Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20360/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Wednesday 31 March 2021	**On 29 April 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR MUHAMMAD YASIN KHAN

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Bukhari, legal representative, Bukhari Chambers solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Howorth promulgated on 7 February 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 20 November 2019, refusing his human rights claim based on his family and private life in the UK. The claim was made in the context of an application to remain as the spouse of a British citizen.

2. The Appellant is a national of Pakistan. He came to the UK as a student in December 2007. His leave in that capacity came to an end in February 2010. An application for a derivative residence card was refused and his appeal failed. A further application made in March 2015 was refused and the Appellant's appeal was dismissed. The Appellant claimed asylum in May 2019 but withdrew that claim.

3. The Appellant has two convictions for sexual assault, in 2008 and 2009. The first led to a three-year community order, the second to a period of eight weeks in prison. He was placed on the sex offenders' register for five years for the first offence and seven for the second.

4. The Appellant married his wife (hereafter "the Sponsor") in 2010. The Sponsor was born in Pakistan. She is now a British citizen. She came to the UK in 1978 when she was a baby. The Appellant's case is that he and the Sponsor care for her mother who also lives in the UK. The Sponsor is said to suffer from mental health problems. The Appellant is also said to suffer from depression.

5. The Respondent refused the Appellant's claim on suitability grounds on the basis that the Appellant's presence is not conducive to the public good. The claim was also refused on the basis that the Appellant's family life could continue in Pakistan. Accordingly, paragraph EX.1 of Appendix FM to the Immigration Rules ("EX.1") did not apply. The Respondent also concluded that there would be no very significant obstacles to the Appellant's integration in Pakistan and accordingly he could not satisfy paragraph 276ADE(1)(vi) of the Immigration Rules ("the Rules"). It is not suggested that the Appellant could meet the residence requirements under paragraph 276ADE of the Rules. Outside the Rules, the Respondent considered the circumstances of the Appellant and the Sponsor but concluded that removal would not entail unjustifiably harsh consequences for them.

6. Judge Howorth upheld the Respondent's view about the Appellant's suitability ([23] of the Decision). She went on to consider whether paragraph EX.1. applies. She concluded that the Appellant and the Sponsor could relocate to Pakistan ([44]). The Judge did not accept that there would be very significant obstacles to the Appellant's integration in Pakistan under paragraph 276ADE(1)(vi) of the Rules ("Paragraph 276ADE(1)(vi)") ([45]). She found the removal of the Appellant to be proportionate ([46]).

7. The Appellant's grounds are not numbered but can be broadly grouped as follows:

   Ground one (§ 2-6 of the grounds): challenge to the finding in relation to suitability.
   Ground two (§7-8 and 10 of the grounds): challenge to treatment of medical evidence.
   Ground three (§9 of the grounds): impermissible speculation in relation to alternative
   care for the Appellant's mother-in-law.
   Ground four (§11 of the grounds): impermissible speculation about the Sponsor's language abilities.

Ground five (§12 of the grounds): wrong self-direction in relation to burden of proof.

Overall, it is suggested that the Decision is Wednesbury unreasonable for those reasons and considered as a whole.

8. Permission to appeal was refused on 17 April 2020 by First-tier Tribunal Judge Fisher in the following terms so far as relevant:

> "…2. The grounds seeking permission are extremely critical of the Judge, asserting that she did not 'fully understand the job at hand'. The author of the grounds may wish to reflect on making allegations of that nature. It is said that the Judge made a number of assumptions, but the grounds are part based on assumption. The Judge was not bound to accept the expert opinion, provided that she gave adequate reasons for rejecting it.
> 3. I cannot accept the assertion that the Judge made findings which were irrational. The threshold for establishing irrationality is high. The Judge noted that the Appellant had not re-offended. She was correct to attack little weight to medical evidence which was considerably out of date. She was entitled to draw conclusions from the evidence. That is part of the Judge's role.
> 4. In reality, these grounds are little more than a rather caustic disagreement with the Judge's findings. They do not disclose any arguable error of law. The Judge made findings which were open to her on the evidence and her reasoning is adequate. Permission to appeal is refused."

9. The Appellant renewed the application on the same grounds as set out above. Permission to appeal was granted by Upper Tribunal Judge Bruce on 8 June 2020 in the following terms:

> "1. It is unclear why the First-tier Tribunal, or the author of the grounds, was under the impression that the Respondent had not articulated that this 'suitability' refusal was being made on the grounds that the Appellant's presence is not conducive to the public good: the refusal letter says in terms that it was at page 4 of 12. As such it was for the Respondent to establish that the Appellant's character, associations or 'other reasons' made it undesirable for him to remain in the United Kingdom. It is not at all clear from the decision that the First-tier Tribunal appreciated that this was where the burden lay: see paragraph 13. On one reading of paragraph 23 it is arguable that the Tribunal simply treated the Respondent's assertion as to undesirability as sufficient, instead of conducting its own assessment of the matter.
> 2. As to the substantive human rights appeal the grounds have less merit but I do not limit the grant of permission."

10. By a Note and Directions dated 3 July 2020 Judge Bruce reached the provisional view that it would be appropriate to determine the error of law issue without a hearing. The Appellant's written submissions in reply did not address the forum for consideration of that issue. They simply invited the Tribunal to set the Decision aside for the reasons set out in the grounds. The Respondent similarly set out her position in relation to the grounds but without comment on the appropriate forum. In reply to the Respondent's written submissions the Appellant indicated that there should be an oral hearing.

