



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/12697/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 July 2019**

**Decision & Reasons Promulgated  
On 15 July 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HANBURY**

**Between**

**MRS AIK  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Tobin, Counsel, instructed by S Satha & Co  
For the Respondent: Mr Bramble, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the appellant's appeal against the decision of the First-tier Tribunal to dismiss her appeal against the Entry Clearance Officer's (ECO's) decision on 5 September 2017 to refuse entry clearance as the perfect partner of a person present and settled in the UK.
2. The background to this matter is that it came before me on 10 April 2019 when I heard oral argument by both representatives. I directed a further hearing to take place at which the parties were to file any evidence relevant to the issue of the alleged lack of capacity on the part of the appellant to enter a marriage with the sponsor. The evidence was to be

limited to issues which had arisen since the last hearing on 7 December 2018.

3. By way of further background, the relationship between the appellant and the sponsor is said to have begun in December 2012. However, both parties agree that this was an arranged relationship. The appellant first met her partner therefore on 11 November 2014 and the arranged marriage took place on 15 November 2014. For reasons which seem understandable, the ECO decided to refuse entry clearance as a partner of a person present and settled in that he was not satisfied that the relationship was genuine and subsisting but more importantly, for the purposes of this hearing, he was not satisfied that the appellant had capacity to consent to marriage at that time.
4. The decision of the ECO was appealed to Judge Beach sitting in the First-tier Tribunal. Judge Beach decided to find that there was a genuine and subsisting relationship but also decided that the evidence did not show that the appellant had capacity to enter a marriage. Although the judge was referred to the relevant authority, that is the case of **London Borough of Southwark v KA [2016] EWCOP 20**, Judge Beach nevertheless decided that the capacity to enter a marriage and sexual relations had to be established by the appellant and she had not done so. This contradicted earlier observations by the judge, at paragraph 42 of her decision, where she noted that capacity to enter a marriage and sexual relations must be presumed unless there is evidence to the contrary.
5. When the matter came before me on 10 April 2019 I agreed with the grounds of appeal in that it seemed to me clear that in relation to capacity the judge should have assumed capacity unless the appellant was proved to lack it.
6. Helpfully, at the adjourned hearing there has been a measure of agreement between the parties. Ms Tobin, who represented the appellant today, expressed some doubt as to the clarity of my directions. I regret any lack of clarity in the earlier directions. In addition, I raised in my earlier decision I raised the possibility that the appellant and the sponsor may be able to continue their family life in India. However, that has clearly not resulted in any change of approach on the part of the respondent. Mr Bramble accepts that possible resettlement of the sponsor to India with the appellant cannot seriously be advanced, given the respondent's international obligations. That clearly has not been a matter that has been worthy of any further exploration. The respondent accepts that the sponsor is resident in the UK and that he is entitled to use the National Health Service and enjoys European standards of welfare provision.
7. In relation to the capacity assessment, following the previous hearing I set aside the adverse capacity assessment made by the judge at the time that the marriage was entered into. Following reflection and consideration of further evidence and in particular the evidence of Dr Vishal Savani dated

21 June 2019 Mr Bramble has accepted that it is now clear from the answers to the questions given to Dr Savani that the appellant had capacity to enter her marriage to the sponsor.

8. It is therefore unnecessary for me to say anything further at this stage but simply to agree with the respondent, who now accepts that the appellant qualified under the Immigration Rules for entry clearance. Accordingly, although this appeal is limited to human rights grounds, it is appropriate to allow the appeal to the Upper Tribunal.

### **Notice of Decision**

The decision of the First-tier Tribunal has already been set aside. The appeal to the Upper Tribunal is allowed.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 9 July 2019

Deputy Upper Tribunal Judge Hanbury