UTIJR6

JR/1572/2020

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of WA
(ANONYMITY DIRECTION MADE)

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Pitt

Representation:

For the Applicant: Mr H Southey QC, Mr D Chirico and Miss A Nizami of Counsel, instructed by J D Spicer Zeb solicitors

For the Respondent: Ms S Broadfoot QC and Ms J Smyth instructed by the Government Legal Department

JUDGMENT

Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a Tribunal or court directs otherwise, the applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Having considered all documents lodged and having heard the parties' respective representatives, Mr H Southey QC, of Counsel, instructed by J D Spicer Zeb, on behalf of the applicant and Ms S Broadfoot QC, of Counsel, instructed by the Government Legal Department, on behalf of the respondent, at a remote hearing at Field House, London on 15 September 2020.

(1) The applicant (WA) challenges the refusal of the respondent to amend his Biometric Residence Permit (BRP) to reflect WA's claimed date of birth (29 December 1994) rather than the assigned date of birth (19 April 1989). The respondent's most recent decision setting out her refusal to amend the BRP was issued on 14 July 2020.

(2) The applicant maintains that the refusal to amend the date of birth in the BRP to reflect his claimed date of birth amounts to a breach of Articles 2 and 8 of the European Convention on Human Rights (ECHR) and is irrational.

Background

(3) WA is a young man born in Gaza in the Occupied Palestinian territories.

(4) At a young age he was severely mistreated by Hamas for refusing to act as a suicide bomber. His family arranged for him to flee Gaza. The applicant maintains that at that time his grandmother told him that his date of birth was 29 December 1994 and gave him documentation confirming this which was lost during his journey to Italy.

(5) The respondent maintains that WA was fingerprinted in Italy on 22 December 2003 but this is disputed by the applicant. It is undisputed that he was fingerprinted by the Italian authorities on 23 February 2005 and 23 August 2005.

(6) The applicant then arrived in the UK on 31 May 2007 and claimed asylum.

First Age Assessment – 4 June 2007

(7) On 4 June 2007 an age assessment was conducted by Reading Borough Council. That age assessment is at E14 of the bundle of materials. An age assessment was required as the applicant did not have a reliable identity document showing his date of birth or supporting his claimed age. The duty to establish whether he was a minor fell to the local authority under the Children Act 1989.

(8) During the age assessment conducted in 2007, the applicant gave a different date of birth to his current claimed age, maintaining that he was born on 19 April 1993; see E22. According to that date of birth he would have been 14 years old at the date of the assessment. According to the applicant's current claimed age he would have been 12 years old at the time of the 2007 age assessment. Reading Borough Council found him to be an adult aged between 18 and 20 years. The assessment from 2007 also shows at E22 that the applicant's evidence at that time was that he knew his date of birth because "his mother had informed him throughout his childhood."

(9) The respondent acted upon the age identified by Reading Borough Council, treated him as an adult and returned him to Italy on 24 August 2007.

(10) The applicant returned to the UK on 12 May 2009 and again claimed asylum.

Second Age Assessment – 4 March 2009

(11) On his return, the applicant continued to maintain that he was a child and another age assessment was conducted. This assessment was made by Gloucestershire County Council. A copy of this assessment is not available. There is a summary of it in a later (fourth) age assessment conducted in 2012; see E50-E51. The summary indicates that at the time of the assessment on 4 March 2009 the applicant gave his date of birth as 29 January 1994 and so was claiming to be 15 years old and more or less a year older than his current claimed date of birth. Notwithstanding production of a birth certificate with the date of 29 January 1994 and an identity document made in Libya, Gloucestershire County Council did not accept the date of birth of 29 January 1994 or that the applicant was 15 years old. The local authority found him to be 16 years of age, that is two years older than he would have been at that time according to his current claimed age; see E51. It remains unclear what other information Gloucestershire County Council had when the assessment was made or whether it was aware of the Reading Borough Council 2007 assessment.

Third Age Assessment - 20 March 2009

(12) On 20 March 2009 the applicant underwent another age assessment. This is at E28. The document is handwritten and the entries are extremely brief or non-existent. The assessment indicates at E28 that the applicant was "very distressed" during the interview and that he was having difficulty with remembering details because of stress. He appeared nervous. On page E31 the writer of the report indicates that the applicant presented as "a young person who could be any age between 14 and 18" and that the "overwhelming impression is of someone who is afraid".

(13) On page E32 the applicant is reported as having stated that he completed five years of primary education. The sections on independent and self-care skills are left blank as is the section on health and medical assessment. The assessment indicates on page E34 that at that time the applicant was claiming to have been born on 29 December 1994, the date he currently maintains is his correct date of birth. He relied on another birth certificate showing his date of birth to be 29 December 1994; see E34. This age assessment concluded that the applicant was 14 years of age and that his date of birth was estimated to be 29 December 1994; see E35. That is consistent with his current claimed date of birth.

Fourth Age Assessment – 21 February 2012

(14) A fourth age assessment was issued on 21 February 2012. This document is at E36. The assessment was conducted by an organisation called Independent Age Assessment on behalf of Gloucestershire County Council. It sets out on E36-E38 how the interviews with the applicant were conducted and the range of documents that

were taken into account. Those documents included the earlier age assessments, other Social Services documents and documents from the applicant's asylum claims. Over E39 to E54 the assessment sets out the information contained in the documents that were considered. The analysis of that information begins on page E55. The writers of the report indicate:

> "It has not been possible to obtain a reliable account from [WA] of his history. He has said he is unable to recall some events and it is noted that Dr [VDL] has stated that memory lapses can be a consequence of his anxiety and PTSD.
>
> There are remarkable inconsistencies in the accounts provided by [WA] at different times …"

(15) The report also confirms that WA had, at different times, given a range of different dates for his date of birth. It indicates that there were also documents with very different dates, for example, an Italian document showing his date of birth to be 10 May 1987. A letter from Gloucestershire County Council dated 31 May 2011 (at E52) stated that there was a record of the applicant's date of birth being 19 April 1989 as well as there being records of other dates of birth.

(16) Having taken into account the applicant's birth certificate, his own accounts, his physical presentation and his behaviour and the other documents considered, the 2012 age assessment concludes on E58:

> "It is very difficult to pinpoint [WA's] age. The inconsistency of his own accounts render them unreliable and while his demeanour has been observed over a sustained period to be that of an adolescent, his physical maturity is believed to be more persuasive evidence to inform an assessment of his age. In 2007 Reading Borough Council concluded that he was then an adult: it does not appear that this was challenged at the time and its outcome would be broadly consistent with this assessment. Hence it is concluded that [WA] was at least 18 years of age in mid-2007, and so was nearing 20 when he presented to Gloucestershire County Council in the spring of 2009.
>
> It is possible that one of the dates of birth provided by [WA] at different times is correct and on the basis of the above it is believed the one which is most likely to be accurate is 19 April 1989. However, in the light of the range of information which needs to be taken into account it is accepted that there could be (sic) fairly wide a margin of error in this: it is believed very unlikely that he is as much as two years younger than this date but could be as much as three years older."

(17) The 19 April 1989 date of birth was taken from a Gloucestershire County Council record; setting out some of the dates of birth recorded for the applicant; see E52. The 2012 age assessment concluded that this was the most likely date when all of the evidence was considered in the round. The 2012 assessment also allows for the applicant's date of birth to be as early as 19 April 1986 but unlikely to be as late as 19 April 1991. The respondent appears to have assigned 19 April 1989 as the applicant's date of birth since the 2012 age assessment was completed.