Having considered the submissions, Upper Tribunal Judge Mandalia directed that there be a remote hearing to determine the error of law issue.

11. So it is that the matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The remote hearing was attended by representatives for both parties. There were a few connectivity issues in the course of the hearing but those were overcome and the hearing proceeded with no major technical difficulties.

12. I have before me a small (unpaginated) bundle which was before Judge Howorth, and which I assume to be the Appellant's bundle (although there is no covering letter confirming that to be the case). I also have the Respondent's bundle of core documents, the Appellant's skeleton argument for the First-tier Tribunal hearing, the various written submissions to which I refer at [10] above and written submissions prepared by Mr Melvin for the hearing before me. I confirm that I have read those and taken them into account along with the oral submissions made. I have referred however only to those parts of the documents and submissions which are relevant to my consideration.

13. For the purposes of my consideration of the Appellant's case, I have adopted the headings which I set out at [7] above concerning the broad scope of the grounds.

DISCUSSION AND CONCLUSIONS

Ground One: Suitability

14. The Judge dealt with this issue at [18] of the Decision as follows:

> "18. The Respondent refuses the application of the Appellant not only on the non-acceptance of insurmountable obstacles, but also on Suitability grounds. The Respondent made the decision to refuse the Appellant on the basis of his character, conduct and associations under R-LTR.1.1.(d)(i) which states:
> *(i) The applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and*
> 19. It is unfortunate that the Respondent does not spell it out, but it should be clear that the Respondent is referring to the S-LTR.1.6. which states:
> *S-LTR.1.16. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.*
> 20. The Appellant was convicted of sexual assault in 2008 and 2009. The Appellant married the Sponsor in 2010 and there have been no further incidents of criminality subsequently. The Appellant stated in oral evidence that whilst he is no longer required to sign the sex-offenders register, he would have [to] declare these convictions in future job applications.
> 21. I note that the 31 page skeleton argument submitted states that 'The Secretary of State confirmed that the Appellant satisfies S-LTR1.1-1.5'. This may be the case but the Appellant has failed to address the Appellant's failure because of his character conduct and associations.

> 22. The Appellant's skeleton argument does state that a considerable time has elapsed since the Appellant's convictions, however I have no evidence before me in respect of sentencing remarks or rehabilitation that might show me anything about the offending or anything to do with how the Appellant has been rehabilitated and whether the Appellant is of any danger to the public. I taken into account the type of offending as being of a particularly dangerous nature to the public and that the Appellant continued to be monitored, by way of the sex offenders register, for a considerable period after the offending (seven years from the second offence). There are also two offences, presumably the sentence for the first, which did include a rehabilitative aspect as the Appellant was required to attend a course, had no impact in respect of preventing reoffending.
> 23. I find it concerning that the Appellant continued to be monitored for some seven years after the offending and there is no evidence before me of any report which indicates the risk the Appellant poses. I do take into account there has been no further offending, but the failure to adduce any evidence of positive change does cause some concern to me. I therefore find that the Respondent's decision to refuse the Appellant on the grounds of character, conduct and association to be reasonable in the absence of any evidence to the contrary other than oral evidence of the Appellant and Sponsor."

15. I can deal very swiftly with the assertion that it was not open to the Judge to raise suitability because the Respondent had not done so. Although there is no depth of reasoning in the Respondent's decision letter as to the suitability issue, the Respondent has clearly refused the claim on suitability grounds based on the non-conduciveness of the Appellant's presence in the UK. The Judge was therefore correct to consider that issue.

16. There is however merit in the ground asserting that the Appellant was required to "prove a negative" ([4] of the grounds). That is perhaps better formulated as in the permission to appeal grant as being the wrong apportionment of the burden of proof. As Judge Bruce pointed out, it was for the Respondent to demonstrate why the Appellant's presence in the UK was not conducive. The Judge's approach at [21] to [23] of the Decision appears to place the burden on the Appellant. Furthermore, what is said at [23] of the Decision is a "rubber-stamping" of the Respondent's decision rather than a consideration by the Judge herself whether the Respondent's case on this point is made out.

17. I do not find of assistance the case of R (oao Ngouh) v Secretary of State for the Home Department [2010] EWHC 2218 (Admin) on which Mr Bukhari placed reliance in submissions as showing the need for a balancing exercise to be carried out. That case was a judicial review challenge to a refusal of indefinite leave to remain based on paragraph 322(5) of the Rules. Whilst I accept that paragraph 322(5) is concerned with the undesirability of allowing a person to remain in the UK, the Judge's consideration is in the context of whether a person should be granted settlement and turns on the Respondent's policy and Rules in that regard and the position of a person who had resided lawfully in the UK for a lengthy period. Furthermore, Ngouh is an unusual case on its facts. As is said at [121] of the judgment, reliance on the convictions had to be looked at in the context of those facts and it is that exercise which the Respondent had failed to conduct. As this was a judicial review, the Judge quashed the decision

under challenge for that reason and required the Respondent to reconsider. The context is for those reasons entirely different.

18. However, the Judge in this case has erred in wrongly assuming that the burden was on the Appellant to show that the convictions did not mean that his presence was not conducive. The Judge had to consider for herself whether the convictions meant that the Appellant's presence was not conducive. The issue was not whether the Respondent's conclusion in that regard was reasonable. I accept that there was evidence in the form of the convictions on which the Judge could rely in endorsing the Respondent's view even though the Respondent's reasoning is not set out in the decision letter. However, and although the Judge has provided some reasons why it might be said that the Appellant's presence is not conducive, notwithstanding the passage of time since the convictions, I am satisfied that the Judge has misdirected herself both in relation to the relevant burden of proof and has also erred by failing to determine the suitability issue for herself.

