



JA (child – risk of persecution) Nigeria [2016] UKUT 00560 (IAC)

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On 18 October 2016

On 24 November 2016

Before

THE HONOURABLE MR JUSTICE COLLINS

DEPUTY UPPER TRIBUNAL JUDGE PETER SAINI

Between

JA

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Miss M Knorr, Counsel, instructed by Wilson Solicitors LLP

For the Respondent: Mr T Melvin, Home Office Presenting Officer

A child can be at risk of persecutory harm contrary to the UN Convention on the Rights of the Child in circumstances where a comparably placed adult would not be at such a risk.

DECISION AND REASONS

1.

This appeal is made against the decision of the Secretary of State to refuse an asylum claim made by the appellant effectively on behalf of her son who suffers from albinism, he being now 7 years old. She came to this country some years ago from Nigeria and there is no question but that she overstayed. Nonetheless her claim was made on the basis of persecution that she said would be occasioned to her son were she to be returned to Nigeria, and that persecution would result from his albinism.

2.

The refusal of the claim, which was in addition put on the basis of Article 8, first came before Judge Canavan in August 2013. That decision found in her favour under Article 8 and accepted that because

there would be sufficient interference with the appellant's Article 8 rights the requirement that she should not be returned because it would be disproportionate was accepted. The appellant appealed against that on the basis that her claim for asylum had been rejected and should have been granted. The Secretary of State sought to cross-appeal on the basis that the Article 8 claim should not have been allowed but permission was not granted to cross-appeal and it was not pursued.

3.

The fresh appeal was considered by Judge Bruce on 5 December 2013. That was of course an appeal to this Tribunal because there had been already the adverse decision of Judge Canavan on this point and Judge Bruce sitting as a Deputy Judge in this Tribunal decided that that appeal should not be allowed. There was then an appeal to the Court of Appeal. Leave to appeal was refused initially by a single Lord Justice but on a renewed hearing was granted and in the result the matter was remitted for reconsideration by this Tribunal and that is the situation that we are dealing with.

4.

It is important to note some of the findings of both First-tier Judge Canavan and Judge Bruce because, as has very properly been accepted by Mr Melvin, it is not for us to go behind any positive findings made in favour of the appellant.

5.

There was before Judge Bruce a report from a Miss Ariyo who had considerable experience in Nigeria. She dealt with the view that was formed generally of albinism. There are it seems a very significant number of albinos in Nigeria. It was put as high as 6,000,000 in one of the reports but that may be an exaggeration. But certainly one is talking almost certainly in terms of over 1,000,000 out of a population we are told of something in the order of 200,000,000. But there is a general discrimination against albinos. This is based upon a view formed by many that albinism is a curse bestowed upon a family as a result of some form of witchcraft which persists in the nature of albinos. There is a further difficulty, albeit perhaps not one which is particularly general, namely that in some cases albinos have been murdered because it is believed that their body parts will bring benefit to others and this, as we say, has undoubtedly resulted in some attacks.

6.

It is not entirely clear what the extent of that is. We are told in the whole of Africa there is no evidence of more than some 100 or so deaths resulting from that but there is some expert evidence which has recently been provided which indicates that there is a danger that this is on the increase because the body parts of albinos can produce very significant financial advantage to those who supply them.

7.

However, it cannot we think be said that this is something which is of general application and the question arises as to whether that which undoubtedly would amount to persecution or fall within Article 2 of the Convention on Human rights is sufficiently of a real risk as to justify on that basis a finding that there will be persecution,

8.

We say a finding that there will be persecution because it was accepted in the earlier decisions that albinos could be regarded as a social group. That must be right. Therefore if there is a failure to provide necessary protection against persecution, if there is persecution, then there is a proper basis for finding that they are refugees and it is again common ground that the test to be applied in deciding on persecution is very much the same test as would apply to decisions whether there is a

breach of Article 3 of the Human Rights Convention and persecution and conduct under Article 3 are put on the same basis.

9.

As we say, there is no question but that there is discrimination against albinos and that were he to be returned to Nigeria the appellant's son, now aged 7, would be exposed to such discrimination. It follows that at school, because he would need of course to have education, he would suffer from those who regarded albinos as persons who suffered from some taint, which meant that they were to be regarded as lesser beings as a result.

10.

