THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 320 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED)
AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED)

BETWEEN

O.N.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL
MINISTER FOR JUSTICE AND EQUALITY
ATTORNEY GENERAL
IRELAND

RESPONDENTS

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JUDGMENT of Ms. Justice O'Regan delivered on the 17th day of January, 2017

Issues

1. Although in the case of O.N. additional issues arise, nevertheless, the within matter has proceeded before the Court on the basis of a single issue as to whether or not the standard of proof applied by the first named respondent in each of the cases above, being an application for refugee status in the case of O.N. and being an application for subsidiary protection in the case of I.N. was correct.

2. The applicants contend that the standard of proof as to fact finding and/or the acceptance of the history of events as disclosed by an individual applicant is one and the same as the standard of proof required in the assessment of real risk, namely, a standard of in or about 30 %, on the basis of a "reasonable degree of likelihood".

3. The respondents contend that in fact two different standards apply and accept that insofar as the standard of proof in respect of future real risk is concerned, that the standard contended for by the applicants, namely in or about 30 %, is acceptable. However, insofar as the standard of proof in respect of fact finding and/or the acceptance of the history of events as disclosed by an individual applicant is concerned, the respondents contend that the correct standard is that of the balance of probabilities, coupled with the affording to the applicant the benefit of the doubt, in appropriate circumstances. In addition, the respondents refer to the fact that some facts which may have been discounted in a fact finding exercise may nevertheless, depending upon the precise impact of the finding of lack of credibility, be taken into account in the evaluation of the risk of future persecution.

4. All parties accept that the burden that might apply in respect of an application for refugee status will be the same as the burden which will apply in respect of an application for subsidiary protection.

Brief Background on the Applicants

5. O.N. was born in September, 1984 and is a Zimbabwean national. O.N. arrived in Ireland on 6th December, 2013 under a false South African passport. Both of his parents were political and died in January, 2007 and April, 2007 respectively. He claimed that he was tortured and raped and subsequently kept a low profile and avoided coming to the attention of Zanu-PF. However, he believed that immediately in advance of his flight to Ireland his presence in Plumtree was detected by Zanu-PF and therefore he fled. O.N. made an application for refugee status on 9th December, 2013 which was refused by the Commissioner on or about 17th January, 2014 and communicated to him on or about 23rd January, 2014. This decision was appealed on 4th February, 2014, an oral hearing was had on 5th January, 2016 and the application was ultimately rejected on 5th April, 2016 which was communicated to him on 7th April, 2016.

6. O.N. swore an affidavit bearing date 6th May, 2016 and a statement of grounds is dated 9th May, 2016. Ultimately leave to apply by way of judicial review to quash the order of the first named respondent of 5th April, 2016 was afforded on 20th June, 2016 including on the ground that the Tribunal applied an incorrect standard of proof.

7. I.N. is from Western Sahara and was born in May, 1984 and arrived in Ireland on 2nd October, 2011. She claims that in 2005 she suffered severe burns while at a protest. She was subsequently imprisoned on 15th December, 2010 for a period of a week and she was released on 21st December, 2010, following her attendance at another protest.

8. Following her arrival in Ireland, I.N. made an application for refugee status which was refused on 15th May, 2012. She subsequently made an application for subsidiary protection on 15th May, 2012. An interview was undertaken on 10th September, 2014 and on 26th February, 2015 her application was refused. I.N. appealed this refusal on 16th March, 2015 and as a consequence there was an oral hearing on 25th February, 2016. Her claim was rejected on 29th March, 2016 which was advised to her on either the 5th or 8th April, 2016.

9. I.N. swore an affidavit on 14th June, 2016 and her statement of grounds is dated 12th August, 2016. She claims that an incorrect standard of proof was applied. She secured leave on 27th June, 2016 which order was perfected on 13th July, 2016 and subsequently a notice of motion issued on 12th August, 2016.

10. Although I.N. in her appeal to the respondent did not raise the issue of the incorrect standard of proof, nevertheless, the respondents do not wish to rely on this fact in resisting her claim. Furthermore in her statement of grounds it is suggested that the Commissioner applied the correct standard of proof. Such portion of her statement of grounds was included in error.

11. By way of preliminary order therefore I afford I.N. leave to amend her statement of grounds to merely state that the first named respondent applied the incorrect standard of proof.

