceives that human trafficking is a problem in the country. The first paragraph of section 7 on page 32 of the report (page 785 of bundle 2) states that high levels of awareness about human trafficking were observed for all the countries; however, Moldovans and Bulgarians were overall the most aware of the human trafficking phenomena. The first paragraph below table 3 on the same page

states that Moldovans are the most concerned with the human trafficking problem. These are potential indicators as to whether trafficked victims are perceived as being different by the surrounding society. On the other hand, the mere fact that a particular issue is a big problem in a particular country or the mere fact that there are high levels of awareness of a particular problem in a given society does not mean that those members of society in the problem group are perceived to be different by the surrounding society.

97. We also noted the information in the second bullet point from the top of 28 of the report (page 781 of bundle 2) reads:

> "Public opinion with regard to whether human trafficking should be blamed on personal irresponsibility of its victims or on poor social institutions differs across the countries. In Moldova, Ukraine and Romania public opinion blames human trafficking on poor legal environment and corruption, while in Belarus and Bulgaria it is blamed on recklessness and imprudence of human trafficking victims. Consequently, trafficking victims in Belarus and Bulgaria may face more difficulties in their social adaptation after the human trafficking case has happened to them……"

98. In other words, the report makes a link between the ease or otherwise of social adaptation in each of the five countries with whether public opinion blames human trafficking on the individuals who have fallen victim to human trafficking or on poor legal environment and corruption. In our view, this is also an indication as to whether trafficked victims are perceived as being different by the surrounding society. The fact that Moldovans do not blame the victims as opposed to other reasons for their experience of having been trafficked may be an indication that victims may not be perceived differently by the surrounding society. On the other hand, the evidence of social stigmatisation in Moldova (see below) against persons who have been trafficked for sexual exploitation tends to go against any assumption along these lines.

99. We turn now to the evidence concerning trafficked victims who have returned to Moldova. At page 747 of bundle 2, there is an e-mail from a Ms. Liliana Sorrentino who appears to work for the OSCE dated 16 May 2006 to a Ms. Zofia Duszynsk who appears to be a caseworker at HFCLC. The subject of the e-mail is said to be: "Re: Trafficking victims in Moldova". Ms. Sorrentino says:

> "To my knowledge in Moldova in the past there have been cases of reprisals and retaliation against victims of trafficking or their loved ones from criminals and there is a possibility of being re-trafficked…….
>
> Additionally, according to information from NGOs there have been also individual cases of abuse and sexual violence against returned victims of trafficking. In general trafficked persons are stigmatised upon return by the community and/or the family in Moldova……"

100. No information has been given as to the background or expertise of Ms. Sorrentino, nor have we been told what she bases her view that "in general trafficked persons are stigmatised upon return by the community and/or the family in Moldova". In the circumstances, we do not place much weight on this e-mail correspondence.

101. We return to the IOM report of 2005, which we considered briefly at paragraph 92 above. This has an information section on the assistance framework in Moldova for returned victims of trafficking. We have considered this evidence carefully in order to see what it tells us about how victims are perceived by the surrounding society.

This section of the report was compiled from information relating to victims assisted in 2004 and earlier. Although we take this information into account, we note that it is now somewhat dated. The assistance, mainly provided by the IOM and other local NGOs, ranges from the very basic (i.e. initial accommodation and return transport to the home community) to a more comprehensive package of assistance (i.e. accommodation, legal, medical and psychological assistance, vocational training, job placement) (page 501 of bundle 2). Generally speaking, only short-term assistance with accommodation is provided; long-term housing assistance is largely non-existent in Moldova. Much of the information in this section of the report appears to relate to female victims who have been trafficked for sexual exploitation. For example, the final paragraph on page 506 of bundle 2 states that, where a victim is unable to return to "her" family, "she" has few options and that, in such cases, service providers encourage the victim to locate another family member or friend who can accommodate "her". The first full paragraph on page 504 states that victims rarely receive follow-up counselling in their home communities, both because services are lacking outside of Chisinau and because victims are concerned that members of their home communities will learn of their experience. This paragraph refers to the need to ensure that victims can avail themselves of long-term support services without fear of stigmatisation. According to the second full paragraph on page 507, although most victims at the NGO shelters stay at the shelter first, undertaking mutual visits with their family before returning to their families and although social assistants at the shelters help with mediation with family members where this is needed, most trafficked victims do not wish to reveal their trafficking experience to their family members (page 507 of bundle 2). Re-trafficking is said to be a prominent issue in Moldova for all forms of trafficking (page 448 of bundle 2). Various reasons are mentioned in the first full paragraph on page 478, including the need to earn money, lack of opportunity or problems in the home. This paragraph goes on to state that other contributors may be the need to repay debt as well as the difficulties faced in reintegration including stigma and shame associated with sexual exploitation as well as dissatisfaction with the material conditions at home. Although this report is broadly consistent with the more recent report from Ms. Surtees (see, in particular, page 428 of bundle 1), which also refers to short-term provision of accommodation and to victims only rarely receiving follow-up counselling in their home communities due, in part, to their concerns that members of their home communities will learn of their trafficking experience, we approach the statistical information given by Ms. Surtees with care, given that the table on page 427 is clearly extracted from table 1 in the IOM report of 2005 (see table 1 of the IOM report of 2005, at page 450 of bundle 2) which is now over two years old and is based on information gathered in 2004 or earlier.

102. The report of Ms. Surtees dated 21 June 2006 also refers to social stigmatisation, as follows (page 429 of bundle 1):

> "Prostitution is socially stigmatised and most people do not differentiate between someone who has worked in prostitution and someone who was trafficked and forcibly sexually exploited. Both are stigmatised and face serious problems when dealing with family and community members and when attempting to socially reintegrate. The issue of stigma also directly informs a victim's access to assistance, with some victims unwilling to accept services from anti-trafficking [sic] organization as they fear stigma associated with trafficking.
>
> Much reintegration depends on the support of the victim's family. While accommodation is available in the short term, returning to one's family is the most common strategy and often the only real option available to victims…….

> Communities stigmatise returning victims, often labelling them as prostitutes rather than victims of exploitation, and victims may not feel comfortable returning home where they will face questions about their experience abroad. With communities increasingly aware of sex trafficking, there is often the assumption that any woman who has returned home from abroad has been working in prostitution. Community stigma can impede a victim's ability to receive training, find employment, find housing options and socially reintegrate in the community……..."

103. In her "comments" of 13 February 2007 (page 441 of bundle 1), Ms. Surtees states that it is important to note the "high level of social stigma and ostracism that women trafficked for prostitution suffer". She quotes the following passage from a report, to be published in 2007, co-authored by her and A. Brunosvkis entitled: "Leaving the past behind: why some trafficking victims decline assistance" (page 441 of bundle 1):

> "In some areas the stigma associated with prostitution is so acute that it is almost impossible for the woman to lead a normal life. In Moldova, for example, service providers referred to a practice of identifying 'prostitutes' (and, by implication, often also trafficking victims) by painting the woman's gate in black. The tradition is closely connected with prostitution, with women working in prostitution seen as 'dirty'. This organisation had assisted several victims who had been subjected to this ostracism…… ." Stigma can also have very real physical consequences. One psychologist explained that one of her clients who had been abroad was brutalised in her community because of the stigma associated with her (forced) prostitution: ….."[She] did not tell anything, but there were a lot of people suspecting because she had been away for four years. She went to a party in the village, and guys there took her out and raped her - 'you were there and did this for money, why not do it for us free of charge'. She came here very depressed. So stigmatisation is a very serious problem". "

104. Considering all of the evidence in the round, we can draw some observations. However, before doing so, we remind ourselves that we are not concerned with deciding whether there is a real risk of ill-treatment of former victims of trafficking for sexual exploitation, although any ill-treatment such individuals do experience will of course help to decide whether they are perceived differently by the surrounding society. Secondly, we remind ourselves that we are not concerned with deciding whether it is reasonably likely that the surrounding society would know that an individual is a victim of trafficking for the purposes of sexual exploitation.