Events from 2014 to the present

(18) Meanwhile the applicant's asylum claim proceeded and was refused by the respondent on 4 February 2014. The applicant appealed and the appeal was heard on 28 March 2014 by First-tier Tribunal Judge Woolley. The applicant was successful. The determination is at D15 to D33. It is of note that WA's account and claim to fear a risk on return was, overall, found to be credible; see paragraph 39 on D28.

(19) Subsequent to that successful appeal the applicant was granted refugee status and on 23 July 2019 was granted indefinite leave to remain (ILR).

(20) A consequence of being recognised as a refugee was that the applicant had to apply for a Biometric Residence Permit (BRP). That document acts as an identity document, containing an individual's name, date and place of birth, fingerprints and a photograph. It enables the holder to demonstrate, amongst other matters, an entitlement to public services and the right to work and study. It is uncontentious that a BRP is issued in conformity with Council Regulation (EC) No 1030/2002 of 13 June 2002 (the EC Regulation) which provides for a uniform format for such documents within the European Economic Area (EEA). The EC Regulation is reflected in domestic legislation by the Immigration (Biometric Registration) Regulations 2008 (Biometric Registration Regulations).

(21) Also uncontentious, is the provision within the Biometric Registration Regulations for the respondent to require the surrender of a BRP or cancel a BRP if she concludes that the information it contains is false, misleading or incomplete. These provisions are contained in Regulations 16 and 17. In practical terms, those provisions allow the respondent to issue an amended BRP if sufficient evidence is provided to show that she should do so.

(22) The BRP issued to WA contained the assigned date of birth of 19 April 1989. As above, this was the date found in the 21 February 2012 age assessment as being the "most likely to be accurate".

(23) Very sadly, as a result of serious mistreatment he experienced in Gaza and in Italy, the applicant continued to experience significant mental health issues. This was despite his having formed strong bonds in the UK with the family who fostered him, Mr and Mrs DT, with whom he continues to live and who have supported him in this and other matters. WA has been diagnosed with post-traumatic stress disorder (PTSD) and depression. That diagnosis is accepted entirely by the respondent. One aspect of WA's presentation has been increasingly profound distress at the use of the assigned date of birth recorded in his official documentation, including the BRP. He believes that his date of birth is 29 December 1994 and that this should be shown on his BRP.

(24) WA's views on this matter is perhaps best set out in a decision dated 16 July 2020 issued by Mr Justice Hayden sitting in the Court of Protection; see C6. In paragraph 6 of that document Mr Justice Hayden states:

> "From one perspective it might be thought that the impact of this bureaucratic decision might have diminished in WA's thoughts over the last decade and perhaps become little more than a frustrating and upsetting irritation. That has not happened. For WA the removal of his date of birth is perceived as a fundamental violation of his own rights and an assault on his identity".

(25) A decision on appropriate treatment from the Court of Protection was necessary as WA's health deteriorated very seriously during 2020. In the early stages of the COVID-19 pandemic WA made an application to volunteer at a Nightingale Hospital. This was rejected because in his application he gave the date of birth he believed to be correct (29 December 1994) rather than the date on his BRP (19 April 1989). The rejection and the reason for it triggered a serious relapse which included a complete refusal of food and fluids beginning in March 2020. WA became extremely unwell and he was eventually admitted to hospital on 20 April 2020. He accepted intravenous fluids but refused nasogastric feeding. On 30 April 2020 he was detained under Section 3 of the Mental Health Act 1983. He was fed using an nasogastric tube on 4 May 2020 but found this to be "intolerable" and removed it after the feed had been given. Further attempts at feeding were unsuccessful. WA intermittently accepted fluids and very limited nutrition. His health continued to be severely compromised.

(26) On 5 June 2020 the applicant's representatives sent a pre-action protocol letter to the respondent setting out his circumstances and requesting that the date of birth in his BRP be amended to 29 December 1994. On 8 June 2020 further submissions were made including a witness statement from the applicant and his foster mother and the exceptional urgency of the situation highlighted where there was a very real risk to the applicant's life given his limited liquid and nutritional intake. On 10 June 2020 the applicant's representatives sent an urgent letter to the respondent informing her that the applicant's doctors had confirmed that his heart had shrunk and that "death will follow anytime from now".

(27) On 10 June 2020 the respondent provided a pre-action protocol response declining to amend the BRP where "your client has not provided evidence to support his claim that his date of birth is 29 December 1994".

(28) The applicant issued this judicial review on 11 June 2020. On the same day interim relief was granted, and the applicant was directed to provide the respondent with an expedited timetable was set down.

(29) On 17 June 2020 the applicant agreed to the insertion of a nasogastric tube to ensure that he remained alive until the outcome of a review that the respondent had undertaken to provide.

(30) Meanwhile the NHS Trust responsible for treating the applicant, concerned about his capacity to make decisions about his nutrition and hydration and the appropriate treatment plan, took his case to the Court of Protection where it was heard by Mr Justice Hayden.

(31) On 14 July 2020 the respondent made a decision which found that there was not satisfactory evidence capable of demonstrating that the claimed date of birth should be accepted and included on the applicant's BRP. The decision considered the new materials put forward by the applicant, together with the previous materials including the four age assessments. This document has become the focus of the applicant's challenge in this matter.

(32) On 16 July 2020 Mr Justice Hayden handed down his final judgment on the applicant's capacity to make decisions about his nutrition and hydration and the appropriate treatment plan where it was found that he did not have that capacity.

(33) The respondent lodged summary grounds of defence on 20 July 2020 and a reply from the applicant was lodged on 31 July 2020.

(34) The Upper Tribunal refused permission on the papers on 3 August 2020.

(35) A further set of amended grounds was filed on 6 August 2020. Those grounds were admitted and, following an oral renewal hearing on 14 August 2020, permission to apply for judicial review was granted by the Upper Tribunal on three grounds. There was agreement that the grounds of challenge on which permission was granted are that the respondent's decision of 14 July 2020:

(i) breaches the applicant's rights under Article 2 ECHR

(ii) breaches the applicant's Article 8 ECHR rights,

(iii) is irrational/Wednesbury unreasonable.

WA's Character

(36) Before proceeding to the specific legal challenges here, it is important to record that judicial authorities who have had significant direct contact with the applicant have made highly positive statements about him. As above, the First-tier Tribunal found his asylum claim to be credible in the round in 2014. In his final judgment of 16 July 2020 Mr Justice Hayden, who spoke with the applicant using remote means on a number of occasions, refers to WA "as open, sensitive and honest"; see paragraph 2. Mr Justice Hayden comments in paragraph 56 that he found WA to be "intelligent, articulate and honest". In paragraph 61 he indicates he found WA to be "articulate, lively and humorous" and "an interesting person who enjoyed conversation". Mr Justice Hayden records that this was also the view of all of the nurses who had provided information in that case. He comments in paragraph 101, "Despite all that he has experienced WA is the gentlest and most courteous of men."

(37) Mr Justice Hayden is also clear in paragraph 64 of his judgment that it is not the case that "WA's rejection of food and hydration is motivated to bring pressure on the Home Office." In paragraph 72 he states:

> "I very much agree … that WA's refusal to eat or drink is not designed to achieve leverage with the Home Office but is a behaviour which gives him '*some sense of control in a situation*' where he perceives '*control to have been taken away from him*'."

This view is repeated in paragraph 80:

> "I should state that nobody has suggested that these behaviours are intended to manipulate events they are maladaptive strategies to achieve emotional respite."

