Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/10552/2019 (V)**

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*
On 17 March 2021

Decision & Reasons Promulgated
On 29 March 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

G K P
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation:
For the Appellant: Mr. J Akhter, Legal Representative, Hudson Legal
For the Respondent: Mr. T Lindsay, Senior Presenting Officer

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Hoffman ('the Judge') sent to the parties on 23 September 2019 dismissing the appellant's appeal against a decision of the respondent to refuse to grant him leave to remain on human rights (articles 3 and/or 8 ECHR) grounds under, or alternatively, outside the Immigration Rules ('the Rules').

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2. Paragraph 4 of the grounds of appeal confirms that the appellant solely challenges the decision of the Judge in respect of his article 3 appeal alone. There is no challenge to the Judge's decision made in respect of the article 8 appeal.

3. By a decision dated 6 July 2020 Upper Tribunal Judge Gill granted the appellant permission to appeal on all grounds, though her primary focus was directed towards ground 1.

4. From the outset I observe that this matter is an example of that fortunately rare creature, an appeal weighed down by the chains of several unfortunate failures by legal representatives. Having been required to consider the matter in detail, it has become apparent that several other failures lie beneath the surface.

5. Legal representatives have been made aware as to my concerns in respect of several failings which arise in this matter. I addressed my concerns with clarity at the hearing. The representatives have accepted responsibility for their failures. I am satisfied each failure by a legal representative was inadvertent rather than negligent, and on their own would not have given rise to the primary ground of appeal now advanced in this matter, namely procedural fairness. It is unfortunate that circumstances conspired to ensure that the combination of several inadvertent failures resulted in the appellant appearing before this Tribunal.

6. An additional concern arising in this matter is the insufficient care given to the drafting of the grounds of appeal that were filed with this Tribunal.

7. It is also appropriate that I detail in this decision my concerns as to the approach adopted by the respondent in respect of her consideration of the initial application for leave to remain.

8. I take this opportunity to thank Mr. Lindsay for his concise and careful submissions, which proved helpful.

Remote hearing

9. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in exactly the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

10. The appellant did not attend the hearing.

11. By directions sent to the parties on 2 December 2020, UTJ Gill directed that Mr. A Rajagopal, Solicitor, G Singh Solicitors, and Mr. S Harding, Counsel, make themselves available to be cross-examined. They attended the hearing remotely,

having on 24 September 2020 filed witness statements dated 10 September 2020 and 21 September 2020 respectively.

Anonymity

12. The Judge issued an anonymity direction in this matter, and no request was made by either party before me for the direction to be set aside.

13. In respect of anonymity and tribunals, the requirement that justice should be administered openly and in public is a fundamental tenet of the domestic justice system. It is inextricably linked to freedom of the press and so any direction as to anonymity must be necessary and reasoned: *R. (Yalland) v. Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin).

14. The public enjoys a common law right to know about court proceedings and such right is also protected by article 10 ECHR.

15. The Judge failed to indicate within his decision as to whether an anonymity direction had been sought by one or both of the parties before him and the reasons for the request, if made. All that is detailed is the direction itself at the conclusion of the decision, in a section imprecisely entitled 'anonymity directions'. Upon reading the record of proceedings it is apparent that Mr. Harding sought a direction 'in light of' the appellant's vulnerabilities. The record of proceedings further details that the presenting officer, Ms. Burrell, presented no objections to a direction being granted.

16. It is unfortunate that the Judge decided to provide no reasons as to why relevant article 10 protections were to be set aside in this matter. As observed by the Supreme Court *In re Guardian News and Media Ltd and Others* [2010] UKSC 1, [2010] 2 A.C. 697 where both articles 8 and 10 of the ECHR are in play, it is for the Tribunal to weigh the competing claims under each article. Since both article 8 and article 10 are qualified rights, the weight to be attached to the respective interests of the parties and family members will depend on the facts. The Judge was therefore obliged to provide reasons as to why article 10 rights were given lesser weight than those given to the appellant's article 8 rights. Such reasons may permissibly be short, with reference to the relevant Guidance Note, but they are required.

17. I am mindful that considerations arise in this matter as to the appellant's mental health concerns. I observe Guidance Note 2013, No. 1 which is concerned with anonymity directions and I note that the starting point for consideration of such directions in this chamber of the Upper Tribunal, as in all courts and tribunals, is open justice.

18. Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules') contains a power to make an order prohibiting the publication of information relating to the proceedings or of any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.

19. Rule 14(7) of the 2008 Rules contains a presumption that information about mental health cases and the names of the people concerned in such will not be disclosed in the absence of good reason. I am satisfied that in the circumstances which arise to be considered in this matter, and in particular the issue of suicide ideation, the interests of justice require that the appellant is not named in these proceedings. I therefore issue the anonymity direction detailed at the conclusion of this decision.

Background

20. The appellant is a national of India and presently aged 31. He entered the United Kingdom with entry clearance as a student on 9 April 2008 and was granted leave to enter until 31 August 2009. He made subsequent variation applications for leave to remain as a Tier 4 (General) Student, with the last grant of leave expiring consequent to curtailment on 3 April 2015.

21. On two occasions, in 2015 and 2016, the appellant applied for an EEA Residence card. The second application was refused by a decision dated 14 April 2017. I understand that the refusal was on 'marriage of convenience' grounds and the appellant withdrew his appeal pending before the First-tier Tribunal in June 2018.

22. The appellant applied for leave to remain on human rights grounds by an application dated 18 December 2018. The application form expressly detailed that he sought leave to remain in this country on private life grounds. This does not preclude an applicant relying upon other relevant articles of the ECHR, but such reliance is to be expressly identified elsewhere in the application.

23. Accompanying the application were various documents including a 'psychiatry' report ('the report') authored by Dr Mala Singh, MBChB, MSC, MRCPsych, Consultant Psychiatrist, dated 26 November 2018. The report provides no detail as to whether this was the first occasion Dr Singh had met the appellant, and no time is detailed in respect of the length of the consultation. Reference is made to a letter of instruction, which is not to be found in the bundles of either party filed with the Tribunal. Dr Singh was provided with two documents. The first is a short letter from the appellant's GP, dated 11 October 2018, detailing that the appellant suffered from 'moderate depression', was taking antidepressants in the form of Mirtazapine, at the mid-level maintenance dose of 30mgs, and the risk of self-harm was identified as 'low'. The second document is a letter from West London Mental Health, dated 5 November 2018.

24. Dr Singh stated as her clinical opinion that the appellant was suffering from a 'major depressive episode ICD 10 F32.2 severe without psychotic symptoms'. For the sake of precision, I note at this juncture that ICD-10 code F32.2 is a medical classification for a 'major depressive disorder, <u>single episode</u>, severe without psychotic features'. The depressive disorder was therefore not recurrent in nature at the time of the report.

25. I observe within the appellant's bundle that an identification of worsening suicide ideation and depressive symptoms is noted in a care plan authored by North West London Specialist Mental Health Services after an outpatient assessment attended by

the appellant on 14 November 2018, three days before his consultation with Dr Singh.

26. In her report Dr Singh opined that the appellant's depression is in the severe range with marked anxiety and panic disorder. She further opined that the appellant has a moderate degree of PTSD.

27. The respondent refused the application by means of a decision letter dated 5 June 2019. The application was considered under article 8. The respondent concluded that the appellant could not meet the requirements of paragraph 276ADE of the Rules. Further, exceptional circumstances did not arise as the appellant could secure medical treatment in India. Whilst considering exceptional circumstances, the respondent addressed article 3:

> '35. Consideration has been given to the differences in the standard of medical facilities in India compared with that available here. Whereas it is accepted that the health care systems in the UK and in India are unlikely to be equivalent, this does not entitle you to remain here. The fact that your circumstances would be less favourable in country [sic] than they are in the UK, is not decisive from the viewpoint of Article 3.
>
> 36. Consequently, it is not accepted that your removal from the UK reaches the high threshold of severity to breach Articles [sic] 3 of the ECHR on the basis of your medical claim and condition.'

28. I have concluded that the two paragraphs detailed above are generic in nature, and evidence limited, if any, consideration of article 3 and the facts arising in this matter. When considered alongside a paragraph that erroneously details the appellant to be HIV+, such approach as adopted strongly suggests a lack of requisite care on the part of the decision's author.

<u>Hearing Before the FtT</u>

29. The appellant was represented at the hearing before the Judge by Mr Harding. Reliance was placed upon a bundle of documents running to 145 pages, which included letters dated 26 April 2019 and 7 August 2019 authored by Syril Derage, specialist practitioner in recovery and transitions, NHS West London. The letter of April 2019 was simply confirmation of an appointment having been made for the appellant. The letter of August 2019 confirmed that the appellant had been seen by the relevant assessment and recovery team since October 2018 and noted that the appellant reported experiencing suicidal ideation at least once a week.

Dr Singh's letter, dated 10 September 2019

30. An unfortunate aspect of this appeal is that at the hearing the Judge was unaware of a letter ('the letter') authored by Dr Singh, dated 10 September 2019, in which she detailed her clinical opinion that the appellant was not in a fit state to give evidence. The letter details:

> 'I have assessed [the appellant] on 9th September 2019, he appeared very dejected and withdrawn . [sic] His attention and concentration was poor, he was not able to give a coherent account of himself. He described getting frequent thoughts of ending his life by jumping in front of a train .[sic] He said his family do not want to know him on account of his marriage which ended badly . [sic] He is extremely traumatised by the violence and abuse he suffered in the marriage. He gets repeated nightmares and intrusive recollections of the past. In my clinical opinion [the appellant] is not in a fit state to give evidence in oral hearing [sic] as this will lead to deterioration in his mental state and further cause emotional and mental harm. He will not be able to cope with giving evidence and the process will increase the risk of suicide.'

31. Mr Rajagopal details by means of his witness statement that a copy of Dr Singh's letter was sent by post to the respondent on 11 September 2019. No corroborative evidence was filed with the Tribunal confirming postage. Mr Rajagopal informed me that he was certain that the letter had been sent in the manner detailed by his witness statement. In answer to my query as to why efforts were not undertaken to email or fax the Presenting Officers Unit in circumstances where the hearing was so close in time, Mr. Rajagopal informed me that he was not aware of the Unit's telephone and fax numbers or its general email address at the relevant time. It is unfortunate that Mr. Rajagopal did not undertake the simple step of conducting an internet search, the general telephone number and general email address of the Unit at Fleetbank House having been online since at least 2018. I confirmed at the hearing my acceptance that G Singh Solicitors had not intended to ambush the respondent with the letter on the morning of the hearing. I further accepted that G Singh Solicitors had sent the letter to the respondent by post in the matter detailed by Mr. Rajagopal. However, I observe that legal representatives should exhibit an understanding as to how long it may take for a document to reach the desk of a presenting officer, particularly when a document is being posted so close to the hearing, and there is an expectation that professional representatives will seek to identify the most expeditious and appropriate form of communication with the respondent.

32. Mr. Rajagopal states that he arranged for a copy of the letter to be faxed to Taylor House. The fax transmission sheet relied upon by Mr. Rajagopal, discussed below, details that the fax was sent to an identified number at 10.05 on 12 September 2019. I have been unable to locate the fax cover sheet and accompanying letter on the Tribunal file. However, I note that the destination number recorded on the fax transmission sheet is the fax number for Taylor House, and so conclude on balance that it was received by the First-tier Tribunal the day before the listed hearing.

