**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Rawofi (age assessment – standard of proof) [2012] UKUT 00197(IAC)

**THE IMMIGRATION ACTS**

**Given orally at Field House**
**On 23 May 2012**
**Determination Promulgated**
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**Before**

**LORD JUSTICE McFARLANE**
**UPPER TRIBUNAL JUDGE WARR**

**Between**

**SAIFULLAH RAWOFI**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss S Khan of Counsel, instructed by Greater Manchester Immigration Aid Unit
For the Respondent: Mr Melvin

*Where age is disputed in the context of an asylum appeal (in contrast to age assessment in judicial review proceedings), the burden is on the appellant and the standard of proof is as laid down in R v Secretary of State for the Home Department Ex parte Sivakumaran [1988] AC 958 and R (Karanakaran) v Secretary of State for the Home Department [2000] EWCA Civ 11.*

**DETERMINATION AND REASONS**

1. This is an appeal from the determination of Designated Immigration Judge Coates made on 21st December 2010 in an asylum case. The appellant claimed to be a child, that is someone under the age of 18, when he arrived in the United Kingdom on 20th September 2010. The question of whether or not he was a child was plainly a matter that was material to the authorities who were required to determine what, if any, support should be offered to him and also the approach to be taken to his asylum claim.

2. On arrival assessment was made by two social workers in Lincolnshire who, having gone through a very detailed process, concluded that he was above the age of 18. Subsequently, some six months later, he was the subject of a further assessment by an independent social worker, Ms Seymour, who also conducted a thorough process and concluded that he was still under the age of 18. It is not necessary for us to descend to any further detail as to the factors that each of these three professionals took into account in reaching their conflicting conclusions. Judge Coates found, and we have no difficulty in coming to a similar conclusion, that each of these two reports was Merton compliant and that the three social workers were *bona fide* and in all respects undertaking a professional task which they purported to discharge. Whilst it was not set up for determination as a discrete preliminary issue, Judge Coates, rightly in our view, in fact addressed the age issue at the beginning of his evaluation and it is his conclusion on that issue which is the sole point before us today.

3. It is common ground, and indeed obvious from the reading of the judgment from paragraph 18 to paragraph 20, that the judge descended into the detail of the various reports and summarised his views about the respective strengths or otherwise of the material before him in that lengthy section of his judgment. He concluded however at paragraph 20 that he preferred the evidence of the Lincolnshire report and therefore concluded that the appellant was at least 18 years of age and therefore fell to be treated as an adult.

4. The appeal arises as a matter of law on the discrete and narrow point, important though it is, of the standard of proof that the judge adopted in coming to his conclusion.

5. Initially permission to appeal was sought and refused by Senior Immigration Judge Waumsley on 28th January 2011, but at a renewed application on 23rd March 2011 Senior Immigration Judge Peter Lane granted permission to appeal and thus the matter has been brought on before us this morning. We are grateful both to counsel, Miss Khan and the presenting officer Mr Melvin for their respective submissions both in writing and orally. The point arises in this way. At paragraph 6 of his judgment, Judge Coates says this:

> "The burden of proof is on the Appellant to show that he is a refugee or is entitled to humanitarian protection or that the Respondent's decision is incompatible with his rights under the 1950 Human Rights Convention. The standard of proof is a reasonable degree of likelihood. I have considered all the evidence in the round. "

6. The judge goes on as we have already described to conduct his evaluation of the evidence but at paragraph 20 he expresses his conclusion in these terms:

> "Having taken all matters into account, I have concluded, on the balance of probabilities, that the assessment by Lincolnshire Social Services is to be preferred and I find that the Appellant is at least 18 years of age. He therefore falls to be treated as an adult".

7. Miss Khan bases her appeal on the wording used by the judge in paragraph 20. She says that the express reference there to the application of the standard of proof as the balance of probability was a material error of law. She asserts that the standard of proof was correctly described by the judge at paragraph 6 in these asylum cases as being the lower standard namely "a reasonable degree of likelihood" and she therefore submits that the determination should be set aside because of that material error.

8. Mr Melvin resists the appeal. He resists it on the facts of the case and he also adopts the characterisation of the matter that we as a Tribunal had put earlier to Miss Khan. In addition Mr Melvin seeks to argue the root and branch legal point that the standard of proof for the determination of age in asylum cases is now established to be the balance of probabilities and that the judge was indeed correct to use that standard in determining age and it follows was therefore incorrect insofar as the issue of age is concerned in describing the standard as a reasonable degree of likelihood in paragraph 6. We propose to deal with Mr Melvin's submissions on the matter of principle and the overall approach first of all.

9. The standard of proof to be applied in asylum cases has been a matter that has been determined by higher courts and certainly until recently, said Mr Melvin, has been accepted to be the reasonable degree of likelihood. It is not necessary for us to do more than flag up that the principal decision was of the House of Lords in R (on the application of Sivakumaran v Secretary of State for the Home Department [l998] AC 958 which established that the lower standard was applicable to the determination of future fact. That was taken forward and applied to all facts in asylum cases in the Court of Appeal decision in R (Karanakaran) v Secretary of State for the Home Department [2000] EWCA Civ 11 and it has therefore been settled law, for a decade and more, that a uniform approach is to be applied in asylum cases, adopting the reasonable degree of likelihood as the standard of proof.

