

ILF-Nepal

The International Legal Foundation

CASE NOTES – WINTER 2011 (January–March)

Editor's Notes: Welcome back to the Case Notes. After this quarterly edition, the ILF is happy to announce that it will resume its monthly publication. This edition is dedicated to the thorny question of age assessment in the criminal justice system. Where the defendant's age is close to the age of criminal responsibility, a single day can make the difference between incarceration and freedom. The Supreme Court of Nepal in Government of Nepal v. Yesu Baral (a/k/a Sanu Bhai K.C) has just issued an important decision on the reliability of dental age assessments. The Editor would like to draw the readers' attention to the decision because it makes it imperative for advocates for juveniles challenging an age assessment report to call the expert to testify at trial.

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Because in Nepal doctors who are asked to provide age assessments generally rely on "bone age," a brief discussion of bone age assessment will be helpful to understand the Yesu Baral decision discussed in the second section.

While medical science has developed several techniques for measuring the developmental maturity of a child, no method is currently available that can reliably provide the chronological age of a child with any useful degree of accuracy. Current methods enable a highly trained and experienced expert to provide, at best, a range of approximately four years within which the child's chronological age is likely to fall. Moreover, because of the rapid and irregular pace of maturation during the mid-to-late teens, measures of physical maturity become increasingly unreliable precisely at the point where they are being applied in criminal cases.

In the United Kingdom, the Royal Society of Radiologists has strongly advised members against conducting bone age assessments for purposes of establishing chronological age because it is so unreliable. A review of published data finds the standard error rate is one half to two years, with the highest error in children in their mid-to-late teens [S. Ritz-Timme et al., "Age Estimation: The State of the Art in Relation to the Specific Demands of Forensic Practice," *International Journal of Legal Medicine*, 113 (2000) 129-36, 131]. Obviously, when the dispute is whether a child is 15 or 16, an assessment that establishes that the child is probably between 14 and 18 is not useful.

In *Government of Nepal v. Rajesh Lama, a/k/a Raghu*, the Supreme Court of Nepal held that a medical age assessment was insufficient to establish that the defendant claiming to be a juvenile was not a juvenile. In that case, Dr. Harihar Wasti of Tribhuvan University submitted a report based on a radiological examination of bones and teeth and a physical examination estimating the defendant's age at "between 16 and 17 years." At trial, Dr. Wasti testified that this meant the defendant had completed 15, had reached or was about to reach 16, but had not yet completed 17. The doctor also testified at trial that an exact age could not be established by any scientific procedures presently available. The Supreme Court found that the government had not satisfied its burden and that Rajesh Lama had to be deemed a juvenile.

The following examples illustrate the unreliability of bone age assessments.

Government of Nepal v. Dinesh Lama (ILF-Nepal 819)(Adv. Chanchala Kaini)

According to his Village Development Committee birth record, Dinesh Lama was born in 1998 and is 13 years old. The bone age assessment submitted by the Department of Forensic Medicine at Tribhuvan University (TU) estimated his age to be between 16 and 17. The district court declared Dinesh a juvenile and removed the case to the juvenile bench.

Government of Nepal v. Prakash Karki (ILF-Nepal 754)(Advs. Sanu Dangol and Surya Bdr Pandey)

According to his mother, Prakash Karki was born in 1997 and is 14 years old. The TU age assessment estimated that Prakash is 16 to 17 years old. The district court found Prakash to be an adult.

Government of Nepal v. Anish Karki (ILF-Nepal 696)(Adv. Bimala Yadav)

According to his family, Anish Karki was just under 16 years old when he was arrested. The age assessment from TU estimated his age to be between 17 and 20. The district court deemed Anish Karki a juvenile and sent the case to the juvenile bench.

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Scientific evidence suggests that dental age assessments are equally unreliable. Given the recent decision of the Supreme Court, it is imperative for lawyers representing juveniles to make sure that the expert testifies at trial about his or her scientific methods.

Government of Nepal v. Yesu Baral (a/k/a Sanu Bhai K.C) (ILF-Nepal 452)(Adv. Bimala Yadav)

Sanu Bhai K.C. (Yesu Baral) was arrested on January 18, 2010, and charged with possessing and selling heroin. He faced a possible maximum term of imprisonment of 10 years and a fine. The major question in the case was his age. Before going into a discussion of this particular case, a summary of the law and science related to the age assessment of a juvenile is essential.

The Convention on the Rights of the Child (CRC) imposes on the government the burden of proving the age of a person accused of a crime who claims to be a juvenile. CRC Article 40 (3)(a) requires that states establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law,” otherwise known as the “minimum age of criminal responsibility” (MACR). The Committee on the Rights of the Child noted that “[a] child without a provable date of birth is extremely vulnerable to all kinds of abuse ... particularly within the juvenile justice system” [Committee on the Rights of the Child, General Comment 10, Art. 39 (45th session, 2007) U.N. Doc. CRC/C/GC/10 (2007)]. Under Article 40(3), the burden falls to the state to prove that a juvenile’s age is not below the MACR. According to the Committee, “If there is no proof of age and it cannot be established that the child is at or above the MACR, the child shall not be held criminally responsible” [*Id.* at Art. 35; see also UNHCR, Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, Guideline 5.11 (February 1997)]. While the Committee did not recommend specific procedures for conducting an age assessment, they established a minimum requirement that any medical or social evaluation of a child’s age must be “reliable.”

