**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/45673/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 28 February 2014** | **On 18 December 2014** |

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**JAMES OKOH**

Respondent

**Representation:**
For the Appellant: Miss E Everett, Senior Home Office Presenting Officer
For the Respondent: Mr E Yerokun, Legal Representative from AA Solicitors LLP

## DETERMINATION AND REASONS

1. The only immigration decision I have found in this case is dated 9 November 2010 and is a decision to remove the respondent (herein after "the claimant") as an illegal entrant.

2. I have seen an "Appeals Processing Referral Sheet" signed by First-tier Tribunal Woolf dated 6 November 2013. She has made a manuscript note in the following terms:

> "Appeal is not brought under Reg 26 of the EEA Regs against removal. FAX attach directions to reps and HO immediately."

A manuscript line is drawn under that phrase and then the note continues:

> "After receiving faxed evidence and oral reps over the phone I find the appeal IN TIME. With reference to Section 10 removal decision – satisfied not received until 1/11/2013."

3. On 28 February 2014 I gave directions requiring the parties to serve on the Tribunal the immigration decision that was the subject of the appeal. By facsimile received on 3 March 2014 the claimant's solicitors sent a copy of the immigration decision dated 9 November 2010 and notes of their dealings with First-tier Tribunal Judge Woolf. They were able to satisfy her that neither they nor the claimant knew about the decision of 9 November 2010 until 31 October 2013 and so the appeal against that decision was in fact made within the allowed time after the decision came to the attention of the claimant or treated as if it were.

4. The situation has been confused because after the removal decision was *made* (but not notified to the claimant) on 27 September 2011 the Secretary of State refused to issue the claimant a residence card as the spouse of an EEA national. That decision clearly was appealable and was appealed and the appeal was dismissed by First-tier Tribunal Judge Mayall in a determination promulgated on 13 December 2011. That appeal turned on whether the claimant had a reasonable explanation for supporting his application with a passport that had previously been reported as lost or stolen and the judge resolved that issue in the Secretary of State's favour. The claimant then appealed a similar decision on 15 November 2012. The appeal was dismissed by Immigration Judge Omotosho in a determination promulgated on 15 February 2013. Judge Omotosho was not satisfied that the claimant's marriage was not a marriage of convenience and therefore was not satisfied it was a qualifying marriage for the purpose of the Immigration (European Economic Area) Regulations 2006.

5. It is against that background that the grounds of appeal to the First-tier Tribunal in this appeal (IA/45673/2013) have to be understood. They refer to an EEA decision dated 30 October 2013 which decision was certified. They further refer to the Immigration (European Economic Area) Regulations 2006 and then raise "specific grounds of appeal against the EEA decision dated 30/10/2013 and immigration decision dated 9/11/2010". The grounds contend that it was wrong to say that the claimant's marriage was not genuine and that the certificate was unlawful "as lacking in the duty of fairness and adequate reasoning as to the basis of the decision being made".

6. The grounds also raised an Article 8 claim complaining that the Secretary of State had not looked at the evidence about the relationship between the claimant and his purported wife.

7. First-tier Tribunal Judge Baldwin was very aware of the history of unsuccessful applications and the claimant's failure to prove that his was

not a marriage of convenience. However, he had the benefit of a considerable raft of evidence before him including medical evidence about the claimant's wife's mental state, which could go someway to explaining unsatisfactory answers she gave to questions, and supporting evidence from two ministers of religion who clearly made a very favourable impression on Judge Baldwin.

8. He said at paragraph 34:-

> "I find that the [claimant] has now proved his marriage is not one of convenience and that they do desperately want and intend to continue to live together and rebuild their lives and her good health. She has been here for fifteen years, and the [claimant] for just over six years. They have clearly formed a significant life together and a close relationship with their Church and many friends here. His wife does not know Nigeria and he, I accept, speaks little French. The only country common to both of them is the UK and there is no suggestion either has any criminal convictions. As a recovering alcoholic who has not relapsed she is clearly going to need all the support she can get from close friends, those they know at their church and her husband. This is not going to be available to anything like the same extent if they have to leave the UK and start all over again in a country foreign to them. It would, I conclude, be disproportionate and unreasonable to expect either or both of them now to leave the UK given my Findings of Fact in relation to their marriage."

9. The First-tier Tribunal Judge then found that the claimant had proved his case, that the decision was "not in accordance with the law" and the appeal was allowed on human rights grounds.

10. The appellant, herein described as "the Secretary of State" was granted permission to appeal by First-tier Tribunal Judge Frankish who said in terms that there was "no merit in the assertion that **Devaseelan** was not applied" (see paragraphs 25 and 30) or that good reasons were not given for diverging from the previous determination (paragraph 30) thereto. However, he gave the Secretary of State permission because the judge's decision to allow the appeal on Article 8 grounds paid no regard to the Immigration Rules.

11. Miss Everett, for the Secretary of State, struggled to criticise the Judge Frankish's findings. She did say that the judge made himself an expert on matters relating to alcoholism but I do not find any merit in that criticism. He was using his experience of life (and people who sit in courts and practice law often develop considerable insights into other people's problems) when making his decision. There really can be no objection to the lawfulness of the decision that the claimant's marriage is not a marriage of convenience.

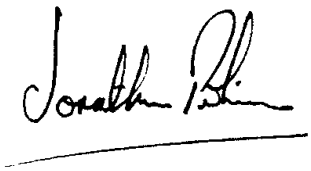
12. Were it not for the fact that the claimant is married to an EEA national I would see some merit in the criticism that the judge did not address his mind to the Immigration Rules before allowing the appeal on human rights grounds. The fact that a marriage is genuine does not excuse a person

from the requirements of immigration control and it is normally right to consider whether that person can leave the United Kingdom and apply to return. Given the support that the judge found that the claimant was giving to his wife, this may have been a case that should have been allowed as an exception under the Rules but it is not what the judge did.

13. This is an EEA case. The claimant cannot be removed if he has a right to be here as the wife of an EEA national. The judge has found that the reason for refusing him a residence permit is wrong, at least at the time when the judge made the decision that he did. This claimant cannot be removed because, on the judge's finding, he is entitled to be in the United Kingdom. It may have been helpful if the judge had followed through the consequences of his finding that the decision is not in accordance with the law but it seems to me quite clear that the judge required the Secretary of State to look again at the decision to remove given the findings he had made about the marriage of the claimant and his wife.

14. The consequence of Judge Frankish's decision is that the Secretary of State should decide what sort of leave, if any, should be given in accordance with the judge's findings. Unless there is a massive change of circumstance since the case was decided last year it would seem to me that the proper thing to do is recognise his right to be here as the husband of an EEA but I cannot make that decision. It is not mine to make and in any event all the information is not before me and it cannot be expected to be before me.

15. I see no error in the finding that the decision of the respondent is contrary to the law and I dismiss the Secretary of State's appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 17 December 2014