19. However, as I noted in the course of Mr Bukhari's submissions my conclusion on the first ground is not necessarily the end of the matter. I have to consider whether the error makes any difference. As I have noted at [5] above, the Respondent also refused the Appellant's claim on the basis that he could not meet the Rules. That was because, in relation to the Appellant's family life, the Respondent concluded that EX.1 was not met and, in relation to the Appellant's private life, because the Appellant had not shown that there were very significant obstacles to his integration in Pakistan and therefore could not meet Paragraph 276ADE(1)(vi). It is therefore necessary for me to examine the Decision in the context of the remaining grounds in order to decide whether the error established by ground one makes any difference to the outcome.

Ground Five: Burden of Proof

20. I begin my consideration of the remaining grounds with ground five as, if the Judge has wrongly directed herself in relation to the burden of proof (other than in relation to suitability already dealt with) that would have an impact on the Judge's findings on other aspects of the Appellant's case.

21. At [13] of the Decision, the Judge states that the burden is on the Appellant to the standard of the balance of probabilities. Whilst that may be a somewhat simplistic statement of where the burden lies in an Article 8 ECHR case, it is not incorrect as a statement of the need for an appellant to establish the facts and strength of his family and private life with which removal will interfere and the level and nature of the interference. It is of course for the Respondent to justify the necessity for and proportionality of removal based on her view of the public interest. However, that exercise in immigration cases at least is simplified by consideration of the interference through the lens of the Rules and Section 117B Nationality, Immigration and Asylum Act 2002.

22. Turning then to the paragraph of the Decision which is criticised in the Appellant's grounds that reads as follows:

> "48. I re-iterate that I have reached this decision as there is an evidential burden on the Appellant which has simply not been discharged. If the Appellant, Sponsor and Sponsor's mother in law are receiving the treatment that they have stated in oral evidence, then it is for them to prove this and this evidence within the UK would be readily available for the GP and consultant providing treatment. I do not accept oral evidence where it would have been straightforward to provide documentary evidence. However, there is not even an Appellant's bundle before me and much of the evidence contained in the Respondent's bundle is so old as to be of little evidential value."

23. The Appellant's grounds in this regard are a little difficult to follow. For that reason, I set out the relevant paragraph of the grounds criticising [48] of the Decision as follows:

> "12. Finally, in Para 48 the IJ lets out that she does not fully understand the job at hand when she claims that the Appellant had an evidential burden to discharge which he did not. The failure of the IJ to appreciate that the Appellant had the legal burden throughout amounts to a gross error of law because it would render the treatment of any evidence unreliable, and the Determination unsafe. It is in furtherance of such confusion that it is also difficult to reconcile that the IJ states that there was no Appeal bundle whilst simultaneously talking about witness statements and expert reports and that she rejected all oral evidence, not because it was unreliable or because it was not credible, but simply because documentary evidence instead had not been given. Such is not what is expected in a properly reasoned Determination, and such treatment of the appeal amounts to an error of law."

24. I accept what is said in the Respondent's written submissions dated 4 August 2020 at [12] that the Judge at [48] of the Decision is not intending to refer to "evidential" as a term of art. The Judge is simply saying that the Appellant has failed to discharge his burden as set out at [13] of the Decision. It is in any event difficult to discern what is the Appellant's complaint about the terminology as [12] of the grounds appears to accept that he bears the burden. If anything, a legal burden is a more formidable threshold to surmount.

25. I accept that there is what I have assumed to be an Appellant's bundle albeit, as I have already indicated, it is not indexed or paginated and there is no covering letter identifying it as such. It is not clear on its face that it is a bundle filed by the Appellant in this appeal. Indeed, many if not most of the documents in what I understand to be the Appellant's bundle are simply copies of what was before the Respondent as is evident from the dates (the witness statements for example date from September 2019 which is when the application was made to the Respondent). In any event, nothing turns on the Judge's reference to the lack of an Appellant's bundle. There is no suggestion in the grounds that the Judge failed to deal with any of this evidence. The complaint is the way in which the Judge has dealt with the evidence.

26. What is said at [48] of the Decision also has to be looked at in its context. This is the final paragraph of the Decision and comes after the Judge's consideration of the material evidence. The focus of what is said at [48] of the Decision is the medical conditions of the Appellant, the Sponsor and the Sponsor's mother. The Judge is not

requiring documentary evidence in support of all the oral evidence. She is simply making the point that it is for the Appellant to show that he, his wife and his mother-in-law suffer from the conditions asserted, are receiving the treatment they say they are receiving and could not receive that treatment in Pakistan (or in the case of the Appellant's mother-in-law could not remain in the UK without the care of the Appellant and the Sponsor).

27. The Judge was entitled to take into account the lack of documentary and up-to-date evidence in relation to medical conditions and treatment. She did not wrongly place the burden on the Appellant to make out his case about the existence of those conditions and need for treatment or alternative care. The requirement is rightly placed on him to evidence those facts. Ground five does not disclose any error of law.

Grounds Two to Four: Obstacles to Relocation to Pakistan

28. There is a degree of overlap in the Decision between obstacles to the Appellant's integration in Pakistan and continuation of family life in that country. The main part of the Appellant's case is that he and the Sponsor could not continue their family life in Pakistan. However, some of the reasons given for that inability also potentially impact on the Appellant's ability to integrate. The criticisms in the grounds are therefore relevant to both the Judge's consideration of EX.1 and paragraph 276ADE(1)(vi) of the Rules.

