



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13546/2019**

THE IMMIGRATION ACTS

**Heard via Skype for Business at Field
House
On 19 March 2021**

**Decision & Reasons
Promulgated
On 22 April 2021**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

**RAJEEVAN NAVARATHTHINAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - COLOMBO

Respondent

Representation:

For the Appellant: Mr M Symes, instructed by Patricks Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Sri Lanka. He appealed to the First-tier Tribunal against the respondent's decision of 15 July 2019 refusing his application for entry clearance to the United Kingdom made on the basis of family life with his spouse, the sponsor. The Entry Clearance Officer refused the application on the basis that the appellant did not meet all the requirements for eligibility for entry clearance, in that it was not accepted that the relationship was genuine and subsisting nor that the couple intended to live together permanently.

2. At the hearing Mr Symes, who also appeared below, stated that the legal issue was that of whether there was a genuine and subsisting relationship between the sponsor and the appellant, but that there were issues arising relating to the sponsor's capacity. The instructing solicitors had not been able to take evidence from her or prepare a witness statement on her behalf, but it was submitted that she should participate in the hearing and give evidence to the Tribunal. The Presenting Officer stated that the respondent had concerns about capacity and had sought the mental capacity assessment which was in the bundle, but had concerns about the report and the relevant expertise of the social worker. The judge agreed as being wholly appropriate that the medical conditions of the sponsor were such that she should be treated as a vulnerable witness. She has a diagnosis of global development delay and microcephaly.
3. The judge heard evidence from the sponsor's mother and from the sponsor herself. In her findings and reasons the judge noted that the respondent did not contest the validity of the marriage between the appellant and the sponsor but at issue was whether there was a genuine and subsisting relationship and whether the sponsor had capacity.
4. The judge gave very detailed consideration to the evidence, including the capacity assessment report which was provided by a social worker from the London Borough of Redbridge, and also took into account the sponsor's statement of entitlement for her personal independence payment (PIP) award. The judge noted the guidance in Goudey [2012] UKUT 00041 in respect of the appropriate test for the subsistence of a marriage. She also noted what had been said about the Mental Capacity Act 2005 in In re M (An Adult) [2014] EWCA Civ 37.
5. The judge expressed concerns about capacity, and I will return to those concerns in more detail when considering the submissions made in relation to what the judge had to say about that, and also the judge found that it had not been shown that the relationship was of the quality of a genuine and subsisting real relationship beyond the formality of a marriage. As a consequence she dismissed the appeal.
6. Permission to appeal was sought, and granted, on the basis first that the judge had made confused findings as to whether or not the sponsor had capacity to enter into marriage and secondly that the judge had erred in law in failing to give express weight to the expertise of the author of the Social Services' capacity report.
7. In his submissions Mr Symes adopted and developed the points made in the grounds. In the refusal letter the respondent had challenged the genuineness and the subsistence of the marriage, stating that it was not an ongoing constant relationship. The Home Office view thereafter had changed and capacity was also put in issue. No fairness point was taken about that, both parties had the local authority report on capacity and it could be predicted therefore that it would be raised as an issue. The judge

found that there were issues about capacity as to whether or not the sponsor sufficiently understood what marriage involved and therefore the marriage was not genuine and subsisting.

8. The judge had referred repeatedly to issues of capacity which had taken a central importance in the appeal so it needed a clear finding on the balance of probabilities. What the judge had had to say at paragraphs 78, 79 and 80 was inconclusive. At paragraph 64 she mentioned the fact that under section 1(2) of the Mental Capacity Act 2005 it was provided that a person should be assumed to have capacity unless it was established that they did not. This was an important issue. If the evidence were uncertain it seemed the appellant should win on the point and the judge had noted that and it was necessary for there to be a clear finding on that and that had never really been done.
9. As to whether the matter of capacity might be irrelevant in light of the finding at the end of paragraph 74 where the judge did not accept the relationship was of the quality of a genuine and subsisting real relationship beyond the formality of marriage, and whether or not that had been challenged, Mr Symes argued that there had been a challenge by implication in the second ground. The evidence base about genuineness was unduly reliant on the DWP assessment in contrast to the local authority assessment. The latter had been commissioned with regard to the issue of capacity but was material from which it could be concluded that the appellant did understand the institution of marriage and should not be trumped by a proforma DWP report. It was an administrative report, rather than a professional report. The clash of evidence had not been adequately resolved. The social worker's evidence was relevant to the genuineness of the marriage.
10. In his submissions Mr Clarke argued that capacity was a term of art and he did not see that the Presenting Officer at the hearing had argued or understood the connotations of the use of the word within the Act. He said a secondary meaning was the ability to do something. If the judge were open to any criticism it was with regard to the language used. It was not true that there were no clear findings on capacity, as such findings were made for example at paragraph 64 and paragraph 78. As regards the term of art under the Act there were clear findings that it had not been rebutted by evidence.
11. The question of capacity within the Act was not determinative of the issue of a genuine and subsisting relationship. The finding on the latter point at paragraph 74 was not challenged. The judge had referred to capacity with regard to the appellant's ability to contract a genuine and subsisting marriage. There was no witness statement from the sponsor or any explanation as to why not.
12. The sponsor had given evidence for example set out at paragraphs 27 and paragraph 30 and there were clearly communication issues. She could not

