Upper Tribunal
(Immigration and Asylum Chamber)

MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)

THE IMMIGRATION ACTS

Heard at Manchester (Piccadilly)	**Determination Promulgated**
On 14 November 2013	

Before

THE PRESIDENT, THE HON MR JUSTICE MCCLOSKEY

and

UPPER TRIBUNAL JUDGE SOUTHERN

Between

MM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant:	Mr P Simm (Solicitor)
Respondent:	Mr McVeety, Senior Home Office Presenting Officer

(1) Where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-Tier Tribunal (the "FtT") to be set aside.

(2) A successful appeal is not dependent on the demonstration of some failing on the part of the FtT. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the FtT, was not considered, with resulting unfairness (E & R v Secretary of State for the Home Department [2004] EWCA Civ 49).

DETERMINATION AND REASONS

INTRODUCTION

1. Both members of this panel of the Upper Tribunal have contributed to this determination

2. The Appellant appeals with permission against the determination of the First-Tier Tribunal (hereinafter "*the Tribunal*") which dismissed her appeal against the decision of the Secretary of State for the Home Department (hereinafter "*The Secretary of State*"), dated 10th April 2013, refusing her application for asylum and, further determining that she did not qualify for humanitarian protection under paragraph 339C of the Immigration Rules or for protection under Article 3 ECHR.

THE REFUSAL OF THE APPELLANT'S ASYLUM CLAIM

3. In order to understand the context and focus of this appeal, it is necessary to outline briefly the Appellant's asylum claim and the reasons for its rejection by the Secretary of State.

4. The Appellant is aged 31 and claims to be of Sudanese nationality and Arabic ethnicity. She entered the United Kingdom, with a visitor's visa, on 3rd October 2012. She claimed asylum on 15th March 2013. The customary screening and asylum interviews followed. The Secretary of State's decision refusing her application is dated 10th April 2013.

5. In brief compass, the Appellant's claim for asylum was composed of the following ingredients:

   (a) She has been a Coptic Christian since birth.

   (b) In April 2008, she was arrested on account of inappropriate attire and detained by the police. A Court sentenced her to 50 lashes. Prior to her release from custody, three police officers raped her.

   (c) She was one of many Christians arrested by the police in November 2011, allegedly stimulated by the dissemination in the United States of a video which criticised Islam.

   (d) She was arbitrarily arrested by police on other occasions.

(e) In September 2012, she was detained again by the same three police officers who had raped her in April 2008. They attempted to rape her again, unsuccessfully.

(f) The Appellant entered the United Kingdom on 3rd October 2012, for the purpose of visiting her sister. Shortly afterwards, her mother informed her that the same three police officers had come to the family home daily looking for her. This prompted her decision to claim asylum.

6. The Secretary of State, in determining the Appellant's claim for asylum, while accepting that she is a Sudanese national, found the following elements of her claim unworthy of belief:

(i) The claim that she had been a Coptic Christian since birth.

(ii) Her claims about arrests by the police.

(iii) Her allegations of rape and attempted rape by police officers.

In making these assessments, the refusal letter highlighted specified inconsistencies and discrepancies in the Appellant's story. It was further considered, in the alternative, taking the Appellant's claim at its zenith, that certain rogue officials, rather than the Sudanese authorities, were the cause of her fear and she would be able to avoid them by relocating to another part of Sudan. Her case was also considered, and rejected, under Article 3 ECHR and paragraph 339F of the Immigration Rules.

THE ISSUE IN THIS APPEAL

7. The grant of permission to appeal to the Upper Tribunal was based on a piece of evidence which was not considered at first instance. This consists of a letter dated 9th April 2013 addressed by the Appellant's solicitors to the UKBA North West Enforcement and Compliance Division in Liverpool. At the outset, we record our finding that, having considered all the evidence and the representations of both parties, we are satisfied that this letter was transmitted by fax on the date which it bears, 9th April 2013 and received by the addressee on that date. We shall describe this document hereinafter as "*the solicitor's letter*".

8. We preface our consideration of the solicitor's letter by highlighting certain features of the UKBA interviews of the Appellant, which were conducted on 15th March and 4th April 2013 respectively. These are the following:

(a) The Appellant described her primary language as Arabic and both interviews were conducted with the assistance of an Arabic interpreter.

(b) She attributed the various forms of persecutory treatment alleged by her to her Christian denomination.

(c) She was accompanied by her solicitor during the main (second) interview, which had a duration of two hours.

(d) She is recorded as having confirmed that she was feeling fit and well, understood the interpreter and understood all of the questions.

9. The solicitor's letter was written five days after the second asylum interview. Referring to the Appellant, it begins:

> "She subsequently attended our office for a read back of the substantive interview. We would now like to make the following further representations on her behalf. We must start by informing you that our client has informed us that on the day of the substantive interview your interpreter did not interpret all questions correctly. After the interview our client consulted her brother in law regarding some of the questions and noted that some questions asked were interpreted completely differently."

The letter proceeded to list a lengthy series of "*clarifications*": 21 in total. This list was followed by the statement:

> "Our client agreed that your interpreter on the day was fully understood as she did not realise that the questions she was answering were at some points completely different to what you were asking."

10. Seven of the 21 "*clarifications*" concerned a series of questions and answers recorded relating to the Appellant's professed Coptic Christian faith. We are mindful of the methodology employed in asylum interviews of this kind. The interviewing official formulates the question in English, the question is then translated by the interpreter, the interviewee answers in his/her native language, the interpreter translates the answer and the interviewer records the answer as translated by the interpreter. In essence, the complaint made on the Appellant's behalf was that the interpreter had misinterpreted various biblical terms, events and dogmas, with the result that the Appellant was not answering the questions formulated in English by the interviewer. This, the letter claimed, gave rise to a mismatch between the interviewer's questions as recorded and the Appellant's answers as recorded.

11. It is common case that the Secretary of State did not reply to the solicitor's letter. Mr McVeety confirmed that a copy of that letter had not reached the Presenting Officer's file by the time of the hearing before the First-tier Tribunal. It is further agreed that the letter did not form part of the evidence considered by the Tribunal at first instance, confirmed by the fact that it was not included in the bundle of documents prepared by the Appellant's solicitors. In a carefully constructed determination, the Judge stated, at paragraph [26]:

> "I find that this case turns upon the credibility of the Appellant's claim to be a Coptic Christian and the credibility of her claim that she was raped in April 2008 by three police officers, that in November 2008 she was arrested at her home by police officers following the release in the USA of the video defaming the Prophet Mohammed, that in September 2012 she was arrested again at her home by police officers who attempted to rape her and finally upon the credibility of her claim that since her arrival in the UK the same police officers have been repeatedly visiting her mother's home and that one of the police officers has been demanding that the Appellant becomes his girlfriend and that if she refuses to do so he will ensure that she becomes everybody's girlfriend."

As this passage demonstrates, the Judge, in common with the Secretary of State, recognised that the Appellant's claim to be a lifelong Coptic Christian is a key element of her story, as she relates her espousal and manifestation of this faith to all of the persecutory acts alleged.

12. The Determination, which consists of 50 paragraphs, devotes 22 of these to the issue of the Appellant's credibility. In paragraph [36], the Judge, adverting to a particular aspect of the asylum interview record and noting a significant inconsistency with the Appellant's witness statement, records the Appellant's answer, in cross examination at the hearing, that the interview record was "*wrong*". This passage of the determination continues:

> "She was asked by [the HOPO] when it came to her attention that the interview record was wrong and she replied that it was three or four hours after the interview when she had gone through the interview record with her brother in law .....
>
> She was asked why neither she nor her solicitors had contacted the Home Office to inform them that the interview record was wrong .....
>
> The Appellant stated that she discussed this issue with her solicitor who told her that she would send a letter to the Home Office pointing out the mistake."