33. On the day of the hearing, 13 September 2019, a copy of Dr Singh's letter was received at Taylor House under cover of a letter from G Singh Solicitor's dated 11 September 2019. The covering letter simply states:

> 'We enclose herewith letter dated 10 September 2019 from the Consultant Psychiatrist regarding the Appellant. We will be grateful if you place this for the attention of the Immigration Judge for the hearing on Friday 13 September 2019.

> A copy of this letter and enclosures has been served on those acting for the Respondent at the address below. [Address of Presenting Officers Unit detailed]'

34. The time of receipt has not been recorded by the hearing centre.

35. I asked Mr. Rajagopal as to why the covering letter failed to clearly detail the importance of Dr Singh's letter and in additional failed to request that it be urgently placed before a judge. Mr. Rajagopal stated his understanding that the contents would become clear upon Dr Singh's letter being read consequent to its receipt at the hearing centre. I observed to Mr. Rajagopal at the hearing that this approach was unduly optimistic. The hearing centre at Taylor House is a large building, running in the region of 26 hearing rooms at the relevant time, with most individual daily lists having between 2 to 4 hearings. In addition to appeal hearings, it also runs bail courts and float lists. Consequently, it receives considerable correspondence every working day, generating much paperwork, that is required to be distributed around the building. Mr. Rajagopal's professed expectation that administrative staff would read the contents of documents received by post and email, which may be one page or several hundred, and ascertain their importance can only be considered entirely misplaced. There was no indication employed within the covering letter as to the importance of the document. Such indication was particularly relevant in circumstances where the letter was sent to Taylor House so close to the hearing date and there was a real likelihood that it would only arrive on the morning of the hearing.

36. Having posted the letter to the respondent, and additionally posted and faxed the letter to the Tribunal, Mr. Rajagopal's final step was to send a copy to Mr. Harding by email. This step was undertaken at 16.02 on 11 September 2019. The email is brief in terms, and does not inform Mr. Harding that the appellant had met again with Dr Singh in consultation:

> 'Attached your copy of the letter from Consultant served on the FTT and HOPOU earlier today.'

37. Mr. Harding accepted by means of his witness statement that he received the email. He explained that by oversight he did not appreciate that he had received additional medical evidence, being unaware that the appellant had recently attended upon Dr Singh, and so erroneously understood that he was being sent a report that he had already read. He therefore failed to open the attachment. I was informed that if he had opened the attachment, Mr. Harding would have brought additional copies to the hearing and sought to secure appropriate instructions.

Hearing

38. The three means adopted by G Singh Solicitors to convey Dr Singh's letter to the Judge, via fax, post and Mr. Harding were unsuccessful. Further, consequent to the approach adopted by G Singh Solicitors in posting the letter to the respondent, rather than sending it by email, Ms. Burrell was unaware of the letter. The hearing therefore proceeded with the Judge and both representatives unaware that Dr Singh had

opined that the appellant was unfit to give evidence. In the circumstances, upon the Judge having confirmed that he would treat the appellant as a vulnerable witness, the appellant gave evidence and was cross-examined. Consequent to submissions, the Judge reserved his decision.

Post-hearing receipt of Dr Singh's letter

39. Having reserved his decision, the Judge became aware of Dr Singh's letter on 17 September 2019. This was six days before he signed his decision. He addressed the letter at [20] of his decision:

> '20. I note that despite the contents of Dr Singh's letter, there is no suggestion that the appellant is incapable of providing instructions to those representing him. Moreover, the appellant's solicitors did not state in their covering letter that their client would not be giving oral evidence to the tribunal. It is clear that the appellant's solicitors have been in possession of Dr Singh's letter from at least 11 September 2019 and they therefore had time to discuss its contents with Mr Harding. However, at the hearing, Mr Harding made no mention of Dr Singh's letter and, as I said above, he instead made an application for the appellant to be treated as a vulnerable witness, which I granted. I therefore assume that it was agreed between the appellant and those representing him in these proceedings that, notwithstanding Dr Singh's blunt assessment that the appellant was not fit to give oral evidence and that the process will increase the risk of suicide, he could in fact be cross-examined. I would add that the appellant did not seem to be distressed while giving oral evidence, and he was able to answer the questions put to him by Ms Burrell and myself without the aid of an interpreter. Furthermore, there was no obvious deterioration in his mental state during the hearing. While I informed the appellant at the outset that he could ask for a break if required, he did not seek one. Finally, but importantly, Mr Harding did not ask me to find that any of the appellant's answers should be doubted as a result of his mental health problems.'

First-tier Tribunal's decision

40. In considering the medical evidence relied upon by the appellant the Judge noted at [31] that it was not disputed by the respondent that the appellant suffered from mental health problems. The core of the respondent's position was that the appellant could obtain support from his family in India and access mental health treatment in that country.

41. At [34] the Judge noted that Dr Singh did not detail in her report as to how she applied the Clinical Outcomes in Routine Evaluation Scale and the Hamilton Rating Scale. The Judge considered Dr Singh's prognosis at [35]-[37]. He then considered Dr Singh's evidence in conjunction with the evidence of Syril Derage and other NHS documents at [38]-[39], with the Judge proceeding to explain at [40]-[43] as to why he preferred the evidence of Syril Derage. It is appropriate that I detail [42]-[43]:

