

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 9 November 2004
Determination delivered orally at Hearing
Date Determination notified:
07th February 2005

Before:

Mr C M G Ockelton (Deputy President)
His Honour Judge N Ainley (Vice President)
Ms C Jarvis (Vice President)

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

For the Appellant: Mr B Hussain, instructed by White Ryland
For the Respondent: Mr T Greig, Home Office Presenting Officer

If the evidence does not establish the claimant's age, the Adjudicator is entitled simply to say so. If age is disputed, it is unlikely to be appropriate for an Adjudicator to assess the claimant's age on the basis of his appearance in the courtroom.

DETERMINATION AND REASONS

1. The Appellant, a citizen of Afghanistan, appeals, with permission, against the determination of an Adjudicator, Mr A W Khan, dismissing his appeal on asylum and human rights grounds against the decision of the Respondent on 6 April 2003 refusing him leave to enter, having refused asylum.
2. In the course of his determination, the Adjudicator said, in respect of the Appellant's own evidence, this:

"Quite frankly, I found the Appellant's evidence to be totally implausible and incredible."

3. He then went on to consider an issue relating to the Appellant's age which had throughout been disputed by the Respondent. The Adjudicator reached his conclusions in the following paragraph of his determination which, although it is somewhat infelicitously expressed and in particular we suspect that the Adjudicator may have been let down by his typist, appears to us to be perfectly clear:

"13. In relation to the Appellant's age, the Respondent claims that he is not a minor and produced a letter from the London Borough of Hillingdon Social Services Department. An approved Social Worker apparently saw the Appellant without an interpreter and in her opinion claimed that he was not a minor and did not fall within the remit of the Children Act 1989. I attach little weight to that document as it is only the opinion of the author and in my view is an improper age assessment. Whether the Appellant is 16, 17, 18 years of age or over, we cannot safely and accurately assess. He could be in the range of somewhere between 16 to 18 years old but I form no opinion as to the Appellant's age in the absence of any satisfactory evidence to show how old he is. He claimed he was born in 1987 and the document he produced claims to show that he was born in April of that year. That would make him 16 years of age. On the available evidence before me, it is impossible to state with any degree of accuracy exactly how old the Appellant is."

4. The grounds of appeal to the Tribunal assert that the Adjudicator erred in making that finding and that in an appeal such as this, an Adjudicator is obliged to make an assessment of age. It is submitted that the finding as to the age of the Appellant was a prerequisite to assessing whether the United Kingdom would be breaching its obligations under the Human Rights Convention.
5. That submission has been expanded before us by Mr Hussain. We have to say that we have some difficulty in grasping his point. The Appellant has the burden of proof. The burden of proof has the effect that the party with the burden of proof loses on an issue if the evidence adduced by that party is not such as to persuade the trier of fact. That is why some American writers call it the "risk of non-persuasion".
6. The position in this appeal could not have been set out with greater clarity by the Adjudicator. He considered all the evidence before him. It did not persuade him as to any particular age of the Appellant. He therefore recorded, entirely correctly, that the burden of proof had not been discharged. In those circumstances and despite Mr Hussein's earnest attempts to persuade us to the contrary, it would have been quite wrong for the Adjudicator to make any finding of fact on the age. The position was simply that the evidence was not sufficient to enable him to do so.
7. Mr Hussein has also suggested that in the absence of any evidence on age, the Adjudicator should have made an assessment of age based on what he saw and heard in court. In our view, that is a

suggestion which is full of danger. We first of all emphasise that of course it did not apply here, because this was not a case where there was an absence of other evidence. Secondly, the Adjudicator had specifically rejected that which he heard in court in the terms that we have already indicated. But, thirdly, we think that it is not in general terms appropriate to expect an Adjudicator to make an assessment of a person's age having merely seen him or her in the formal surroundings of a court room. We venture to suggest that an Adjudicator who based an assessment of age, particularly when the matter was disputed, merely on what he saw across a court room would indeed err in law.

8. For the reasons we have given, we reject Mr Hussein's submissions and dismiss this appeal.

C M G OCKELTON
DEPUTY PRESIDENT