12. Insofar as there is a delay in maintaining the within judicial review application I have indicated to the parties that if I find that an incorrect standard of proof was applied then I will extend time.

Brief Synopsis of the Parties' Respective Submissions

13. The applicant argues that effectively a "reasonable degree of likelihood" test would be appropriate and in this regard refers to the cases of -

a. *R (Sivakumuran) v. Secretary of State for the Home Department* [1988] AC 958

b. *I.N.S. v. Cardozo-Fonseca* [1987] 407 US 407

c. *The Minister for Immigration and Multicultural Affairs v. Rajalingam* [1999] F.C.A. 719 (although the applicant suggests an effective shy-away from the second principle identified by Sackville J.)

d. the judgment of Brook L.J. in *Karanakaran v. Secretary of State for the Home Department* [2000] 3 All ER 449

e. *F.A. v. Minister for Justice* [2002] 5 I.C.L.M.D. 108

f. *B.P. v. Minister for Justice & Ors.* [2003] 4 I.R. 200

g. *Da Silveira v. Refugee Appeals Tribunal* [2004] IEHC 436.

The applicant suggests that the judgment of Herbert J. in *D.H. v. Refugee Applications Commissioner* [2004] IEHC 95 should be considered as an outlier.

14. The respondents argue that different standards are applied in different jurisdictions and therefore a uniform standard as contended for by the applicant is not possible. The respondents contend that the UK authorities are not as persuasive as they might initially seem by reason of the fact that the House of Lords in the case of *Karanakaran* accepted the decision of the majority in the matter of *Kaja* [1994] UKIAT 11038 as valid in circumstances where the Secretary of State did not argue against the majority decision. Furthermore, the respondents argue that because of the EU decision of *M.M. v. Minister for Justice* (Case C-277/11) and the case of *Danqua v. Minister for Justice and Equality* (Case C-429/15) all prior decisions must be reviewed and treated with caution, as the Court of Justice has found that the relevant assessment takes place in a two separate stage process. This is a fundamentally different approach to the approach taken by the Tribunal in *Kaja* which held that it

was a unitary process, and in addition, no consideration was afforded as to the impact and/or scope of the "benefit of the doubt" application.

Relevant Legislation

15. The United Nations Convention on Human Rights, 1951, as amended by the 1967 Protocol, provides at Article 1A(2) that a refugee is any person who:-

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear,
>
> is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

16. The Refugee Act 1996 came into law on 26th June, 1996 and was an act to give effect to the status of refugees by virtue of the Geneva Convention, 1951 and the subsequent Protocol on 31st January, 1967. The definition of refugee at s. 2 thereof mirrors the definition in the Charter aforesaid. Under s.11A(3) of the Act as amended it is provided that where an applicant appeals against a recommendation of the Commissioner under s. 13 it shall be for him or her to show that he or she is a refugee. Under s. 16(2) it is available to the Tribunal to affirm the recommendation of the Commissioner or set it aside and recommend that the applicant shall be declared to be a refugee.

17. Under s. 16 of the Act, before deciding on an appeal the Tribunal shall consider:

a. The relevant notice under subs. 3.

b. The report of the Commissioner under s. 13.

c. Any observations made to the Tribunal made by the Commissioner or the High Commissioner.

d. The evidence adduced and any representations made at an oral hearing, if any.

e. Any documents, representations in writing or other information furnished to the Commissioner pursuant to s. 11.

18. In Council Directive 2004/83/EC at Article 2 a person eligible for subsidiary protection is defined as meaning a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of formal habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

19. Under Article 3, Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, insofar as those standards are compatible with this Directive.

20. In Article 4 (5) it is provided that where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following 5 conditions are met:-

" (a) the applicant has made a genuine effort to substantiate his application;

(b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

(e) the general credibility of the applicant has been established."

21. The European Communities (Subsidiary Protection) Regulations, 2006 mirror the Council Directive aforesaid.

22. In the European Union (Subsidiary Protection) Regulations, 2013 regulation 2 provides that a person eligible for subsidiary protection means a person "in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm and who is unable or owing to such risk, unwilling to avail himself or herself of the protection of that country".