10. Mr Melvin's submission is based upon the development of the law since then in relation to determination of age in judicial review proceedings. It is well known that there has been a burgeoning of case law and indeed a burgeoning volume of cases which turn upon the determination of the age of a young person in relation to the provision of services and support by local authorities under the Children Act and, of course, in relation to the approach taken to the support or otherwise by the authorities generally. The case law to which both counsel have referred in relation to the determination of age in those cases is similarly well established. The standard of proof there is the balance of probabilities. The most recent authority, and we are grateful to Mr Melvin for his reference to this, would seem to be CJ (by his litigation

friend SW) v Cardiff City Council [2011] EWCA Civ 1590 and that has been applied by this Tribunal in age assessment judicial review proceedings in the case of R (ES) v London Borough of Hounslow [2012] UKUT 00138. It is therefore well settled, in age assessment judicial review proceedings, for the balance of probabilities to be the evidential yardstick that is applied.

11. Mr Melvin's submission is that the same test should apply here, that the matters of law sitting behind the conclusion as to the standard of proof in the judicial review line of cases should apply to asylum cases.

12. Miss Khan submits otherwise. She submits that the law is well established, as we described a short time ago, and that we should continue to look for Judge Coates's decision to be based upon the reasonable degree of likelihood.

13. In our view this court is bound by the decision of the Court of Appeal in the case of Karanakaran and behind that, the decision of the House of Lords in the case of Sivakumaran. The approach taken in asylum cases before the Immigration and Asylum Tribunals is established as the reasonable degree of likelihood and it seems to us that it is just not open to this Tribunal to identify and hive off the topic of age and say that this now should be the subject of a different standard of proof, namely the balance of probabilities.

14. We must therefore apply the law as we have described it in asylum cases before the Immigration and Asylum Tribunals, irrespective of the different approach which is taken in judicial review proceedings. In making that observation we are not blind to the fact that many, if not most, of the age assessment judicial review cases are now heard by judges sitting in this Tribunal. There is a need for clarity of approach by a judge determining an age issue as to which of the two jurisdictions he or she is applying. It is of note that the case law put before us by both sides in this case draws extensively on the judicial review determinations because those are the more recent and the more widely reported on the age issue and there is a danger, it certainly seems to us, for judges to be drawn into the body of case law which they will know well in relation to judicial review and to consider applying the balance of probabilities to the determination of age in asylum cases. As we have described, we take the view that the test is different in these cases and where the test is material the lower test has to be applied. There is also a difference in the burden of proof. This is accepted by Miss Khan before us. In the determination of age in judicial review proceedings the burden of proof is attributed to neither party. It is for the court to ask itself the age question without loading it one way or the other by attribution of the burden of proof. In an asylum case before the Immigration and Asylum Tribunals Miss Khan accepts the burden of proof is always upon the appellant as Judge Coates described correctly in paragraph 6. Therefore this further distinction between the judicial review jurisdiction and the asylum jurisdiction must also be borne in mind. Having dealt with the submissions that Mr Melvin makes on higher and general matters of law and principle, we now turn to look at the outcome in this case.

15. It is correct that in the words that he used in paragraph 20 Judge Coates referred to the balance of probabilities. However when one looks at the exercise that he had undertaken and the conclusion on the facts of this case to which he arrived, we do not consider that that was a choice of words that materially affected the outcome. Miss Khan's submissions on paper might have been read as indicating that all an appellant has to do is put forward a report from an expert who was Merton compliant and otherwise *bona fide* indicating that the appellant was not an adult, to satisfy the standard of proof of reasonable degree of likelihood irrespective of any other evidence in the case, banking, as it were, on a positive report in the appellant's favour being enough to trigger a finding that the person was still not an adult. In oral submissions she rightly and realistically clarified the position and accepted that the judge must take account of all the evidence in the case and, when applying the standard of proof of reasonable degree of likelihood, must come to a conclusion as best he or she can on all of that evidence.

16. Looking at it in that way it is absolutely plain that if Judge Coates was asked on the evidence before him in this case whether there was a reasonable degree of likelihood that this young individual was a child or an adult, the conclusion would have been adult. He says in the course of paragraph 20 that not only did he come to that conclusion, reading between the lines, that it was established on a reasonable degree of likelihood, he found that it was established on the balance of probabilities, the higher standard, that the appellant was an adult. Sometimes in civil proceedings for example in the Family Division, where all that is required is a finding on the balance of probability, a judge will go further and say "I am satisfied beyond reasonable doubt" that a particular fact is or is not established. That is not legally impermissible; it is a way of describing the degree of certainty or otherwise that the judge has achieved following an analysis of the evidence.

17. The point Miss Khan raises would be extremely important if the judge had phrased matters in a different way. If he had in paragraph 6 said "the standard of proof that this appellant has to achieve is to satisfy me that he is a child on the balance of probabilities," Miss Khan's case would be extremely strong given the analysis of the legal position that we have already given. But that was not this case. The judge was faced with two sets of professional evaluations. He conducted a detailed comparison of the two and came to a conclusion, making a choice between the one and the other, which certainly satisfied the standard of proof of reasonable degree of likelihood and indeed on his appraisal went further. On that basis we are satisfied that there is no material irregularity in the course of the decision given by Judge Coates and we therefore dismiss this appeal.

Signed Date

Lord Justice McFarlane