First Tier Tribunal
(Immigration and Asylum Chamber)

Cancino (costs – First-tier Tribunal – new powers) [2015] UKFTT 00059 (IAC)

THE IMMIGRATION ACTS

Heard at Taylor House, London
On 18 December 2014

Decision Promulgated

……

Before

Mr Justice McCloskey, President of the Upper Tribunal,
sitting as a Judge of the First - tier Tribunal

and

The President, First-tier Tribunal, Mr M Clements

Between

ERNESTO GARCIA CANCINO

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Ms J Fisher (of Counsel) instructed by Visa Legal Solicitors
Respondent: Mr T Wilding, Senior Home Office Presenting Officer

[1] Rule 9 of the 2014 Rules operates in conjunction with section 29 of the Tribunals, Courts and Enforcement Act 2007.

[2] The only powers to award fees or costs available to the First-tier Tribunal (the "FtT") are those contained in Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "2014 Rules").

[3] Transitionally, Rule 9 of the 2014 Rules applies only to appeals coming into existence subsequent to the commencement date of 20 October 2014. It has no application to appeals predating this date.

[4] It is essential to be alert to the distinctions between the costs awarding powers contained in Rule 9(2)(a) and Rule 9(2)(b) of the 2014 Rules.

[5] Awards of costs are always discretionary, even in cases where the qualifying conditions are satisfied.

[6] In the ordinary course of events, where any of the offending types of conduct to which either Rule 9(2)(a) or Rule 9(2)(b) of the 2014 Rules applies, the FtT will normally exercise its discretion to make an order against the defaulting representative or party.

[7] The onus rests on the party applying for an order under Rule 9.

[8] There must be a causal nexus between the conduct in question and the wasted costs claimed.

[9] One of the supreme governing principles is that every case will be unavoidably fact sensitive. Accordingly, comparisons with other cases will normally be inappropriate.

[10] Orders for costs under Rule 9 will be very much the exception, rather than the rule and will be reserved to the clearest cases.

[11] Rule 9 of the 2014 Rules applies to conduct, whether acts or omissions, belonging to the period commencing on the date when an appeal comes into existence and ending on the date of the final determination thereof.

[12] The procedure for determining applications under Rule 9 of the 2014 Rules will be governed in the main by the principles of fairness, expedition and proportionality.

DECISION ON COSTS

Introduction

1. This is the judgment of the panel to which both members have contributed. This appeal, the substantive disposal whereof was completed on 20 October 2014, has been listed for the purpose of determining the Appellant's application for costs against the Respondent (hereinafter the "*Secretary of State*"). Furthermore, this case has been selected for the purpose of providing guidance on the exercise of the recently acquired power of the First-tier Tribunal (the "*FtT*") to award costs in certain circumstances.

The FtT's Power to Award Costs

2. Until recently, the FtT was endowed with the limited power to award costs contained in the now repealed Asylum and Immigration Tribunal (Procedure) Rules 2005, rule 23A whereof, operative from 19 December 2011, provided:

"*(1) Except as provided for in paragraph (2), the Tribunal may not make an order in respect of costs (or, in Scotland, expenses) pursuant to section 29 of the Tribunals, Courts and Enforcement Act 2007 (Power to Award Costs).*

(2) If the Tribunal allows an appeal, it may order the respondent to pay to the appellant an amount no greater than -

(a) Any fee paid under the Fees Order that has not been refunded; and

(b) any fee which the appellant is or may be liable to pay under that Order."

Thus the FtT was enabled, through the exercise of a discretionary power, to order the Respondent to pay the successful Appellant's fees. There was no costs awarding power.

3. With effect from 20 October 2014, the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "*2014 Rules*") came into operation, in substitution for the predecessor regime. Rule 9(1) of the 2014 Rules replicates precisely its predecessor, Rule 23A of the (now superseded) 2005 Rules. It provides:

"*(1) If the Tribunal allows an appeal, it may order a respondent to pay by way of costs to the Appellant an amount no greater than –*

(a) Any fee paid under the Fees Order that has not been refunded; and

(b) any fee which the appellant is or may be liable to pay under that Order."

Rule 9(2) contains the new power to award costs. It provides in material part:

"*(2) The Tribunal may otherwise make an order in respect of costs only -*

(a) Under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs; or

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings."

