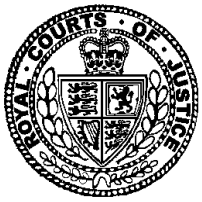

Neutral Citation Number: [2021] EWCA Civ 12

Case No: C2/2020/1693

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
UPPER TRIBUNAL JUDGE PITT
JR/1572/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 January 2021

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE BEAN
and
LORD JUSTICE PHILLIPS

- -

Between:

THE QUEEN ON THE APPLICATION OF WA (PALESTINIAN TERRITORIES)	**Claimant/ Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Respondent**
- and -	
MIND	**Intervener**

- -
- -

Hugh Southey QC, David Chirico and Asma Nizami
(instructed by **J D Spicer Zeb Solicitors**) for the **Appellant**
Samantha Broadfoot QC and Julia Smyth
(instructed by **The Government Legal Department**) for the **Respondent**
Stephen Simblet QC (instructed by **Rheian Davies, Solicitor**) for the **Intervener**

Hearing date: 25 November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 12 January 2021.

Lord Justice Phillips:

1. The appellant ("WA") is a national of the Palestinian Territories. He suffered sustained torture as a child in Gaza and then physical and sexual abuse in Italy whilst on his way to the United Kingdom, where he claimed asylum. He was granted refugee status and leave to remain in this country in April 2014, receiving a Biometric Residence Permit ("BRP") issued by the Home Secretary which stated that his date of birth was 19 April 1989 ("the Stated Date"), the date considered most likely in the last of four age assessments carried out by local authorities between 2007 and 2012. WA was granted indefinite leave to remain in July 2019.

2. On 29 September 2020 Upper Tribunal Judge Pitt ("the Judge") dismissed WA's expedited claim for judicial review of the Home Secretary's refusal, most recently on 14 July 2020 ("the Decision"), to amend the date of birth on his BRP to 29 December 1994 ("the Claimed Date"). WA, who suffers from continuing depression and complex features of PTSD, genuinely and firmly believes that the Claimed Date is his true date of birth. In the context of his traumatic personal history, he finds the imposition of what he believes to be an incorrect date created by the Home Office to be dehumanising and corrosive of his sense of identity. In March 2020 he began to restrict his intake of fluids and food and his BMI fell to a dangerously low level. He has been in hospital since 20 April 2020. Although WA is currently accepting some clinically assisted nutrition and hydration (CANH) pending the outcome of these proceedings, his weight continues to fall and his life is in imminent danger.

3. WA now appeals the dismissal of his claim, with permission granted by Lewis LJ[1], on the grounds that:

   i) the Judge erred in failing to make a finding of fact as to WA's true date of birth, notwithstanding that the Home Secretary had accepted that the Judge could do so on the particular facts of this case;

   ii) the Judge was wrong to conclude that the Home Secretary did not owe a positive operational duty arising from WA's right to life under article 2 of the European Convention on Human Rights ("the ECHR"), and further wrong to decide that the only response required by such duty was through the NHS, the state body caring for WA;

   iii) the Judge was wrong to hold that WA's right to respect of his private life pursuant to article 8 of the ECHR did not impose a positive obligation on the Home Secretary to amend the BRP to reflect the Claimed Date.

4. The Home Secretary rightly recognises that WA's personal circumstances evoke the greatest sympathy and appropriately makes plain that she is acutely aware of what was at stake. The Home Secretary nevertheless resists the appeal, contending that no operational duty is owed under article 2, and that any duty has in any event been

[1] Permission was refused to appeal on the ground that the Judge should have found the Decision to be irrational.

fulfilled. Further, as the Claimed Date was outside the reasonably possible range of WA's birth date, there is no obligation under Article 8 to amend the BRP to reflect it.

5. An anonymity direction has been made in this case. No report of these proceeding shall directly or indirectly identify WA or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

The background

6. The following summary of the background is drawn, in the main, from the Judge's detailed account.

Events prior to WA's arrival in the UK in 2007

7. WA was born in Gaza in the Occupied Palestinian territories. 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. WA maintains that his grandmother told him that his date of birth was the Claimed Date and gave him documentation confirming it, but that was lost during his journey to Italy. After arriving in Italy he was subjected to physical, sexual and mental abuse.

8. WA was fingerprinted in Italy on 22 December 2003, 23 February 2005 and 23 August 2005. The Home Secretary points out that the Italian Authorities would only have taken fingerprints if they understood on each occasion that WA was over 14 years of age, which would indicate his birth-year was no later than 1989. WA now claims to have been aged only 8 on the first of those occasions and 10 on the second and third.

The First Assessment

9. On 31 May 2007 WA arrived in the United Kingdom and claimed asylum. He claimed to be a minor, aged 14, born on 19 April 1993. However, as WA did not have a reliable identity document and looked older (as a photograph taken on arrival might suggest), an age assessment was necessary.