read or write. There had been no romantic relationship so far. They had married in another country in circumstances where she had given her communication via emojis. Answers had been given in interview not by the sponsor but by her mother. It was a long distance relationship. When the judge had considered the legal connotations of capacity within the Act, she had to consider the circumstances about communication/contact between the appellant and the sponsor. There were unchallenged findings with regard to the relationship at paragraph 71 and paragraph 72 and this was significant. On the paucity of evidence it should be questioned how the judge could make findings other than those she had. The findings at paragraph 72 were critical and there was no real challenge to those findings.

13. At ground 2 issues were raised with regard to the capacity report, but it did not really take matters further. The findings at the end of paragraph 74 were quite devastating. Ground 1 could not be made out. It could be there was a failure to explain capacity as a term of art but there was no error of law.
14. With regard to ground 2 the judge rejected the local authority's report it was said but that was not correct. She had said it should be given limited weight but had not gone behind the presumption of capacity. The report had been agreed between the parties. The error alleged went to weight together with the point about the DWP report. The judge had considered the latter report at paragraph 69, placing reliance on it, and the problem in the grounds was that it was not argued before the judge that it was not a reliable document. It could not be said that the judge should have criticised a report not challenged before her. In any event the way in which she had dealt with it was wholly sustainable. What arose from paragraph 59 and in reality the way the Presenting Officer had put the case at paragraph 34 there was no apparent knowledge of the act or presumptions of capacity being a term of art. The judge considered the content of the evidence at paragraphs 60 and 61 and it did not help the appellant about the genuineness or subsistence of the marriage. There was detail at paragraph 61 and the judge noted limited scope about ability to communicate and this fed into the genuineness and subsistence issue as did paragraph 62. The judge set out criticisms at paragraph 63 and these were fair in the context of the genuineness and subsistence test. So whether the appellant met the capacity definition under the Act or not should perhaps have been a reference to vulnerability, rather than culpability but the findings were made in respect of the genuineness and subsistence of the marriage and the decision was sustainable.
15. By way of reply Mr Symes argued there was material in the local authority report that was relevant to capacity in the broader sense with regard to the ability to participate in a genuine relationship which the person genuinely understood. Reference was made to this at paragraph 10(f) of the skeleton before the judge. With regard to the sponsor speaking about

the appellant and messages between them and body language it was relevant to the broader capacity sense of participating in the relationship.

16. I reserved my decision.
17. I consider first the judge's findings on the point of capacity. She set out at paragraph 64 the gist of section 1(2) of the Mental Capacity Act 2005, which provides that a person should be assumed to have capacity unless it is established that they do not. The judge went on to say that the difficulty in the case was that it was not established by any medical evidence before her upon which reliance could reasonably be placed that the sponsor did not have capacity in relation to a decision to marry. She went on to say that she shared the concerns raised by the respondent in relation to the quality of the capacity report but it did however provide a view of the social worker tasked with preparing such a report by her local authority employer that the sponsor did have capacity. The judge went on to say that she placed limited weight on that conclusion due to the concerns as to whether the assessment was properly and thoroughly focused on all relevant considerations, but the result remained a position where it was not established that the sponsor did not have capacity, and in such circumstances a person was to be assumed to have capacity. The judge regarded this as deeply unsatisfactory in all the circumstances of the case and given the evidence overall which she was shortly to go on to address as to the limitations on the sponsor's abilities, she had serious concerns as to the sponsor's capacity with respect to a decision to marry and thereafter engage in consequences including sexual relations. She went on to note that the sponsor had clearly affirmed her belief that she was in love with her husband, that they would get to know each other better over time but the report which had recorded that also recorded that to date despite having celebrated their wedding and entered into married life on the basis that the appellant was "shy" there had been no affection or romantic activity between the couple.
18. At paragraph 63 the judge noted the contents of the local authority assessment. It clearly recorded areas in which the sponsor could not recall simple information such as her surname or how long she had known her husband and the assessor's doubts as to whether the failure to recount details was due to not remembering or an inability to recall related to a possible learning disability. In evaluating whether the sponsor understood the consequences and possible risks of the decision, the record did not point to any evidence that she understood the possible risks of entering into a marriage or the marriage not working out, rather it recorded her belief that the couple loved each other and would get to know each other. The assessor interpreted the sponsor's body language as demonstrating that she was deeply in love with the appellant but did not explain what this body language was and how, given the linguistic and cultural differences, the body language displayed denoted a person deeply in love or the relevance of that assessment to the analysis of whether or not the sponsor had the relevant capacity. The report did not record that