105. In our view, the fact that Moldova is Europe's poorest nation taken in conjunction with other factors (such as family relations, lack of employment, lack of awareness of the dangers of being trafficked as well as corruption which enables traffickers to operate) go some way towards explaining the reasons why individuals are pressurised to, or feel compelled to, enter into arrangements which result in their being trafficked. Given that the estimated number of individuals who have been trafficked, as a percentage of the general population, is the highest for Moldova amongst the five countries in which it is a problem, we conclude that human trafficking is a particular problem in Moldova. It is, therefore, not surprising that Moldova has the highest proportion of the population which perceives human trafficking as a problem in the country. Whilst we were initially encouraged by the fact that public opinion in Moldova blames human trafficking on the poor legal environment and corruption, rather than on the individuals (which as we stated at paragraph 98 above, may be an indication that victims are not perceived differently by the surrounding society), this was not borne out when we considered other evidence referring to social stigmatisation of victims of trafficking for sexual exploitation and the fact that victims of trafficking for sexual exploitation rarely availed themselves of follow-up assistance because of concerns about members of

their home communities learning about their experience. Social stigmatisation is mentioned as one of the difficulties faced in any reintegration process, as well as one of the reasons for the phenomena of re-trafficking, described as a "prominent" issue in Moldova. We are not told whether the practice in Moldova of "identifying prostitutes" by painting the woman's gate in black is widespread. Nevertheless, the existence of such a practice is indicative of societal attitudes towards prostitutes in Moldova. We note that the quote at our paragraph 103 suggests that the term "prostitutes" by implication often includes trafficked victims, which is supported by the experience of the individual mentioned subsequently in the same paragraph.

106. On the whole of the evidence, and although we had some misgivings about the evidence before us (as we have explained already), we are persuaded that individuals who have been trafficked for the purposes of sexual exploitation are reasonably likely to be perceived as being different by the surrounding society if the fact that they had been trafficked for the purposes of sexual exploitation is known to the surrounding society. We are persuaded that it is reasonably likely that a social group of "former victims of trafficking *for sexual exploitation*" does have a distinct identity in Moldova, *because* the group is reasonably likely to be perceived as being different by the surrounding society. This group is not quite the same as the third of Ms. Chandran's suggested groups of "victims of trafficking for sexual exploitation", because we have added the word "former". The reason for doing so is to make it clear that it is the past experience of having been trafficked which is the common background. Without this addition, it may be argued that it is the risk of being trafficked in the future which is relied upon, and that would fall foul of the principle that the group must exist independently of the feared persecution.

107. Accordingly, having considered the background evidence and for the reasons given above, we are satisfied that the Appellant is a member of a particular social group this group, namely, "former victims of trafficking for the purposes of sexual exploitation". This group satisfies both limbs of regulation 6(1)(d) within the context of Moldovan society and is independent of the reason for the feared future acts of persecution. (It is not necessary for us to consider whether *women* are discriminated against in Moldova. We make it clear that we do not lay down any guidance in this respect.)

108. We set out below a summary of our conclusions. Because of the agreement between the parties as to the existence of a real risk of persecution in this case, this decision should not be taken as a decision to the effect that former victims of trafficking for sexual exploitation are in general at real risk of persecution in Moldova, or that they are at such risk by reason of membership of a particular social group, or that there is in general an insufficiency of protection for former victims of trafficking for sexual exploitation in Moldova, or that former victims of trafficking in Moldova cannot internally relocate within paragraph 339O of the Immigration Rules. We envisage that, in the generality of cases, the outcome of the case would depend on these issues, rather than whether there is a particular social group. As we have stressed above, the facts of this case are highly unusual. The evidence which emerged at Z's trial was such that the Respondent accepted that the Appellant would be at real risk of serious harm in her particular case from Z and Z's associates and family, that there would be insufficient protection in her particular case and that she would not be able to internally relocate in her particular case.