> '42. Finally, I return to Dr Singh's letter dated 10 September 2019 referred to earlier in this determination. As mentioned above, Dr Singh is not treating

the appellant and it is unclear from his [sic] letter why the appellant was sent to see him [sic] again on 9 September 2019. No letter of instruction has been provided from the appellant's solicitors, so it is unclear what Dr Singh was asked to provide and in what terms. I find that detracts from the weight I can attach to his [sic] 11th hour letter. If the appellant was sent to Dr Singh to obtain an assessment that he was unfit to give oral evidence then, as I mention above, those representing him appear to have decided that, contrary to Dr Singh's opinion, he could in fact do so. If instead Dr Singh was being asked to provide an up-to-date medico-legal report for this appeal, then his [sic] one paragraph letter addressed simply to 'Sir/Madam' falls far short of what is required for that. I find that rather than providing a sober assessment of the appellant's current condition, Dr Singh's letter provides only a broad-brush sketch. No detail of Dr Singh's purported assessment of the appellant on 9 September 2019 is provided. His [sic] claim that the appellant is in no state to give oral evidence is not explained in any detail. For example, he [sic] does not provide any examples of how the appellant was unable to give a coherent account of his claim. He [sic] also fails to consider whether the appellant might be exaggerating or fabricating his condition. Neither does Dr Singh explain why the appellant would be in such a poor mental state now given that he has been undergoing treatment for some time. That claim is contrary to what Mr. Derage reports, i.e. that the appellant has responded 'somewhat effectively' to the support provided to him. I also take into account that, importantly, those actually treating the appellant on the NHS have not provided evidence to say that the appellant is so fragile that he is unable to give oral evidence to the tribunal, and, as I said above, Dr Singh's opinion on this point is undermined by the fact that the appellant was so able.

43. I therefore find that Dr Singh's letter displays a distinct lack of nuance and detail expected of expert evidence. Having considered Dr Singh's letter of 10 September 2019 in the round with his report and the other medical evidence, I remain of the opinion that while Dr Singh and Mr Derage agree on many points, where Dr Singh departs from the NHS evidence, the more measured evidence of NHS (who have had far greater interaction with the appellant and are responsible for his treatment) is to be preferred. I do not therefore accept that, as of the date of hearing, the appellant's mental health has deteriorated to the extent that he is unable to give oral evidence, as Dr Singh claims.'

42. The Judge dismissed the appeal on both articles 3 and 8 grounds. As to article 3, the Judge considered the health care, or 'medical' claim, concerned with the appellant's depression and related mental health concerns at [64]-[65]. Such consideration is rooted in an assessment under the test established in *N v. Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 A.C. 296. The Judge then proceeded to consider article 3 and the risk of suicide separately at [66]-[75] through the prism of the Court of Appeal judgment in *J v. Secretary of State for the Home Department* [2005] EWCA Civ 629, [2005] Imm. A.R. 409.

Grounds of Appeal

43. The appellant's grounds of appeal were filed with the Tribunal by his present legal representatives, Hudson Legal. As discussed with Mr. Akhter at the hearing, the grounds do not meet the basic requirements expected by this Tribunal. Whilst the Tribunal will usually overlook spelling mistakes, it does expect the grounds advanced to correctly state the law, to be both internally and externally consistent, and for sentences to make sense. There was a consistent failure to meet these basic requirements in this matter. The use of paragraph numbers is expected. I observe that the use of paragraph numbering in this matter, and on occasion their replacement with letters, appeared to be exercised at the whim of the author; sometimes present yet missing for entire pages. Mr. Akhter assured me that such significant failings as to drafting that arose in this matter were a rarity, and my concerns were noted.

44. As it is difficult to provide an adequate summary of the grounds, particularly grounds 2 or 3, without engaging in a laborious battle with what is written on the page and with what is ultimately understood to be the case advanced[1], it is appropriate that I detail UTJ Gill's reasoning in full when granting permission to appeal:

> 'After the hearing before Judge of the First-tier Tribunal Hoffman had concluded on 13 September 2019, the judge received (on 17 September 2019) a letter dated 11 September 2019 from the appellant's representatives (G Singh Solicitors) which enclose a letter dated 10 September 2019 from Dr Mala Singh, a consultant psychiatrist, who said in his [sic] letter that he [sic] had examined the appellant on 9 September 2019 and concluded, inter alia, that the appellant was not in a fit state to give evidence and that the process of doing so will increase the risk of suicide.
>
> The judge did not have copies of these letters at the hearing, nor was his attention drawn to them by the appellant's Counsel, Mr. S Harding. The appellant gave oral evidence and was cross examined.
>
> At para 20 his decision, the judge said, inter alia, that there was no suggestion that the appellant was incapable of giving instructions and that the appellant did not seem to be distressed while giving oral evidence.
>
> Ground 1 contends that the judge erred at para 20, in that, he was not qualified to comment on the mental state of the appellant. Ground 1 also contends that the judge should have called for a hearing *de novo* upon reading the letter from the consultant psychiatrist.
>
> Ground 1 raises issues that require to be considered by the Upper Tribunal, including whether:

[1] I take this opportunity to observe that there is not, as asserted by the appellant, a procedural rule that the evidence of a witness not called by a party to give evidence at a hearing must be accepted by a judge unless and until a judge directs of their own volition that the witness attends the hearing and gives live evidence. It is a matter for a judge as to what weight to give to the evidence.

i) the appellant's representatives (G Singh Solicitors) ought to have brought the letter dated 10 September 2019 from Dr Mala Singh to the attention of Mr Harding, Counsel, prior to the hearing;

ii) whether Mr, Harding ought to have brought the letter to the attention of the judge;

iii) whether the judge should, in any event, have aborted determination of the appellant's appeal and instructed a hearing *de novo*, upon receiving the letter dated 10 September 2019 from Dr Mala Singh.'

Preliminary matter - (1) Mr. Rajagopal and Mr. Harding

45. Though their attendance was directed by UTJ Gill, I am grateful to both Mr. Rajagopal and Mr. Harding for attending the hearing before me. It permitted me to appreciate their concern as to unfolding events. Mr. Harding explained that his error had not previously occurred and would not occur again. I am satisfied that this is the case. I am further satisfied that he understands that in the world of modern communication an obligation falls upon him, as counsel, to open and check every document sent to him by instructing solicitors, even if he believes that they have been sent on previous occasion(s).