29. Before I turn to the factors relied on and the criticisms made of the Judge's reasoning, it is necessary for me to say a little more about the Judge's approach to these issues in the context of the error which I have found to be established by ground one.

30. In particular, Mr Bukhari submitted that the error in relation to suitability will have infected the whole of the Decision because the Judge will have had this in mind when dealing with the other aspects. I do not accept that submission for the following reasons.

31. First, the Judge, having reached the conclusion about suitability at [23] of the Decision went on to say the following:

> "24. I go on to consider the insurmountable obstacles test in EX.1. since I have concluded that the Respondent's decision to refuse the Appellant in respect of his character conduct and associations is the correct decision, the Appellant cannot succeed under the Immigration Rules, however for completeness I consider EX.1. and EX.2. of the Immigration Rules."

32. As the Judge rightly says, if the Appellant fails on suitability grounds, he is unable to meet the Rules. The Judge therefore goes on to consider whether he meets the other aspects of the Rules "for completeness" but also leaving out of account her conclusions as to suitability.

33. Although I accept that the Judge, at [45] of the Decision when considering Paragraph 276ADE(1)(vi) does mention the likelihood of the Appellant failing on suitability grounds, she goes on to state that "[o]therwise, as indicated above" she does not find the Appellant case in that regard to be made out (my emphasis). In other words, the Judge has considered that part of the case also in the alternative as if suitability were not at issue.

34. Second, and linked to this point, the issue whether the Appellant meets the Rules under EX.1. or Paragraph 276ADE(1)(vi) depends on the Appellant establishing on the evidence that he meets specified thresholds. There is no balancing assessment to be carried out at that stage between interference and the public interest.

35. Third, if the Judge had found those thresholds to be met (or either of them), then the Appellant could contend that the error made in relation to suitability made a difference to the outcome (and I would undoubtedly have accepted that redetermination of the appeal was required). However, the Judge concluded that the thresholds were not met. For those reasons, if the Judge's findings on EX.1. and Paragraph 276ADE(1)(vi) are sound, then the appeal fails under the Rules irrespective of any finding in relation to suitability.

36. Fourth, although it might be said that the finding on suitability is capable of influencing the Judge's assessment outside the Rules, when the Judge goes on to carry out that assessment (at [46] to [47] of the Decision), the Judge makes no mention whatsoever of either suitability or even the criminal convictions.

37. Grounds two to four all concern the Judge's findings under the Rules, in particular in relation to EX.1, as to the obstacles to family life on return to Pakistan and I have therefore grouped them together under the one heading when considering the criticisms made.

38. I begin with the criticisms made of the Judge's consideration of the medical conditions of the Appellant, the Sponsor and the Sponsor's mother.

39. The Judge deals with the documentary and other evidence relating to the Appellant's and Sponsor's mental health at [25] to [36] of the Decision as follows:

> "25. The Appellant provides a psychological report of Dr Salma Latif. The report is based on an interview that took place with the Appellant on 20th March 2019 and 'Medical records of Mrs Khan'.
> 26. Dr Latif describes having seen a 'Community Log Sewa' dated 19th May 2014 confirming the Sponsor's long history of mental health difficulties from 2008 stating she has deliberately self-harmed in the past, cuts herself and has a history of agoraphobia, severe panic attacks and anxiety attacks.
> 27. Dr Latif also describes evidence from 2017 and 2018 which states that the Sponsor has had five miscarriages and is keen to be referred for private fertility treatment.

> 28. Dr Latif concludes that removing the Appellant to Pakistan could exacerbate the Appellant's and the Sponsor's mental health conditions.
> 29. I do find that Dr Latif is an appropriately qualified medical practitioner, however I find the evidence relied upon by Dr Latif to be scant and I find it hard to see how Dr Latif could conclude as she did with sight of such little evidence, with evidence of mental health problems dated some five years previously, and having seemingly not even have met [sic] the Sponsor. I find that the conclusions reached could not possibly have been reached on the basis of the evidence that Dr Latif has seen. If she has had greater evidence before her, it is not recorded in the report.
> 30. In respect of the Sponsor's health, there is a letter before me dated 27 December 2012 in respect of miscarriages the Sponsor had suffered from and a letter from 14th April 2014 which describes high levels of anxiety experienced by the Sponsor.
> 31. In respect of the medical difficulties of the Appellant, I have before me prescriptions from 27.11.2018 for Zopiclone (a sleeping tablet) and appointments for psychological appointments, albeit with no evidence of what occurred at those appointments or further recommendations for treatment.
> 32. In respect of the Sponsor's mother in law [sic] there is medical evidence (GP records) from March 2013 to February 2014 and a letter from 18 September 2016 which states that the Sponsor's mother suffers from Type 2 diabetes, previous stroke, depression and anxiety, recent diagnosis of pneumonia and asthma.
> 33. All of the evidence before me is worryingly out of date, with the exception of the psychological report where I have reservations about the out of date material reviewed by Dr Latif in terms of the weight I attach to this evidence.
> 34. I can attach little weight to any of the medical evidence before me for either the Sponsor, her mother in law [sic] or the Appellant. The evidence is out of date and therefore cannot be relied upon for a review of the current position.
> 35. I note that the Sponsor at the hearing appeared anxious, but I have little evidence of value on which I can make a finding on as to the impact on the sponsor or the Appellant of the Appellant's removal to Pakistan.
> 36. I have considered the oral evidence of the Appellant and Sponsor. The Sponsor stated that she was reliant on the Appellant and that she could sometimes not get out of bed. In these circumstances she relied on the Appellant to her help her [sic]. The Sponsor also referred to the Appellant assisting her mother in law [sic] by talking to her."

