Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03923/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 13th June 2014	**On 24th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR B.A
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Raggi Kotak (Counsel)
For the Respondent: Mr Neville Smart (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Freer promulgated on 17th October 2013, following a hearing at Birmingham Sheldon Court on 7th October 2013. In the determination, the judge dismissed the appeal of the Appellant, who applied for, and was subsequently granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Ghana, who was born on 12th January 1994. He appeals against the refusal of asylum, and the refusal of humanitarian protection in accordance with paragraph 339C of HC 395.

The Appellant's Claim

3. The Appellant came to the UK as a minor in 2005, with a man who claimed to be his uncle, and was subsequently made to work in a brothel for many years. It is accepted by the Respondent that he has been trafficked into the UK. He is a victim of human trafficking. His claim is that as a "young vulnerable person with no family support" he will be rendered vulnerable and destitute in Ghana were he to be forced to return there. Further, in Ghana there would be insufficient protection for him as a person who was formerly trafficked for child labour.

The task before the Judge

4. The judge had regard to the "qualifying regulations" as set out in the Minimum Standards Directive 2004/83/EC which was transposed into UK law through the *Qualification Regulations 2006 (S1 number 2525).* The judge also had regard to the guidelines for the UN High Commissioner for Refugees for particular social groups. He held that the "core issue arises from the apparent tension between the test in the qualifying Regulations and the UNHCR guidelines. I have to decide whether to apply a two-step test or an alternatives test" (para 32). What the judge was referring to here was whether he could confine his attention to the "protected characteristics" approach, or whether he should also consider the "social perception approach." Either he could allow the appeal if only the Appellant could show existence of "protected characteristics," or he could allow the appeal only if the Appellant could also additionally show evidence of "the social perception approach." The latter involved a two-stage approach. The judge set out the respective claims of the Appellant and the Respondent Secretary of State.

5. First, as far as the Appellant was concerned, the following submissions were made. It was unnecessary for the Appellant to show that the society in Ghana would perceive the Appellant differently as a former victim of trafficking (see para 22). It was enough to note that insufficiency of protection from harm existed on account of the simple fact that the Appellant was formerly trafficked for child labour from Ghana to the UK. As such, he was a member of a particular social group (PSG).

6. In applying a two-stage requirement, the Respondent had accordingly applied the wrong test to the Appellant's situation. What she ought to have done was to have applied the two aspects of a single test, but as alternatives. The first aspect was the 'protected characteristics approach', flowing on account of the Appellant's immutable characteristic, as a PSG. The second aspect was the "social perception approach," flowing from the fact that society in Ghana would set the Appellant apart from the community as a group. Both aspects were set out in the Minimum

Standards Directive 2004/83/EC and again in the transposed UK law of the *Qualifications Regulations 2006 (S1 number 2525).*

7. If the two aspects were treated as two limbs of a single requirement, then they would be seen as alternatives to a single test, and this has been recognised as being the correct approach by the UN High Commissioner for Refugees in the 2002 guidelines on particular social groups.

8. In **Secretary of State for the Home Department v Fornah** [**2006] UKHL 46** Lord Bingham recognised that there was a single test with two separate limbs to be treated as alternatives. This judgment is binding on the Respondent and the courts. It was followed in **MK (Lesbians) Albania CG [2009] UKAIT 00036** (at page 350) where it was said that,

> "If as it appears lesbianism is a comprehensive cultural taboo in Albania, then it would appear that lesbian women in Albania would be regarded as sharing a common characteristic and/or would be perceived as a group by society and so satisfy the definition provided in the UNHCR guidelines .. approved by the House of Lords in **Fornah**."

9. The Appellant recognised that the Tribunal had not taken this position in the case of **SB (PSG/Protection Regulations – Regulation 6) Moldova CG [2008] UKAIT 00002** when it observed that, "the observations of their Lordships were *obiter*, although very persuasive, because it is clear that their Lordships did not decide the case under Regulation 6(1)(d) ."