The whole of Rule 9 is reproduced in Appendix 1. The new framework has two other basic components of which judges and practitioners must be aware. The first is the Presidential Guidance Note No 1 of 2014, paragraphs 29 – 35 whereof are contained in Appendix 2 hereto. There is also a relevant provision of primary legislation, namely section 29 of the Tribunals, Courts and Enforcement Act 2007, which provides:

"*(1) The costs of and incidental to –*

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal, shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may –

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) "wasted costs" means any costs incurred by a party –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

(7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses."

This is reproduced in Appendix 3. We shall comment further on section 29 *infra*.

4. As regards proceedings in the Upper Tribunal, the relevant provision is rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, (contained in Appendix 4 hereto) which, so far as material, provides as follows:

"10.–(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings [transferred or referred by, or on appeal from,] another tribunal except –

(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except –

….

(c) under section 29(4) of the 2007 Act (wasted costs) [and costs incurred in applying for such costs];

(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings."

Thus rule 10(3)(a) of the Upper Tribunal Rules mirrors rule 9(2)(a) of the 2014 Rules. However, it is noteworthy that rule 10(3)(d) is couched in slightly different language, extending to a party's representative.

Exclusivity

5. Judges and practitioners should be aware that rule 9 of the 2014 Rules contains the only powers to award costs exercisable by the FtT. Thus rule 9 establishes an exclusive regime. These powers are not amplified in any way by section 29 of the 2007 Act. This is the effect of section 29(3). However, rule 9 and section 29 co-exist. We shall elaborate on the nature of this relationship below.

Discretion

6. In every case where the FtT is contemplating either a fee award or an award of costs under rule 9, the Judge must be aware that a discretion is being exercised. This flows from the language of section 29 of the 2007 Act and rule 9 itself. Judges should bear in mind that this discretion is to be exercised judicially. Thus its exercise is to be informed by taking into account all material considerations and disregarding any alien, or immaterial, factors. Furthermore, it must be exercised in good faith and in furtherance of the underlying statutory purpose. The power must not be exercised irrationally. And it must be exercised in a procedurally fair manner. In short, all of the familiar standards and constraints of public law are engaged.

7. Judges must also bear in mind that where they are persuaded that the relevant qualifying condition is satisfied, the making of a costs order does not follow inexorably. Rather, it is discretionary. Under rule 9(2)(a), the qualifying condition is that the party seeking the order has incurred costs as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative. Under rule 9(2)(b), the qualifying condition is that a person has acted unreasonably in bringing, defending or conducting proceedings. There is a further, discrete discretion to be exercised. This relates to the amount of costs to be specified in any order made under either limb of rule 9. We consider that, as a general rule, where it is demonstrated that a measurable amount of costs has been incurred as a result of the offending act or omission of the party or representative concerned, the whole of such amount should be specified in the order. However, Judges must be aware that this does not follow automatically and that there may be cases where, reasonably and justifiably, the order specifies a lesser sum.

8. As the analysis in [7] above demonstrates, each case in which the exercise of either of the powers enshrined in rule 9(2) of the 2014 Rules will be intensely fact sensitive. This consideration will be dominant in every case. Thus comparisons with other cases in which the power has, or has not, been exercised are unlikely to be informative. Furthermore, there is a distinct risk that they will suffer from the disadvantage of being anecdotal and/or unreliable and/or incomplete. Accordingly, attempts to introduce comparisons with other cases should normally be discouraged by Judges.

Fee Awards

9. The power to award fees is unchanged. Rule 9(1) replicates verbatim rule 23A(2) of the former regime. As before, this power is exercisable only where the appeal succeeds. In such cases, an award of fees, of an amount up to but not exceeding the fee paid, to the successful appellant does not follow as a matter of course. Rather, there is a discretion to be exercised. This discretion, in common with all discretions belonging to the domain of public law, must be exercised taking into account all material considerations, disregarding all immaterial factors, in pursuit of a proper purpose and within the bounds of rationality. As a general rule, the FtT, while always being cognisant that a discretion is being exercised, may be expected to make a fee award in favour of a successful appellant. In the interests of practical and efficient case management, the Respondent's representative should, at the conclusion of the hearing, identify any facts or factors which are said to warrant displacement of this general rule. There will, in effect, be a presumption – rebuttable – that a fees recovery order will be made in respect of a successful appellant. Finally, we take this opportunity to remind Judges of the Joint Presidential Guidance relating to fee awards (Appendix 5 hereto).