The decision at paragraph 82 also sets out how the team responsible for treating WA viewed his attachment to his claimed date of birth:

> "that he has been given an incorrect date of birth is properly to be described as '*an overvalued idea*'. From this it is extrapolated that WA is so fixated with this perceived injustice that it overwhelms his ability to weigh CANH as a global decision."

Mr Justice Hayden also indicates at paragraph 66:

> "It is important that I record that if, hypothetically, the date of birth with which WA identifies was restored to him, all the doctors are clear that it would be a significant boost to his psychological wellbeing."

In paragraph 98 Mr Justice Hayden comments that WA:

> "In the course of the last few months, reached a tipping point in which he is entirely clear that he can no longer live without the reinstatement of what he is certain is his true date of birth."

(38) Justice Hayden begins his conclusion in paragraph 102 by remarking:

> "I make no apologies for repeating that I consider WA has a great deal to offer the world as well as much to receive from it. No effort should be spared in encouraging him to choose life."

He then states in the following final paragraph:

> "In his childhood and adolescence WA encountered the suppression of his autonomy and the corrosion of his identity. If he will forgive me further ad hominem remarks, I would wish to point out to him that he has his very proud Palestinian name, his rich and beautiful language, a faith which sustains and supports him and a family who loves him and claim him as their own. DT told me that there were times when she was not sure whether she was looking after WA or he after her. I also noticed that Mr DT unconsciously used an Arabic expression that he later told me he had learnt from his son. They are manifestly a close and loving family. I am not in a position to reinforce WA's sense of identity in any way, only engagement in the identified psychological therapy will achieve that. I, am, however, able to protect WA's autonomy. In effect, to restore it to him. For all involved in this case the decisions have been difficult and painful. From this point on the decisions will ultimately be taken by WA with the advice and encouragement of his family and the clinicians, but no more than that."

(39) It is also appropriate to set out here that the respondent has not sought to gainsay anything in the judgment of Mr Justice Hayden concerning the applicant's excellent character or the acute seriousness of his current circumstances. The respondent, quite properly, has also indicated at appropriate points in this matter her great sympathy for WA's personal circumstances.

Preliminary Issue – Admission of New Documents

(40) On the morning of the hearing on 15 September 2020, the applicant applied to admit further evidence which had been provided to the respondent outwith the agreed timetable.

(41) The first document was a report dated 2 September 2020 from Dr Jennifer Wild, a Consultant Clinical Psychologist and Senior Research Fellow at the University of Oxford. Paragraph 6 of the report explains that it was produced as a result of instructions from the applicant's legal representatives in order to "share my expert view on [WA's] biological age and whether or not his belief of his biological age has arisen from his trauma." Dr Wild gave evidence to the Court of Protection and was found to have provided "thoughtful, well-reasoned and carefully structured."; see paragraph 74 at C33. In paragraph 11 of the new report Dr Wild clarifies that the report was based on the interview she conducted with the applicant on 2 July 2020 which was part of an assessment for the Court of Protection proceedings before Mr Justice Hayden where she was acting as an expert witness on capacity. In very brief summary, Dr Wild's opinion in the new report was that WA did not appear to be older than he claimed because he had omitted to count the time that passed when he was travelling but that this was likely to be because the trauma he experienced as a child had caused premature aging. The report went to some of issues in dispute between the parties, therefore.

(42) There was some dispute as to when this document could be said to have been properly served on the respondent where the documents that it enclosed were not immediately accessible and the full material was not with the Secretary of State until 7 September 2020. I accept that was a week outside the time limits for new evidence to be served. It remains the case that the document has been with the Secretary of State in its entirety for a week and had the initial report for nearly two weeks. It is relevant to the issues to be litigated. There is clearly a need for expedition in this matter given that WA's health is so seriously compromised. My conclusion was that in all the circumstances it was appropriate to allow this document to be admitted and to decline to allow an adjournment to afford the Secretary of State to have more time to consider it. In the event, Ms Broadfoot QC's detailed analysis of Dr Wild's report showed that the respondent could not have gained much benefit, if any, from considering Dr Wild's report of 2 September 2020 any further.

(43) The applicant also sought to admit a document from Amnesty International dated 23 February 2006 entitled "Italy: Invisible children - The human rights of migrant and asylum-seeking minors detained upon arrival at the maritime border in Italy". The document sets out the legal provisions and practice in Italy for dealing with

unaccompanied asylum-seeking children in 2006 and the concerns of Amnesty International at the lack of transparency, the detention of minors, treatment of minors during transfers, detention conditions and risks relating to inaccurate age assessments. There was no dispute that this document was only served to the Secretary of State on 14 September 2020, the day before the hearing. The substantive section of the report comprises thirteen pages. It was simply my view that the document was submitted too late for the Secretary of State to consider it and, as above, there remained an imperative for the matter to be considered expeditiously and without further delay. I refused to admit the Amnesty International document for these reasons.

The Respondent's Decision of 14 July 2020

(44) The latter part of this decision contains extensive extracts and analysis of the respondent's assessment in the decision of 14 July 2020 of the individual documents and information that was before the Secretary of State when she concluded that the assigned age should remain on the applicant's BRP. It is not necessary also to include them here. From paragraph 42 onwards in the respondent's decision, she draws together the analysis of the individual documents and sets out the principles used to make a holistic assessment and underpin her conclusions. It is useful to include much of those sections of the report here in order to set the context for the applicant's Article 2 and 8 ECHR challenges:

> **"Amending [WA's] Age**
>
> 42. As can be seen from the evidence submitted there is some evidence which supports that [WA] is the age he claims. However, in light of all the matters above, which I have considered in the round, I have concluded that there is no evidence which could lead me to conclude that the age assessments were wrong, and that WA is the age which he claims to be.
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> 43. Regulation 15 of the Immigration (Biometric Registration) Regulations 2008 states that the BRP can contain the holder's date of birth. Regulation 16 makes express provision for the Secretary of State to require the surrender of the BRP if she thinks that information provided in connection with the document was or has become false, misleading or incomplete. Pursuant to: (a) Regulation 16, the Secretary of State has the power to cancel a document on such grounds; and (b) Regulation 17, the holder of a BRP must notify the Secretary of State if he knows or suspects that the information provided was or has become false, misleading or incomplete. These provisions underline the importance of information in the BRP being accurate. Against that background, it is considered that for the Secretary of State proactively to amend a document to contain information which she believes to be false would be acting inconsistently with the Regulations.
>
> 44. The guidance available on gov.uk about biometric residence permits (https://www.gov.uk/biometric-residence-permits) confirms that the BRP contains the holder's name, date and place of birth. There is no capability or capacity to record an alternate possible date of birth, or a date of birth which the holder believes themselves to be, which is the same as any other secure official

document issued by the UK government for example a driving licence or passport.

45. The Home Office position is that someone's identity (i.e. biographic details such as name, date of birth and nationality) should remain consistent during their presence in the UK, save where proper grounds exist to amend that information. Regulation 16 of the Immigration (Biometric Registration) Regulations 2008 allows the Home Office to reissue a biometric residence permit (BRP). Adopting the approach set out in the Use and Change of Names Guidance it is considered important that requests to change previously recorded biographic information should be supported by satisfactory evidence to ensure this new information forms part of someone's "single identity for all official purposes.

47. I have considered whether a change of biographic information (specifically a date of birth) can be accepted on discretionary or compassionate grounds, that is, in circumstances where it is not accepted that the existing date of birth is wrong – and in fact, where it is positively believed that it is right. There is no premise for this within the existing Immigration Rules, policy, guidance or precedent case law. I have examined the impact of a refusal to change [WA's] date of birth. That he has PTSD, depression and anxiety is not disputed.

