CUREDI013UK001

Question(s) at stake:

Whether the discrimination faced by an albino child in Nigeria could amount to persecution.

Outcome of the ruling:

The discrimination faced by an albino child in Nigeria could amount to persecution, depending on the individual personal circumstances. A child can be said to be at risk of harm, or of facing a risk of harm in a given circumstance, even if an adult placed in a comparable situation would not face the same risk.

The appeal was allowed, and refugee status was granted under the Refugee Convention and on humanitarian grounds.

Topic(s):

- Immigration and Asylum

Keywords:

- Grounds/Reasons of persecution
- Membership of a particular social group
- Refugee status
- Asylum seeker

Tag(s):

- Albinism
- Witchcraft
- Children

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Country:

United Kingdom

Official citation:

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

Link to the decision:

https://www.refworld.org/cases,GBR_UTIAC,585936de4.html 06977

ECLI:

No ECLI number / ECLI number unknown

Date:

24 November 2016

Jurisdiction / Court / Chamber:

Upper Tribunal, Asylum and Immigration Chamber

Remedy / Procedural stage:

Appeal

Previous stages:

- Appeal to the Court of Appeal against decision of the Upper Tribunal (date of decision unknown. The Court of Appeal remitted the case to the Upper Tribunal, Asylum and Immigration Chamber)
- Appeal to Upper Tribunal, Asylum and Immigration Chamber against Secretary of State's decision and against First Tier Chamber (decision promulgated on 5 December 2013)

- Appeal to First Tier, Asylum and Immigration Chamber against Secretary of State's decision (August 2013)
- Secretary of State's decision (date unknown)

Subsequent stages:

None

Branches / Areas of law:

Administrative law; Asylum law

Facts:

The appellant had made an asylum claim on behalf of her seven-year-old UK-born son, "who suffers from albinism": this claim was refused by the Secretary of State, and the appellant's appeal was against this decision. Her claim was made on the basis that, were she to be returned to Nigeria, her son would suffer persecution as a result of his albinism - the appellant came to the UK some years ago from Nigeria, and had overstayed her visa. (para. 1)

The refusal of the claim, which was also made "under Article 8 of the European Convention on Human Rights (ECHR)", first came before the First Tier Tribunal in August 2013. That decision was rendered in the appellant's "favour under Article 8": it is accepted that, if she and her son were returned to Nigeria, this would constitute "sufficient interference with the appellant's Article 8 rights." Asylum, however, was refused. "The appellant appealed" that decision on the grounds "that her claim for asylum had been rejected" when "it should have been granted." (para. 2)

The Upper Tribunal decided that said "appeal should not be allowed. There was then an appeal to the Court of Appeal" and "leave to appeal" was initially refused. On a renewed hearing leave to appeal was granted and, as a "result, the matter was remitted for reconsideration by" the Upper Tribunal. (para. 3)

The appellant argued that in Nigeria there exists discrimination against albinos – persons with albinism – and that if returned to Nigeria her son "would be exposed

to” forms of discrimination amounting to persecution. “At school […] he would suffer’ at the hands of those “who regarded albinos as persons who suffered from some taint” or contamination. (para. 9)

In previous stages, an expert report was submitted, according to which there is, in Nigeria, a pattern of general discrimination against albino persons. This pattern stems from the widespread belief that “albinism is a curse” imposed on “a family as a result of witchcraft.” This witchcraft is then believed to persist in the nature of albinos. “In some cases, albinos have been” attacked because of a belief “that their body parts will bring benefit to others”, and these attacks have even resulted in the murder of albino persons. (para. 5)

On the basis of the evidence presented, it was found “that the appellant was likely to have a subjective fear that both she and her son would suffer discrimination” as a result of his albinism, and that this discrimination would be likely to recur in a wide range of areas. It was also “accepted that the Nigerian authorities” lacked the ability to, and were unlikely to, “provide” the appellant and her son with “effective protection” against such ongoing discrimination: nor would the authorities be capable of protecting them against the potential “risk of more serious harm arising from ritualistic abuse.” (para. 11)

The main question to be decided was that of the extent to which the appellant’s son would be affected by this prejudice, and whether the effects of that prejudice would be so severe as to rise to the level of a “serious risk” of persecution that would satisfy the criteria on which a successful asylum and humanitarian protection claim must rest. (para. 12)

Ruling:

“The appellant’s appeal was allowed on asylum” and “humanitarian grounds.” (p. 9)

The Upper Tribunal ruled that albino persons in Africa can “be regarded as a particular social group”, (para. 8) and that “the Nigerian authorities were” unlikely “to provide” them with “effective protection” against the persecutory harms they face. (para. 11)

Albino persons were not, the Upper Tribunal considered (on the basis of the evidence presented), facing a real risk of ritual slaughter in Nigeria. However, the Upper Tribunal stated that the discrimination that would be faced by an albino child in Nigeria could have particularly “adverse” consequences for that child, and that this could amount to persecution. (para. 14) If children’s rights under the Convention on the Rights of the Child “were violated in” such a “sustained or systematic manner, this could be sufficient” to constitute persecution. (para. 19)