Rule 9 (2)(a)

10. Rule 9(2) confers on the FtT two substantive, separate costs awarding powers. The first is a power that "*wasted costs*" are to be paid. Wasted costs, by virtue of the statutory definition (*supra*), are costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative **or** costs incurred by a party which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect that party to pay. Careful attention must be paid to the definition of "*wasted costs*" in section 29(5) of the 2007 Act. This replicates *verbatim* that contained in section 51(7) of the Supreme Court of Judicature Act 1981 (inserted by section 4 of the Courts and Legal Services Act 1990). It is worthy of note that this amended provision was introduced in the wake of the White Paper on Legal Services (CM 740 1989), which expressed the view that adequate remedies should be available to enable the Courts to deal with unsatisfactory work by lawyers. The statutory amendment introduced in 1990 extended the power to make wasted costs orders against solicitors only to encompass all litigators and all advocates. In The Supreme Court Practice 1999, Volume 2, one finds the following commentary, at paragraph 20A(403):

> "*The definition of 'wasted costs' given in section 51(7) shows a preference for a version of the harsher tests found in recent case law;* ***it does not require a showing of misconduct or gross neglect but is, at its lowest, a negligence test***."
>
> [Emphasis added.]

Thus the twofold policy of the legislation was to lower the threshold for making a wasted costs order and to enlarge the class of persons against whom such order could be made.

11. Attention must also be paid to the definition of "*legal or other representative*" in section 29(6) of the 2007 Act. This means "*any person exercising a right of audience or right to conduct the proceedings on his behalf*". This definition clearly embraces Home Office Presenting Officers. However, we consider that it does not extend to unrepresented litigants or "Mackenzie" friends. We also draw attention to the words "*or any employee of such a representative*". Thus it will be no defence for a solicitor to seek to avoid responsibility by inculpating another solicitor or member of secretarial or administrative staff employed by him. The responsibility is both personal and vicarious. Whether this discrete aspect of the definition includes, for example, a fellow partner or an employee of a partnership are issues which may foreseeably arise and will have to be determined when they materialise.

12. When considering whether to make a wasted costs order under rule 9(2)(a), the following golden rules must be observed:

    (a) The Tribunal must be alert to the definition of "*wasted costs*" in section 29(5) of the 2007 Act.

    (b) A discretion is being exercised: there are no rights in play.

    (c) The discretion is to be exercised judicially. Fundamentally this requires the Tribunal to take into account all material considerations, to disregard everything immaterial and to act within the constraints of rationality.

    (d) If the Tribunal finds, giving effect to the statutory definition, that wasted costs have been occurred, an order does not follow as a matter of course: rather, the order is discretionary.

    (e) The Tribunal must be alert to Presidential Guidance Note Number 1 of 2014 (Appendix 4 hereto).

    (f) Rule 9 must not be considered in isolation: rather, it operates in the context of the overriding objective enshrined in rule 2(2) and, specifically, it is incumbent on the Tribunal to seek to give effect thereto when considering the exercise of the powers contained in rule 9.

13. The leading authority on wasted costs orders continues to be the decision of the Court of Appeal in Ridehalgh v Horsefield [1994] Ch 205. As this decision emphasises, the jurisdiction to make a wasted costs order is directed to the representatives of a party. In the context of Tribunal proceedings, the definition of "*legal or other representative*" in section 29(6) of the 2007 Act must be carefully respected. The Court formulated the general principle in play thus, at 225f:

"*Solicitors and barristers may in certain circumstances be ordered to compensate a party to litigation other than the client for whom they act for costs incurred by that party as a result of acts done or omitted by the solicitors or barristers in their conduct of the litigation.*"

As regards taxonomy, it is conduct of this kind which is under scrutiny in every case where a wasted costs order is contemplated. The Court of Appeal (at 226b) identified that two public interests, existing in tension rather than in harmony, are engaged by every court's wasted costs jurisdiction. The first, in summary, is that lawyers should not be deterred from pursuing their client's interests by fear of incurring a personal liability to their client's adversary. The second is that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their adversary or their adversary's lawyers.

14. In its judgment, the Court of Appeal traced the history of the wasted costs jurisdiction. This included in particular a decision of the House of Lords in Myers v Elman [1940] AC 282 which is authority for the following propositions:

(a) The Court's jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors.

(b) Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct the making of a wasted costs order does not.

(c) The Court's jurisdiction to make a wasted costs order against a solicitor is founded on breach of the duty owed by the solicitor to the Court to perform his duty as an officer of the Court in promoting within his own sphere the cause of justice.

(d) To show a breach of that duty it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor off the roll. While mere mistake or error of judgement would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross.

(e) The jurisdiction is compensatory and not merely punitive.