However, having considered the matter, the Home Office's position is that any finding on age should be evidence-based, determined in accordance with an accepted legal process for determining age, and a decision to revise a person's age should not be taken for the primary purpose of addressing or accommodating mental health concerns, however severe they may be, in circumstances where there is no proper basis for the age to be revised. In your representations you have emphasised that there would be a substantial advantage to WA in changing the date of birth, and no disadvantage to the Home Office in doing so. While I recognise that there may well be a significant advantage to WA, the matter cannot be properly assessed in terms of whether there is any disadvantage or prejudice to the Home Office. The question is whether there is evidence to support any change, and if not whether the change is one that the Home Office, as a public authority with functions in respect of official documents, can and should make. Subject to WA's reliance on Article 8, and having taken into account all of the difficult personally compelling circumstances of this case, I have concluded that the BRP should not be amended to state a date of birth which the Home Office believes to be false."

(45) The decision letter goes on to indicate in paragraphs 51 to 54:

"51. The requirements of the BRP Regulations, as a legislative scheme necessary for the avoidance of a false, misleading or incomplete information being included in a BRP, and therefore ensuring that someone's identity remains consistent, do not violate [WA]'s Article 8 private life rights, even if they are engaged. Even if WA's Article 8 rights have been interfered with, our assessment is that any interference is justified, due to the public interest in maintaining the integrity of the age assessment process, and the recording of accurate information on the BRP to ensure consistency of identity.

52. In WA's case it is the medical opinion of those treating him that there would be an adverse impact on the state of his mental health if his request to amend his date of birth is refused. This adverse impact is recognised and has been carefully considered. However, there is nothing in precedent or policy that supports an amendment being made to his BRP on the basis of undue interference with WA's Article 8 rights, without sufficient evidence of his current BRP being incorrect. For the reasons already set out – while recognising the very serious nature of WA's mental health condition, and his strongly held belief that he is the age he claims to be – we do not consider that the BRP ought to be amended to set out a date of birth which we believe to be false.

53. WA has continued to access the necessary treatment of his mental health and has psychological and psychiatric support in place, as evidenced in the letter from Bristol Central and East Recovery Team dated 30 April 2020. In addition, he has people around him in his personal life who are supporting him and a home to live in, i.e. a "secure base" from which he can continue to get the relevant care he needs. I understand that there are also parallel Court of Protection proceedings where the matter of WA's continued capacity is being considered and a substantive judgment is likely to be handed down imminently.

54. Having taken all the relevant information into consideration, it is not considered that refusing to amend WA's date of birth on his BRP (to his claimed DOB or to record both the stated and claimed DOBs) would breach his rights under Article 8."

(46) The respondent concludes:

"Conclusion

55. It is Home Office policy to give prominence to a Merton-compliant age assessment by a local authority; it is likely that in most cases the authority's decision would be determinative as set out in the ***Assessing Age*** guidance. Nevertheless, it is important that all available relevant sources of information had been considered and an overall decision made in the round. In that respect, I have considered all of the materials which you have provided, as set out above, and your accompanying representations and the interim judgment of the Court of Protection. I have also taken into account WA's overall credibility which has been accepted by the First-tier Tribunal Judge.

56. The supporting evidence is being given due weight for the reasons given above. The personal letters and statements from people who know [WA] are helpful in establishing the course of events and in explaining the impact the date of birth issue is having on him. In terms of evidential value or whether they provide evidence that outweighs the local authority age assessments, they have less value and are therefore afforded lesser weight.

57. As set out above, I have reviewed and considered each of the supporting letters and statements received on an individual basis, taken cumulatively and alongside all of the other evidence previously submitted. I have also taken account of the assessing age policy guidance, in particular the section entitled 'new relevant evidence received post age decision'. In line with this guidance

I have reviewed the totality of evidence of age. Because of the passage of time I have not made the local authority aware of the new evidence nor have I invited them to review their earlier decision. It remains open for WA and his legal representatives to ask the local authority to undertake an additional review. I have also referred to other parts of the policy guidance, including the section entitled 'weighing up conflicting evidence of age'. It remains the case that I give prominence to the Merton-compliant age assessments, which found that [WA] was born on 19 April 1989. I am also required, however, to consider all the available sources of information and make an overall decision in the round.

58. Having considered all of the matters in the round, and for the reasons set out above, my conclusion is that there is no evidence which undermines the conclusions in the 2007 and 2012 local authority age assessments.

59. Having addressed all of the evidence submitted in pursuance of the Tribunal's Order dated 11 June 2020 it is my view that the new evidence does not show that WA is the age he claims to be. I conclude that if the Home Office were to amend the date of birth as sought by [WA], it would be including a date of birth which is false (and certainly one which the Home Office believes to be false). For the reasons set out above, notwithstanding the extremely difficult and compassionate circumstances of this case, the Home Office does not consider that it can amend the BRP to include a date of birth which is believed to be false. The request to amend the date of birth recorded on WA's biometric residence permit, including to record both the stated and claimed date of birth, is therefore refused. His date of birth of 19 April 1989 is maintained."

Article 2 ECHR

(47) For the purposes of this case, the relevant part of Article 2 ECHR states "Everyone's right to life shall be protected by law."

(48) As agreed by the parties, in those parts of the challenge here concerning human rights, it is for the Tribunal to decide if the respondent's decision of 14 July 2020 amounted to an infringement of the ECHR, unlike an ordinary judicial review of a public law decision; Miss Behavin' Ltd v Belfast City Council [2007] UKHL 19 at [31] and [37] applied.

(49) The applicant maintains that the respondent's refusal to amend his BRP to reflect his claimed date of birth is a breach of his right to life under Article 2 ECHR. He submits that the respondent is under a positive operational duty to protect his Article 2 rights.

(50) The respondent maintains that she is not under a positive obligation to protect the applicant's Article 2 EHCR rights. The respondent submits that her responsibility in this matter towards the applicant is to provide a lawful process for deciding the date of birth of undocumented migrants, including provision for amending an earlier decision where satisfactory evidence is provided. The respondent submits she has met that duty and did so in her decision of 14 July 2020. The respondent maintains that the proposition that Article 2 ECHR can be extended to impose a positive duty

on the respondent to protect the applicant's life when operating a system for assigning an age and administering the BRP s system is misconceived.

(51) Both parties sought support for their positions from the case of Rabone v Pennine Care NHS Foundation Trust [2012] 2 AC. That case concerned an involuntary patient with known suicidal ideation who, tragically, killed herself when on leave from the hospital where she was being treated. The Supreme Court had to decide whether the NHS Trust responsible for her care was under a positive operational duty to protect her Article 2 ECHR rights and found in the affirmative.

(52) In paragraph 12 of Rabone, the Supreme Court identifies that the ECtHR has found there to be "a positive duty to protect life in certain circumstances" as one of three overarching duties imposed on a state by Article 2 ECHR. The Supreme Court goes on in paragraph 12 to expand on what that duty comprises:

> "This latter positive duty contains two distinct elements. The first is a general duty on the state 'to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life': see *Öneryildiz v Turkey* (2004) 41 EHRR 325, para 89 applying, mutatis mutandis, what the court said in *Osman v United Kingdom* (1998) 29 EHRR 245, para 115. The second is what has been called the 'operational duty' which was also articulated by the court in the *Osman* case. This was a case about the alleged failure of the police to protect the Osman family who had been subjected to threats and harassment from a third party, culminating in the murder of Mr Osman and the wounding of his son. The court said that in 'well-defined circumstances' the state should take 'appropriate steps' to safeguard the lives of those within its jurisdiction including a positive obligation to take 'preventative operational measures' to protect an individual whose life is at risk from the criminal acts of another: para 115. At para 116, the court went on to say that the positive obligation must be interpreted 'in a way which does not impose an impossible or disproportionate burden on the authorities'. In a case such as *Osman,* therefore, there will be a breach of the positive obligation where:
>
> > 'the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.' (See para 116.)"