23. In Regulation 10(2) it is provided that where an applicant appeals against the recommendation of the Commissioner under the provisions of the regulations it shall be for the applicant to show that he or she is the person eligible for subsidiary protection.

24. Regulation 13(4) mirrors Article 3(5) of the Council Directive 2004/83/EC and applies it to applicants for subsidiary protection.

25. Both parties accept that the EU Directive of 2004 is an effective implementation within the EU of the 1951 Convention, and in this regard Mr. De Blacam refers to Recital No. 3 thereof, which provides that the Geneva Convention Protocol provides the cornerstone of the international legal regime for the protection of refugees.

UNHCR Handbook Guidance

26. The UNHCR periodically issues guidance and/or overviews in respect of assessment and/or procedures concerning the asylum systems and I been referred to a number of same.

27. The earliest reference is the UNHCR note on burden and standard of proof in refugee claims of 16th December, 1998. The applicants refer to para. 7 to 12 inclusive thereof. In para. 7 it identifies that the standard of proof is the threshold to be met by an applicant in proving the facts to support his or her claim. In para. 8 reference is made to common law countries and the criminal and civil standards. Thereafter it states:-

> "Similarly in refugee claims, there is no necessity for the adjudicator to have to be fully convinced of the truth of each and every factual assertion made by the applicant. The adjudicator needs to decide if, based on the evidence provided as well as the veracity of the applicant's statements, it is likely that the claim of that applicant is credible."

28. In para. 9 it is noted that an applicant may be vague or inaccurate in providing detailed facts (this theme is again taken up in the May 2013 Handbook referred to by the applicants at Chapter 2 when it is stated that there is a wealth of research in the field of psychology which reveals that there is a wide-ranging variability in a person's ability to record, retain and retrieve memories. Further, memory for temporal

information such as dates is notoriously unreliable and may be difficult or impossible to recall and later it is stated that a person's recall of dates, frequency and duration is nearly always reconstructed from inference, estimation and guesswork, and is rarely accurate).

29. In para. 11 it is provided:-

> "Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed."

In para. 12 in dealing with the concept of "benefit of the doubt" it is stated that where:-

> "the adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim; that is, the applicant should be given the 'benefit of the doubt'."

30. A further handbook issued in January, 1992.

31. At para. 196 it is stated that it is a general legal principle that the burden of proof lies with the person submitting a claim. However the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.

32. At para. 197 it is provided that the requirement that evidence should not be too strictly applied does not however mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

33. Paras. 203 and 204 deal with the application of the benefit of the doubt and provide that this should only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general

credibility. The applicant's statements must be coherent and plausible and must not run *contra* to the generally known facts.

34. The UNHCR Handbook of May, 2013 has a number of Annexes including flow charts and check lists for decision makers. It appears that the UNHCR also runs various training courses for decision makers.

35. One of the documents provided by the UNHCR is identified as Exhibit BN5 in the affidavit of Barry McGee on behalf of the respondents dated 4th November, 2016. This document is headed "Standards of Probability and Assessment of Future Risk". It incorporates a chart of between 0% and 100%. At 0% there is less than any reasonable chance and at 100% it is beyond any doubt. This chart is produced for the purposes of showing how standards of probability and assessment of future risk operate. It states that there are many standards but the chart seeks to identify only the more common ones. At 51% is included the balance of probabilities and underneath that a statement is incorporated as follows "used in proving facts in an asylum claim in many common law countries."

36. The respondents rely on the Supreme Court judgment of the 1st March, 2002 in the case of *V.Z. v. Minister for Justice and Others* [2002] 2 I.R. 135. Page 148 of the judgment of McGuinness J. in a comment of the UNHCR Handbook stated:-

> "It seems to me, however, that the guidelines contained in the Handbook are of relevance in considering the arguments made by counsel on both sides in this appeal and accordingly I refer to a number of passages from the Handbook here."

Case Law

1. EU

37. The case of *M.M.* being a judgment of the Court of Justice of the European Communities under Directive 2004/83/EC, given on 22nd November, 2012, was a reference for a preliminary ruling from the Irish High Court. Under review was Article 47 of the Charter affording rights to all persons to an effective remedy before an independent and impartial tribunal.

38. The Court noted the provisions of Article 4 of the 2004 Directive relating to the assessment of facts and circumstances and went on at para. 64 of the judgment to state:-

> "In actual fact, that 'assessment' takes place in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met."

