Upper Tribunal
(Immigration and Asylum Chamber) APPEAL NO: IA/37292/2013

Heard at Field House on
6 October 2014

Determination promulgated on
23 October 2014

THE IMMIGRATION ACTS

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL DIGNEY

OLUWATOYIN OLUWASEUN SHIYANBOLA (MS)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the respondent: Ms Isherwood, Home Office Presenting Officer
For the appellant: Ms Record

DETERMINATION AND REASONS

1. The appellant, a citizen of Nigeria, applied to remain in this country on the basis of her relationship with her husband and their three children. That application was refused and an appeal against the decision dismissed. A first-tier judge refused permission to appeal on the basis that the judge was entitled to reject the evidence put before him on behalf of the appellant and that the grounds of appeal rely on a version of the facts that the judge expressly rejected. Upper Tribunal Judge Freeman granted permission to appeal because there was now DNA evidence that proved that the three children of the appellant were the children of her husband. In the light of that evidence the judge's findings of fact (that the children were not the children of the appellant's husband) might be an error of fact that amounted to an error of law; see *E&R [2004] EWCA Civ 49*. That evidence would then need to be looked at in the light of the judge's findings on the rest of the case which would have to be considered as a whole. The implication is that the new evidence might cast doubts on the rest of the judge's findings.

2. Paragraph 66 of *E&R* reads:

> 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. (emphasis added)

3. *E&R* suggests that this principle applied in the area of asylum law. I first of all have to decide whether it goes further. Paragraph 25 of *MM (unfairness; (E&R) Sudan [2014] UKUT 00105 (IAC)* reads:

> The pivotal importance of the error of fact upon which the reasoning of the judge was demonstrably based helps to explain why, **in appeals based on issues of international protection**, (emphasis added) there is room for departure from an *inflexible* application of common law rules and principles where this is necessary to redress unfairness. **This is especially so where the respondent**

> **has….failed to co-operate to achieve a correct result** (emphasis added).

4. The passage that I have highlighted suggests that this principle only applies in appeals concerning international protection. This is not such a case and is one where there is no reason why a fresh application could not be made. I conclude that the principle does not apply in a case such as this.

5. Should I be wrong about this I go on to consider the principles laid down in *E&R*. I deal with the third point first. The error here was indubitably the error of the appellant's advisors. The question of paternity had not been conceded, and bearing in mind the flaws in the appellant's evidence, which must have been as apparent to the appellant's advisors as they were to the First-tier Tribunal judge, DNA evidence was clearly called for.

6. I turn to the first and second requirements. What they must be taken to mean is that there can be no doubt about the error; that it is "uncontentious". Ms Record says that the new evidence leaves the matter beyond doubt. However, whilst DNA evidence cannot lie its provenance is not necessarily as claimed. Here when one looks at the judge's reasons for concluding that the husband was not the father of the children, it is difficult to see how he could have been, and that throws doubt on the provenance of the evidence. Those two requirements are not satisfied. The facts of this case do not come within the law as set down in *E&R.*

7. That is enough to dispose of that appeal but Ms Record relies on *MM* and I must say a word about that. That was a case where the respondent had been a party to the error, as the missing letter that showed that there had been a mistake, had been sent to the UKBA. It followed that the respondent was a party to the error and relied on a matter that she should not have relied on. That brings into play the second emphasised matter in the quotation in paragraph 3. There is no suggestion here that the respondent was in any way party to the error.

8. It follows that there is here no factual error that could amount to an error of law.

9. It follows that the original determination did not contain an error of law and the original decision shall stand.

The appeal is accordingly dismissed

Designated Judge Digney
Judge of the Upper Tribunal 10 October 2014