(53) This raises the first question concerning Article 2 ECHR that the Tribunal must answer here: does a positive operational duty arise in the circumstances of this case such that the respondent must act to protect the applicant's right to life by amending his BRP to show his claimed date of birth?

(54) Assistance in answering this question can be drawn from the examination by the Supreme Court in Rabone of when the positive operational duty has been found to have arisen in ECtHR jurisprudence. As set out above, the Supreme Court notes in paragraph 12 of Rabone that the ECtHR identified in Osman v United Kingdom (1998) 29 EHRR 245 that the positive operational duty arises in "well-defined circumstances" and that the ECtHR also indicated that the state's action in response

is required to be "appropriate" and the duty does not require there to be an "impossible or disproportionate burden on the authorities".

(55) In paragraphs 21 to 25 of Rabone Lord Dyson analyses "the essential features of the cases where Strasbourg has so far recognised the existence of an operational duty." This was necessary as no decision was cited in which the ECtHR "clearly articulates the criteria by which it decides whether an article 2 operational duty exists in any particular circumstances"; see paragraph 22.

(56) In paragraph 21 of Rabone Lord Dyson identifies that ECtHR case law indicates that the fact that there is a real and immediate risk to life is a "necessary but not sufficient condition for the existence of the duty." He continues:

> "This is because, as the Court of Appeal said, a patient undergoing major surgery may be facing a real and immediate risk of death and yet the *Powell* case shows that there is no article 2 operational duty to take reasonable steps to avoid the death of such a patient."

(57) In paragraph 22 Lord Dyson identifies that the operational duty:

> "… will be held to exist where there has been an assumption of responsibility by the state for the individual's welfare and safety (including by the exercise of control). The paradigm example of assumption of responsibility is where the state has detained an individual, whether in prison, in a psychiatric hospital, in an immigration detention centre or otherwise."

(58) In paragraph 23 Lord Dyson identifies that the ECtHR:

> "… has repeatedly emphasised the vulnerability of the victim as a relevant consideration. In circumstances of sufficient vulnerability, the ECtHR has been prepared to find a breach of the operational duty even there has been no assumption of control by the state, such as where a local authority fails to exercise its powers to protect the child who to its knowledge is at risk of abuse as in *Z v United Kingdom* [2001] 34 EHRR 97".

(59) In paragraph 24 Lord Dyson identifies that a relevant consideration shown in the Strasbourg jurisdiction is "the nature of the risk" and whether this is an "ordinary risk" of the kind that individuals in the relevant category should reasonably be expected to take or an "exceptional risk" which could give rise to an operational duty. The example given is the risk that a soldier could expect as part of ordinary military duties as opposed to threats to life which "arise exceptionally".

(60) In paragraph 25, Lord Dyson indicates that the factors identified above are "relevant" but not "a sure guide as to whether an operational duty" would be found by the ECtHR and that this is not surprising where this area of the jurisdiction "is young" and "still being explored by the ECtHR".

(61) Also of relevance, in paragraph 100 of Rabone, Baroness Hale identifies that the Strasbourg court has not set down that the operational duty amounts to "a duty to protect an individual from taking his own life":

> "That there is no general obligation on the state to prevent a person committing suicide, even if the authorities know or ought to know of a real and immediate risk that she will do so".

(62) Pulling together the guidance in Rabone and applying it to this case, it is my conclusion that the respondent does not have an Article 2 ECHR positive operational duty towards the applicant. There are two main reasons for this.

(63) Firstly, it is difficult to see how the circumstances here can be properly found to amount to "well-defined circumstances" required for the duty to arise where they are only very partially in line with the criteria identified in Rabone as having the potential to show that an operational duty does arise. The applicant is clearly very vulnerable and that is a potentially relevant factor identified in paragraph 23 by Lord Dyson. There is also a real and immediate risk to life but this is specifically stated by Lord Dyson in paragraph 21 not to amount to a sufficient condition for the duty to arise. The situation identified in paragraph 24 of Rabone of an "exceptional risk" beyond a predictable, "ordinary" risk to life having the potential to give rise to a positive operational duty, the example being given of a soldier, is very different and not analogous, to the circumstance of the applicant in this case.

(64) The circumstances here are that the applicant has a genuinely held but overvalued preoccupation with his claimed date of birth. As the respondent has been unable to accept that his claimed date of birth is sufficiently well-evidenced and unable to issue an amended BRP after applying the systems she has in place for those assessments, the applicant's preoccupation has led him to refuse sufficient food and fluids for many months and taken him close to death. This is extremely serious but it is not a situation that can be said to come within or close to the criteria shown in ECtHR case law as capable of giving rise to an Article 2 ECHR positive operational duty on the respondent.

(65) Secondly, in Rabone the Supreme Court found that there was a positive operational duty on the NHS Trust responsible for the treatment and care of an involuntary patient to protect that patient's right to life. That situation is very close to WA's circumstances and, as in Rabone, the operational duty on the state to act to protect WA's right to life is being met here by the NHS Trust which is treating him in line with the treatment plan identified as most appropriate by the Court of Protection. That is where the state's operational duty and its response to that duty manifests in this case. That action is the proper implementation of the "appropriate steps" required by the ECtHR in Osman. Where that it so, it is not appropriate or proportionate for the respondent to be required to act outwith her legal powers and policy by accepting the applicant's claimed date of birth which she has found to be wrong under lawful procedures which are not subject to challenge here.

(66) The applicant argues that it is not correct or is not sufficient that only the NHS Trust is expected to meet the operational duty to protect the applicant's right to life. He argues that the state as a whole is required to act to protect Article 2 ECHR rights and that must include the respondent. The respondent's action in refusing to amend the BRP is therefore a failure by the state properly to recognise and respond to the duty to protect the applicant's life. Mr Southey QC relies on the case of Woś v Poland (Application 22860/02) as authority for the state's responsibility being indivisible and the state as a whole, rather than a single individual public authority, being responsible for responding to the operational duty.

(67) The case of Woś does not support this contention. The case was concerned with whether the state could absolve itself of responsibility for the actions of a private body which had been set up to administer war reparations and thereby avoid being fixed with a breach of an Article 6 ECHR right to a fair hearing. The ECtHR in Woś did not find that there was an indivisible operational duty across all state organisations to respect the applicant's Article 6 ECHR rights. The Court found that the state could not avoid responsibility by seeking to limit it to the private body delegated to administer the reparations scheme. Further, as above, the state here does not seek to avoid responsibility for WA's right to life via a private organisation but has accepted the Article 2 ECHR operational duty arises and is responding to it through the actions of the NHS Trust.

(68) The applicant also seeks support from the case of Mammadov v Azerbaijan (Application no.4762/05). In Mammadov, a family had been living in an unauthorised dwelling and the housing authorities and police attended to enforce their return to a hostel where they had permission to live. The applicant's wife, already very unwell, was so disturbed by these events that she threatened to set herself on fire if the authorities did not leave. Mrs Mammadov proceeded to carry out her threat and, after being taken to hospital, died from her injuries. The applicant in Mammadov argued that the state had breached the operational duty to protect his wife's right to life and also failed to carry out effective investigations into what had happened.

