Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24686/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination promulgated**
On 5 June 2015	**On 9 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHAEL OLUWAFEMI ADEWUYI
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Mr Okunowo, Solicitor

DECISION AND REASONS

1. The respondent to this appeal is a citizen of Nigeria born on 10 October 1973. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Bartlett, allowing the respondent's appeal against a decision of the Secretary of State, dated 19 May 2014, to remove him to Nigeria, having refused his application for leave to remain on human rights grounds. The Secretary of State refused the application for leave on human rights grounds, having found Mr Adewuyi could not succeed under

Appendix FM or paragraph 276ADE of the Immigration Rules, HC395, and there were no exceptional circumstances for the purposes of article 8 of the Human Rights Convention.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Mr Adewuyi from now on as "the appellant" and the Secretary of State as "the respondent".

3. I was not asked and saw no reason to make an anonymity direction.

4. The appellant claimed to have arrived in the UK as a visitor on 15 December 1994. On 26 May 2006 he applied for indefinite leave to remain but his application was refused without a right of appeal on 20 August 2009. On 25 August 2009 he was served with a notice of liability to removal. A further application for leave to remain outside the rules was refused on 30 September 2013 without a right of appeal. His latest application was submitted on 12 January 2014.

5. At the appeal hearing before Judge Bartlett, the appellant's representative made it clear the appeal was not pursued under Appendix FM of the rules but was pursued under paragraph 276ADE(1)(vi) only. Alternatively, the judge was asked to find a breach of article 8 outside the rules.

6. The judge heard oral evidence from the appellant only. The appellant said he had lived with his partner, Ms Martins, from 2006 until she left the home they shared in August 2014. There were two children of the relationship: Joshua, born in 2008, and Elizabeth, born in 2009. Ms Martins also had a child from a previous relationship, Raphael, born in 2002. The appellant said his parents in Nigeria had died. He had one uncle but they did not get on with each other. He said he visited his children, who lived with Ms Martins, every weekend.

7. The judge rejected parts of the evidence. She did not find the appellant had resided in the UK, as he claimed, since 1994. She found he was prepared to state things in his witness statement and orally which were not true and correct. Turning to article 8 outside the rules, it having been conceded that Appendix FM could not assist the appellant, the judge considered section 117B. As he had been living in the UK illegally little weight should be given to the appellant's private life formed during that time. The judge did not accept the appellant was maintaining a family link with his "stepchild", Raphael. However, the judge accepted there was family life between the appellant and his biological children because of the birth certificates. At its highest, the appellant's case was that he had limited face-to-face contact with them. The judge noted the children were not British and appeared to have no leave to remain in the UK. The same was true of Ms Martins. It was unclear whether the children would remain in the UK. However, based on the facts currently appertaining, the judge found it was in the children's best interests for the weekly contact with the appellant to continue. She went on to reason that removing the appellant would inevitably have a significant

impact on the children's relationship with their father. It was in the best interests of the children to maintain the status quo. Taking the appellant's evidence at its highest, that he lived with his children until 2014, he would have lived with them almost their entire lives and it was reasonable to assume their relationship was of significant importance. The judge found the appellant had resided in the UK since at least March 2008, which was almost 12 years. However, he had not worked for almost nine years. He attended church. The judge found his private life ties were limited. However, she found it would not be proportionate to remove him because this would separate him from the children. The judge did not go on to consider paragraph 276ADE(1)(vi).

8. The grounds seeking permission to appeal argue the decision contains a mistake as to a material fact. The judge had been given inaccurate information. At the date of hearing Ms Martins and the children had been granted limited leave until 15 September 2015. This was granted on a discretionary basis following the refusal of the asylum claim which was submitted after the breakdown in the relationship between the appellant and Ms Martins on 9 January 2014. This indicated that the relationship had broken down in November 2013, not August 2014 as the judge was told. There had been no contact between the appellant and his children since then.

9. First-tier Tribunal Judge Grant-Hutchinson granted permission to appeal.

10. I heard argument on the question of whether Judge Bartlett's decision is vitiated by material error of law. Ms Brocklesby-Weller suggested the grounds seeking permission to appeal had been inadvertently truncated and there were in reality two points. However, it is clear to me that there is a single ground on which permission to appeal has been granted concerning mistake of fact. I refused Ms Brocklesby-Weller's application to vary the grounds.

11. With respect to the single ground on which permission was granted, she accepted she was in difficulties. I did not need to call on Mr Okunowo.

12. In *MM (unfairness; E & R) Sudan* [2014] UKUT 00105 (IAC), the Tribunal discussed the applicable principles in play when an argument is made that an error of law was brought about by a mistake of fact. The following passages are germane to this case:

> "19. Of unmistakable importance also, in the context of this appeal, is the decision of the Court of Appeal in E & R – v – Secretary of State for the Home Department [2004] EWCA Civ 49. As appears from the opening paragraph of the judgment of Carnwath LJ, one of the two central issues raised in this appeal concerned cases decided by the first instance Tribunal (in that instance, the Adjudicator) where it is demonstrated that –

> "…. an important part of its reasoning was based on ignorance or mistake as to the facts …."

Drawing particularly on the speech of Lord Slynn in R – v – Criminal Injuries Compensation Board, ex parte A [1999] 2 AC 330 (at pages 333 – 336), Carnwath LJ stated:

> "[63] In our view, the CICB case points to the way to a separate ground of review, based on the principle of fairness …. the unfairness arose from the combination of five factors:
>
> (i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);
>
> (ii) The fact was 'established', in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;
>
> (iii) The Claimant could not fairly be held responsible for the error;
>
> (iv) Although there was no duty on the Board itself, or the police, to do the Claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result.
>
> (v) The mistaken impression played a material part in the reasoning."