According to “the findings of the judges” and “the evidence”, if he were to be returned to Nigeria, “he would find himself in a society” where there is a general discriminatory attitude and approach to those persons living with albinism, and this would be both a novel and negative experience for him. As a child born and brought up in the UK, the Upper Tribunal reasoned, he would never have faced discrimination on the basis of his albinism, and, thus, return to Nigeria would place him at real risk of suffering. (para. 13) “That is something which is bound to have a particular effect upon him.” (ibid.) The Upper Tribunal noted that the appellant’s child “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.” (para. 14) “ 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.” (para. 24)

Main quotations on cultural or religious diversity:

- “[T]here 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." (para. 9)

- "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." (para. 13)
- "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." (para. 14)
- "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." (para. 23)

Main legal texts quoted in the decision:

- Convention on the Rights of the Child (adopted 20 November, 1989, entered into force 2 September 1990) 1577 UNTS 3

- Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR), arts 8 and 3

Cases cited in the decision:

ECtHR cases:

- *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2006) 46 EHRR 449

UK cases:

- *E v Chief Constable of the Royal Ulster Constabulary* [2009] I AC 536

Canada cases:

- *Kim v Canada* (MCI) 120111 2 FCR 448

Commentary

The Meaning of Persecution for Albino Children in Nigeria

This decision upholds earlier cases accepting the appropriateness of regarding albino persons as a social group under the Refugee Convention, i.e., those cases where the applicant is seen as someone who shares, with other members of his or her social group, an innate characteristic or unalterable common background. What makes this case significant is that it moves away from an adult-centred approach to one that takes on the perspective of the child, and asks what “being persecuted” means from that child’s perspective.

In relating to the Refugee Convention, the Upper Tribunal adopted a “rights-based approach”, interpreting it in light of the Convention on the Rights of the Child (CRC) and the UNHCR Guidelines on International Protection regarding Child Asylum Claims. Specifically, the Upper Tribunal considered that “all who deal with asylum issues should take into account that a child could be at risk of persecutory

harm contrary to" the Refugee Convention, even if this occurred in circumstances where a similarly placed adult would not be at such risk. (para. 15) This does not mean that children have additional rights under the Refugee Convention: it means that the concept of persecution is to understood in line with the distinctive situation of children. (Pobjoy 2017: 118-119)

The Upper Tribunal observed that the UNHCR Guidelines state that forms of ill-treatment that may not qualify as persecution if experienced by "an adult may" qualify as such if they are experienced by "a child, and the child's youth, immaturity, vulnerability, etc., will rightly be related to how that child experiences or fears harm" (para. 16).

The Upper Tribunal reinforced its reasoning via a "willingness to engage with comparative case law" focusing on the special vulnerability of children. It noted that in the case "of the Federal Court of Canada in *Kim v Canada* (MCI) 120111 2 FCR 448, the CRC was referred to and the point was" stated that if "children's rights under the" Convention "were violated in a sustained or systematic manner" that demonstrated a state's "failure" to provide "protection", a "child" might thus "qualify for refugee status." (para. 19) The Upper Tribunal also highlighted that in the case of *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, the European Court of Human Rights (ECtHR) stated that "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." (para. 17)

In addition, the Upper Tribunal added that the ECtHR reiterated that:

"[T]he 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.” (ibid.)

On reviewing the above reasoning, the Upper Tribunal inferred that it indicated the necessity to give particular attention to children’s vulnerability. Although these observations are obiter, for the Upper Tribunal they carry considerable weight: they coincide with the approach endorsed by the Convention on the Rights of the Child, and therefore should be adopted. It concluded that where some forms of discrimination carry particularly adverse effects, those forms of discrimination can amount to persecution.

While starting its assessment from the vulnerability of children, the Upper Tribunal added a disclaimer, noting the necessity of considering the particular circumstances of the child and the facts of the case. (paras. 24, 25) In this case, the Upper Tribunal pointed out, the child had been brought up in the UK, and had never faced the general attitude of prejudice and bigotry towards albino persons prevalent in Nigeria. (para. 23) The Upper Tribunal added a careful stipulation here, stating that this was not an appropriate test case for albinos facing deportation to Nigeria, or the refusal of any application to stay in the UK. This case was not one to be regarded as having a general application, save for the approach deployed. (paras. 24, 25) In other words, the Upper Tribunal refused to recognize the group of albino children in Nigeria as deserving *prima facie* refugee status (Grover 2018: 67).

Literature related to the main issue(s) at stake:

- Grover, Sonja C. 2018. *Child Refugee Asylum as a Basic Human Right*. Cham: Springer International Publishing.
- Pobjoy, Jason. 2017. *The Child in International Refugee Law*. Cambridge: Cambridge University Press.

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