Equally there is a finding in the previous judge's decisions because Judge Bruce agreed with Judge Canavan essentially in her findings that, and I quote from paragraph 37 of Judge Canavan's decision:

"The background evidence and expert evidence are consistent in showing; that albino people are the subject of widespread societal discrimination in areas such as education and employment and may often be ostracised by their families and the community. The evidence also shows that according to some cultural and belief systems in Nigeria albino people are believed to be endowed with certain powers. There are reports that some albinos have been kidnapped and killed for ritualistic purposes."

11.

Reference was made to Miss Ariyo's report and it was accepted that the appellant was likely to have a subjective fear that both she and her son would suffer from discrimination in a wide number of areas as a result of his albinism. It was further accepted that the Nigerian authorities were not likely to be able to provide effective protection to the appellant and her son against ongoing discrimination or the risk of more serious harm arising from potential ritualistic abuse.

12.

Judge Canavan went on to approach the matter on the basis that what was important was the question of access to education and employment and, if the result of discrimination was that access to education and employment was compromised, then that would fall within a definition of persecution and that followed in fact from consideration of an approach which has been accepted generally. But the question as again Judge Canavan posed was how seriously the prejudice might affect a person and that would depend on their personal circumstances.

13.

One has to look at this from the point of view of "N", the child. He it must be borne in mind has so far, and he is now 7 years old, been living in this country where there is not the general antipathy to and discrimination against albinos. Thus, if he goes to Nigeria he will find himself in a society which on the findings of the judges and on the evidence is one where there is a general discriminatory approach to those suffering from albinism. That is something which is bound to have a particular effect upon him. Equally it is not suggested that his mother would not send him to school. There was evidence apparently that a number of parents did not send their albino children to school thinking that there was not any point because albino children would not get anywhere anyway, as a result of the approach that there was in Nigeria. That we have no doubt is not an attitude that his mother would follow.

14.

Nonetheless, it seems to us to be certainly within the realms of a real risk that he will suffer bullying and unpleasant actions whether or not they amount to physical violence from fellow pupils, and certainly a general adverse attitude from the public at large, something which we do not doubt, he

will find difficult to follow and which will affect him far more deeply perhaps than a child brought up in Nigeria exposed to that sort of attitude and no doubt so far as possible protected by his family and not expecting anything else from where he grows up than that sort of attitude. It will for "N" be something entirely new.

15.

The Convention on the Rights of the Child is clearly a relevant consideration that this Tribunal and indeed all who deal with asylum issues should take into account, and it is clear that a child could be at risk of persecutory harm contrary to the Convention in circumstances where a comparably placed adult would not be at such risk. The contrary is not I think argued by Mr Melvin who makes the point that the findings of both judges below cannot be criticised on the basis that they adopted a proper approach and that what would be suffered was not sufficient to amount to persecution. He submitted that the risk of ritual slaughter which is really what it amounts to was not such as could properly be said to amount to a real risk as opposed to a remote possibility, and to that extent we are inclined to agree.

16.

But as the UNHCR has observed in its Guidelines, ill-treatment which may not arise to the level of persecution in the case of an adult, may do so in the case of a child, and the child's youth immaturity, vulnerability etc will rightly be related to how that child experiences or fears harm.

17.

In E v Chief Constable of the Royal Ulster Constabulary [2009] I AC 536 Lady Hale made some observations which are relied on. What she said so far as material was this, in paragraphs 8-9:

"8. These and later cases show that the special vulnerability of children is relevant in two ways. First, it is a factor in assessing whether the treatment to which they have been subjected reaches the 'minimum level of severity' - that is, the high level of severity - needed to attract the protection of article 3. As the Court recently reiterated in the instructive case of Mubilanzila Mayeka and Kaniki Mitunga v Belgium (2006) 46 EHRR 449, para 48:

'In order to fall within the scope of article 3, the ill-treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.'

Detaining a Congolese child of five, who had been separated from her family, for two months in an immigration detention facility designed for adults met that high threshold even though the staff had done their best to be kind to her.

9. The special vulnerability of children is also relevant to the scope of the obligations of the state to protect them from such treatment. Again, in Mubilanzila Mayeka and Kaniki Mitunga v Belgium, at para 53, the court reiterated, citing Z, A, and Osman, that:

". .the obligation on the parties under Article 1 of the Convention taken in conjunction with Article 3 requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment including such ill-treatment administered by private individuals. Steps should be taken to enable effective protection to be provided, particularly to children and other vulnerable members of society and should include reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge." (emphasis supplied)...