10. Such an assessment ("the First Assessment") was carried out on 4 June 2007 by Reading Borough Council. The assessment records that WA explained that he knew his date of birth to be 19 April 1993 because his mother had informed him of that throughout his childhood. There was no mention of the Claimed Date, nor of being informed of his birth date by his grandmother. The assessor concluded, given his physical appearance, response to questions and demeanour, that he was not a minor, but was aged between 18 and 20 years. WA now says that he was then only 12.

11. The Home Secretary acted on the First Assessment, treated WA as an adult and returned him to Italy on 24 August 2007. However, WA manged to return to this country in early March 2009 (the Judge mistakenly stating that it was in May 2009) and again claimed asylum as a child, on this occasion asserting that he was aged 15, having been born on 29 January 1994. He produced a purported birth certificate with that date and an identity document made in Libya.

The Second Assessment

12. A second age assessment was undertaken by Gloucestershire County Council ("Gloucestershire") on 4 March 2009 ("the Second Assessment"). Although no copy of the Second Assessment is now available, its contents are referred to in the Fourth Assessment, referred to below. Gloucestershire rejected WA's claims, finding him to be 16 years old.

The Third Assessment

13. Gloucestershire undertook a further assessment on 20 March 2009 ("the Third Assessment"), the report of which consists of brief manuscript entries, with some sections left blank. The writer stated that WA 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". The report also refers to the birth certificate showing the Claimed Date, but issued in October 2008, indicating that the original had been lost. Apparently on that basis, WA's age was assessed as 14 and his date of birth was estimated as the Claimed Date.

The Fourth Assessment

14. On 21 February 2012 an organisation called Independent Age Assessment produced a further assessment on behalf of Gloucestershire ("the Fourth Assessment"), referring to a three-hour interview with WA the previous September. This assessment, by two social workers, was by far the most detailed, including consideration of WA's account and presentation, the full documentary history, previous assessments, photographs taken in 2007 and 2009 and physical characteristics. It is not suggested that it was other than fully "Merton compliant"[2]. The author noted, among other matters, (i) that WA's legal representatives placed no reliance on the purported birth certificate showing the Claimed Date; (ii) that his receding hairline and facial hair in 2007 and that he had reached his terminal height in 2009 suggested that he was older than his claimed age by some margin; and (iii) that UKBA had records of WA's birth dates as 19.4.89, 10.5.91 and 19.4.83 (assumed to be a slip for 19.4.93, the date he gave on first arrival) and that the Italian authorities recorded a date of 10.5.87. The conclusion was as follows:

> "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 19.4.89. However, in the light of the range of information which needs to be taken into account it is accepted that there could be [a] fairly wide margin of error in this: it is believed very unlikely that he is as much as 2 years younger than this date but it could be as much as 3 years older."

[2] Shorthand for compliance with the requirements of an age assessment on which the Home Secretary may rely as set out in *R(B) v Merton London Borough Council* [2003] EWHC 1689 (Admin) and developed in subsequent cases.

15. WA did not challenge the Fourth Assessment. At some point thereafter, acting on the conclusion of that assessment as to the most likely date, the Home Secretary assigned the Stated Date as WA's date of birth.

The outcome of WA's asylum claim

16. WA's asylum claim was eventually refused on 4 February 2014, but his appeal was successful in the First-tier Tribunal. Judge Woolley found that, considering all the evidence in the round, WA's account was credible and that he had a well-founded fear of persecution in the Palestinian territories. As indicated above, WA was thereafter granted refugee status and, in July 2019, indefinite leave to remain. As a refugee he was required to apply for, and was issued, a BRP. WA's document contained the Stated Date.

WA's life in this country

17. WA was placed with a foster family in 2009 and has remained with them ever since, forming deep bonds and strong attachments with his foster parents and siblings. His foster parents, Mr and Mrs DT, have fully supported him strongly in this dispute, as well as in other matters. He is described by all who met him as a kind and gentle man who is highly motivated to help others. He has studied at college, enjoys a range of interests and pursuits and until recently played football with a local team.

18. Nevertheless, WA has continued to suffer significant psychological distress from the traumas he endured in Gaza and Italy. One aspect of that condition has been increasingly profound distress at the use of the Stated Date recorded on the BRP rather than the Claimed Date. WA's use of the Claimed Date in relation to matters such as his GCSE certificates and bank accounts has caused him difficulties when seen to be inconsistent with the Stated Date on the BRP.

WA's hunger strike and its consequences

19. Matters came to a head this year. In the early stages of the Covid-19 pandemic WA made an application to volunteer at a Nightingale hospital. The application was rejected because the date of birth he gave (the Claimed Date) was inconsistent with the Stated Date on his BRP. This event triggered a serious relapse in his mental state, which included a complete refusal of food and fluids. On 20 April 2020 he was admitted to hospital. WA accepted intravenous fluids but refused nasogastric feeding. On 30 April 2020 he was detained under the Mental Health Act 1983. On 4 May 2020 he was fed using a nasogastric tube, but found this to be intolerable. Further attempts at feeding were unsuccessful and he thereafter intermittently accepted fluids and very limited nutrition. His health became severely compromised.

The commencement of these judicial review proceedings

20. On 5 June 2020 WA's representatives sent a pre-action protocol letter to the Home Secretary requesting that the date of birth on his BRP be changed to the Claimed Date, followed by further submissions and a witness statement from WA and his foster mother. On 10 June 2020 the representatives informed the Home Secretary that WA's heart had shrunk and that death could follow at any time.

21. On 10 June 2020 the Home Secretary responded, declining to amend the BRP because WA had not provided evidence to support the Claimed Date. These proceedings were commenced on 11 June 2020 and on the same date the Upper Tribunal ordered WA to serve any further evidence and submissions and the Home Secretary to confirm within 14 days thereafter whether she would maintain the Stated Date on the BRP or effect a change. On 17 June 2020 WA agreed to the insertion of a nasogastric tube to ensure his survival until the outcome of the Home Secretary's further consideration.

The Decision

22. On 14 July 2020 the Home Secretary gave her decision based on representations and further material served on 26 June 2020, refusing to effect any change. The letter stated that:

    i) although there was some evidence which supports the Claimed Date, considering matters in the round, there was no evidence which would lead to a conclusion that the age assessments were wrong and that WA was the age he claimed to be;

    ii) whilst the Immigration (Biometric Registration) Regulations 2008 ("the Regulations") permitted the Home Secretary to require the surrender of and cancel a BRP which was or had become false, misleading or incomplete, there was no power to amend a document to contain information which the Home Secretary believes to be false, and such proactive action would be inconsistent with the regulations, which underline the importance of accuracy;

    iii) WA's condition was not disputed, but any decision on age should be evidence-based. 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.

    iv) the Home Secretary recognised that Article 8 rights relating to private life extend to features integral to a person's identity or ability to function socially as a person. However, the requirements, under the Regulations, of ensuring that someone's identity remains consistent, did not violate WA's Article 8 rights. To the extent that they did, any interference was justified due to the public interest in maintaining the integrity of the age assessment process and the recording of accurate information on the BRP.

The Court of Protection proceedings

23. In the meantime, the Mental Health Partnership and the NHS Trust responsible for WA applied to the Court of Protection for directions as to whether WA had capacity to make decisions about his nutrition and hydration and, if not, what approach to nutrition and hydration would be in WA's best interests.

24. On 16 July 2020, after a four-day hearing in which he heard evidence from WA and his foster mother, Hayden J determined that WA lacked capacity to make decisions about his nutrition and hydration and approved a treatment plan, but rejected options which involved forced-feeding. Hayden J emphasised that WA's autonomy would be

protected, which meant that if he refused to accept clinically assisted nutrition and hydration, that refusal should be respected.

25. In his judgment Hayden J further:

i) made numerous positive comments about WA and his character, commenting that he was "intelligent, articulate and honest" and "the gentlest and most courteous of men";

ii) stressed that WA's refusal to eat or drink was not manipulative or designed to achieve leverage with the Home Office;

iii) recorded that if the Claimed Date was restored to WA, all the doctors were clear that it would be a significant boost to his psychological wellbeing;

iv) but commented that WA had 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; and

v) concluded that 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.

The Regulations

26. The UK Borders Act 2007 s.5(2) provides that regulations made under that Act (the Regulations referred to above) may make provision about the content of BRPs and s.5(3) permits the Home Secretary to cancel a BRP in numerous circumstances, including:

> "(f) if the Secretary of State thinks that the document should be re-issued (whether because the information recorded in it requires alteration or for any other reason)."

27. Regulation 15(1) provides that a BRP "may" contain some or all of certain specified information, including "(d) the holder's date of birth".

28. Regulation 16(1) provides that the Home Secretary may require the surrender of a biometric immigration document if she thinks that:

> "(a) information provided in connection with the document was or has become false, misleading or incomplete;
>
> ……..
>
> (d) the document should be re-issued (whether because the information recorded in it requires alteration or for any other reason)"

29. Regulation 17 provides that the Home Secretary may cancel a BRP in various situations, including the two specified in Regulation 16(a) and (d).

Ground 1 – whether the Judge should have determined WA's true date of birth

The Judge's approach

30. At the hearing of the claim for judicial review, WA invited the Judge to determine his age as a matter of fact. The Home Secretary reserved her position should the matter go further, but accepted that the Tribunal could make a finding on the facts as to WA's age. The Home Secretary further accepted that if the Judge found, on the balance of probabilities, that WA's age was as he claimed, then Article 8 would require the reissue of his BRP with an amended date of birth. However, it was also the Home Secretary's case that the Judge could not sensibly find in WA's favour in that respect.

31. In her judgment promulgated on 29 September 2020, the Judge undertook a detailed consideration of the written evidence as to WA's date of birth, in particular in relation to the contention that the Decision was irrational. The Judge concluded that it was not irrational, but did not, at least expressly, make a finding as to WA's age or date of birth.

32. On receipt of the draft of the judgment, and noting WA's proposed grounds of appeal, Ms Broadfoot QC, counsel for the Home Secretary, sent an urgent note to the Judge, exceptionally inviting the Tribunal to address the factual issue of age in the finalised judgment. WA, on the other hand, objected to any substantive amendment to the draft.

33. The Judge declined the Home Secretary's invitation to amend the draft. In written reasons for refusing WA permission to appeal, the Judge stated that it was clear from the judgment that she did not accept on any basis that the case put before her established that WA's date of birth was as he claimed. Further, the question was not WA's exact date of birth, but whether he could show that the age on his BRP was wrong and that it should instead show the Claimed Date.

34. WA now contends that the Judge erred in failing to determine his birth date, particularly where both parties invited her to do so.

The applicable principles

35. It was common ground (and recognised by the Judge in her judgment) that, on the application for judicial review of the Decision, it was for the Tribunal to decide whether WA's rights under the ECHR had been violated. It was not a question of reviewing whether the Home Secretary had properly considered those rights: *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420.

36. In *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin), [2010] HRLR 2, the Divisional Court considered claims that British soldiers had murdered or tortured Iraqis in breach of Articles 2 and 3 of the ECHR. In ordering cross-examination of witnesses, the Court recognised that the usual procedure in judicial review cases is for there to be no oral evidence and for factual disputes to be resolved in favour of the defendant. However, a different approach was needed where, as in that case, there were "hard edged" questions of fact which could be determined by the court so that there would remain no room for legitimate disagreement. Where it was necessary for the court to determine factual issues itself, cross-examination could be ordered.

WA's argument on appeal

37. WA's contention was that his date of birth was a "hard-edged" fact, capable of being determined by the court on all the evidence, including, in particular, from WA himself (consistently accepted to be credible and honest) and his foster mother, an experienced carer well-placed to assess WA's age when he was placed with her in 2009. As the Tribunal was obliged to decide whether WA's rights had been breached by including the Stated Date on his BRP, it could not avoid the obligation to determine the crucial precedent fact, namely, what was his true date of birth.

38. Even if the Tribunal could not have reached a conclusion on the balance of probabilities, WA argued, it could form a view of the probability that the Claimed Date was accurate, such probability forming an important element in the subsequent consideration of the proportionality of the Decision. In *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449, Sedley LJ explained at 479E, albeit in the context of assessing a claim for asylum, that "…the convention issues from first to last, are evaluative, not factual. The facts, so far as they can be established, are signposts on the road to a conclusion on the issues; they are not themselves conclusions..."

Discussion

39. In my judgment the starting point is that there is no primary record of WA's date of birth, his representatives rightly not relying on the purported certificate created in Libya many years later. Neither is there any other direct evidence as to when he was born. Whilst WA is accepted to be honest and credible, his current firm belief is based on his recollection of what he was told (and given) by his grandmother when, on his account, he was a young child. He himself gave a different date, supposedly told to him by his mother, on arrival in this country in 2007, and gave yet a third date in between. It seems that other dates have been provided here and in Italy. In those circumstances, while fully accepting that WA now honestly believes the Claimed Date, his recollection that it is what he was told by his grandmother cannot be regarded as reliable (even assuming that she herself knew and told him the correct date).

40. In those circumstances WA's age was necessarily and properly the subject of assessment. This involved a process of evaluation of a wide range of evidence and, ultimately, an expression of expert opinion as to age and an educated guess as to the most likely date of birth. The Fourth Assessment, the most detailed, comprehensive and Merton compliant, gave a wide range for WA's date of birth (1986 to 1991), and nominated the Stated Date as the most likely. The Claimed Date falls outside that range by at least three years.

41. In my judgment, there was no prospect that the Tribunal could have determined WA's date of birth on the balance of probabilities, even if it heard evidence, including persuasive opinion evidence from WA's foster mother and others. The Judge was right not to undertake that task. Even if a "hard-edged" fact would be determinative of judicial review proceedings if established, there is no obligation to undertake a fact-finding exercise if there is no sensible prospect that the fact could be established to the requisite standard. I also see no merit in a fact-finding exercise resulting in ascribing percentage probabilities to each of various dates suggested as being WA's true date of birth. Once it is recognised that a precise date of birth cannot be established by evidence, the best that can be done is to assess age. That assessment may lead to a "most

likely" date of birth, representing an assessment of the mid-point of the probable range, or the convention of using 1 January of the most likely year as the birth date.

42. Further, I accept the Home Secretary's contention (as did the Judge in her reasons for refusing permission to appeal) that, in any event, the evidence is not capable of establishing that the Claimed Date is WA's true date of birth. WA has been assessed, consistently, as being significantly older than he claims, the one exception being the Third Assessment, which itself expressed a wide range and appears to have placed WA at the very bottom of it due to a misplaced reliance on the Libyan-produced birth certificate. Given that WA's own account has not been consistent and that there is no other direct evidence, there is simply no basis for departing from the weight of expert opinion as to his age range.