(69) Mr Southey QC referred to paragraph 115 of Mammadov which states:

> "115. The Court considers that, in a situation where an individual threatens to take his or her own life in plain view of State agents and, moreover, where this threat is an emotional reaction directly induced by the State agents' actions or demands, the latter should treat this threat with the utmost seriousness as constituting an imminent risk to that individual's life, regardless of how unexpected that threat might have been. In the Court's opinion, in such a situation as in the present case, if the State agents become aware of such a threat a sufficient time in advance, a positive obligation arises under Article 2 requiring them to prevent this threat from materialising, by any means which are reasonable and feasible in the circumstances.

(70) The applicant argues that this reasoning indicates that, "however unexpected the threat", the respondent can be under a positive operational duty if a threat to the applicant's right to life arises. As before, however, the reality is that here the

responsibility for the immediate threat to the applicant's life does not lie with the respondent but with the NHS Trust. The efforts to protect WA's right to life that are being made by the state via the NHS Trust are entirely in line with the kind of response the ECtHR considered appropriate in paragraph [116] of Mammadov:

> 116. In the context of the present case, the Court notes that, depending on practical possibilities and the moment at which the State agents became aware of the threat, some of the hypothetical steps to be considered could have entailed, inter alia, calming down the situation by verbally persuading Chichek Mammadova to refrain from any actions threatening her life, or physically preventing her from taking hold of and pouring kerosene on herself, or physically preventing her from igniting it, or putting out the fire as soon as she set fire to herself. Such steps could also have included providing immediate first aid, calling an ambulance or assisting in hospitalising the victim… ."

(71) For these reasons, the Tribunal concludes that there is no positive operational duty on the respondent to act in the way suggested by the applicant to protect the applicant's life and she is not in breach of Article 2 ECHR in declining to accept his claimed age and amend his BRP.

Article 8 ECHR

(72) Article 8 ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2.There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

(73) The ECtHR in the case of Ciubotaru v Moldova (Application Number 27138/04) identifies in paragraph 49 that a right to a private life includes "the right to establish details of their identity as individual human beings". The respondent accepts that the applicant's date of birth forms part of his personal identity and that Article 8 ECHR is engaged.

(74) The ECtHR in the case of Bensaid v UK (Application Number 44599/98) identifies in paragraph 47 that:

> "Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world … . The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."

Article 8 ECHR is therefore also engaged in relation to the applicant's mental health.

(75) The ECtHR has also identified that Article 8 ECHR encompasses not only the requirement for there to be no interference with the exercise of Article 8 ECHR rights unless that interference is shown to be lawful and proportionate but also a positive duty to respect Article 8 ECHR rights. This is set out in paragraph 50 of Ciubotaru which states:

> "Although the object of Article 8 is essentially to protect the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference. There may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life (see *X and Y v. the Netherlands,* 26 March 1985, § 23, Series A no. 91). The boundaries between the State's positive and negative obligations under this provision do not always lend themselves to precise definition; nonetheless, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation (see *Paulík v. Slovakia*, no. 10699/05, § 43, ECHR 2006XI (extracts))."

(76) The question before the Tribunal is, therefore, whether there is a positive duty on the respondent to respect the applicant's Article 8 ECHR rights by amending his BRP to reflect his claimed date of birth. As set out in Ciubotaru, in assessing whether the respondent is under that positive duty, a fair balance must be struck between the interests of the applicant and "the community as a whole" and the state enjoys a margin of appreciation.

(77) As set out in the decision of 14 July 2020 in paragraph 6 at D2, when the applicant claimed asylum his age was disputed and the respondent applied the "Disputed Age Cases" policy then in force in order to assign a date of birth. The lawfulness of that guidance is not challenged here and nor is that of the later iterations of that policy including the "Assessing Age" policy guidance followed in the decision of 14 July 2020. Following that policy, the respondent assigned the date of birth of 19 April 1989. When the applicant was granted refugee status, the respondent issued the applicant with a BRP containing the assigned date of birth. That was in line with the EC Regulation and the Biometric Registration Regulations which incorporated the EC Regulations into domestic law. The provisions of those Regulations are not challenged. It is also not disputed that the Biometric Registration Regulations give the respondent a discretion to amend the assigned date of birth in a BRP if she "thinks" that the "information provided in connection with the document was or has become false, misleading or incomplete"; see Regulations 16 and 17.

(78) It is therefore not in dispute that the respondent has made provision for a lawful system for determining the age of undocumented migrants and a system for deciding when that assigned age can be changed and applied that system when assigning an age to the applicant and issuing him with his BRP. It is not suggested here that those systems in themselves fail to strike a fair balance between the state and the individual. It is clear that maintaining coherence in the BRP system is in the public interest. A BRP allows for proper identification of the individual and of the rights

and benefits to which they are entitled. The respondent acts in line with ECtHR case law such as Ciubotaru in which the ECtHR found that a state should have a proper system for the records of someone's identity; see paragraph 57. The ECtHR continued in paragraph 57:

> "The Court does not dispute the right of a Government to require the existence of objective evidence of a claimed ethnicity. In a similar vein, the Court is ready to accept that it should be open to the authorities to refuse a claim to be officially recorded as belonging to a particular ethnicity where such a claim is based on purely subjective and unsubstantiated grounds."

(79) In applying these procedures when assessing what age should be assigned to the applicant and included in his BRP, the respondent meets the positive duty on her under Article 8 ECHR to respect an important part of the applicant's identity, his date of birth. That positive duty does not extend to having to assign the applicant the date of birth he maintains is correct, however genuine his belief may be. Where the respondent has adopted a proper process for determining the age of the applicant, Article 8 ECHR cannot require her to set that process aside because of the particular impact of the outcome of that process on a particular individual. Meanwhile, the NHS Trust responds to the positive duty on the state to protect the applicant's mental health.

(80) For these reasons, my conclusion is that there is no positive obligation on the respondent to respect the applicant's private life by amending his BRP to reflect his claimed date of birth and that there is therefore no interference with the applicant's Article 8 ECHR rights.

Rationality

(81) It is also the clear judgment of the Tribunal that the respondent's decision of 14 July 2020 is not irrational. In reaching that conclusion, the Tribunal has focussed below on the aspects of the decision that were the subject to particular criticism for the applicant.

(82) From the outset of the decision in paragraph 1 on D1, the respondent shows that she asked herself the correct question:

> "whether the new evidence causes me to:
>
> - change the current stated DOB on the Claimant's Biometric Residence Permit (BRP) to the claimed DOB;
> - maintain the DOB; or
> - record both the stated and claimed DOBs on the BRP"

(83) The respondent sets out accurately the new materials relied upon by the applicant; see D1. She indicates that during the assessment she kept in mind "the compelling

personal circumstances of [WA]" and appreciated that that they arose because of "the very significant distress his recorded age causes him"; see paragraph 4 on D2.

(84) The respondent then sets out the principles she applied when assigning the applicant with a date of birth and when considering whether the new materials could show that the claimed age should be preferred; see paragraphs 6 to 10 on pages D2 to D3. As before, the applicant does not challenge the legality or rationality of the legislation or guidance documents relied on by the respondent in her assessment. This guidance clearly allowed for prominent weight to be placed on a "Merton compliant" age assessment given that a local authority has the necessary expertise to make such an assessment. The same paragraphs point out the options that were open to the applicant to challenge the local authority age assessments if he disagreed with them but that no challenge was ever made.