18.

Clearly that indicates that it is necessary to have particular regard to the vulnerability of children. What Lady Hale said was agreed to by Lord Brown but was not dealt with by the other three of their lordships who sat on that case and so we accept that the observations are obiter. Nonetheless they carry considerable weight and they coincide with the approach that has been indicated to be correct from the Convention on the Rights of the Child and we have no doubt that that is the approach that should be adopted.

19.

That discrimination which has particular adverse effects can mean that there is persecution is undoubtedly so. An example given has been discrimination that prevents the access to employment or to education. But that that is not essential in order for persecution to be established is clear, Miss Knorr has referred in her skeleton argument to a decision of the Federal Court of Canada in Kim v Canada (MCI) 120111 2 FCR 448 at 467, 469 and 475, in which the CRC was referred to and the point was made that if the children's rights under the CRC were violated in a sustained or systematic manner demonstrative of a failure of state protection that child might qualify for refugee status.

20.

Equally in that case the court made the point that to acknowledge that children have distinctive rights was not to graft additional rights on to the definition in the Refugee Convention of persecution but was instead to interpret the definition of persecution in accordance with the distinctive rights that children possessed as recognised in the CRC and it was a denial of the CRC rights that the court believed to be important in deciding whether there was an entitlement to refugee status.

21.

It has been submitted essentially by Mr Melvin that we cannot go so far, and we should not go so far, as to recognise that discrimination in Nigeria could amount to persecution because there are a very large number, running into certainly at least, 1,000,000 of albinos in that country who would be entitled if that were right to protection.

22.

But that we do not think is the whole answer. We have to consider the facts relating to the individual who appears before us. We have here as we have said, a child born in this country, and brought up in this country, who has not faced any of the discrimination and the basis of that discrimination which he could be at real risk of suffering were he to be returned to Nigeria.

23.

Thus he would if returned have to recognise that he is treated as someone who has a real difficulty, inasmuch as to it is considered by many that he has been tainted by some form of witchcraft and that he simply is to be regarded as a second class citizen. That of course in itself might not be enough but it is the effect of that upon him that matters and we have no doubt that there is a real risk of certainly bullying, possibly worse, when he goes to school and that he will feel a pariah in society as a whole. As the previous judges have decided there is not likely to be any protection from the authorities that he can expect from such conduct against him and thus the effect on him is that much more serious than would have been the effect had he lived all 'his life and been brought up in the society in Nigeria.

24.

That in our judgment puts him in a different position from the general position of albinos in Nigeria and in our judgment the likely effect on him even short of any real risk of being slaughtered or otherwise his body parts being taken, is sufficient to indicate that there is a real risk of persecution.

25.

We must make it clear that we are approaching this on the basis that the position and the particular vulnerability of children must be the starting point. But this is a case which depends upon its facts and the circumstances of the child having been brought up in this country and not having faced the general approach to albinos that exists in Nigeria. Thus we do not regard this as really being appropriate to be a test case for albinos who are due to be returned to Nigeria or who face the turning down of any application made to stay in this country. Those will depend upon the circumstances of their individual positions, their age, no doubt and their background. That is why we say that this is not a case that can be regarded as one which is of general application save for the approach. But the approach is one which is as we understand is not in itself contentious. It is merely that Mr Melvin understandably submits that what he is likely to suffer by way of discrimination is not sufficient to amount to persecution.

26.

We must make it clear that in our judgment this was a relatively close run case because it obviously is more usual to find persecution where there is something rather more than that which exists in this case. But bearing in mind all the circumstances and the matters to which we have referred we will allow this appeal and direct that the appellant and her son should be entitled to protection under the Refugee Convention.

27.

This will persist only so long as there is a need for it and there can in future if the need arises be a reconsideration because the old approach which this country adopted that once refugee status was accepted there was permanent right of residence has in accordance with the precise terms of the Convention being changed.

Notice of Decision

The appeal is allowed on asylum grounds/ humanitarian protection grounds

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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



Mr Justice Collins Date: 22 November 2016

TO THE RESPONDENT FEE AWARD

No fee award is made.

Signed

A handwritten signature in black ink, appearing to be 'Mi' with a flourish at the end.

Mr Justice Collins Date: 22 November 2016