10. However, in Ms Kotak's submissions before me, the House of Lords had considered the definition of the PSG and therefore their reasoning on the definition was part of the *ratio* of the case. In the alternative, if this was not the case, then the findings of the House of Lords were highly persuasive, and therefore applicable, when determining the appeal, which it had done after hearing full legal argument.

11. In the jurisprudence of the Tribunal, it had already been accepted that "former victims of trafficking" could comprise a PSG, and this was clear from **SB (Moldova)** and from **AZ (Trafficked Women) Thailand CG [2010] UKUT 118**.

12. But what was now being argued was that the Appellant was also a PSG on account of his membership of a "young and vulnerable people with no family support." As such, he would be able to meet both limbs of the test set out in Article 6(1) of the Qualification Regulations 2006.

13. If the Appellant had very little in the way of problem solving skills then he would find it very hard to survive upon return to Ghana. He would be highly visible and exposed to risk on the streets in Ghana. He would be perceived differently in society and would be set apart.

14. Second, as far as the Respondent's submissions were concerned, these were that the Appellant could not be defined as a member of a group based upon being a group of "young and vulnerable people with no family

support" because to do so was to use persecution to define the group as such. This was not permitted. He was not, as such, possessed of immutable characteristics until after he had been trafficked. Only then was he a victim of human trafficking. Membership of the group could not crystalize until after the persecution occurred. The social context required consideration. Former victims would need to establish a distinct identity within society. The evidence did not support the view that society would recognise victims of trafficking as a particular social group which would cause them to be targeted any more than any other person. A real risk of re-trafficking and reprisals had not been substantiated. Therefore, state protection in Ghana was sufficient. It was not shown to be inadequate. The test in **Horvath v SSHD [2001] AC 489** was met.

The Judge's Findings

15. The judge in the First-tier Tribunal considered the jurisprudence carefully. He noted that, as far as the judgments in **Fornah [2006] UKHL 46**, were concerned, two of their Lordships, namely, Lord Bingham and Lord Brown, had accepted explicitly the UNHCR guidelines. In fact, Lord Brown was highly critical (at paragraph 120) of the circular argument that any group solely defined by persecutory treatment must be excluded from protection by the Refugee Convention. The court, however, was composed of five Law Lords, and this was a minority judgment. These dicta could not form part of the *ratio decidendi*. They were of persuasive authority only.

16. The judge was more influenced by the recent Tribunal determination of **AZ (Trafficked Women) Thailand CG [2010] UKUT 118**, which had the status of a country guidance case, but where paragraphs 128 to 143 involved a wide-ranging analysis of all the previous case law that was material.

17. At paragraph 131, the Tribunal paid attention to the UNHCR guidelines (HCR/GIP/06/07) of 7th April 2006 and observed that, "it is quite rightly acknowledged that not all victims or potential victims of trafficking fall within the scope of the refugee definition." In the same paragraph, the Tribunal also considered the difference between the Directive and the Regulations, and it concluded, as was noted in **SB (Moldova)**, that the only difference between the two was that, "in particular," in Article 10(1)(d) of the Directive had been replaced by "for example" in Regulation 6(1)(d).

18. Consideration was given by the Tribunal in that case to the UNHCR's comments that states ought to permit alternative, rather than cumulative application of the two concepts, but at the start of paragraph 124, the Tribunal stated that, "although we are urged by Miss Brewer to find that the two sub-sections should be read as alternative concepts, we are unable to accept that."

19. Clearly, therefore, the Tribunal had rejected the submission that the two concepts should be treated as alternatives. It had rejected the UNHCR position.

20. In fact, at the end of paragraph 134, the Tribunal stated that:

> "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 (paragraphs 71 and 72)."

[These numbers are a reference to **SB (Moldova) [2008] UKAIT 0002** and the sentence I quote is found at the middle of paragraph 72 thereof].