(85) The decision then analyses the four age assessments; see D3 to D4. Submissions made for the applicant objected to the weight placed on the 2012 age assessment and to lesser weight being placed on the 4 March 2009 assessment which found the applicant's age to be 12 December 1994. Those submissions do not have merit where the respondent was entitled to give prominence to a Merton-compliant age assessment and the 2012 assessment is manifestly more comprehensive and detailed than that conducted on 4 March 2009; see paragraphs 11 and 14 to 17 above.

(86) The respondent goes on to assess individually the new pieces of evidence provided by the applicant; see D4 to D8. In paragraphs 13 to 15 of the decision, on page D4, the respondent takes into account a letter dated 26 June 2020 from the Principal at the applicant's school. As with all of the new materials put forward for the applicant, the respondent summarises the document, sets out the positive evidence going towards the applicant's claimed age contained in the document and then sets out other aspects of the document not favourable towards the applicant's case. That is a wholly clear and rational approach.

(87) Nothing in any of the assessments of the individual documents was shown to approach the threshold of irrationality. The respondent indicated across those assessments her appreciation that many of those providing the new evidence knew the applicant personally over a period of time and had expertise working with young people. At paragraphs 19 to 21, for example, the respondent considers the witness statement dated 8 June 2020 of Mrs DT, the applicant's foster mother, and acknowledges her involvement with young people over many years, the length of time she has known WA and how she has never doubted his claimed age. The analysis in these parts of the decision show that the respondent carried out a balanced and rational assessment of the new materials.

(88) It was argued for the applicant that in paragraph 26 of the decision the respondent was not entitled to rely on the comments of the Central and East Recovery Team on the possibility that a child may "hang onto the age they were when they fled and not accept the age throughout the journey". That submission relied on report of Dr Wild dated 2 September 2020 which is at J1. Dr Wild expressed the opinion in paragraphs

20 to 23 of her report that trauma "has likely" caused the applicant to age prematurely. She found this to be a more likely explanation for the applicant appearing older than his chronological age than his having failed to factor in the years that he was travelling to his understanding of his age. She relied on two studies on childhood trauma leading to premature physical aging to support her view.

(89) Paragraph 26 of the decision does not suggest that the comment of the Central and East Recovery Team attracted significant weight such that, even if it is shown to be unreliable by Dr Wild's report, it is difficult to see that this could undermine the rationality of the decision as a whole. In any event, Dr Wild's report does not show her to be an expert in age assessment. It is based in part on her meeting with the applicant which was conducted for a different purpose, an assessment of the applicant's capacity for the Court of Protection case. Dr Wild identifies academic research considering whether trauma can lead to premature ageing including the onset of puberty but does not set out any detail as to whether that research can be applied generally or how it should be used for a specific analysis of the applicant's apparently mature appearance. Looked at fairly, neither the Recovery Team report or Dr Wild's report do more than speculate as to the reason for the perceived discrepancy between the applicant's claimed age and the observations of his physical appearance at various times. As above, that is not sufficient to show irrationality of any materiality where, as above, the Recovery Team report forms a very limited part of the respondent's decision.

(90) In paragraph 32 the respondent considers the applicant's submission that his claimed age is supported by his having attended school consistently with that age. The final sentence of this paragraph refers to an age assessment conducted in 2011 but this appears to be a typographical error and the reference must intended to be to the age assessment from 2012. The respondent accepts the applicant's school attendance was consistent with his claimed age. It was not irrational for the respondent to decline to place more weight on this factor where she provides a cogent reason for not doing so, as the appellant's attendance at school followed the less reliable age assessments and not the more reliable 2012 age assessment.

(91) The decision of 14 July 2020 then turns in paragraphs 32 to 36 to the determination of the First-tier Tribunal from 2014 which found the applicant's asylum claim to be credible. The determination is at D15. The applicant submitted that the "global positive finding" on the applicant's credibility (in paragraphs 37 and 39 of the decision, D28) in a judicial assessment should lead the respondent to add weight to the applicant's claim about his age. Further, at the time of the hearing before the First-tier Tribunal, the respondent maintained that the applicant's date of birth was the assigned date of 19 April 1989. The determination shows in paragraph 20(i) on D19 that the respondent submitted to the First-tier Tribunal that "if [the applicant was born in 1989 his reports cannot be true." The First-tier Tribunal went on to find the applicant's claim credible, however. The applicant maintains that the fact of his credibility being accepted where the respondent at the time considered that the account could not be consistent with his assigned age acts to undermine the assigned

age and suggest more strongly that the claimed age may be correct. The respondent therefore erred in the decision of 14 July 2020 by not placing more weight in the applicant's favour on the basis of these aspects in the First-tier Tribunal decision.

(92) The respondent addresses those submissions in the decision of 14 July 2020 and does not accept them. The Tribunal's view is that her reasons for not doing so, set out in paragraphs 33 to 36 of the decision, are cogent. The First-tier Tribunal was clearly aware of inconsistencies in the evidence concerning the applicant's date of birth and the chronology of his account; see, for example, paragraph 20(i) D19 and D20, paragraph 21 (i) of D21 and paragraph 34 on D26 and D27. The First-tier Tribunal went on to say in paragraph 34 of the determination (at D27):

> "There have been a variety of age assessments undertaken. The appellant himself believes he was born in 1994 because that is what he was told by his grandmother, but the age assessment puts him as being born in 1989. It is known that he was in Italy in 2003 and 2005 when he was fingerprinted. As Mr Edwards commented it is unlikely that his year of birth will ever be ascertained. His 'birth' certificate was obtained from Libya and can never have been verified against official records even if these ever existed. The appellant has explained that his 2007 statement contained many falsehoods as he was saying what he had been instructed to say by the agent and he sought to disclaim it. Against this whole background I find that errors in chronology are not determinative of the truth of the claim."

(93) In this paragraph the First-tier Tribunal agrees with the respondent's submission that the applicant's age may never be ascertained. It is also clear that the judge does not make a finding on either the claimed or the assigned age or attribute any particular age or date of birth to the applicant. My reading of the final sentence in paragraph 34 is that, given the inconsistencies identified in the evidence, trying to reconcile dates or establish a consistent chronology was not possible but that this did not prevent the judge, after conducting a holistic assessment of all of the evidence, from finding the applicant's core claim of facing a risk on return was credible to the lower standard. As Ms Broadfoot QC submitted at the hearing, the judge focussed more on assessing whether the evidence was capable of showing a risk on return and not on reconciling the applicant's date of birth and the chronology. The applicant's submission that the First-tier Tribunal decision implies that the claimed age "*may* be true" (paragraph 49 of applicant's skeleton argument) is not made out, therefore.

(94) It is also perhaps worth pointing out that other aspects of the First-tier Tribunal decision support the view that it cannot be read as an endorsement of particular parts of the applicant's evidence even where it finds his evidence in the round to be credible. It is asserted for the applicant that the respondent is wrong to maintain that he was fingerprinted in Italy in 2003; see paragraph 6 above. The extract from paragraph 34 of the First-tier Tribunal decision set out above, however, shows that the judge made a clear finding that "he was in Italy in 2003".

(95) The fact of the applicant being found credible in the round by the First-tier Tribunal also cannot not bear the weight asserted for the applicant. There is no suggestion by the respondent here that the applicant is not an honest person or that he is not

entirely genuine in his belief as to his claimed age. The credibility finding of the First-tier Tribunal does not assist the applicant greatly, however, where, it is clear on the face of the First-tier Tribunal determination and in other evidence, for example the age assessments, that the evidence on his date of birth remains very variable and not at all straightforward. It follows that the respondent did not err in paragraphs 32 to 36 of the decision of 14 July 2020 in finding that the First-tier Tribunal decision did provide significant assistance to the applicant in establishing his date of birth.