43. For those reasons, I see no merit in this ground of appeal.

44. I would add that, in the course of argument, I asked whether, given that the wording of Regulation 15(1) is permissive rather than mandatory, it would be a solution to the dispute for WA's BRP to be re-issued with no date of birth specified, or with a phrase such as "over 21". Neither party considered such a course would be acceptable. WA explained that it was important to him, as a matter of principle, that the Claimed Date was recorded. Further, the absence of a date of birth on the BRP would result in many questions being asked, whereas he just wanted to be normal. The Home Secretary explained that the BRP was in a standard form in use throughout Europe and that consistency and reliability of information was central to the efficacy and integrity of the regime.

Ground 2: Article 2 of the ECHR

The applicable principles

45. Article 2 provides "Everyone's right to life shall be protected by the law". In *Rabone v Pennine Care NHS* [2012] 2 AC 72 Lord Dyson JSC explained at [12] that the European Court of Human Rights ("the ECtHR") has interpreted those few words as giving rise to several both negative and positive duties on the state. In particular, "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. The positive obligation must be interpreted "in a way which does not impose an impossible or disproportionate burden on the authorities".

46. In *Rabone*, an NHS Trust had allowed a voluntary psychiatric patient to visit her home, despite knowing that she was suicidal. The question was whether the Trust had breached an operational duty owed to the patient under Article 2 and was liable for the fact that she had indeed killed herself.

47. Lord Dyson first reviewed the cases where the ECtHR had recognised the existence of an operational duty, including *Mammadov v Azerbaijan* (Application No 4762/05) (2014) 58 EHRR 18, where the applicant's wife had set fire to herself during an attempt by police officers to evict the applicant and his family from accommodation they were occupying. The ECtHR stated:

> "115… 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 art.2 requiring them to prevent this threat from materialising, by any means which are reasonable and feasible in the circumstances."

48. Lord Dyson then attempted to discover the essential features of those cases, stating:

> "21…It is clear that the existence of "a real and immediate risk" to life is a necessary but not sufficient condition for the existence of the duty. This is because...a patient undergoing major surgery may be facing a real and immediate risk of death and yet…there is no article 2 operational duty to take reasonable steps to avoid the death of such a patient.
>
> 22. No decision of the ECtHR has been cited to us where the court clearly articulates the criteria by which it decided whether an article 2 operational duty exists in any particular circumstances. It is therefore necessary to see whether the cases give some clue as to why the operational duty has been found to exist in some circumstances and not in others. There are certain indicia which point the way …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 exercise of control). The paradigm example of assumption of responsibility is where the state has detained an individual…
>
> 23. When finding that the article 2 operational duty has been breached, 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 where there has been no assumption of control by the state, such as where a local authority fails to exercise its powers to protect a child who to its knowledge is at risk of abuse…
>
> 24. A further factor is the nature of the risk. Is it an "ordinary risk" of the kind that individuals in the relevant category should reasonably be expected to take or is it an exceptional risk?...the court drew a distinction between risks which a soldier must expect as an incident of his ordinary military duties and 'dangerous' situations of specific threat to life which arise exceptionally from risks posed by violent, unlawful acts or others or man-made or natural hazards. An operational obligation would only arise in the later situation.
>
> 25. All of these factors may be relevant in determining whether the operational duty exists in any given circumstances. But they do not necessarily provide a sure guide as to whether an operational duty will

> be found by the ECtHR to exist in circumstances which have not yet been considered by the court…. But it seems to me that the court has been tending to expand the categories of circumstances in which the operational duty will be found to exist."

49. Applying those principles, Lord Dyson found that an operational duty existed in *Rabone*. The patient had been admitted because she was a real suicide risk. She was extremely vulnerable. The Trust had assumed responsibility for her and she was under its control. Once it was established that there was a "real and immediate" risk to her life, the duty arose.

50. Baroness Hale of Richmond JSC, at [100], addressed the more precise question of when the state has a duty to protect an individual from taking his own life, stating:

> "It does seem fairly clear 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. I say this because, in *Mammadov*…the court twice stated...that the duty to protect a person from self-harm arose only "in particular circumstances"…This is understandable. Autonomous individuals have a right to take their own lives if that is what they truly want. If a person announces her intention of travelling to Switzerland to be assisted to commit suicide there, this is not, by itself, sufficient to impose an obligation under article 2 to take steps to prevent her.

51. At paragraph [101] Baroness Hale recognised that what those "particular circumstances" are was harder to determine, but at [104] she stated that:

> "The state does have a positive obligation to protect children and vulnerable adults from the real and immediate risk of serious abuse or threats to their lives of which the authorities are or ought to be aware and which it is within their power to prevent."

The Judge's reasons

52. The Judge accepted that there was a real and immediate risk to WA's life, being the necessary condition identified by Lord Dyson in *Rabone,* and that he was vulnerable, but she did not see how the circumstances of the case can properly be found to amount to "well defined circumstances". There was no "exceptional risk" to WA beyond a predictable ordinary risk.

53. Further, it was the NHS that was treating WA, in a situation that was very close to the circumstances in *Rabone*, so the state's operational duty and its response manifested itself there. It was the NHS that was obliged to take "appropriate steps". The Judge rejected the contention that, once a state was under an operational duty, all parts of the state were subject to the duty. The case in *Wós v Poland* App. No 44599/98 did not support that concept, but was rather authority for the proposition that the state could not delegate performance of an operational duty to a private contractor.