21. The Upper Tribunal had consistently, therefore, found, following an exhaustive analysis of the cases at a country guidance level, that the House of Lord's decision on this issue was obiter and therefore of interest but not one that could be regarded as binding. It had rejected the UNHCR alternatives test. It had preferred the two-limb test.

22. On this basis, the First-tier Tribunal applied the jurisprudence set out in the relevant cases, to the facts before it. It concluded that the majority of cases concerned women when it came to human trafficking. The Tribunal, however, was prepared to take a different view of a young male Appellant. It referred to the relevant section in "the refugee and international law" (by Goodwin-Gill and McAdam, 3rd Edition, Oxford, 2007) where it was stated (at page 84) that "clearly gender is used by societies to organise or distribute rights and benefits; where it is also used to deny rights or inflict harm, the identification of a gender-defined social group has the advantage of external confirmation." The judge went on to hold that the Appellant met the first limb of the test of having a relevant immutable characteristic. He had also to then show, in a two-stage test, that he met the second limb and this he failed to do, because he could not show that he would be socially perceived as part of a different group. The Appellant had to show who was a "perceiver." He was only known in that way to his lawyers, to experts, and to the two traffickers who had brought him to the UK. He was not known in that way to anybody else. He had gone overseas as a young minor many years ago and "he has grown very much and has considerably changed appearance by reason of his changing age characteristic, since he went to the United Kingdom" (para 46). He could not succeed in his appeal.

23. The First-tier Tribunal also gave consideration to an alternative argument that the Appellant was a "young vulnerable person with no family support" and held that there was no doubt that the Appellant was young and vulnerable. However, the Appellant, whilst potentially a member of a social group, could not show that it was an immutable characteristic to be young. The judge held that, "an immutable characteristic has to be shown and age ... is always mutable, due to all Appellants being time bound" (para 47).

Grounds of Application

24. The grounds of application stated that the judge had erred in law in concluding that the Appellant was not at risk of persecution by virtue of being a member of a particular social group. There were two grounds in particular.

25. First, it was argued that the courts have on different occasions made different findings on the issues raised. In **Fornah [2006] UKHL 46**, the House of Lords held that only one limb of the test was required. This was followed by the Tribunal in **MK (Lesbians) Albania CG [2009] UKAIT 00036**. However, in two other cases the Tribunal found that both limbs were required. These were **SB (Moldova) [2008] UKAIT 00002** and **AZ (Trafficked Women) Thailand [2010] UKUT 118**. It was argued that it was plainly unsatisfactory to have two different positions taken by the courts on such a key question as the protection to be accorded to a member of a particular social group. Clearly the dicta in the House of Lord's judgments were more persuasive. It was true that in **SB (Moldova)** their Lordships decided that the dicta in **Fornah** were obiter, but this was incorrect because in **Fornah** their Lordships heard full argument from the parties on the issues before them and then only decided that one limb of the test was required. This was not the case in **SB (Moldova)**. Here, whereas both parties before the Tribunal had agreed that only one limb of the test was required, the Tribunal, without informing the parties of its intentions, determined that both limbs were required, and did not invite any argument on this question. A conflict between judicial decisions thereby arose. **SB** was followed by **AZ**, whereas **Fornah** was followed by **MK**. The result is an unsatisfactory state of affairs. It is inappropriate for binding country guidance case law, not to be based upon the House of Lord's findings, in circumstances where that Tribunal has heard no argument, because both parties had already agreed that the House of Lords had correctly determined the issue on this question.

26. Second, the Appellant in any event in this case already met the two-limb test because, it was argued before the Tribunal that the Appellant was in the alternative a "young vulnerable person without family support." Yet, the First-tier Tribunal Judge rejected the appeal on the basis that age was not an immutable characteristic and this was plainly wrong in the light of **LQ (Age: Immutable Characteristic) Afghanistan [2008] UKAIT 00005**.

27. On 30th December 2013, the Upper Tribunal granted the Appellant permission to appeal on the basis that, whereas the judge had properly considered and applied **AZ (Trafficked Women) Thailand [2010] UKUT 118**, it was arguable that the judge failed to deal with the alternative particular social group ground that was claimed, namely, that the Appellant was a "young vulnerable person with no family support."