46. I am also satisfied that Mr. Rajagopal is aware that brief inattention to detail can, on occasion, lead to difficulties for his clients and I am satisfied that creating such difficulties are not his intention. However, as detailed within this decision, I am concerned that inadvertent errors arose on more than one occasion in this matter. I have addressed the lack of helpful detail in the brief correspondence with Mr. Harding and the Tribunal, and further the inadequacy of Mr. Rajagopal's assumption that administrative staff at hearing centres will sift documents on his client's behalf to ascertain their importance. The obligation falls upon him, and G Singh Solicitors, to succinctly and coherently detail the nature of documents sent to the Tribunal and to identify any urgency as to their being placed before a judge. I accept that Mr. Rajagopal now has sufficient insight as to the difficulties such erroneous action may cause. However, I am required to address one further issue of concern. By means of his witness statement Mr. Rajagopal confirmed the following:

> 'The letter from Dr Singh dated 10 September 2019 was served on the First Tier Tribunal [sic] under my cover letter dated 11 September 2019. The letter was faxed …. to the First Tier Tribunal [sic] at 10.05 on 11 September 2019 …'

47. A copy of the fax covering sheet was appended to Mr. Rajagopal's witness statement. It confirms that Dr Singh's letter was sent to the Tribunal at 10.05 on 12 September 2019 and not on 11 September 2019 as asserted in the witness statement. It is unfortunate in circumstances where there have been repeated failures to act with sufficient care, that an inaccurate witness statement was filed with the Tribunal. I am mindful of the High Court confirmation in *Ras Al Khaimah Investment Authority v Azima* [2020] EWHC 1686 (Ch), at [19], that a solicitor in giving evidence to a court, or tribunal, is under a duty to be not only completely honest but also scrupulously accurate, otherwise there is a particular risk of a judge being misled because of the

trust which is placed in solicitors as officers of the court to give their evidence reliably. The High Court observed that misleading a court, or tribunal, even inadvertently, is potentially a breach of paragraph 1.4 of the Solicitors Code of Conduct (2019). However, following discussion with Mr. Rajagopal, I am satisfied that the error as to the date was consequent to inadequate attention and am assured that he understands the care he is to take when filing a witness statement with the Tribunal in his professional capacity.

Preliminary matter - (2) New matter

48. Before I consider the primary issue advanced on behalf of the appellant, namely procedural impropriety, I detail the conclusion as to my discussion with the representatives at the hearing as to whether the human rights (article 3) ground advanced by the appellant under section 84 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') is a 'new matter' for the purpose of section 85(5) and (6) of the 2002 Act.

49. The appeal as presently advanced before this Tribunal expressly details that it is only concerned with the appellant's article 3 appeal. As detailed above, the application form used to apply for leave to remain, as prepared by G Singh Solicitors, was solely founded upon article 8 private life rights. Within the form, at page 9, reference is made to requesting leave to remain outside of the Rules 'due to medical condition'. No more is said.

50. The application form details at page 9 that it was accompanied by a covering letter. As stated above, such letter is not to be found in the bundle of either party. This is despite it setting out the substance of the application that was before the respondent. In my experience, the failure to provide all documents accompanying an application for leave to remain is too common on the part of the respondent and it should not persist. The Tribunal should properly have before it the documentation relied upon in an application so that it can fully consider the appeal before it. It is not the role of the respondent to act as gatekeeper and decide what documents filed by the appellant it wishes to place before the Tribunal.

51. The failure of the respondent to provide the covering letter was compounded by the failure of G Singh Solicitors to place it in the appellant's bundle. Such failure is surprising as it is for the appellant to establish what matters he raised before the respondent by means of his application.

52. Consequent to such failure, neither the Judge nor Mr, Harding and Ms. Burrell were aware as to the extent and substance of the application submitted by the appellant to the respondent in December 2018 beyond the application form confirming that reliance was placed upon article 8 private life rights. It appears, without more, that the Judge and the representatives relied upon the expansive grounds of appeal authored by G Singh Solicitors, which placed article 3 and suicide ideation firmly at the forefront of the appeal, and the reference to article 3 in the respondent's decision, which I have found to be generic in nature.

53. In preparation for the hearing, and being concerned as to the new matter issue, I considered the documents filed with care and observed that accompanying the application was a letter authored by G Singh Solicitors, dated 25 September 2018, informing the appellant's GP that the appellant had recurring thoughts of suicide. It is not explained as to whether the GP was aware of the appellant having suicide ideation before this date. In addition, the appellant's suicide ideation is addressed in one line by Dr Singh in her report, within the section entitled 'long term and short-term prognosis'. I observe that reference to '*If he were to be returned, he will kill himself before going as he is estranged from his family due to his marriage, and soon after the marriage his father passed away*' appears to constitute simple repetition of the appellant's evidence rather than a medical prognosis. The approach adopted by Dr Singh is very unhelpful and will be addressed below. Also accompanying the application is a letter from the appellant's GP, dated 11 October 2018, identifying the appellant's risk of self-harm as low. A care plan letter from NHS West London NHS Trust, written consequent to an outpatient assessment on 14 November 2018, a month after the GPs letter, details a history of suicide ideation, with such thoughts occurring every 3 to 4 days.

54. On its face, in the absence of the covering letter, prior to the hearing in this Tribunal there was a likelihood that I would have to consider the guidance provided in *Mahmud (s.85 NIAA 2002 - 'new matters')* [2017] UKUT 00488 (IAC). However, during the hearing Mr. Rajagopal informed me that a covering letter did accompany the application, and I accept his oral evidence on this issue. He proceeded at my request to read out paragraphs of the covering letter and I am satisfied that the issue of article 3 and suicide ideation was clearly addressed, as was reliance upon the appellant's mental health concerns. Consequently, any concern as to whether a new matter existed fell away.