It is clear from all the evidence that the person to whom reference is made in the last paragraph of this passage is a case worker (identified elsewhere in the evidence) in the employment of the solicitor's firm concerned who discharged a number of roles: she accompanied the Appellant during the second asylum interview, she wrote the aforementioned solicitor's letter and she liaised with the Appellant in preparing for the hearing at first instance. In the next succeeding paragraph, the Judge continues:

> "Whilst I accept that matters can be overlooked by busy solicitors, I find the fact that the Appellant's solicitors did not write to the Home Office pointing out such a significant error in the Appellant's interview record damages the credibility of her claim that she instructed her solicitor to do so. I find **therefore** that the fact that the Appellant has given an inconsistent account as to whether it was the same three police officers who had raped her in April 2008, who subsequently attempted to rape her in September

2012 **is a material inconsistency which damages both the credibility of the Appellant's claim and her credibility generally.**"

[Our emphasis.]

13. Permission to appeal to the Upper Tribunal was granted on the sole ground that the solicitor's letter was neither mentioned nor produced at the first instance hearing. The Judge granting permission considered this to be an arguable "*procedural irregularity*".

EVERY LITIGANT'S RIGHT TO A FAIR HEARING: THE GOVERNING PRINCIPLES

14. The matrix of this appeal, rehearsed above, prompts reflection on the content and reach of one of the cornerstones of the common law, namely the right of every litigant to a fair hearing. The right in play is properly described as fundamental, irreducible and inalienable.

15. The law reports and texts are replete with formulations and manifestations of this right. For present purposes, and bearing in mind the doctrine of precedent, we focus upon two of the leading decisions of the superior courts. The first of these is R – v – Chief Constable of Thames Valley Police, ex parte Cotton [1990] IRLR 344. It may be observed that, in both the reported cases and the leading text books, this decision has not received the prominence it plainly merits. This might be attributable to its appearance in one of the minority series of law reports. Having said that, Cotton has been recently quoted with approval and applied by Moses LJ in McCarthy v Visitors to Inns of Court and Bar Standards Board [2013] EWHC 3253 (Admin) and by Underhill J in R (Hill) v Institute of Chartered Accountants [2013] EWCA Civ 555. In Cotton, the issue, in a nutshell, was whether the decision of the Chief Constable to dismiss a police officer was vitiated by procedural unfairness on account of inadequate disclosure to the officer of the case against him. We distill the following principles from Cotton:

    (i) The defect, or impropriety, must be procedural in nature. Cases of this kind are not concerned with the **merits** of the decision under review or appeal. Rather, the superior court's enquiry focuses on the process, or procedure, whereby the impugned decision was reached.

    (ii) It is doctrinally incorrect to adopt the two stage process of asking whether there was a procedural irregularity or impropriety giving rise to unfairness and, if so, whether this had any material bearing on the outcome. These are, rather, two elements of a single question, namely whether there was procedural unfairness.

    (iii) Thus, if the reviewing or appellate Court identifies a procedural irregularity or impropriety which, in its view, made no difference to

the outcome, the appropriate conclusion is that there was no unfairness to the party concerned.

(iv) The reviewing or appellate Court should exercise caution in concluding that the outcome would have been the same if the diagnosed procedural irregularity or impropriety had not occurred.

16. These last two propositions are expressed with admirable clarity in the judgment of Simon Brown J, which was under appeal (at page 13B/D):

> "It is sufficient if an Applicant can establish that there is a real, as opposed to a purely minimal, possibility that the outcome would have been different."

The complaint in Cotton was that certain information, damaging to the police officer's case, had not been disclosed to him. Simon Brown J concluded that even if this disclosure had taken place -

> "… there would have been no real, no sensible, no substantial chance of any further observation on the Applicant's part in any way altering the final decision in his case."

The Court of Appeal upheld both his conclusion and the governing principle which he formulated: see the uncritical rehearsal of the Applicant's argument in the judgment of Slade LJ (at pages 10 – 11) and the endorsement of the conclusion of Simon Brown J by all three members of the Court of Appeal. Slade LJ espoused the following formulation of the governing principle:

> "Natural justice is not concerned with the observance of technicalities, but with matters of substance."
>
> [At page 14.]