54. The Judge also rejected the contention that the case of *Mammadov* indicates that an immediate threat to commit suicide imposes an operational duty on the Home Secretary.

Again, the Judge considered that the state's obligation to respond to the immediate threat was that through the NHS.

55. Accordingly the Judge concluded that there was no positive operational duty on the Home Secretary under Article 2 to amend WA's BRP so as to protect his life.

The arguments of WA and the Intervener on the appeal

56. As the Judge had accepted that WA was a vulnerable patient in the control of the State, whose life was at real and immediate risk, a positive operational duty necessarily arose, as the Judge herself recognised. The question was whether the duty extended beyond the NHS Trust to the Home Secretary.

57. Mr Southey QC, on behalf of WA, stressed that from the ECtHR's point of view, the state was a single indivisible entity. Once it was accepted that the state was under a positive operational duty to protect WA's life, any organ of the state was required to take reasonable and proportionate steps to fulfil that duty. In this case the Home Secretary was the representative of the state whose actions and inactions had given rise to WA's decision to stop eating and drinking, and was the representative who could take simple, reasonable and proportionate steps to reverse that decision: applying the test in *Mammadov*, as state agents have become aware of such a threat, 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. In the same way that the Polish state in *Wós* could not delegate duties to a third party, the state could not avoid the operational duty to take reasonable steps by leaving the response to an organ of the state that could not take those steps.

58. The conclusion of WA's argument was that, if the Home Secretary was under a positive operational duty to take any reasonable and feasible step, it was obviously proportionate for the Home Secretary to amend the BRP.

59. The Intervener supported WA's arguments, particularly as to indivisibility of the state for the purposes of the operational duty, and stressed that the courts will often go to great lengths to protect Article 2 rights where it is only the identified risk to life that creates the Article 2 operational duty. The Intervener concluded that the Home Secretary's stance "puts pettifogging bureaucracy over life".

Discussion

60. When someone makes a serious and sustained attempt to take their own life, they may well come within the care or control of a branch of the state, whether it be the police, the social services or the NHS, and may well be a vulnerable person in need of state protection by the appropriate agencies. The state, through the relevant organ, would thereby be likely to come under a positive operational duty to take reasonable steps to protect the life of that person (the patient), whether by way of urgent response or longer-term care.

61. WA's argument, however, is that if the cause of the patient's suicidal intentions is deep unhappiness (whether or not justified) with an administrative decision of another branch of the state, that branch is obliged, on learning of the effect of its decision on the patient, to take proportionate steps to change the decision so as to protect the

patient's life. This is the case even though the impact of the administrative decision on the patient's life, viewed objectively, might not be considered to be significant. Indeed, the less significant the decision, the more proportionate it would be to reverse it to save the patient's life. The range of administrative decisions which might have to be reconsidered and reversed in this scenario is obviously wide: decisions as to benefit payments, taxation, housing and immigration status would be subject to review if they resulted in great distress and consequent threats (considered to be genuine) to commit suicide. When required to "protect" a life, a small (but unjustified) increase in benefit payments or a small (but unjustified) tax rebate might be viewed as entirely proportionate. It is not difficult to conceive of a situation in which a patient is severely distressed and threatening suicide by reason of the administrative actions of multiple government agencies.

62. In my judgment, no obligation to review administrative decisions in such circumstance will usually arise under Article 2. The state body undertaking such administrative matters, such as the Home Secretary in WA's case, will not have assumed responsibility for the welfare and safety of the patient and will not have a role in addressing the aspects that render the patient vulnerable. The fact that other branches of the state (in WA's case, the NHS) may come under operational duties due to their assumption of responsibility for or control over the patient cannot sensibly impose an operational duty on other branches of the state in exercising functions that would not otherwise give rise to such a duty.

63. Such an analysis is not an attempt impermissibly to "divide" the state or to treat its operational duties as being delegated to one branch only. It is rather a recognition that operational duties which arise from assumed responsibility for or control over a person must necessarily relate to the branch of the state which has that responsibility or control and its duties in that regard.

64. WA relies upon the broadly worded statements in *Mammadov* and by Baroness Hale in *Rabone* as to the existence of an operational duty when the state knows or ought to know of a threat to life. However, those statements were made in the context of considering when a duty arose, not the scope of the duty and by which branch of the State it was to be performed. In *Mammadov*, the operational duty plainly fell to be performed by police officers who attempted to evict the suicidal wife: they were the state agents exerting authority and control and had responsibility for the welfare of the occupants in so doing. In the same way, it is plain that Baroness Hale had in mind that the operational duty would be imposed on and performed by the authorities with responsibility for the welfare of children or the vulnerable, not by other branches of the state making purely administrative decisions not obviously connected with the welfare and safety of those children or the vulnerable.