55. Being now aware as to the contents of the covering letter, a second concern arises. Whilst there is no consideration of suicide ideation by the respondent in her decision letter, on the same day she sent a second letter to the appellant, care of G Singh Solicitors, detailing, *inter alia*:

> 'I am sorry that the decision to refuse your application may have caused you harm.
>
> There is support available if you have had suicidal thoughts recently, or if you are feeling suicidal now. There are telephone helplines with specially trained volunteers who will listen to you, understand what you are going through, and help you through the immediate crisis.'

56. The approach adopted by the respondent is of considerable concern. When undertaking her decision on the application, she failed to consider the issue of suicide ideation as relied upon by the appellant in respect of article 3. Indeed, she made no assessment as to whether the appellant possessed such ideation. Yet, when sending her decision, she was aware as to her duty of care in respect of conveying a negative decision to a person who may possess suicidal thoughts. I am satisfied, to

the requisite standard, that the second letter was sent to the appellant because the respondent was fully aware that the appellant professed to suffer suicide ideation.

57. The respondent is obliged to consider the application before her in accordance with the law. In this matter she sought and secured a fee of £1033 to process the application. The appellant was entitled to assume that the consideration of his application would, at the very least, be adequately undertaken. I am satisfied, having read the contents of the second letter, that the respondent was aware as to the appellant's reliance upon suicide ideation and there was a deliberate failure to consider it within the body of the decision letter. Whilst the exercise of an appeal to the First-tier Tribunal can usually cure any deficiency in the respondent's consideration of an application for leave to remain, the approach adopted in this matter could possibly have led to a vulnerable person waiting several further months or longer for resolution of their application. Such delay could potentially trigger further adverse stress and accompanying emotional and mental concerns which may have resulted in significant personal difficulties.

Decision on Error of Law

58. I have sympathy for the Judge who, at the hearing, was unaware as to the existence of Dr Singh's letter of 10 September 2019. The failings of the appellant's solicitors and counsel, and the failings of the administration at Taylor House in respect of the fax sent by Mr. Rajagopal on 12 September 2019 were simply unknown to the Judge.

59. However, as observed by the Judge at [18]-[19] of his decision, by 17 September 2019 he was aware of the letter before he completed and signed his decision. He was also aware that the medical opinion as to fitness to give evidence was made very recently in time, and prior to the hearing. I am required to consider whether he adopted a lawful approach to the situation in which he found himself from 17 September 2019 onwards. For the reasons detailed below, I conclude that he did not act fairly and consequently his decision as to the article 3 appeal has to be set aside with no findings of fact preserved.

Procedural unfairness

60. There is no complaint by the appellant as to the Judge's conduct at the hearing. It is accepted that the Judge was unaware of Dr Singh's letter as none of the various avenues adopted by G Singh Solicitors to place the document before him prior to, or during, the hearing had succeeded.

61. Rather, the grounds assert that upon receiving the letter the Judge should have directed that the hearing be heard *de novo*. Confusingly, the grounds assert that such approach should have been adopted because there was 'sufficient evidence' that the appellant was a vulnerable witness and 'there is doubt as to his instructions'. The former does not require a hearing *de novo* in this matter as it concerns the approach the Judge was required to adopt in his holistic consideration of credibility: *AM (Afghanistan) v. Secretary of State for the Home Department* [2017] EWCA Civ 1123, [2018] 2 All E.R. 350. In any event the Judge had accepted at the hearing that the

appellant was to be considered vulnerable. As to the second contention, there was simply no cogent evidence before the Judge that the appellant lacked capacity. Indeed, his various legal representatives have proceeded on the basis that he has capacity to instruct, with no application to the Tribunal for a litigation friend to be appointed in these proceedings.

62. The focus at the hearing before me was upon a bald assertion in the grounds, without more, that there had been procedural impropriety. It is unfortunate that the author of the grounds decided to provide no further detail as to this complaint. At the hearing, I proceeded on the basis that the complaint was implicitly founded upon procedural unfairness and related to the approach adopted by the Judge upon his receiving Dr Singh's letter after the conclusion of the hearing.

63. Upon receiving the letter, the Judge could properly have adopted one of two steps. Firstly, he could have issued directions requesting the appellant to confirm whether reliance continued to be placed upon Dr Singh's letter and if the answer was in the affirmative for both parties to indicate whether they would wish to make oral or written submissions on the issue. An alternative approach would have been to have simply resumed the hearing at a later date, at the convenience of the representatives, and hear oral submissions on the contents of the letter.

64. Could the Judge have adopted a third approach of simply proceeding without a hearing by taking the medical evidence at its highest, observing that the respondent had not challenged the medical evidence previously filed with the Tribunal? Such an approach would be anchored on at least two presumptions: that the respondent would agree with such course of action and that the contents of the letter could sustain such approach. Neither presumption could be appropriately presumed and so this approach was not open to the Judge in this matter.

65. The approach adopted by the Judge was simply to proceed and complete the writing of his decision. He considered the letter in the absence of submissions from the parties and expressed criticisms of it at [42] and [43], above. As is clear from [20], above, the Judge proceeded on several assumptions which can properly now be identified as wrong.

66. The Judge was no doubt aware that the appellant had given evidence before him at the hearing, without complaint, and so the issue as to fitness to 'give' evidence could be considered redundant. Further, he had at the hearing confirmed that he would treat the appellant as a vulnerable witness. However, the position remained that Dr Singh's letter had been filed and served and there was no express confirmation that it was no longer relied upon.

67. In addition, thought short, the letter presented the most up-to-date psychiatric assessment of the appellant and should properly be weighed in the holistic assessment as to credibility: *AM (Afghanistan)*, at [21].