109. It is evident from our reasoning above that we have been able to reach a conclusion (in the Appellant's favour) on the particular social group issue without having to consider the LD Ukraine case. It follows that that decision did not materially assist us and therefore that paragraph 17.8 of the Practice Directions is not satisfied. However, we noted that the determination in LD Ukraine was promulgated before the system of reporting determinations of the IAT commenced. Accordingly, it would seem that the applicable paragraph was paragraph 17.10 of the Practice Directions, and not paragraphs 17.6 to 17.8. However, paragraph 17.10 had not been complied with either. In all of these circumstances, the application to rely on the LD Ukraine decision is formally refused, although this does not, in our view, disadvantage the Appellant.

110. Whilst we have found the UNHCR's Trafficking Guidelines (pages 1541 to 1557 of bundle 4) informative, they did not provide much assistance in enabling us to determine whether, as a matter of legal analysis, "former victims of trafficking" or "former victims of trafficking for sexual exploitation" are capable of being members of a particular social group. This does not disadvantage the Appellant, because we have reached the conclusion that "former victims of trafficking" or "former victims of trafficking for sexual exploitation" are capable of being members of a particular social group. Similarly, the UNHCR's Trafficking Guidelines were not of any assistance in enabling us to decide whether these groups are particular social groups in the context of Moldovan society. With regard to the UNHCR's PSG Guidelines (pages 1568 to 1572 of bundle 4) and the UNHCR's Gender Guidelines (pages 1558 to 1567 of bundle 4), we take issue with the suggestion at paragraph 11 of the PSG Guidelines (repeated in the Gender Guidelines) that a particular social group is a group of persons who either share a common characteristic other than their risk of being persecuted *or* who are perceived as a group by society, for reasons we have already given at paragraphs 67 to 74 above. In addition, as we have said, we have reservations as to whether the words "related to" in paragraph 21 of the PSG Guidelines is consistent with the Geneva Convention or regulation 5(3) of the Protection Regulations or Article 9.3 of the Qualification Directive.

111. We turn now to consider the issue of causation in the Appellant's case. As we have said in paragraph 78 above, we are prepared to assume, in the context of Moldova and having regard to the background evidence as to state-protection generally, that anyone who is at a heightened risk of ill-treatment which is shown to be at least *related* to the individual's past experience of having been trafficked constitutes harm for a Geneva Convention reason provided that the individual is a member of a social group which is defined independently of the feared act of future persecution. The Respondent accepts that the Appellant is at real risk of serious harm. In the Respondent's view, the Appellant is at real risk of serious harm because of the combination of the "particular nature of the gang" (by which the Respondent refers to the fact that Z and Z's associates have a powerful reach in Moldova and that their trafficking operation is still ongoing in Moldova, see paragraphs 3 and 27 above) and the Appellant's personal profile (by which the Respondent must be referring to the fact that the Appellant had been trafficked by Z and Z's associates and had given evidence in the trial against Z). There may be other reasons, for example, that the Appellant has successfully fled from the clutches of Z and Z's associates. However, the important point is that, given the Respondent's acceptance of the future risk of serious harm, the Appellant is at a heightened risk of ill-treatment in Moldova which (on the basis of the Respondent's reasons for accepting that the

Appellant is at real risk of serious harm) is at least in part related to her experience of having been trafficked for the purposes of sexual exploitation in the past, that is, it is at least in part related to the fact that she is a member of a particular social group (comprised of "former victims of trafficking for sexual exploitation"), although this does not mean that there is insufficient protection in general from the state in Moldova. Accordingly, we are satisfied that there is the necessary causal nexus between the Appellant's membership of her particular social group and an effective reason for the future acts of persecution.