40. The Appellant's primary criticism concerns the report of Dr Latif ("the Expert Report"). It is suggested that there is a contradiction between the Judge's finding that Dr Latif is a suitably qualified practitioner and her conclusion that she cannot give weight to the report because Dr Latif has not shown how her opinion is reached. It is said that Dr Latif has said that she formed her opinion based on an interview with the Appellant and the Sponsor. The Appellant submits that the Judge must either have found that Dr Latif was incompetent or that she was biased. If not, then the Appellant says that "it is not the IJ's place to challenge a suitably prepared report of a suitably qualified medical practitioner that has never been challenged by the Respondent."

41. The Appellant's grounds take the Judge's comments out of context. In order to understand the Judge's conclusions and why she gave little weight to the Expert Report, it is necessary to look at what is said about that report against the report itself.

42. The Expert Report appears at [RB/K]. It is dated 20 April 2019. The nature of the Expert Report is said to be a "[r]eport detailing care provided to partner suffering form [sic] mental health difficulties and extenuating circumstances as to why Mr Muhammad Khan should remain in the UK".

43. As the Judge accepts, Dr Latif has appropriate qualifications as a psychologist although not as a psychiatrist. That may explain why she does not deal in the Expert Report with a diagnostic assessment of the Appellant's physical symptoms. She could not of course assess the Sponsor's symptoms in any event as she did not see the Sponsor.

44. The sources of information and documents relied upon are set out at [5.1] of the Expert Report as follows:

> "A psychological assessment of Mr Khan was undertaken on the 20th March 2019 at a meeting room in Cheadle House. Mr Khan is able to speak English with fluency and the assessment was undertaken in English. Mr Khan fully understood that the assessment was being carried out on the basis that a psychological report would be compiled and detail his present mental health functioning and also his wife's difficulties. Mr Khan provided his verbal consent to being interviewed for the psychological assessment and for the writing of this subsequent report."

It is not said for how long the meeting lasted. The Expert Report goes on to record that Dr Latif saw the medical records for the Sponsor. There is no mention of having viewed the Appellant's medical records.

45. Having recorded the Appellant's account of his past personal and medical history, Dr Latif sets out the following concerning the mental health of the Sponsor:

> "..7.6 A letter from Community Logg Sewa (dated 19th May 2014) confirms that Mrs Khan has a history of mental health difficulties from 2008 and deliberately self-harmed in the past and cuts herself on a regular basis, has a history of Agoraphobia and severe panic and anxiety attacks and has been seen by a Consultant Psychiatrist in the past and has also been diagnosed with somatic symptoms."

Other than what the Appellant told Dr Latif about his wife's depression (which is in the form of bare assertions), that is the sum total of the evidence about the Sponsor on which Dr Latif relied.

46. In relation to the Appellant's own mental health, Dr Latif sets out at [8.0] of the Expert Report the symptoms which the Appellant claims to suffer – that he is unable to sleep and has been prescribed medication to help him sleep, that he has a loss of appetite and has lost weight, that he is unable to concentrate and becomes frustrated and feels worried due to his immigration status. It is also said that he has ongoing suicidal ideation, but he has never attempted suicide as the Sponsor is a protective factor. As I have pointed out, Dr Latif did not apparently have the Appellant's medical notes to confirm his report and nor is she a psychiatrist who would have carried out an assessment of his symptoms based on diagnostic criteria.

47. Instead, based on the Appellant's self-reporting, Dr Latif concludes as follows:

> "**9.0 CONCLUSION**
>
> (i) *The likely psychological impact and the possible consequences that Mr Khan and his wife would face on Mr Khan's deportation to Pakistan;*
>
> Mr Khan and his wife Mrs Khan have experienced considerable difficulty and traumatizing experiences within their past nine years of marriage. [Dr Latif then summarises the history of problems with conception]. She also has a diagnosis of Diabetes and long history of self-harm and depression. Mr Khan is at present taking anti-depressant medication. He is receiving therapy at present. Given Ms Khan's traumatic failed pregnancies and her failed physical and mental health, as well as her husband's ongoing immigration predicament, she is completely dependent upon her husband for emotional and practical support and if Mr Khan was to leave and be forcibly returned to Pakistan, if Mrs Khan was requested to severe [sic] ties with her family and be forced to leave with him to keep their marriage together, then this would cause her to put her own health at risk, given her physical and mental health difficulties.
>
> (ii) *The likely difficulties along with its psychological impact Mr Khan would face in his reintegration in Pakistan;*
>
> In my professional opinion, if Mr Khan is returned to Pakistan forcibly, his wife is likely to experience a deterioration in her depressive state, because he emotionally and practically supports her. She also has a history of self-harm and the impact of his departure may increase the risk of further self-harm.
>
> At present Mr Khan is taking anti-depressants and is undergoing therapy as a result of the time he spent in custody and because of his wife's miscarriages and his own immigration predicament. He is likely due to his own failing mental health experience difficulty in reintegrating back into Pakistan after at least 12 years. His poor mental health would also cause him difficulty in securing employment.
>
> (iii) *Any other related matters as you see fit.*
>
> Mr Khan will be separated from his wife who is emotionally and practically dependent on him and without his support it is likely that Mrs Khan's mental health will deteriorate further given her long history of depression and self-harm.
>
> Mrs Khan has a poor state of mental health and at present requires a supportive environment. Her main source of support is Mr Khan and if he is removed from the UK, on balance in my opinion, the mental health of Mrs Khan will further deteriorate."