68. In the circumstances, by adopting the approach of proceeding in the absence of submissions, when it was unclear as to whether the representatives had knowledge

of a document filed with the Tribunal, or in the alternative whether reliance continued to be placed upon it, I conclude that the Judge clearly erred in law. He was aware that the letter had not been before him at the hearing, a fact unknown to the parties. In the absence of submissions from either party addressing the document it was unclear as to whether it continued to be relied upon.

69. The question for me is whether the Judge materially erred in law.

70. If the issue of fitness to give evidence had been raised before the Judge at the hearing, he would have been required to assess whether the appellant would be able to understand the questions he would be asked, apply his mind to answering them, and convey intelligibly the answers he wished to give. Suicide ideation, without more, is not sufficient to establish incapacity for the purposes of fitness to give evidence.

71. On the issue of fitness to give evidence, the letter is wholly inadequate. It confuses vulnerability with capacity. There is a presumption that an adult is capable, though this may be rebutted by a specific finding of incapacity. Dr Singh is silent as to capacity and fails to expressly apply the criteria as to capacity as set out in the Mental Capacity Act 2005. The high point of the letter in respect to capacity may be said to be the observation that the appellant 'was not able to give a coherent account of himself'. However, on its face this is not a sufficiently clear medical opinion that the appellant lacked capacity. Indeed, I am satisfied that Dr Singh was not considering capacity when providing such opinion, because her reasoning as to the appellant's 'fitness' is rooted in his vulnerability:

> 'In my clinical opinion [the appellant] is not in a fit state to give evidence in oral hearing [sic] as this will lead to deterioration in his mental state and further cause emotional and mental harm. He will not be able to cope with giving evidence and the process will increase the risk of suicide.'

72. When considering the appellant's vulnerability in light of such evidence, the Judge would have been required to be mindful of the Equal Treatment Bench Book and in particular the chapters concerned with mental disability, particularly memory. However, vulnerability does not by itself automatically equate to incapacity.

73. Having considered the letter, I am satisfied that it is wholly inadequate for the purpose on which reliance is placed upon it. It lacks basic detail as to the circumstances of the consultation. There is no reference as to whether the appellant informed Dr Singh as to his ongoing interaction with the NHS. It provides an opinion as to fitness to give evidence with no engagement with capacity. No detail is given as to why the appellant's attention and concentration was poor. No detail is given to whether the appellant believed himself incapable of giving a coherent account of his personal history, or whether this was Dr Singh's professional opinion. No detail is given to the observation that the appellant was 'extremely traumatised' by events in his marriage. No critical assessment is detailed as to whether other medical practitioners engaged with the appellant over time considered his risk of suicide to be enhanced, or not, by the appeal process. Indeed, Dr Singh provides no detail as to

from what base the risk of suicide is said to rise from. Whilst being mindful of Dr Singh's qualifications and experience, and also being aware that her medical opinion has been accepted in other appeals, I am satisfied that this letter is wholly inadequate and cannot properly be relied upon in this matter. I explicitly state that such finding does not necessarily equal or entail the discrediting of Dr Singh as a medical expert in other matters. As this case amply establishes, well-meaning, experienced professionals can make errors. However, her letter was and remains incapable of founding a cogent submission as to unfitness to give evidence.

74. It is well established that what fairness requires depends on the particular context, both legal and factual: _R. v Secretary of State for the Home Department Ex p. Doody_ [1994] 1 A.C. 531]. I am satisfied that the present case was one in which the duty to act fairly did apply as a matter of principle.

75. In _R (Osborn) v Parole Board_ [2013] UKSC 61; [2014] AC 1115, at [65], the Supreme Court confirmed the proposition that the test for whether there has been procedural fairness or not is an objective question for the court to decide for itself. The court's function is 'not merely to review the reasonableness of the decision-maker's judgment of what fairness required'. Lord Reed observed, at [67], that 'one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested' [emphasis added].

76. Recalling Lord Donaldson MR's judgment in _R v. Leicester City Justices, ex parte Barrow_ [1991] 2 QB 260, at 290, that any unfairness, whether apparent or actual and however inadvertent, strikes at the root of justice, I am mindful that a reasonable judge considering the letter at a resumed hearing and noting the clinical opinion as to fitness to give evidence, may have considered adjourning the hearing to permit Dr Singh, or another psychiatrist, to address capacity: Rule 4(3)(h) The Tribunal Procedure (First-tier Tribunal) Rules 2014. I am also mindful that Mr. Harding, an experienced counsel, would in all likelihood have observed the failings contained within the letter and may well have advised the appellant as to the merits of seeking an adjournment to secure further medical evidence in relation to his ability to give evidence. It would be a judicial decision as to whether an adjournment would be granted, but I cannot conclude that an adjournment would not have been granted on the facts arising. In circumstances where the Judge sought no submissions on the letter and erroneously presumed that the appellant had provided instructions not to rely upon it, I cannot be sure that the appellant was not prejudiced by the approach adopted by the Judge. Consequently, the decision of the Judge must properly be set aside.

Remaking the Decision

77. Both parties confirmed that if procedural unfairness were established, and findings of fact were required to be remade in their entirety, this was a matter that should properly be remitted to the First-tier Tribunal.

78. I have considered the Joint Practice Statement of the First-tier Tribunal and the Upper Tribunal concerning the disposal of appeals in this Tribunal, in particular paragraph 7.2, and conclude that the effect of the material error of law has been to deprive the appellant of a fair hearing before the First-tier Tribunal.

79. Consequently, I set aside the decision in respect of the article 3 appeal alone and remit it back to the First-tier Tribunal at Taylor House with no findings of fact preserved.

80. The decision as to the article 8 appeal is preserved as the appellant has not appealed against this element of the Judge's decision.