39. The respondent refers to para. 29 of the judgment in the subsequent decision of the Court of Justice of the European Communities of 20th October, 2016 in the case of *Danqua*. The respondent refers to para. 29 of the judgment which provides that in the absence of specific EU rules it is for the domestic legal system of the Member State to determine the procedural requirements attaching to the submission and examination of an application *inter alia* for subsidiary protection provided that the requirements are not less favourable than those governing similar domestic situations (principle of equivalence) and secondly that they do not render impossible in practice or excessively difficult the exercise of the rights conferred by the EU legal order (principle of effectiveness).

40. The respondent argues that by reason of the decision in *M.M.* aforesaid to the effect that the process of assessment of facts and circumstances is a two-stage undertaking then the UK authorities are not relevant because their foundation is that of the Tribunal in *Kaja* to the effect that it is a unitary process and for that reason the Tribunal considered that the same standard of proof was relevant to the assessment of facts as to the assessment of a real risk of persecution if returned to the country of origin.

41. The applicants counter that the *M.M.* decision did not introduce any radical change in the manner of approaching past facts and the possibility of real risk if returned to the country of origin. Mr. De Blacam suggests that the two factors always had to be dealt with separately. It appears to me that this is a well founded observation. If one looks at the *Da Silveira* judgment or the *M.A.M.A.* judgment the respondent has argued that these cases in fact deal with future risk as opposed to the assessment of past facts and therefore are not material to the standard of proof required for past facts. The essence of the argument however on the part of the respondents is such that in 2004 and 2009 respectively the High Court was reviewing the matter on the basis of a two separate stage process.

2. UK

42. As aforesaid the applicants contend that the standard of proof for the assessment of past facts and future risks are similar and amount to "reasonable degree of likelihood". In this regard the applicants have laid considerable stress on the UK jurisprudence. The applicants also contend that a uniform standard should be applied by all jurisdictions. In reliance on the UK jurisprudence the applicants point to the fact that the test was applied by Peart J. in the case of *Da Silveira* and subsequently was applied by Cooke J. in the case of *M.A.M.A. v. Refugee Appeals Tribunal* [2011]

43. Although as aforesaid the applicants rely on the UK authorities no reference has been made by them to the case of *M.A. (Somalia) v. Secretary of State for the Home Department* [2011] 2 All E.R. 65, a judgment given unanimously by the Supreme Court on 24th November, 2010. In fact it does appear to me that the judgment of Sir John Dyson sets out in a fairly straightforward manner the history of the appropriate standard of proof which has been applied in UK jurisprudence.

44. Lord Dyson states at para. 15 of his judgment that prior to the case of *Sivakunaram* [1988] A.C. 958 the general view in asylum cases was that past and existing facts should be determined according to the civil standard of proof, that is the balance of probabilities. He noted that the case of *Fernandez v. Government of Singapore* [1971] 1 W.L.R. 987 propounded that a lower test should be applied in assessing the risk of adverse treatment on the basis of the facts.

45. The 1988 case of *Sivakumaran* is a House of Lords decision which held that there must be a reasonable degree of likelihood that the applicant will be persecuted on return. Some argument was made as to whether the same standard of proof should be applied as to past events and future risks.

46. It appears that following the House of Lords decision in 1988 it was unclear whether the real risk/ real possibility test should be applied to proof of past and existing facts.

47. In the majority Tribunal decision of *Kaja* (1995) a two-stage test for determining past events and future risk was rejected. It was held that the test of reasonable degree of likelihood should be applied to all aspects of the determination and this was the standard which was applied in practice by the IAT thereafter.

48. In the case of *Horvath* [2000] I.N.L.R. the Court of Appeal, albeit *obiter,* favoured the approach taken in *Jonah* (1985) namely, that the balance of probabilities

will apply to past events and the lower test of a degree of likelihood was sufficient in assessing the real risk for the future.

49. In *KaranaKaran* [2000] 3 All E.R. 449 Brooks L.J. approved the test identified in the case of *Rajalingam* [1999] which in fact set out 6 principles including at Principle 2 "Although the civil standard of proof is not irrelevant to the fact-finding process, the decision-maker cannot simply apply that standard to all fact-finding." That case also appears to have approved the *Kaja* tribunal majority decision namely that a unitary approach to both fact finding and future risk should be applied at the lower standard level.

50. Lord Dyson concluded his commentary on the standard of proof required, at para. 20, to the effect that the approach in *Jonah* and *Horvath* appeared consistent with the requirement for substantial grounds or serious reasons. However the argument before the Court in the case of *M.A. (Somalia)* was approached by the Secretary of State on the basis that the correct test was "real possibility to both past and present facts" and Lord Dyson stated:-

> "Without deciding the point, we are content to do the same in this appeal. We express no view on the issue which is both difficult and important. We think it would be desirable for the point to be decided authoritatively by this Court on another occasion."

3. Ireland before 53

51. Both parties refer to the case of *HJ (Iran) v. Secretary of State* being a judgment of the UK Supreme Court delivered on the 7th of July 2010, albeit for different reasons. The applicants rely on the judgment to support the proposition that there is a need for a rigorous and careful examination of the applicant's specific

characteristics and circumstances – there should be a careful and fact sensitive analysis. The applicants also refer to para. 90 of the judgment where it is stated

> "Where life or liberty may be threatened, the balance of probabilities is not an appropriate test."

On the other hand the respondents refer to para. 30 of the judgment where the court following a review of comparative jurisprudence stated:

> "I do not think that they reveal a consistent line of authority that indicates that there is an approach which is universally accepted internationally."

The respondents also referred to para. 35 (a) of the judgment dealing with the test to be adopted and where it is stated:-

> "The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case."

52. Although not referred to by the respondent the next paragraph of the judgment:-

> "The next stage is to examine a group of questions which are directed to what his situation will be on return."

This appears to me to acknowledge the two stage process which Mr. Connell Smith argues was initially identified in the *M.M.* judgment.

53. The case of *Da Silveira v. Refugee Appeals Tribunal* [2004] IEHC 436 came before Peart J. in the High Court in Ireland who delivered a decision on 9th July, 2004 in connection with an application of leave for judicial review. One of the grounds was that the Member had erred in relation to the standard of proof which he applied. The case of *KaranaKaran* was referred to on behalf of the applicant. Peart J. stated that it seemed at that stage that a standard of proof less than even the civil balance of probabilities was appropriate in respect of the chances of future persecution and the learned judge reiterated that he was dealing with leave only. The trial judge also referred to the case of *Rajalingam* and quoted from same extensively. However it does appear to me that all was in the context of the assessment of future persecution.

54. In the subsequent case of *M.A.M.A.* being a judgment of Cooke J. delivered on 8th April, 2011. The claim concerned the applicant contending that there was an obligation on the part of the Tribunal Member to assess the prospective risk of persecution notwithstanding the rejection of past facts and events as lacking credibility. Cooke J. remitted the matter for further consideration on the basis that the precise impact of the finding of a lack of credibility upon the evaluation of the risk of future persecution depends upon the nature and extent of the findings underlining the finding at the first stage. The obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which could be accepted. The Court considered the UK cases aforesaid and the Australian case of *Rajalingam* and the Court ultimately found that the correct approach to the standard of proof was adopted in the case of *Da Silveira*. In that judgment Cooke J. did quote a portion of Peart J.'s judgment including:-

> *"A lack of credibility on the part of the applicant in relation to some, but not all, past events, cannot foreclose or obviate the necessity to consider whether,*

if returned, it is likely that the applicant would suffer Convention persecution."

Cooke J. goes on at para. 17 to state:-

"This court accepts as correct the approach to the standard of proof outlined in this case law. The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for "reasonable speculation" is not an invitation or pretext for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant."

If one reviews the judgment of Peart J. this statement from his judgment appears to be in the context of the history as outlined by the applicant being rejected but nevertheless it is necessary to go on to consider the prospect of a real risk into the future.

55. Having considered both judgments carefully I do not see where either judgment makes any pronouncement on the standard of proof to be applied in relation to an applicant's credibility concerning the history given as to past events.

56. I have considered the further cases of:

a. *F.A. v. Minister for Justice* (21st December 2001), and

b. *B.P. v. Minister for Justice* [2003] 4 I.R. 200

raised in the submissions of the applicants. However, I am of the view that neither judgment advances the standard of proof required in respect of past events/applicant's history.

Other Jurisprudence and Material

57. The respondent has referred to two Canadian cases namely that of *Adjei* of 1989 and the case of *Alam*, a judgment of 6th January, 2005. In the first case it was held that:-

> *"[A]lthough an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not."*

58. In the second case one of the grounds for seeking judicial review was that the board allegedly erred in the standard of proof they required, namely the finding was based upon the fact that the claimant had not discharged his burden of proof sufficiently to establish on a balance of probabilities his claim is well-founded. Paragraph 8 of the judgment of O'Reilly J. includes as follows:

> *"Obviously, claimants must prove the facts on which they rely, and the civil standard of proof is the appropriate means by which to measure the evidence supporting their factual contentions. Similarly, claimants must ultimately persuade the Board that they are at risk of persecution. This again connotes a civil standard of proof. However, since claimants need only demonstrate a risk of persecution, it is inappropriate to require them to prove that persecution is probable. Accordingly, they must merely prove that there is a*

"reasonable chance", "more than a mere possibility" or "good grounds for believing" that they will face persecution."

59. The respondent has also referred to the case of *R.C. v. Sweden* being a final judgment by the European Court of Human Rights delivered on 9th June, 2010, dealing with the 1951 Convention as amended by the 1967 Protocol. The respondent refers in particular to para. 50 of this judgment where the Court acknowledged that asylum seekers frequently require the benefit of the doubt when it comes to the assessment of credibility of their statements and documents submitted however when the veracity of the asylum seekers' submissions are questioned by information presented the individual must provide a satisfactory explanation for the alleged discrepancy. The Court goes on to state:-

"In principle, the applicant has to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3."

60. Having considered the judgment it does appear to me that in general terms the judgment does acknowledge that the benefit of the doubt is frequently required in the assessment of credibility of an applicant's statement.

61. I have discounted reference to the text book of Hathaway, same having been found to be partisan in *I.E. v. Minister for Justice* [2016] IEHC 85 (Humphreys J.) and *M.A. v. Refugee Appeals Tribunal* [2015] IEHC 528 (MacEochaidh J.).

Principles

62. In my view, the principles which emerged from the consideration of all of the foregoing would be as follows:-

(1) There is no approach which is universally accepted either within the EU or internationally.

(2) There is no approach mandated internationally by the Convention or within the EU by the 2004 Directive or domestically by virtue of either the 2006 or 2013 Regulations.

(3) The UK previously applied a test of "the balance of probabilities" to past events, however, since *Kaja*, the test applied by the UK authorities has been "reasonable degree of likelihood" subject to the rider that the UK court has acknowledged in the case of *M.A. (Somalia)* that the issue should be decided authoritatively on another occasion.

(4) The UNHCR recognises the balance of probabilities coupled with, where appropriate, the benefit of the doubt, as an acceptable approach.

(5) Canada applies a balance of probabilities test to past events.

(6) The United States applies a much lower standard to past events.

(7) The enabling provision contained in Article 3 has not been acted upon in legislation in Ireland.

(8) The EU decisions of *M.M.* and *Danqua* require respect for the principle of equivalence and the principle of effectiveness in dealing with foreign nationals looking for international protection/asylum.

(9) The balance of probabilities is the civil standard in Ireland.

(10) Both cases of *Da Silveira* and *M.A.M.A.* were dealing with the standard required when looking at the real risk and not the standard required in respect of past facts or the credibility of the applicant and accordingly these judgments did not import into Irish jurisprudence the test of "reasonable degree of likelihood" in respect of past facts or the applicant's credibility (however, even if they did, which is contended for by the applicants, it was done so on an *obiter* basis).

(11) Recognition of a two stage process predated *M.M.*

Conclusion

63. In light of the foregoing principles and having regard to the fact that the balance of probabilities is the civil standard of proof in this jurisdiction, I am satisfied that the principle of equivalence and the principle of effectiveness are both safeguarded by the application of the standard of proof – being the balance of probabilities – coupled with, where appropriate, the benefit of the doubt. Until such time as this State might introduce more favourable standards as contemplated by Article 3 of the 2004 Directive, this is the appropriate standard to apply, i.e. the balance of probabilities, coupled with, where appropriate, the benefit of the doubt.