In the second of the three judgments delivered, Stocker LJ considered the threshold for intervention by the Superior Court to be "a real risk of injustice or unfairness" [page 15].

17. The third judgment, that of Bingham LJ, contains a comprehensive review of the authorities, which commences with the following statement [page 16]:

> "Judges of high authority have held that the subject of a decision who has been denied a right to be heard cannot complain of a breach of natural justice (or unfairness) unless he can show that the decision **might** have been different if he had been heard."
>
> [Emphasis added.]

Having referred to two of the leading text book commentaries, Bingham LJ continued:

> "While cases may no doubt arise in which it can properly be said that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, **I would expect these cases of be of great rarity**."
>
> [Our emphasis.]

The reasons formulated by Bingham LJ in support of this proposition included the following:

> "(1) Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
>
> (2) … Experience shows that that which is confidently expected is by no means always that which happens ….
>
> (4) In considering whether the complainant's representations would have made any difference to the outcome, the Court may unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of a decision.
>
> (5) This is a field in which appearances are generally thought to matter.
>
> (6) Where a decision maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard and rights are not to be lightly denied."

18. The fourth of the principles expounded by Bingham LJ in the passage set out above invites reflection, given that the present context is that of an appeal on a point of law from a decision of the First-tier Tribunal to the Upper Tribunal, to be contrasted with an application for judicial review based on alleged procedural unfairness. Such appeals are governed by section 11 of the Tribunals, Courts and Enforcement Act 2007, which provides in subsection (1):

> "For the purposes of subsection (2), the reference to a right of appeal is to a right of appeal to the Upper Tribunal on any point of law arising from a decision made by the First-Tier Tribunal other than an excluded decision."

We are satisfied that the fourth of the principles formulated by Bingham LJ (*supra*) applies fully to appeals of this *genre*, for two main reasons. The first is that where either party to an appeal before the First-tier Tribunal is denied a fair hearing, this constitutes an error of law. The second is that in determining appeals, this Tribunal is not concerned with **the merits** of the decision of the lower Tribunal. Rather, its function is to decide whether, within the compass of the grant of permission to appeal, the decision of

the First-Tier Tribunal is vitiated by a material error of law. This analysis is reinforced by section 12 of the 2007 Act. This provides, *inter alia*, that where the Upper Tribunal is satisfied that the decision of the First-Tier Tribunal "*involved the making of an error on a point of law*" and orders that the decision be set aside, it may re-make the decision. If it decides to do so, it will, in effect, conduct an appeal on the merits, either applying the correct legal principles in play to findings of fact preserved from the First-tier Tribunal determination or, in cases where those findings have given rise to the relevant error of law, evaluating all the evidence, forming its own views and making its own findings and conclusions. The timing of this exercise, where performed, is telling: it is separated from the error of law hearing, whether it is conducted immediately thereafter or, where unavoidable, at a later date. It is a re-making exercise.

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

28. 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. …

30. 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:

31. "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*).

32. 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.

33. 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.

22. We consider it important to emphasise that in appeals of the present kind the criterion to be applied is not that of reasonableness. In this respect, the present case is a paradigm of its type. Judge Levin's conduct of the hearing at first instance was beyond reproach. The irregularity which has been exposed is entirely unrelated to how the hearing was conducted. The judge cannot possibly be faulted for the non-emergence of the solicitor's letter. On any showing, the judge acted responsibly and reasonably throughout. However, as the authorities demonstrate clearly, the criterion to be applied on review or appeal is fairness, not reasonableness.

23. Alternatively phrased, the terminology of sections 11 and 12 of the 2007 Act does not exclude the possibility of correcting unfairness on the basis that the problem does not arise because of any failure by the Tribunal itself. By way of illustration, in R (Ignaoua) v SSHD [2013] EWHC 2512, at paragraph 26, Cranston J said this:

> "[26] The third strand of principle is that statutory power, although expressed in general terms, should not be construed so as to authorise acts which infringe the basic rules and principles of the common law. Parliament is presumed not to have intended to change the common law unless it has clearly indicated that intention either expressly or by necessary implication: R v Secretary of State for the Home Department, Ex parte Pierson [1998] AC 539, 573E-F, 575D, per Lord Browne-Wilkinson. In his judgment in the same case Lord Steyn stated the principle broadly: "Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural": 591F."