Medical opinion – Dr Singh

81. I observe the Judge's considerations of Dr Singh's report and letter, and his accompanying observations:

- There was a failure by Dr Singh to detail how the Clinical Outcomes in Routine Evaluation Scale and Hamilton Rating Scale were applied, at [33]
- The report was not a 'particularly detailed one', at [40]
- There was an acceptance of the appellant's stated history at 'face value' without further enquiries, at [40]
- There was a failure to consider whether the appellant's low mood and anxiety related, in part, to the appellant's uncertain immigration status, at [40]
- The letter provides 'only a broad-brush' sketch of the appellant's current condition, at [42]
- There was no detail provided as to the assessment conducted on 9 September 2019, at [42]
- No explanation was given as to why the appellant was in such poor mental state in September 2019 when he had been receiving treatment through the NHS for approximately one year, to which he had responded 'somewhat effectively', at [42]
- Dr Singh's letter 'displays a distinct lack of nuance and detail expected of expert evidence', at [43]

82. Having addressed Dr Singh's letter above, I confirm that I have read her report with care. Ultimately, a holistic assessment of the evidence will have to be undertaken at the resumed hearing. However, I informed Mr. Akhter as to my concerns with Dr

Singh's report in this matter and it is appropriate that I detail such concerns in my decision.

83. A copy of the instructions sent to Dr Singh should properly have been filed and served by G Singh Solicitors. It is essential that legal representatives are mindful of their duty to cooperate with the Tribunal and to help the Tribunal deal with a case fairly and justly. In matters where an appellant has previously not been found to be credible, either by the Tribunal, or as in this matter by the respondent in circumstances where the appellant withdrew his appeal before a hearing, it is imperative that an expert be informed as to such adverse conclusions before they embark upon their assessment. The appellant should ensure that the Tribunal is made aware as to the substance of the information that has been conveyed to an expert.

84. Dr Singh appears to have uncritically accepted the appellant's stated personal and emotional history. I observe at this juncture that the appellant informed Dr Singh at the consultation on 17 November 2018 that his wife, an EEA national, was a paranoid schizophrenic who was physically, verbally and emotionally abusive to him. He informed Dr Singh that they were together for a period of time but had been separated for some 3½ years before the consultation: section 4 of report. This is suggestive that the couple had separated in or around May 2015, which was 2 months after the appellant's first application for an EEA residence card and 17 months before his second application. However, in his witness statement dated 5 September 2019, he states at para. 6 that the relationship ended after he withdrew his appeal in June 2018. It will be for the First-tier Tribunal to assess the true factual situation and consider whether there are other possible causes of the symptoms identified by Dr Singh: *MN v. Secretary of State for the Home Department* [2020] EWCA Civ 1746, [2021] H.R.L.R. 2, at [121].

85. A consequence of the uncritical approach adopted to the information provided, which was undertaken in circumstances where Dr Singh appears to have been unaware as to the respondent considering the marriage to be one of convenience, is that the prognosis at section 6.4 of the report reads as if simply repeating the appellant's assertions rather than being a reliable indication as to the likely course of the medical condition. Such an approach is entirely unhelpful.

86. Dr Singh opines that if the appellant were 'to be returned [to India], he will kill himself before going as he is estranged from his family due to his marriage, and soon after the marriage his father passed away. He will not have any support from his family. He will be isolated and that can lead to desperation causing him to take his own life'. The certainty used as to the appellant seeking to kill himself is, in the experience of this Tribunal, unusual and particularly so where the consultant psychiatrist is aware that the previous month the appellant was identified as low risk of self-harm by his GP. Further, having identified suicide ideation being such that the appellant 'will' kill himself, Dr Singh took no steps to identify relevant interventions that would aid the appellant in the short- to medium-term.

87. I note the importance of the identification of diagnostic criteria, and it is a primary requirement of any expert opinion on an applicant's psychological state to explain how they meet the diagnostic criteria for the condition in question. Dr Singh failed to undertake this elementary requirement.

Earlier EEA decision(s)

88. The core of the appellant's claim relates to his mental health and the adverse consequences of his marriage to an EEA national. By means of his witness statement dated 5 September 2019 he provides detail as to the relationship. He acknowledges one of the two unsuccessful applications he made for an EEA residence card, detailing, *inter alia*:

> '5. … My application for an EEA Residence Card was under consideration by the Home Office in 2017 … My application was refused by the Home Office. An appeal was lodged. The appeal was listed for hearing in May 2018 and had to be adjourned for medical evidence to be provided regarding [the appellant's wife's] mental health. By the time the appeal was again listed for hearing in June 2018, [the appellant's wife's] mental health had worsened again. She was in no fit state to attend the hearing and their relationship became very strain. There was a detailed medical report on the paranoid schizophrenia of [the appellant's wife]. I had no choice but to withdraw the appeal.'

89. It is understood that the applications for an EEA residence card were refused on the ground that the marriage was one of convenience. I observed to Mr. Lindsay at the hearing that a judge at the resumed hearing will be greatly aided by the respondent filing and serving copies of the two relevant decisions, dated 25 August 2015 and 14 April 2017.

90. Mr. Akhter is aware that the burden is placed upon the appellant and the First-tier Tribunal may well expect an explanation as to why the appellant withdrew his appeal, in circumstances where if his wife were unable to attend the hearing, he could have sought to have relied upon documentary evidence to establish the marriage was not entered into solely for immigration advantage.

Covering letter for December 2018 application

91. The First-tier Tribunal would be aided by a copy of the covering letter accompanying the application of December 2018. The parties are to liaise as to its filing.

Notice of Decision

92. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the Judge's decision promulgated on 23 September 2019 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, in respect of the human rights (article 3) appeal alone:

93. The decision as to the human rights (article 8) appeal stands: [76].

94. This matter is remitted to the First-tier Tribunal at Taylor House for a fresh hearing before any Judge other than Judge Hoffman.

95. No findings of fact are preserved.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

96. Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 25 March 2021