(D) Summary of general conclusions:

112. (a) (i) Given that the family is a quintessential social group which exists independently in society, it is not necessary to invoke any other characteristic or circumstance in order to define it. This means that it is not necessary to show general discrimination as an identifying characteristic of the group. If, contrary to our view, discrimination is necessary, then the feared future act(s) of persecution can provide the necessary discriminatory element without falling foul of the principle that the group must not be *solely* defined by the fear of persecution because the dam already exists as a social group;

(ii) Similarly, in cases where the members of a social group share a common background which is an immutable characteristic and which they cannot change (for example, the sharing of a common past experience) or they ought not to be required to change, then if the common background defines the group by giving it a distinct identity in the society in question which has nothing to do with the actions of the future persecutors, then the group exists independently of the feared future act(s) of persecution and circularity is avoided. It is not necessary to show general discrimination as an identifying characteristic of the group. If an element of discrimination is necessary, it can be provided by the fear act(s) of persecution without leading to circularity.

(b) Where the particular social group relied upon is the broad one of gender or a group with gender-based identifying features, then discrimination in the wider sense against the gender must be shown to exist as an identifying feature of the group.

(c) "Former victims of trafficking" and "former victims of trafficking for sexual exploitation" are capable of being members of a particular social group within regulation 6(1)(d) because of their shared common background or past experience of having been trafficked. MP Romania should no longer be relied upon, as it was wrongly decided. However, we emphasise that, in order for "former victims of trafficking" or "former victims of trafficking for sexual exploitation" to be members of a particular social group, the group in question must have a distinct identity in the society in question.

(d) The adjunctive "and" in regulation 6(1)(d) of the Protection Regulations should be given its natural meaning.

(e) In the context of Moldovan society, a woman who has been trafficked for the purposes of sexual exploitation is a member of a particular social group within regulation 6(1)(d), the particular social group in question being "former victims of trafficking for sexual exploitation".

Decision

113. **The appeal is allowed.**

Ms. D. K. GILL
Senior Immigration Judge Date: 31 October 2007

Approved for electronic distribution

Country background materials considered by the Tribunal	**Date**
Kartusch, Thompson and Sorrentino: Trafficking in Persons, Witness Protection and the Legislative Framework of the Republic of Moldova	2003
International Organisation for Migration: Moldova	2004
Poppy Project: When Women are Trafficked	April 2004
R Surtees: Report for Nexus Institute	21.6.2005
Raviv and Andreani: The Changing Patterns and Trends of Trafficking in Persons in the Balkan Region	July 2005
R Surtees: Second Annual Report on Victims of Trafficking in South-Easter Europe	2005
Immigration and Refugee Board of Canada: Victims of Organised Crime and State Protection *et seq*	17.2.2006
E-mail from L Sorrentino	16.5.2006
E-mail from A Andreani	17.5.2006
US State Department: 2006 Trafficking in Persons Report: Moldova	6.6.2006
Amnesty International Report 2006: Moldova	23.6.2006
UN Committee: Report on Elimination of Discrimination against Women	16.8.2006
United Nations: Concluding Comments of the Committee on the Elimination of Discrimination against Women.	25.8.2006
UK Home Office IND: Operational Guidance Note: Moldova	9.10.2006
United Nations: Domestic Violence in Moldova Ending the Silence	11.10.2006
E-Mail from R Surtees and newspaper articles	30.10.2006
OSCE Mission to Moldova: Anti-Trafficking in Human Beings	2006
Extracts from US State Department Report on Victims of Trafficking	2006
Normative Acts: Trafficking in Human Beings in Moldova	2006
UNDP Human Development Report 2006: Moldova	2006
UNDP Human Development Indicators Country Fact Sheets	13.2.2007
E-mail from Rebecca Surtees	13.2.2007
International Organisation for Migration: Research Shows Significant Figures on Human Trafficking	16.2.2007
International Organisation for Migration: Human Trafficking Survey	16.2.2007
US State Department: Country Reports on Human Rights Practices in Moldova - 2006	6.3.2007
Extracts from La Strada	Undated
Extract from www.protectionproject.org	Undated