48. Dealing first with the Sponsor's mental health, as I have already recorded, Dr Latif did not meet her. She has relied wholly on the Sponsor's medical notes and the brief comments recorded about what the Appellant said were her problems. The only reference to the Sponsor's medical notes is the passage I have set out at [45] above. That is a reference to a letter dated some five years prior to the Expert Report. Although that letter appears to refer to ongoing problems since 2008, the letter is historic. That is clearly something to which the Judge has had and was entitled to have regard. It was not possible for the Judge to assess whether those problems continued because, as she comments at [34] of the Decision, the evidence was "out of date".

There is another letter in the bundle dated 14 April 2014 but, as the Judge said, it could not be relied upon to show the present position. It is notable that the Sponsor's witness statement makes no mention at all of mental health problems either in the past or currently. That was something to which the Judge was entitled to have regard. She has recorded some oral evidence from the Sponsor at [36] of the Decision, but that has to be contrasted with the omission in the written statement.

49. Turning then to the Appellant's mental health, probably as a result of Dr Latif's qualification as a psychologist and not a psychiatrist, there is no diagnosis of mental illness based on physical symptoms. Dr Latif has relied wholly on what she was told by the Appellant. There is no reference to her having had the Appellant's medical notes.

50. There is other medical evidence in the Respondent's bundle relating to the Appellant. There is a prescription for Zopiclone dated 27 November 2018. Zopiclone is a sleeping pill (as confirmed by the Appellant recorded at [8.2] of the Expert Report). There is no reference in the Expert Report that I can see to the Appellant being prescribed any other medication. There is reference in a subsequent letter dated 21 April 2019 from Dr Latif to the immigration authorities (seeking a change in his immigration reporting requirements) to the Appellant taking Citalopram which is an anti-depressant. There is however no mention of this in the Expert Report and it is not therefore clear from where Dr Latif has taken the information in her conclusion that the Appellant is prescribed anti-depressants.

51. Similarly, Dr Latif says in her conclusions that the Appellant is receiving therapy for his mental health. There is no reference to this in the Appellant's account to Dr Latif of his medical history or symptoms. There is some supportive evidence in the bundle to an "initial assessment appointment" with "Let's Talk-Wellbeing" (part of the Nottinghamshire Healthcare NHS Foundation Trust) which was arranged for 6 December 2018. It appears that the Appellant attended that appointment and was "to be offered step 2 Cognitive Behavioural Therapy for stress management". A further appointment was arranged on 18 January 2019. It is not clear whether the Appellant attended. A letter from the organisation dated 29 March 2019 states that the Appellant did not attend his appointment on that day, and another was arranged on 12 April 2019. Thereafter the evidential trail goes cold. The hearing before Judge Howorth was on 24 January 2020 (there is a typographical error in the Decision in this regard). There was therefore a period of nine months at least where there was no evidence as to the position.

52. As with the Sponsor, there is no mention of the Appellant's mental health problems in his witness statement. There is no mention in either the Appellant's or the Sponsor's witness statements of the mental health problems of the other partner.

53. Contrary to the submission in the Appellant's grounds, it is for a Judge to decide what weight can be accorded to evidence provided he/she does so on a rational basis and provides reasons. That includes the evidence of experts. In this regard, there is a

distinction to be drawn between an expert having the necessary expertise and the relevance and strength of the content of his/her report. Here, the Judge accepted that Dr Latif had relevant expertise. However, she could give less weight to Dr Latif's report due to the doctor's failure to show how she had reached her conclusions. That was particularly so in relation to the Sponsor where Dr Latif has relied on evidence pre-dating the Expert Report by some five years to reach a conclusion as to the Sponsor's current mental health without even meeting the Sponsor. It is difficult to see on what she has based her assessment as to the Sponsor's current mental health problems let alone what might occur if the Sponsor were to leave the UK with the Appellant or remain in the UK without him.

54. There is perhaps a little more evidence on which Dr Latif could base her assessment of the Appellant. She did not however have his medical notes and has relied, it appears, wholly on what she was told by the Appellant about his problems. I have already pointed to certain discrepancies between, for example, the evidence which the Judge had about his medication and what Dr Latif said he was prescribed.

55. The Judge had to base her assessment of the Appellant's and Sponsor's mental health problems on all the evidence. She was entitled to draw attention to the historic nature of the medical evidence and lack of up-to-date documentary evidence to show what are the problems. I have already noted the lack of any mention of the mental health conditions in the Appellant's and Sponsor's witness statements. The Judge has had regard to their oral evidence in this regard at [36] of the Decision.

56. The Judge has had regard to the other evidence, in particular as to prescription of medication for mental health problems at [31] of the Decision. Her comments in that paragraph and at [41] of the Decision are criticised as "unfortunate" for having reduced the Appellant's and Sponsor's problems to mere provision of sleeping tablets which are available in Pakistan. The Judge says as follows at [41]:

> "The Appellant according to the evidence has a degree in engineering from Pakistan. He has lived most of his life in Pakistan, I find that he could return and set up again ion Pakistan. The evidence before me in respect of medical problems indicates that the Appellant may have some psychological difficulties, as may the Sponsor, as I have indicated the evidence before [me] is poor and not up to date. The Appellant could continue to receive sleeping tablets in Pakistan and this is the only evidence available to me at present of medication he is in receipt of. There is no up to date evidence of the Sponsor's medication."