there was any discussion or questions raised with the sponsor as to sexual relations within the context of the marriage and her understanding of that. The sponsor had indicated that no “romantic activity” had taken place.

19. As regards the DWP report, this reported such matters as the sponsor needing supervision or assistance from another person to prepare or cook a simple meal; she could eat or drink unaided, she could wash and bathe unaided and manage her toilet needs or incontinence unaided and dress and undress unaided and express and understand verbal information unaided. She needed prompting from another person to read or understand complex written information; she needed support to engage with other people from someone who is trained or experienced in helping people to engage in social situations; she needed prompting or assistance from another person to make simple budgeting decisions.
20. The judge found it reasonable to place reliance on the DWP assessment which the sponsor and her mother clearly accepted, and therefore made findings based on that, including the fact that though she could engage in oral communication she could not read or understand complex information or engage with others in social situations without the support of someone else who was trained or experienced in helping her. The judge found that the sponsor was not able to live independently without support. She was deeply vulnerable and somewhat isolated given her inability to travel independently outside her home or look after her finances or securely feed herself without any provision of services.
21. The judge referred again at paragraph 78 to her concerns about the sponsor’s capacity, saying that whilst accepting pending an unequivocal demonstration that she did not have capacity she must be considered to have capacity. She said that in paragraph 79 that if it were unequivocally beyond doubt that the sponsor had capacity, the evidence as to the relationship between the couple would still amount to little more than an assertion of a relationship given the formality of the marriage, the short period of time together without any romantic activity or documented demonstration of affection other than the exchange of picture messages and calls during which the sponsor could not converse with any level of sophistication or spontaneity. At paragraph 80 she said that where it is not established that a person does not have capacity, capacity is to be assumed but the issue was of such gravity that where there were given concerns or reasonable doubts as to capacity, the public interest surely could not and in her view did not lean towards a grant of entry clearance on the basis, as submitted, that this was not a settlement route and matters might be audited in five years but rather away from the grant of entry clearance. She said “if I consider the sponsor as a person with capacity to enter into marriage, I remain unsatisfied that on the evidence before me there is a genuine relationship akin to and of the nature and quality of marriage between the couple.”

22. The challenge in this case, as set out above, is as to the judge's findings or as it is contended lack of clear findings, on capacity, and her treatment of the local authority capacity report. In my view, the findings in this regard, to which I shall return shortly, may, even if they are vulnerable to the challenge to them made by Mr Symes, be severable from the findings as to the genuineness and subsistence of the relationship between the couple if such severance can properly be made. After all, capacity is not normally an issue in a marriage entry clearance case, and if one took the capacity issue out of this case, in my view if the findings on the genuineness and subsistence of the relationship between the couple are sound ones and untainted by any flaws in the capacity findings, then the decision can stand.
23. In this regard it is necessary to look at the decision of the judge where it concentrates on the genuineness and subsistence of the marriage. She set out detailed reasons in this regard at paragraphs 70 to 72 of the decision in particular. She noted that the basis of the refusal in this regard was because the answers given by the appellant and the sponsor in interview demonstrated they did not know details of each other's lives which was to be expected after several months of marriage where they were stated to be in daily communication. The appellant's witness statement gave explanations to the discrepancies in part based on the fact of the marriage being arranged meant that the couple did not know a great deal about each other at that stage. It is accepted that the mother answered for the sponsor during the interview. There was no photographic evidence of the couple together or documenting the wedding celebration. A discrepancy as to where the sponsor stayed after the wedding was identified but regarded as lacking substance, in the judge's paragraph 71. She also considered there the evidence of a visit to Sri Lanka in November 2019 where she found that the couple had spent time together but it had always been under the auspices of their families and in particular the sponsor had never spent time with her husband when her mother had not been in close proximity. She did not find that the couple had "lived together" in any meaningful sense. She considered this to be consistent with the limitations on the sponsor's ability to be independent and conduct herself without support and that it demonstrated the limitations on her ability to exercise personal autonomy.
24. Having reminded herself that the sponsor (she wrote appellant but clearly meant the sponsor) was properly treated as a vulnerable witness, the judge found that her ability to communicate orally was clearly very limited. Communications appeared to be through emojis and picture messaging. The sponsor's mother said in evidence that the couple talked on the phone daily and this had continued while the appeal had been pending. There was no evidence before the judge such as telephone records which would support the frequency and regularity of contact between the couple or that they had maintained conversations together or were in contact with each other for any length of time. There was no evidence of any written communications or video communications or texting or picture messaging

between the couple. There was no evidence of demonstrations of affection such as greetings cards or gifts. The appellant's witness statement referred to his awareness that the sponsor could not read and write and that her talking "was not as spontaneous as mine" and that she "does not have a lot of words to carry out the interview even when she talks". In evidence she was able to communicate the single word "happy" as a response to her husband coming to the United Kingdom and "crying" if he could not come.

25. The judge found that the sponsor did have positive feelings for her husband and the assessor clearly recorded her repeated affirmations of love for her husband. However there was no detailed evidence before the judge or clear articulation as to the sponsor's position or knowledge regarding her marriage and the nature of the relationship she had entered into. The judge found the sponsor did not readily understand certain matters and was heavily dependent on her mother to manage and mediate her interactions. Taking account of the evidence available, she also found that it was more likely than not that the appellant and the sponsor were not able to communicate orally with any detail or depth or in a manner approximating to talking given its ordinary meaning in the context of chatting or conversing between couples. She found that the sponsor relied heavily on her mother's presence to support her with communication. She found that she could not read or write or articulate her feelings, thoughts and understanding with any level of sophistication. She found that the sponsor's mother was overoptimistic even if earnest in seeking to put across that the couple "talk" daily. She found it was more likely than not that the couple's "talk" on the telephone was severely limited and not sufficient to develop knowledge of each other so as to develop a genuine or real relationship beyond the formality of being married.
26. The judge went on at paragraph 74 in her consideration of the marriage to conclude that the appellant had not satisfied her that the relationship was of the quality of a genuine and subsisting real relationship beyond the formality of a marriage.
27. In my view it is clear that the judge came to her conclusions on the genuineness and subsistence of the marriage without factoring into that what she had concluded or failed to conclude about capacity. In my view the appeal therefore falls to be dismissed on the basis that there has not been shown to be any error of law in the judge's assessment in this regard.
28. On the capacity point, the judge clearly had concerns about this and there is undoubtedly concern expressed in her decision as to how to address the consequences of the absence of evidence to show that the sponsor did not have capacity with her concerns about the marriage. However she made it sufficiently clear at paragraph 80 that if she considered the sponsor to be a person with the capacity to enter into marriage she remained

unsatisfied on the evidence before her there was a genuine relationship akin to and of the nature and quality of marriage between the couple. As regards the findings on capacity I consider that the judge, though she wavered to an extent, clearly regarded herself as bound by section 1(2) of the 2005 Act and though she came close at times in her decision to going against the presumption, ultimately her decision was faithful to the presumption. I also consider that she was entitled to express the concerns she had about the capacity report for the reasons that she gave. But in the end, if I am wrong in the analysis set out above in this paragraph, I do not consider that any flaws that might have existed in her assessment of the capacity point are material errors of law given the soundness and untainted nature of her findings on the genuineness and subsistence of the marriage. I also consider that she gave proper and appropriate consideration to the DWP report.

29. I can only conclude by expressing my own sympathy for the sponsor as the judge did at her paragraph 81, given the circumstances in which she has clearly wanted to be married for some time, but nevertheless on the judge's findings I consider that there is no error of law in the assessment of the genuineness and subsistence of the marriage or in respect of her findings on capacity and therefore this appeal is dismissed.

The appeal is dismissed.

No anonymity direction is made.



Signed
Upper Tribunal Judge Allen

Date 14 April 2021