The learned Lord Justice added:

> "[64] It is in the interests of all parties that decisions should be made on the best available information."

He continued:

> "[66] In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the Appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

20. The principles relating to the impact upon proceedings of unfairness arising from error of fact were reconsidered by the Court of Appeal in R & ors (Iran) v SSHD [2005] EWCA Civ 982 in which decision the Court of Appeal conducted a detailed review of categories of error of law frequently encountered. Brooke LJ said the following:

> **"Part 6. Error of law: unfairness resulting from a mistake of fact**
>
> 1. The next matter we must address relates to the circumstances in which an appellate body like the IAT, whose primary role during the relevant period was restricted to identifying and correcting errors of law, could entertain an argument to the effect that the outcome in the lower court was unfair as a result of a mistake of fact, and that this constituted an error of law which entitled it to interfere.
>
> > In E & R v Home Secretary [2004] EWCA Civ 49; [2004] QB 1044 this court was concerned to provide a principled explanation of the reasons why a court whose jurisdiction is limited to the correction of errors of law is occasionally able to intervene, when fairness demands it, when a minister or an inferior body or tribunal has taken a decision on the basis of a foundation of fact which was demonstrably wrong. ...
>
> 1. At para 64 Carnwath LJ said that there was a common feature of all these cases, even where the procedure was adversarial, in that the Secretary of State or the particular statutory authority had a shared interest with both the particular appellant and with any tribunal or other decision-maker that might be involved in the case in ensuring that decisions were taken on the best information and on the correct factual basis. At para 66 he identified asylum law as representing a statutory context in which the parties shared an interest in co-operating to achieve a correct result. He went on to suggest that the ordinary requirements for a finding of unfairness which amounted to an error of law were that:
>
> > (i) there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;
> >
> > (ii) it must be possible to categorise the relevant fact or evidence as "established" in the sense that it was uncontentious and objectively verifiable;
> >
> > (iii) the appellant (or his advisers) must not have been responsible for the mistake;
> >
> > (iv) the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

Notably, the learned Lord Justice made clear that he was not seeking to lay down a precise code. Brooke LJ continued:

1. "Needless to say, such a mistake could not be identified by the supervising or appellate court unless it was willing to admit new evidence in order to identify it. Paragraphs 68 to 89 of the judgment in E and R contain an analysis of relevant case law on the power to admit new evidence. It concluded with the observation that the case of Khan v SSHD [2003] EWCA Civ 530 that gave rise to the problem summarised in (viii) above was a good example of the need for a residual ground of review for unfairness arising from a simple mistake of fact and that it illustrated the intrinsic difficulty in many asylum cases of obtaining reliable evidence of the facts that gave rise to the fear of persecution and the need for some flexibility in the application of Ladd v Marshall principles (*infra*).

   1 The reference to the Ladd v Marshall principles is a reference to that part of the judgment of Denning LJ in [1954] 1 WLR 1489 when he said (at p 1491) that where there had been a trial or hearing on the merits, the decision of the judge could only be overturned by resort to further evidence if it could be shown that:

   (1) the new evidence could not with reasonable diligence have been obtained for use at the trial (or hearing);

   (2) the new evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive);

   (3) the new evidence was apparently credible although it need not be incontrovertible.

2. By way of a final summary of the position, Carnwath LJ said in E and R at para 91 that an appeal on a question of law might now be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" and that the admission of new evidence on such an appeal was subject to Ladd v Marshall principles, which might be departed from in exceptional circumstances where the interests of justice required".

21. As we have observed, the context of the decision of the Court of Appeal in E & R – v – Secretary of State for the Home Department was an appeal from the Adjudicator to the Immigration and Asylum Tribunal. As a result of subsequent statutory reforms, the equivalent judicialised bodies are now the First-tier Tribunal and the Upper Tribunal respectively. In our judgment, simple logic impels inexorably to the conclusion that the decision in E & R applies fully to appeals from the First-tier Tribunal to the Upper Tribunal."

13. Having considered this guidance, I have decided there is no material error of law of the kind proposed by the respondent and her appeal must be dismissed. The respondent seeks to adduce new evidence to correct the error of the presenting officer who appeared in the First-tier Tribunal. However, no explanation has been offered as to why this error was made or, to put it another way, why the evidence now relied on by the respondent was not available at the date of the hearing. I infer from the circumstances that it could have been adduced at the time of the hearing if reasonable diligence had been applied.

14. In any event, even if that hurdle were overcome, the condensed summary of the legal test provided in the last substantive paragraph of the respondent's grounds omits the key point that the error in this case was brought about by the misinformation given (no doubt in good faith) to the judge by the presenting officer. Any resultant unfairness in the hearing resulted from the respondent's own error.

15. Finally, it was not possible to say the evidence was "established" in the sense that it was uncontentious and objectively verifiable. Unfortunately, Ms Brocklesby-Weller had not been able to obtain the missing evidence to show me.

16. The judge’s decision is undoubtedly extremely generous to the appellant. However, it does not contain a material error of law of the kind contended by the respondent. Accordingly it shall stand and the respondent’s appeal is dismissed.

NOTICE OF DECISION

The First-tier Tribunal did not make a material error on a point of law and its decision allowing the appeals on article 8 grounds shall stand.

No anonymity direction has been made.

Signed

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal