Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06225/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 August 2019	**On 2 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MRS NAJIA AKHTER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D. Balroop, Counsel.
For the Respondent: Ms A. Fijiwala, Home Office Presenting Officer.

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh who resides in that country along with her family where she has lived throughout her life. She appealed a decision of the Entry Clearance Officer UKVI Sheffield, dated 30 January 2018 to refuse to grant her leave to enter the United Kingdom as a spouse, which application was made on 25 July 2017 online. The Appellant claimed that she was validly married to Ruball Miah, a British citizen settled in the United Kingdom. The Respondent refused the application because the genuineness of the relationship was in doubt.

2. The Appellant sought permission to appeal which was initially refused. However, a renewed application was made to the Upper Tribunal and granted by Upper Tribunal Judge Grubb on 02 July 2019. His reasons for that grant are:-

> *"1. The First-tier Tribunal (Judge J H L Shepherd) dismissed the appellant's appeal on Art 8 grounds against a decision to refuse her entry clearance as a spouse.*
>
> *2. The judge found that the appellant's marriage was not "genuine and subsisting". It is arguable. On the basis of the grounds, that the reasons for that finding are not sustainable. There appears to be an underlying perception that the marriage is, somehow, not a real one because of the sponsor's learning difficulties but the judge rejected the argument that he lacked capacity to contract the marriage. It is not immediately apparent why the fact that the appellant is not informed about the sponsor's need for care etc, even if the judge is correct on that, is relevant to whether the relationship is "genuine and subsisting". There was evidence that the appellant had spent time with the sponsor following their marriage, when if accepted it would have been clear what his needs are. That evidence stood against the judge's finding and it is not readily apparent why the judge rejected it.*
>
> *3. For these reasons, permission to appeal is granted."*

3. Thus, the appeal came before me today.

4. Mr Balroop submitted that the nub of his appeal was the error made by the Judge in concluding that the relationship between the Appellant and her sponsor husband was not "genuine and subsisting".

5. He relied on the grounds seeking permission to appeal. Albeit that the Judge, at paragraph 61 of the decision, found that the sponsor did have the capacity to enter into his marriage with the Appellant, she went on to conclude that the relationship between them was not genuine and subsisting and arrived at this finding for three reasons. Firstly, that the sponsor's reading and writing proficiencies are at a low level and he has no grasp of financial matters. Secondly, that the sponsor's mother did not give oral evidence during the hearing and finally, that the Appellant is not appropriately informed about the caring responsibilities that she will have when in the United Kingdom. As to the first reason, Mr Balroop submitted that these were effectively "red herrings in the assessment of whether the relationship between the Appellant and sponsor is genuine and subsisting". They go to the issue of his capacity to conduct his relationship and communicate with the Appellant, but no further. The Judge had the benefit of medical evidence which did not suggest a lack of capacity and supported the Appellant's presence in the United Kingdom. Further, there was a plethora of communication evidence between the Appellant and sponsor, demonstrating that he had the capacity to conduct his relationship and communicate with the Appellant. As to the issue of the sponsor's mother not giving oral evidence during the hearing, the Judge has erred in drawing an adverse inference from this. The Judge never put to the sponsor that an adverse inference might be drawn as a consequence of this. In so doing, she again fell into error. In any event, such evidence

would have added little in light of the finding by the Judge that the sponsor had the capacity to enter into his marriage with the Appellant. As to the last issue, it amounts to an unsafe finding by reason of it being irreconcilable with the fact that the Appellant and sponsor are cousins, that they have known each other since 2013 and have been in communication ever since, and that the Appellant and sponsor lived together for 12 days in 2016 and 5 weeks in 2017/2018 during which time, if not earlier, the Appellant would have become fully aware of the caring responsibilities she would have once in the United Kingdom. It was during this period that the Appellant and sponsor had sexual intercourse. The Judge also erred in coming to an adverse conclusion about the relationship between Appellant and sponsor on the basis that the latter did not sign her application form. Part of the application process would have caused her to have to provide both fingerprints and a photograph.

6. Ms Fijiwala argued that there was no material error. The Judge had considered all relevant issues within the appeal, including witness evidence and a failure by the sponsor to acknowledge the Appellant's difficulties. The conclusions of the Judge were open to be made in all the circumstances.

7. I find that, for all the reasons put forward in the grounds seeking permission to appeal, the Judge in the First-tier Tribunal materially erred. Her reasons for finding that the relationship between Appellant and sponsor was not "genuine and subsisting" are unsustainable. The Appellant's learning difficulties do not undermine the marriage. The Judge rejected the argument that he lacked capacity to contract the marriage. There was evidence that the Appellant and sponsor spent time together following the marriage, during which it was consummated. Throughout that period, it would have been plain precisely what his needs are.

8. It the circumstances, the Judge materially erred.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remake the decision in the appeal by allowing it.

No anonymity direction is made.

Signed Date 22 August 2019

Deputy Upper Tribunal Judge Appleyard

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.

Signed Date 22 August 2019

Deputy Upper Tribunal Judge Appleyard