57. When [31] and [41] of the Decision are read together and with the rest of the Judge's findings about the Appellant's and Sponsor's mental health, having regard also to what I have said about the totality of the evidence, there is and can be no error of law. The Judge has faithfully recorded the evidence she had. She has taken into account the oral evidence (in spite of the failure to mention any of these problems in written statements). She was entitled to reach the conclusion she did about this evidence. There is no "downplaying" of what that evidence shows.

58. The second criticism made and which is the subject of ground three concerns the Judge's finding about alternative care available to the Appellant's mother-in-law in the UK. The relevant paragraphs of the Decision (which cross over with what is said about the Appellant's and Sponsor's own mental health and therefore begin at [36] cited above) read as follows:

> "37. However, the presence of the sister in the family home with the Appellant, Sponsor and Sponsor's mother was omitted in written statements and it must be the case that the Sponsor's sister also assists in caring for the family. There is no statement of the Sponsor's sister before me and she did not attend court. This makes it difficult to find that the Sponsor's mother could not be cared for, if indeed she requires care as there is no current evidence of this before me, by the Sponsor's sister.
> 38. I also find that the omission of reference to the Sponsor's sister living with the Sponsor's family rather tarnishes the evidence of the Appellant and Sponsor. It appears that her presence was deliberately omitted from the written evidence and only became apparent in cross examination. It was also stated in oral evidence that the Sponsor's sister was caring for her mother on the day of the hearing which also diminishes claims that she couldn't care for her if the Sponsor left the UK."

59. The first point to make about this passage is that, as with the evidence about the Appellant's and Sponsor's mental health, the evidence about the sister emerged only in oral evidence and is not covered in the written statements. There is mention of a brother in the Sponsor's witness statement but no mention of a sister. It is not suggested in the grounds of appeal that the Judge has misunderstood the evidence. Although paragraph 9 of the grounds refers to "a hidden sponsor's sister at home", that paragraph goes on to refer to the lack of evidence from "the sister in question". It appears therefore to be accepted that there is indeed a sister who lives in the UK. Indeed, that appears confirmed by the penultimate sentence of the paragraph which states that "[t]he only evidence if it can be called that, was that the sister was with the mother at home for the few hours that the appellant and the Sponsor were in court". Mr Bukhari accepted that the Sponsor does have a sister in the UK. The grounds do not however provide any further detail about the whereabouts of that sister. When I asked Mr Bukhari about this and whether she lived with the Sponsor and her mother, he said that "she comes and goes but does not live in the same house". As I have already noted, coming back to the written evidence, there is mention in the Sponsor's witness statement to a brother who used to assist his mother but it is said that "for the past three years he was no longer available to assist her". It is not said why he is no longer able to help. There is no evidence from this brother.

60. The issues in this regard were, first, the need for the Sponsor's mother to have care and, second, whether that care would be available from elsewhere. Dealing with the second issue first, the fact of other family members being available and able to assist was clearly relevant. The Judge was entitled to have regard to the lack of evidence from those other family members and to draw inferences from that omission. I do not have any record of proceedings to check the extent of what was said in evidence about the sister but, at the very least, based on the evidence which is accepted as having been

given in the grounds, the Judge was entitled to find that there was a sister who could help out.

61. That brings me on to the first issue, namely whether the Sponsor's mother needs care and the extent of her caring needs. That is part of the Judge's consideration at [37] of the Decision.

62. The written statements of the Appellant and Sponsor point to a stroke which the Sponsor's mother suffered in 2015. It is said that she is "old and frail" and that "she has been incapable to conducting [sic] day to day normal activities on her own. She needs regular physical support in terms of eating, bathing and other essential health needs." It is said that the Sponsor "always hold her to walk around or to go for medical checkups and so on". The statements were made in September 2019.

63. There is a letter from the Sponsor's mother dated 13 September 2019 at [RB/F] which similarly refers to having suffered a serious stroke and being unable since "to function without physical support". She says that she does "not think that [she] could be alive for even a week as [she] could not wash, cook, eat or even walk without physical support and [the Sponsor] has been the only one caring for [her]." She too mentions the Sponsor's brother but says that "since his father passed away he no longer comes near [her]". There is no reason provided why that should be so.

64. I turn to the independent, documentary medical evidence about the Sponsor's mother's health and caring needs. This consists of the following (at RB/C and in the loose bundle):

    (a) Letters dated 5 January 2018 and 12 September 2019 from Leicester General Hospital referring to admissions for an endoscopy. There is no evidence about the reason for that procedure nor any information about the outcome.
    (b) Letter dated 30 November 2017 from a Consultant General and Colorectal Surgeon, Mr Sangal. He confirms seeing the Sponsor's mother (then aged 65 years) on 22 November 2017. The letter confirms that the mother's daughter (presumably the Sponsor) attended with her mother. There is a suggestion of the need for a colonoscopy but the Sponsor's mother was said not to want one. There is a possible diagnosis of coeliac disease but no further information about that. It appears that the Sponsor's mother was already having endoscopies at that time. She was on a gluten free diet.
    (c) Notification of an appointment on 7 April 2017 with the respiratory medicine department. It is not said what this is for nor is there any information as to outcome.
    (d) Letter dated 18 September 2016 from the Sponsor's mother's GP. She is said at that time to suffer from type 2 diabetes, "previous stroke", depression and anxiety and "recent diagnosis of pneumonia and asthma". It appears from what is there said that the appointment in April 2017 related to that latter condition.
    (e) Patient records from March 2013 to March 2014. These confirm a stroke in 2013 (and not 2015 as stated in the Appellant's and Sponsor's statements although I

accept that she may have had more than one stroke). In April 2013, her older daughter (I assume the Sponsor) is said to suffer from depression and anxiety, her son is said to suffer from social anxiety and agoraphobia (as a result of which he does not leave the house) and her youngest daughter is said to be recently divorced and therefore "feeling down". There is reference to general check-ups, a chest infection in May 2013 and back pain in June 2013 and subsequently. The records refer to onset of diabetes in January 2014.