(96) The applicant also challenged the comments made in paragraph 37 of the decision on the prominence given to the 2012 age assessment. I have already set out above why the respondent was entitled to find the 2012 assessment the most reliable of the four age assessments. This paragraph does not state that the approach taken by the respondent was to require documentary proof of age in order for the 2012 age assessment to be displaced. It merely sets out the correct approach provided in the "Assessing Age" guidance that where there is an absence of documentary evidence, prominence should be given to a "Merton compliant" age assessment.

(97) The substantive remaining parts of the respondent's decision are set out in paragraphs 44 to 46 above. As already indicated, the respondent was entitled to work from the starting position of the age already assigned to the applicant and require satisfactory evidence showing that this was not correct and should be amended. She was entitled to give prominence to the 2012 age assessment. She explains the legitimacy of the processes she applied when assessing and reassessing the applicant's age. The decision takes into account the applicant's medical issues. In so far as it finds, as this decision does above, that no breach of Articles 2 or 8 ECHR arises, it is rational.

(98) For all of these reasons, the Tribunal concludes that the respondent's decision of 14 July 2020 does not disclose public law error on the ground of rationality.

Conclusion

(99) The application for judicial review is refused as it has not been shown that the respondent's decision of 14 July 2020 breaches the applicant's rights under Article 2 and 8 ECHR or is irrational.

(100) The Tribunal appreciates that this conclusion may have very serious implications for WA as he may experience it as a further repudiation of his deeply and genuinely held belief as to his correct date of birth. Any right-thinking person would wish to avoid causing him any further suffering and be deeply concerned at the prospect of any further deterioration in his health. That being so, however, does not permit the Tribunal do anything else here but fulfil its duty to apply the law as it is understood to the facts as found without fear or favour.

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UTIJR6

JR/1572/2020

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

The Queen on the application of

WA
(Anonymity Direction Made)

Applicant

v

Secretary of State for the Home Department

Respondent

Before

Upper Tribunal Judge Pitt

ORDER

Sitting remotely at Field House, 15-25 Breams Buildings, London, EC4A 1DZ on 15 & 29 September 2020

UPON the application for judicial review having been listed for a remote substantive hearing on 15 September 2020

AND UPON the Tribunal having heard oral detailed submissions on 15 September 2020 from Mr Southey QC for the Applicant and Ms Broadfoot QC for the Respondent

AND UPON the Tribunal, on 16 September 2020, having issued directions relating to the handing down of the judgment and having promulgated an embargoed judgment on 25 September 2020

AND UPON the Applicant on 28 September 2020 having submitted a written application for permission to appeal to the Court of Appeal

AND UPON the Respondent informing the court on 28 September 2020 that while under usual principles, the Respondent would be entitled to her costs, she does not seek an order for cost on the very specific facts of this case at this stage but that the Respondent may seek her costs should the matter go further

IT IS ORDERED:

a. The Applicant's application for judicial review is dismissed.

b. Permission to appeal is refused.

c. No order as to costs, save that the publicly funded costs of the Applicant shall be subject to detailed assessment.

REASONS FOR REFUSING PERMISSION TO APPEAL TO THE COURT OF APPEAL

1. The Applicant applied for permission to appeal to the Court of Appeal in written submissions dated 28 September 2020.

2. In paragraphs 6 and 8.4 of the grounds, the Applicant maintained that the Tribunal erred in law in failing to make a finding of fact on the Applicant's date of birth.

3. At the hand down hearing on 29 September 2020, after receiving the reserved judgment and in response to paragraphs 6 and 8.4 of the Applicant's grounds, the Respondent invited the Tribunal, exceptionally, to amend the reserved judgment to include a finding of fact on the applicant's date of birth. The Applicant objected to any substantive amendment to the reserved judgment.

4. The Tribunal did not accede to the Respondent's invitation for the following reasons. Firstly, it is clear from what is in the judgment that the Tribunal does not accept on any basis that the case put before the Tribunal establishes that the Applicant's date of birth is as claimed.

5. Further, the Tribunal does not accept the submission that in this case the Tribunal had the task of reaching a view on the Applicant's exact date of birth. As the judgment shows, there have been previous executive and judicial assessments of the Applicant's age and the Applicant's case here did not adduce primary evidence going to his age. The question for the Tribunal in this application was a different one, whether the Applicant could establish that the age in his Biometric Residence Permit (BRP) was wrong and that the BRP should, instead, show his claimed date of birth.

6. The evidence led before the Tribunal does not establish the Applicant's exact date of birth but only goes to various conflicting views on his date of birth. This is not a case like the standard age assessment judicial review cases where, if the Applicant falls into a particular age range he is entitled to statutory benefits. As before, this case can only succeed if the Applicant can show that the Respondent should not have entered the date that she has on the BRP and that she should have entered the particular claimed date of birth he puts forward. For the avoidance of doubt, the Tribunal indicates again here that the conclusions in the judgment are based on the lack of evidence to show that either of those propositions can be made out.

7. The Tribunal therefore declined the Respondent's invitation to make a substantive amendment to the reserved judgment and proceeded to consider the Applicant's grounds for permission to appeal to the Court of Appeal.

8. The Applicant submitted in paragraph 7 of the grounds that the Tribunal's decision on there being no breach of Article 2 ECHR was wrong in law. The Tribunal did not find, as alleged in the grounds, that the respondent's view of the Applicant's age was determinative of whether a breach of Article 2 ECHR arose. The determinative question was whether a positive operational duty arose and lawful reasons were given for finding that it did not; see paragraphs 47 to 64 of the judgment. Paragraphs 65 to 71 of the judgment explain why the case of Woś does not support the Applicant's submission that the Respondent is under a positive operational duty.

9. The Applicant submitted in paragraph 8 of the grounds that the Tribunal erred in finding that the Respondent's decision refusing to amend the BRP disclosed no breach of Article 8 ECHR. Paragraph 78 of the judgment sets out how the respondent has met any positive duty on her to respect the Applicant's Article 8 ECHR rights, was entitled to look for sufficient evidence justifying an amendment to a BRP and was not, in law, required to do more than she did. There was no requirement as of the date of the decision for the respondent

to have a policy on amending dates of birth in BRPs. Paragraph 8.4 of the grounds is dealt with in paragraphs 4 to 6 above.

10. The Applicant submitted in paragraph 9 of the grounds that the Tribunal's decision disclosed legal error in the assessment of the rationality of the Respondent's decision. The Tribunal gave detailed and cogent reasons in paragraphs 81 to 95 of the judgment for finding that the respondent took a rational approach to the decision of the First-tier Tribunal. As noted by the Tribunal in paragraph 83 of the judgment, the respondent's decision did recognise the impact on the applicant. The rationality of the respondent's decision was subjected to the requisite close scrutiny by the Tribunal; see paragraphs 81 to 97 of the judgment.

11. The Tribunal therefore concludes that the grounds of appeal for permission to appeal to the Court of Appeal show no real prospect of success. The case turns on very particular facts rather than highlighting a novel point of law or legal point of more general application. In all the circumstances, therefore, the Tribunal does not find that it is appropriate to grant permission to appeal for some other compelling reason; [21] of J-S (Children) [2019] EWCA Civ 894 and [22]-[23] of JD (Congo) v SSHD [2012] EWCA Civ 327 applied.

Signed: *S Pitt*
Upper Tribunal Judge Pitt **Signed on: 29 September 2020**

Dated:

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 29/09/2020

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).