65. In this case the protection of WA's life was plainly the responsibility of the NHS Trust, giving rise to operational duties in that regard as in *Rabone.* To impose a corresponding operational duty on the Home Secretary in exercising a record keeping function not obviously related to welfare and safety would be to expand the scope of Article 2 far beyond any ECtHR decision to date and in a manner not intended by that court.

66. I therefore consider that the Judge was right to reject WA's claim under Article 2, largely for the reasons she gave.

Ground 3: Article 8 of the ECHR

The applicable principles

67. Article 8 of the ECHR provides as follows:

> "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 well-being of the country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others."

68. In *R (Elan-Cane) v Secretary of State for the Home Department* [2020] 3 WLR 386, King LJ provided the following framework for considering whether the Home Secretary was under a positive obligation to introduce the option of an "X" marker in a passport to denote that a person identified as having no gender:

> "i) In considering Article 8 in relation to respect for family and private life, the court must first examine whether there existed a relationship, or state of affairs, amounting to private or family life within the meaning of Article 8 of the Convention."
>
> ii) Having determined that Article 8 is engaged, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference, the next stage is to consider whether there is, on the facts of the case, not only the primary negative obligation inherent in Article 8, but also a positive obligation ingrained in an effective respect for private or family life.
>
> iii) In considering whether there is a positive obligation, and if so how it should be given effect, the state enjoys a certain margin of appreciation. It may be that the margin of appreciation alters in its breadth, for example it may be narrower at the stage of determining whether there is or is not a positive obligation and wider as to how that positive obligation should be implemented.
>
> iv) In considering whether there is such a positive obligation on the state, regard must be had to the fair balance struck between the competing interests.
>
> v) In In determining whether there has been an interference with a Convention right, the domestic court will consider what test would be applied by the European Court of Human Rights (ECtHR). However, it is for the domestic court to decide whether the proposed justification for the alleged interference has been made out by the state."

69. In considering the question of "fair balance", King LJ, at [103] put into the equation the impact on the claimant, including the limited impact on their Article 8 rights overall of the denial of the availability of an "X" marker on the passport application form. The court concluded that HMPO's current policy does not at present amount to an unlawful breach of the claimant's Article 8 rights.

70. The obligation of a state in relation to changing aspects of identity in formal records was considered in *Ciubotaru v Moldova* (2010) 29 BHRC 326, in which the applicant had sought to have his ethnicity on his identity card changed from Moldovan to Romanian, but was not permitted to rely on evidence demonstrating his claim. The ECtHR stated as follows:

> "56. The government's main argument was that recording an individual's ethnic identity, solely on the basis of his or her declaration and in the absence of any objective grounds linking the individual to the ethnicity claimed, could lead to serious administrative consequences and to possible tensions with other countries.
>
> 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. In the instance case, however, the applicant appears to have been confronted with a legal requirement which made it impossible for him to adduce any evidence in support of his claim."

71. In *Bulgakov v Ukraine* (2011) 52 EHRR 11 the applicant had sought an order requiring the state to issue a passport showing his original Russian name rather than the "Ukrainianised" version. The ECtHR recognised that a name was not only an important element of self-identification, but it was a crucial means of personal identification in society at large. However, the Court also held that issuing a new passport with a changed name:

> "...might dissociate the person from his or her other important personal documents and records. To maintain the link between the "old" and the "new" forms of a person's name, it would be reasonable to require the individual to follow a specific procedure for effective change."

72. The ECtHR referred to the procedure for changing a name, stating that the restrictions under the relevant regulations appeared to be justifiable under Article 8(2).

The Judge's reasons

73. The Judge found that:

i) the Home Secretary had made provision for a lawful system of determining the age of undocumented migrants and a system for deciding when that age could be changed, thereby fulfilling the requirement of having a proper system for recording a person's identity;

ii) in applying those procedures in assessing WA's age and including it in his BRP, the Home Secretary met the positive duty under Article 8 to respect an important part of WA's identity, his date of birth;

iii) that positive duty did not extend to having to assign WA the date of birth he maintained to be correct: Article 8 could not require the Home Secretary to set aside the proper process adopted because of the particular impact of the outcome of that process on a particular individual. The NHS Trust responds to the positive duty on the state to protect WA's mental health.

The arguments of WA and the Intervener on the appeal

74. Mr Southey contended that the Judge erred in focusing solely on the Home Secretary's policies and procedures and regarding compliance with them as determining compliance with Article 8. That approach failed to have any regard to the circumstances of the individual, WA, and the proportionality of refusing to respect his wishes with regard to his identity in view of the impact on him. As the impact on WA was enormous, the proper consideration of individual proportionality leads to the conclusion that his Article 8 rights did give rise to an obligation to amend his BRP.

75. That argument was supported by the Intervener, who emphasised that the Judge ignored the fact that the Decision has resulted in a massive effect on the private life of WA, not only in relation to his identity documents, but his ability to live a normal life. Whilst there was an argument that Article 2 duties in respect of WA's condition were imposed on the NHS and not the Home Secretary, that was not an issue in relation to Article 8, where both positive and negative obligations rested with the latter.