Submissions

28. At the hearing before on 13th June 2014, Miss Raggi Kotak, of Counsel, appearing on behalf of the Appellant, adopted her submissions in her detailed Grounds of Appeal. Broadly speaking, she submitted that there were two grounds. First, EC Council Directive 2004/83/EC (the Qualification Directive) sets out the "minimum standards" to be guaranteed. Article 10(1)(d) deals with membership of a particular social group in terms that:

"A group shall be considered to form a particular social group *where in particular*

(1) Members of that group share an innate characteristic or common background that cannot be changed, or share a characteristic or belief that is so fundamental to their identity or conscious that a person should not be forced to renounce it; *and*

(2) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society."

29. The EU Qualification Directive was transposed into UK law through The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (S1 number 2525) which provides that:

"Reasons for persecution

6(1) In deciding whether a person is a refugee:

(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 the 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 surrounding society."

30. The claim raises the question as to whether both limbs of the tests above have to be met in order to form a PSG or just one limb. In the UNHCR guidelines on membership of a particular social group it is argued that only one limb of the test had to be met.

31. Accordingly, the judge in the first instance Tribunal erred in his application of the definition of PSG when considering the group "former victim of trafficking," and failing to follow the test as set out by the House of Lords in **Fornah**.

32. In **Fornah [2006] UKHL 46**, their Lordships concluded that, "the only issue in each case is whether the Appellant's well-founded fear is of being persecuted 'for reasons of ..... membership of a particular social group.'" (para 1).

33. In the consideration, their Lordships fully considered the different elements of the definition of PSG and determined the relevant issues, including the test as set out above in the Qualification Directive and Qualification Regulations, and in particular whether it was necessary to meet both limbs of the test.

34. It is therefore argued that any principles established relating to the definition are *part of the ratio* of the determination and are not obiter as suggested by the First-tier Tribunal Judge.

35. In **Fornah** their Lordships stated (emphasis added):

> "When assessing a claim based upon membership of a [PSG] .... national authorities should certainly take that as listed [in the Qualification Directive] into account. I do not doubt that a group should be considered to form a [PSG] ... where, in particular, the criteria in sub-paragraphs (i) and (ii) are both satisfied .... *If, however, this Article were interpreted as meaning that a social group should only be recognised as a [PSG] ... for the purposes of the Convention if it satisfies the criteria in both sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority."* [16] (per Lord Bingham).

36. The UNHCR position is that the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives [16] (per Lord Bingham).

37. Lord Bingham had stated that when considering if a person has become a PSG that,

> "Since it is common ground that a family may be a particular social group ... the questions here are whether the Adjudicator was entitled to conclude that on the facts the family of the First Appellant's husband was such a group ..... when applying the UNHCR definition ..... or Article 10(d)(i) and (ii) *jointly or alternatively,* of the EU Directive, I am of the opinion that he was clearly so entitled ..." [24].

38. Lord Hope adopted the definition (at para 38) of the PSG as set out by Lord Bingham, and went onto accept that both parts of the test were met (at paragraphs 44 to 45). His Lordship then went on to consider the requirements of the test and considered the question of whether it was necessary to demonstrate, "recognition within the society subjectively that the collection of individuals is a group that is set apart from the rest of the community" before declaring that:

> "*My own preference is .... that it would be a mistake to insist that such recognition is always necessary.* I agree with him that it is sufficient that the asylum seeker can 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 and actions of the persecuted." [46]

39. For his part, Lord Rodger did not consider the specific question of whether a PSG had to meet both limbs of the test in Article 10(d). However, Baroness Hale adopted the UNHCR guidelines [at 100] based on the argument that only one limb of the test had to be met. Baroness Hale stated that the guidelines indicated that a PSG is a group who share a

common characteristic other than the risk of being persecuted, or who are perceived as a group by society [103]. The suggestion that only one limb of the test had to be met was also adopted by Lord Brown, who also followed the UNHCR guidelines, and found that the Qualification Directive had to be interpreted consistently with this [118].