(f) There is an extract from what appears to be a disability allowance care form dating 5 December 2013 which refers to physiotherapy for back problems and various medications for other problems. There is no evidence about outcome.

(g) Letter (undated) from Stroke Association setting out the service provided. There is no evidence about take up of the offer of support nor when this service was offered.

65. There is also evidence in the bundle about personal independence payments. However, first, this is historic (dating back to 2016) and, second, it appears to relate to payments made to the Sponsor and not her mother. It is not clear therefore whether the documents relating to carers allowance given, it appears, to the Appellant, relates to care of his mother-in-law or the Sponsor. However, a letter dated 23 February 2015 appears to suggest the latter as it refers to the Sponsor not getting disability benefit from February to March 2015 and to the Appellant not therefore being entitled to carers allowance for that period.

66. As the Judge rightly points out, none of this evidence shows the Sponsor's mother's need for care. The medical records do not go up to the date when the Appellant and Sponsor say that she suffered the serious stroke. There is no independent medical evidence confirming that she suffered that stroke nor the level of incapacity as a result. The evidence there is about the Sponsor's mother's health is largely historic (as the Judge observed) but, as the Judge also observed, does not provide evidence of the need for any personal care let alone to the level asserted in the statements.

67. Whether or not the Judge has speculated about the availability of care from the Sponsor's sister is therefore irrelevant. As I have already observed, however, the Judge was entitled to draw inferences from the lack of evidence about the position both of this sister and of the Sponsor's brother. The Judge was therefore entitled to conclude as she did at [42] of the Decision that "the Sponsor's mother could be cared for by the Appellant's sister who resides with the Sponsor's mother, <u>if indeed she requires care</u>" (my emphasis).

68. Moving then finally to ground four, this concerns the Sponsor's ability to speak the languages spoken in Pakistan. This is dealt with by the Judge at [43] of the Decision as follows:

> "I also find that the Sponsor speaks languages of Pakistan, as her parents relocated to the UK from Pakistan and it is likely that she communicated with them [in] Pakistani languages. I do however find that it is also likely that the Sponsor has been truthful that she cannot write in any Pakistani language".

69. As with the other written evidence to which I have referred, the statements of the Sponsor and Appellant contain no more than bare assertions that the Sponsor does not speak or write any of the languages in Pakistan. There is however other evidence that the Sponsor's mother speaks Urdu as her main language (see for example entry dated 28 August 2013 in the medical records). Although the Sponsor came to the UK at a young age, the Judge was entitled to draw inferences from the fact that her parents will have spoken the languages used in Pakistan which is confirmed by the evidence. This is not impermissible speculation.

70. As Mr Melvin pointed out, to establish that the Decision is Wednesbury unreasonable or perverse the Appellant would have to show that the Decision is one which a Judge properly directed could not have reached on the evidence. It is a high threshold. Leaving out of account the suitability findings, the Judge has taken into account all relevant evidence and has made findings open to her on that evidence for the reasons she has given which are adequate. She was entitled to reach the conclusions she did regarding EX.1. and Paragraph 276ADE(1)(vi) and on the proportionality of removal. As I have concluded for the reasons given at [30] to [36] above, the Judge has reached those conclusions without regard to her findings about suitability and on the assumption that the Appellant would not fail for suitability reasons.

71. I therefore conclude that there is no error in relation to the Judge's findings about the obstacles to family life being continued in Pakistan. The Judge was entitled to conclude on the evidence that the obstacles asserted did not, for the reasons given, amount to insurmountable obstacles. The Judge was entitled to find that there would be no very significant obstacles to integration in Pakistan and therefore that Paragraph 276ADE(1)(vi) was not met. For that reason, the Judge was entitled to conclude that the Appellant could not satisfy the Rules even if the suitability requirement was met. She was entitled to conclude that the Appellant's human rights would not be breached by removal.

72. For those reasons, the Judge's error in relation to the finding concerning the suitability requirement makes no difference to the outcome. Based on the Judge's assessment of the Appellant's inability to meet the other requirement of the Rules based on his family and private life, she was entitled to conclude that he would not be able to satisfy the Rules in any event. She was entitled to take that into account when considered whether Article 8 would be breached by removal. She has not taken into account her findings relating to suitability (or even the criminal convictions) when carrying out her proportionality assessment. She was therefore entitled to dismiss the appeal on the basis that Article 8 ECHR would not be breached. For that reason, although there is an error of law in the Decision, I decline to set aside the Decision. I therefore maintain the Decision.

CONCLUSION

73. For the foregoing reasons, although I accept that there is an error of law disclosed by the first ground, I am satisfied that it is not one which affects the outcome.

Accordingly, I decline to set aside the Decision. I therefore uphold the Decision with the result that the Appellant's appeal remains dismissed.

DECISION

The Decision of First-tier Tribunal Judge Howorth promulgated on 7 February 2020 involves the making of an error on a point of law but that error is not one which affects the outcome. I therefore uphold the Decision.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 22 April 2021