76. Mr Southey further contended that the Judge further erred in failing to take into account, in assessing proportionality, the reliability of the Claimed Date and also of the Stated Date. She has also failed to appreciate that there was not in fact any policy or procedure in relation to the change of a date of birth on a BRP.

Discussion

77. It was common ground that WA's right to respect for his private life included the right to have his date of birth accurately stated on his BRP. The question which arises in the present case, however, is whether he was entitled to have the date amended to a date which cannot be established by evidence and which is well outside the wide range of his assessed age, where the consequence for WA of refusal are very grave indeed.

78. In my judgment, and as recognised by the ECtHR in *Ciubotaru*, a public authority's record keeping function must respect the Article 8 rights of individuals, but that does not extend to inserting information in records which is not supported by evidence and is considered, on good grounds, to be inaccurate or misleading. That must be the case no matter how serious the consequence for a particular individual.

79. It may not matter whether that conclusion is reached by holding that there is no positive duty to insert inaccurate or unverified information, or by deciding that the duty to respect an individual's identity (or his perception of it) is overwhelmingly overridden by the public interest in accurate and evidence-based records.

80. If follows that I agree with the Judge that WA's claim under Article 8 must also fail.

Conclusion

81. I would therefore dismiss the appeal. In so doing, I would echo the Judge's concern as to the impact of the decision on WA and share her view that any right-thinking person would wish to avoid causing WA any further suffering and be deeply concerned at the prospect of any further deterioration in his health. I would also repeat Hayden J's view that 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.

Lord Justice Bean:

82. I agree with both judgments, in particular the closing remarks in each of them. I too profoundly hope that WA will make the choice to live.

Lord Justice Underhill:

83. I also agree. This is a deeply sad case, and I am very conscious of the possible consequences of our decision to uphold the stance being taken by the Secretary of State. However, I do not think that it is fair to her to characterise this as a case where the life of a mentally ill man is being put at risk by a point of "pettifogging bureaucracy", as Mind has chosen to describe it. The true nature of the issue can be brought into clearer focus by considering what the position would be in a slightly more straightforward situation. The starting-point is that WA's "biometric residence permit" is the key document evidencing his right of residence in the UK and his status for all official purposes: it is equivalent in authority to his passport or (in another country) his official identity card. Suppose that we were concerned with the inclusion in such a document not of the subject's age but of some other objective fact whose truth or otherwise could be clearly established – say, their nationality or their parentage or their height or eye colour (which used to be recorded in passports). In ordinary circumstances it would go without question that the state would be not only entitled but obliged to use the objectively correct information, however much the person in question genuinely but wrongly believed something different: the integrity of official records is, rightly, a matter of fundamental importance. That entitlement, and obligation, cannot be altered by the fact that as a result of a mental illness the subject is prepared to imperil their life unless plainly incorrect information is included in the official record. The consequent risk to their life is a tragic consequence of their illness, and it cannot fairly be regarded as the responsibility of the state because it is not willing to record something that it knows to be untrue. At para. 61 of his judgment Phillips LJ gives examples of many other kinds of cases where a person might genuinely threaten suicide if they were not accorded a benefit to which they were not entitled – for example, the grant of housing or a particular immigration status; and these illustrate how impossible the consequences would be if that threat created an obligation on the state to confer the benefit nonetheless. (Some of those examples relate to financial benefits – and indeed date of birth, with which we are concerned here, governs entitlement to, for example, pension rights; but that is not the heart of the point.)

84. Part of WA's argument is that the situation in his case is different because, unlike in the examples I have posited above, his date of birth cannot be definitively established: since no "right answer" can now be identified, why should the Secretary of State refuse

to accept the date which WA personally believes to be correct? I am afraid, however, that I cannot see that the situation is in truth any different. Although it may not be possible to be sure of WA's correct date of birth, it does not follow that no date can be shown to be clearly incorrect. It is still possible to establish the range of possible dates. Phillips LJ has set out the materials which must form the basis of any assessment of WA's age, culminating in the extremely thorough "fourth assessment", which arrives at a five-year range between 19 April 1986 and 19 April 1991: obviously the end-points of the range are less likely than a date nearer the mid-point. That is itself a generous range, but the date of birth now (though not originally) claimed by WA is more than three and a half years after the latest date in it. The Secretary of State and the Judge were fully entitled to take the view that the evidence simply could not support that date. That being so, there is no distinction from the situation considered in the previous paragraph. The state is being asked to include in a core official document important information which is simply wrong. It cannot be put under an obligation to do so by WA's intention – however sincere – to take his own life if it does not do so.

85. Phillips LJ has recorded how the Court in the course of the hearing explored possible compromises or middle positions which might give both parties a way out of this situation, but it appears that even if the Secretary of State were prepared to adopt some form of words to accommodate WA's belief he is not at present prepared to accept anything less than the unequivocal inclusion in his BRP of his claimed date of birth. I, like Phillips LJ, profoundly hope that ways can be found to persuade WA to make the choice to live, for his own sake and for that of all those who love and value him.