40. It is clear from this that three judges in the House of Lords explicitly considered the question whether both limbs of the Qualification Directive (Article 10(d) of the Regulations) had to be met. Three judges found that they did not in the form of Lord Bingham, Lord Hope and Lord Brown. The definition of the UNHCR was adopted by Baroness Hale who argued that only one limb had to be met. She, therefore, implicitly accepted the test of one limb. Of the remaining judges, Lord Rodger did not consider the issue. Most importantly, none of their Lordships found that both limbs had to be met.

41. It is in these circumstances, that the Tribunal decisions have to be assessed. The case of **SB (PSG - Protection Regulations - Reg 6) Moldova CG [2008] UKAIT 00002** saw the Tribunal consider the application of **Fornah** when it went on to rule that [69]:

> "…. 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 1(d) of the Qualification Directive …. 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** as well as in **Shah and Islam**, that the determination of the question as to whether a particular social group exists in society must always be considered within the context of society in question."

42. On behalf of the Appellant, it is argued that the Tribunal in **SB** was wrong because the House of Lords in **Fornah** had clearly decided the cases under all the issues, including the Directive/Regulations, and had consistently and constantly referred to these. **SB** was followed by **AZ (Trafficked Women) Thailand CG [2010] UKUT 118**, which also required both limbs to be satisfied. However, it was not followed by the Tribunal in **MK (Lesbians) Albania CG [2009] UKAIT 000036**, which stipulated that only one requirement should be satisfied. It is on this basis that the Appellant argues that the authorities are in disarray. An authoritative decision is required. The Appellant argues that (1) the test in **Fornah** is not obiter and is binding; (2) it is only necessary to meet one limb of the test because it has been accepted by the judge that the Appellant was a former victim of trafficking, and he therefore met the first limb of the test, because he was part of a group that had an innate characteristic or a shared background; (3) that on this basis it should have been accepted that the PSG test was satisfied.

43. Second, it was said that the judge was wrong to have said that [47],

> "An immutable characteristic has to be shown and age ... is always mutable, due to all Appellants being time bound. The definition cannot go so far as to meet the first of the two limbs for that reason. Therefore it too fails to pass the two-limb test."

I find that this is an error of law. I now proceed to re-make the decision.

Error Law

44. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of **TCEA [2007]** such that I should set aside that decision and re-make the decision (see Section 12(2) of **TCEA [2007]**.) My reasons are that it has been well established that age is an immutable characteristic in **LQ (Age: Immutable Characteristic) Afghanistan [2008] UKAIT 00005**. The judge accordingly erred in concluding that for the Appellant to be a "young vulnerable person without family support" was not to be a 'member of a particular social group'. That being so, I now proceed to re-make the decision (see Section 12(1)(ii) of **TCEA [2007]**).

Re-Making the Decision

45. I have re-made the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. Notwithstanding Miss Kotak's valiant efforts to persuade me otherwise, in submissions which were made in a measured and thoughtful way, I am not satisfied that on the established case-law, which I have recounted above, it is enough to say that a finding that a person is 'young and vulnerable with no family support', inevitably leads to the conclusion he will also then be at risk of persecution. The evidence must show this. The evidence here does not. Second, the Upper Tribunal has considered the position and the preponderance of opinion in the majority of cases, as reflected in **SB (Moldova)** and in **AZ (Trafficked Women) Thailand CG [2010] UKUT 118** is that there are two separate tests and both must be satisfied. It has been established that under Regulation 10(1)(d) the 'group' must have a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. It is not enough to say that group has an innate characteristic or common background that cannot be changed. The two requirements are separate. Separate evidence is called for in order to prove both requirements. The failure of the appellant in this case to do so means that he cannot succeed.

Decision

46. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed.

47. Anonymity order made.

Direction Regarding Anonymity – Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Juss 19th July 2014