Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: **IA 24976-13**

THE IMMIGRATION ACTS

At **Field House**
on **10.03.2014**

Decision signed: **18.03.2014**
sent out: **20.03.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Rushana UMAROVA

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Koforowola Anifowoshe* (counsel instructed by Elkettas & Associates)
For the respondent: Mr Ian Jarvis

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Esther Lagunju), sitting at Birmingham on 5 November 2013, to dismiss an EEA family member appeal by a citizen of Uzbekistan, born 19 June 1988, and married to a citizen of Lithuania (the sponsor). The appellant had been refused a residence card, as, following a visit to their claimed matrimonial home, the Home Office regarded theirs as a marriage of marriage of convenience. Permission was granted, incidentally on the numerous points of fact raised, but mainly on the legal basis, not raised at all in the grounds, that the burden of proof lay on the respondent in cases such as this.

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2. It was agreed before us that the law is not quite so simple as that, and is as set out in Papajorgji (EEA spouse - marriage of convenience) [2012] UKUT (IAC) 38:

> *i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.*
>
> *ii) IS (marriages of convenience) Serbia [2008] UKAIT 31 establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights.*

3. It is also quite clear in this case that, following the visit, there was evidence justifying such a suspicion; so there was an evidential burden on the appellant to address that evidence, but no more. The evidence, as set out in the refusal letter, was as follows:

> A female not the target, offered to show the targets [*sic*] room to the team, but it was not the targets room. It was clear that the room was only occupied by a female, there were no male clothes in the room, and no evidence that any male stayed in that room. A British male who stated he was only visiting and does not live at the address stated that a female lived in the room alone, and her boyfriend worked abroad.

4. Unsatisfactory as such a short report may be, it does give enough information for it to be answered: a complaint by Miss Anifowoshe about its being hearsay is misconceived in this field, where there are no formal rules of evidence. The appellant's remedy was, in advance of the first-tier hearing, either to ask for the disclosure of the immigration officers' notes, or for witness summonses directed to them.

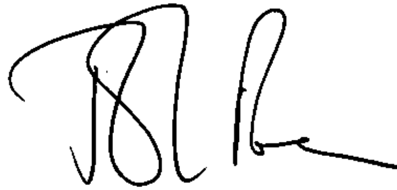
5. Miss Anifowoshe's main complaint, however, was that, though the judge had dealt (at paragraphs 11 – 13) with the appellant and the sponsor's answers to the evidence about the visit, and (at 9 – 10) with specific discrepancies between them about when he left for work in the mornings, and the payment of the rent and other bills, she hadn't dealt with a considerable volume of positive evidence they had given about their relationship. The permission judge dealt with this in the following terms "It is averred that the evidence of the witnesses took place for more than one hour during which some 90% of their answers matched each other".

6. If permission were to be given on this basis in the first place, the permission judge needed to give directions, through his resident judge and the hearing judge's, for a typed transcript of the evidence, so that this Tribunal could form its own independent view of what had been said. However, in this case it is clear that a considerable amount of evidence was given, and it may be inferred that what the appellant and the sponsor said was at least intended to be in her favour.

7. Taken together with the judge's mistake about the burden of proof, which she placed on the appellant throughout to prove she satisfied the requirements of the Immigration (European Economic Area) Regulations 2006 [the EEA Regulations], I regard her failure to deal with what is more likely than not to have been positive evidence about the

relationship of the appellant and the sponsor as making her decision as a whole less than satisfactory, though there was nothing wrong with her treatment of the evidence about the visit. The result will be a fresh hearing before another first-tier judge.

Appeal allowed
Decision to be re-made on fresh hearing in First-tier Tribunal at Hatton Cross, not before Judge Lagunju



(a judge of the Upper Tribunal)