Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11053/2016

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision Promulgated**
On: 9 August 2017	**On: 10 August 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

MOHAMED SLITI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Ms Barton, Counsel
For the respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Tunisia, has appealed against a decision of the First-tier Tribunal dated 18 November 2016 in which it dismissed an appeal against the decision of the respondent refusing him entry clearance as the spouse of a British citizen ('the sponsor'), on human rights grounds.

2. In a decision dated 1 June 2017 First-tier Tribunal Judge Froom considered it arguable, inter alia, that no specific allegation of the

© CROWN COPYRIGHT 2017

parties being involved in a marriage of convenience was made and in all the circumstances the First-tier Tribunal erred in law in making this finding.

Genuine and subsisting marriage

3. It is clear from the respondent's decision dated 12 April 2016 that the sole reason for refusing the appellant entry clearance was because she was not satisfied that the relationship is genuine and subsisting. The respondent was satisfied that all the other requirements of the Immigration Rules were met, including the financial requirements.

4. The First-tier Tribunal acknowledged that the sponsor was a frequent visitor to Tunisia but made the following relevant findings of fact at [19] to [20]: the evidence of communication between the parties is limited; no documentation to support the claim that they are building a home in Tunisia was provided; there was insufficient evidence as to how the relationship developed given the 27-year age difference between the parties. The First-tier Tribunal then said this at [21]:

> "Taking all of this evidence into account I am satisfied that the relationship is not genuine and the marriage is one of convenience entered into simply to allow the appellant to enter into the UK."

5. Mr McVeety accepted that the First-tier Tribunal was not entitled to find the relationship to be a marriage of convenience when that allegation was never made by the respondent. The respondent did not seek to rely upon any evidence to establish a marriage of convenience and only contended the marriage not to be genuine. Mr McVeety accepted that a marriage of convenience is to be distinguished from a relationship that is found not to be genuine. In Sadovska v SSHD [2017] UKSC 54 the Supreme Court considered the definition of a 'marriage of convenience' at [24]. This term is found in EU law whereas the definition of a 'sham marriage' is set out at section 24 of the Immigration Act 2014.

6. Although the First-tier Tribunal properly directed itself to the Respondent having the burden of establishing that the marriage is one of convenience at [6] and [7], the First-tier Tribunal has not applied this when making its findings of fact. It is difficult to discern why the First-tier Tribunal was satisfied that the respondent established that the marriage was one of convenience, the predominant purpose of which must be abusive conduct. The respondent made no such assertion in her decision and the decision was made on the papers. In so finding I am satisfied that the First-tier Tribunal erred in law.

7. It is difficult to separate the error of law in finding that the marriage is one of convenience from the finding that the relationship is not genuine and impossible to know to what extent the finding that the marriage is one of convenience played a role in the conclusion that the relationship is not genuine.

Article 8

8. The First-tier Tribunal went on to address Article 8 taking the evidence at its highest from [26] onwards. In so doing the First-tier Tribunal has taken into account an irrelevant consideration at [35], [40] and [44]: the sponsor would relocate to Tunisia if the relationship is genuine and subsisting. The real question for the First-tier Tribunal, taking the evidence at its highest, is whether or not it is proportionate to expect this British citizen sponsor with an established home and employment in the UK to forego this by moving to Tunisia, in order to have family life with her husband, when all the requirements of the Immigration Rules are met. It follows that in failing to ask itself the correct question the First-tier Tribunal has erred in law when determining Article 8.

Disposal

9. Both representatives agreed that the decision should be remade by the First-tier Tribunal. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the First-tier Tribunal.

10. Ms Barton acknowledged that the appeal proceeded on the papers but that the parties now accept that an oral hearing is more appropriate, and as such the necessary fee for an oral hearing will be paid.

Decision

11. The decision of the First-tier Tribunal involved the making of a material error of law. Its decision cannot stand and is set aside.

12. The appeal shall be remade by First-tier Tribunal de novo.

Signed: Ms Melanie Plimmer Dated: 9 August 2017
Judge of the Upper Tribunal