This principle is recognised also by the authors of Macdonald's Immigration Law & Practice, (8th edition) at paragraph 19.35:

> "… The duty of fairness imposed on the Tribunal is thus more likely to be derived from the high common law standards of fairness applied by the higher courts…."

The point to be emphasised is that the judge's conduct of the hearing is not to be evaluated by reference to a test of reasonableness or fault. Common law fairness is of a quite distinct hue and unfairness is not dependent on demonstrating either.

CONCLUSION

24. We apply the principles rehearsed above to the matrix of this appeal in the following way. The solicitor's letter was, on any showing, an important piece of evidence. It derived this status from the course which the hearing took when the Appellant, in cross examination, made the claim that the interview record was erroneous and that she had promptly instructed her solicitors to this effect and had been informed by them that they would write to the Secretary of State in appropriate terms. The Judge made a positive finding that there was no such letter. Building on this finding, he found that this reinforced "*a material inconsistency*", namely the evident discrepancy between the contents of the asylum interview record and the Appellant's witness statement. The Judge plainly disbelieved the Appellant's claim concerning her instructions to her solicitors and their response that they would write a letter. This belief was founded substantially on a mistake of fact, namely the erroneous belief that no such instructions had been given by the Appellant and no such letter had been written. When one considers the key passages in paragraphs [36] – [37] in their full context, the conclusion that this was a material error is inescapable. The Judge, in terms, found the Appellant to be mendacious and this became one of the important building blocks in his overall assessment that her claims were not worthy of belief. The resulting unfairness to the Appellant is palpable.

25. The pivotal importance of the error of fact upon which the reasoning of the judge was demonstrably based helps to explain why, in appeals raising issues of international protection, 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, in the words of Carnwath LJ in E & R, paragraph [66], failed to co-operate to achieve a correct result. As we have seen, generally, the first of the Ladd v Marshall principles requires that the new evidence which was not considered at the earlier hearing could not with reasonable diligence have been obtained at that stage. Plainly that cannot be said here because the letter was written by the very solicitors who were presenting the case before the Tribunal and so it *was* available. It is established that neither the rule in Al-Mehdawi v SSHD [1990] 1 AC 876 (that a procedural failure caused by an appellant's own representative did not lead to an appeal being in breach of the rules of natural justice) nor a failure to meet the first of the Ladd v Marshall principles applies with full rigour in asylum and human rights appeals: see, e.g. FP (Iran) v SSHD [2007] EWCA Civ 13. The decision of the Court of Appeal in E & R v Secretary of State points towards a broader approach, in which the common law right to a fair hearing predominates. We consider that this appeal must succeed accordingly.

A FINAL OBSERVATION

26. By section 12 of the 2007 Act, where the Upper Tribunal concludes that the decision of the First-Tier Tribunal involved the making of an error on a point of law **and** decides to set the decision aside, it must either remit the case to the First-tier Tribunal or remake the decision itself. We consider that, as a fairly strong general rule, where a first instance decision is set aside on the basis of an error of law involving the deprivation of the Appellant's right to a fair hearing, the appropriate course will be to remit to a newly constituted First-Tier Tribunal for a fresh hearing. This is so because the common law right to a fair hearing is generally considered to rank as a right of constitutional importance and it is preferable that the litigant's statutory right of appeal to the Upper Tribunal should be triggered only where the former right has been fully enjoyed.

DECISION

27. For the reasons elaborated above, we conclude that the decision of the First-tier Tribunal involved the making of a material error of law. The appeal to the Upper Tribunal is allowed to the extent that the decision of the First-tier Tribunal is set aside and the appeal is remitted, to be determined afresh by a different constitution of that Tribunal, with no findings of fact preserved.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 13 February 2014