Current scientific research makes it clear that dental age assessments are unreliable in general and particularly after the child reaches his/her mid-teens. The Royal College of Pediatrics and Child Health advised, "Overall, it is not possible to actually predict the age of an individual from any anthropometric measure, and this should not be attempted" [Ros Levenson and Anna Sharma, "The Health of Refugee Children: Guidelines for Pediatricians," *Royal College of Pediatrics and Child Health* (1999), 13-14]. A study comparing four different dental age assessment methods found a dramatic drop off in accuracy over the age of 15 across all methods [H.M. Liversidge et al., "Accuracy of Age Estimation of Radiographic Methods Using Developing Teeth," *Forensic Science International* 159S (2006), S68-S73].

Dental age assessment, or the Demirjian method, which involves dental X-rays, is the most commonly used method of estimating a child's age [see A. Demirjian et al., "A New System of Dental Age Assessment," *Human Biology*, 45 (1960), 211-227.] The technique can give an estimated age with a margin of error of plus or minus two years. Demirjian's table, published in 1976, consists of data from French Canadian children between the ages of 5 and 15, but there are serious questions as to its applicability to other populations. A study of South Indian children using the Demirjian Method found that it overestimated the age of the children sampled by an average of approximately three years [Serene Koshy et al., "Dental Age Assessment: The Applicability of Demirjian's Method in South Indian Children," *Forensic Science International* 94 (1998) 73-85, 77]. In addition, the method relies on being able to assess the development of healthy teeth in healthy children. Malnutrition, poor oral hygiene, or delayed development can introduce bias into the estimate.

Even under the best circumstances, a dental age assessment cannot give a precise age for a child. Instead, it can give an estimated age with a margin of error. The UK's Royal Academy of Pediatrics and Child Health advises that age assessments based on dental analysis can only give a 95% confidence interval of \pm 2 years. This means that if dental age assessment gives an estimated age of 16, there is a 95% probability that the chronological age is between 14 and 18. If any of the problems discussed above are present, the range can be much greater.

Interestingly, in Nepal, the Juvenile Justice Reform Regulations (2063) implicitly recognizes the lack of reliability of medical/dental age assessment. Under Rule 15 of the Regulations, a birth certificate issued by a hospital is considered the most reliable indicator of a child's age. If no hospital record exists, then a birth certificate issued by a local Village Development Committee (VDC) is controlling. If no birth records exist, then school records that mention date of birth are accepted. Only if none of the above documentation can be acquired is an age assessment conducted by a government hospital accepted. In other words, the age assessment of an expert is the least reliable method.

In this case, ILF-Nepal framed the question as one of pure statutory construction under Rule 15 of the Juvenile Justice Reform Regulation (2063). While Yesu Baral claimed to be 18 at the time of his arrest, his VDC birth certificate made it clear that he was 15 years, 5 months, and five days. He himself then admitted to being 15. Nevertheless, the district court *sua sponte* ordered an age assessment. On January 31, 2010, a report based on a dental age assessment conducted by Dr. Vishnu Prasad Sharma and Dr. Arjana Maharjan concluded that our client had completed 16 years.

On a petition for a writ of habeas corpus to the Supreme Court, neither party presented scientific evidence supporting or rebutting the reliability of the age assessment method. The Court held that "the doctor's age assessment was irrefutable evidence." On remand from the Supreme Court, the prosecution never challenged the validity of the VDC certificate. Nevertheless, the district court, surmising that since Baral had lied about many things, he "probably" lied about the VDC, accepted the expert age assessment. ILF-Nepal asked the court to call the expert to testify about the dental age assessment, but the court refused. It found Baral guilty and sentenced him as an adult to six years imprisonment and a fine.

There is nothing to suggest that the Supreme Court in this case intended to overrule its decision in *Rajesh Lama*, which was consistent with the CRC and supported by the scientific testimony of the expert. Therefore, the decision in this case stands for the narrow rule that only where there are conflicting statements regarding the age of the juvenile, where a dental age assessment has been performed, and where the dental age assessment is unchallenged, a dental age assessment is “irrefutable evidence” of age.

The ILF wants to thank Blake Trettien, a New York University School of Law graduate, currently working in the office of the ILF in New York for his thorough research on age assessment. ILF-Nepal also wants to welcome back Susan Lee, a former International Fellow, now the International Director of ILF-Nepal, and welcome Nicola Manning, a criminal defense lawyer from New Zealand who will be serving as an International Fellow at ILF-Nepal for the next three months.

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