This decision, in retrospect, may rightly be considered enlightened. It was pronounced in an era when there was no overriding objective and when litigation was substantially less voluminous than today. Notably, the principles enunciated by their Lordships were founded on the solicitor's duty to the Court. One can also identify in the speeches traces of what, with the passage of time, became the more developed doctrine of misuse of the Court's process. Several decades later, of course, the power to make a wasted costs order became regulated by a combination of statute and rules of Court. One particular aspect of these reforms was to extend the liability to an order of this Court to representatives other than solicitors.

15. As the historical review in Ridehalgh shows, there is one especially noteworthy feature of the progressive regulation of the jurisdiction of the High Court to make a wasted costs order against a solicitor. Whereas the original wording of the relevant provision – order 62, rule 8(1) of the Rules of the Supreme Court – employed (*inter alia*) the language "*misconduct or default*", in 1960, this was omitted when the rule was amended in 1986 by order 62, rule 11, which introduced the criterion of a failure to conduct proceedings "*with reasonable competence and expedition*". Thus a wasted costs order could be made by reference to the ordinary standard of negligence, rather than a higher standard requiring proof of gross neglect or serious dereliction of duty. The next significant development occurred in 1990, as noted above, when section 4 of the Courts and Legal Services Act substituted a new section 51 in the Supreme Court Act 1981. This was followed by an appropriate amendment of order 62, rule 11.

16. The history outlined above was considered by the Court of Appeal in Ridehalgh v Horsefield, prompting the following observation by Lord Bingham MR, at 231d :

> "*There can in our view be no room for doubt about the mischief against which these new provisions were aimed: this was the causing of loss and expense to litigants by the unjustifiable conduct of litigation by their or the other side's lawyers. Where such conduct is shown, Parliament clearly intended to arm the Courts with an effective remedy for the protection of those injured.*"

For present purposes, the most significant feature of the decision in Ridehalgh is that it provides authoritative construction of the statutory terminology – in section 51(7) of the Supreme Court Act 1981 – which was replicated *verbatim* in section 29(5) of the 2007 Act which, in turn, forms an intrinsic part of the regime established by rule 9 of the 2014 Rules. The Court of Appeal said the following, at 232d/h:

> "***Improper*** *means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgement limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code …….*
>
> ***Unreasonable*** *also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently.* ***The acid test is whether the conduct permits of a reasonable explanation****. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable …….*
>
> *We are clear that* ***negligent*** *should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the*

profession ……. We would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence."

[Emphasis added.]

The Court then noted that, pursuant to the decision of the House of Lords in Saif Ali v Sidney Mitchell [1980] AC 198, the standard in an action for negligence against a solicitor is "*advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well informed and competent would have given or done or omitted to do.*" (At page 218D, per Lord Diplock.)

17. There is one additional feature of note in the decision in Ridehalgh. The Court of Appeal declined the invitation to provide any more comprehensive definition of the three adjectives in question and, in particular, to accord to each a self contained meaning. Its reason clearly was that the three species of unacceptable conduct do not belong to hermetically sealed compartments. As a result, depending of course on the context, conduct which is unreasonable may also be improper and conduct which is negligent will very often be unreasonable.

18. We have dwelt at some length on the decision in Ridehalgh in view of its unbroken nexus with rule 9 of the 2014 Rules. The primary guidance which the decision provides is set out above. The decision also provides guidance on certain ancillary issues of some importance. The first, already highlighted in [6] above, is the discretionary nature of the jurisdiction. Per Sir Thomas Bingham MR, at 239e:

"*Even if the Court is satisfied that a legal representative has acted improperly, unreasonably or negligently and that such conduct has caused the otherside to incur an identifiable sum of wasted costs, it is not bound to make an order, but in that situation it would of course have to give sustainable reasons for exercising its discretion against making an order.*"

It seems to us uncontroversial to suggest that, in the ordinary course of events, where any of the types of unacceptable conduct is demonstrated, together with the requisite causal nexus, the discretion will be exercised by making a wasted costs order. However, the Tribunal will have to be alert that the context is one of discretionary choice, rather than obligation. It should also bear in mind the sage observation of Lord Rodger in Medcalf v Weatheril [2003] 1 AC 120, at [76]:

"*All kinds of mitigatory circumstances may be relevant to the exercise of that discretion.*"

Secondly, it is clear that where a wasted costs order is sought, the onus rests on the party making the application: see Ridehalgh, at 239C, later endorsed in Medcalf at [40], per Lord Steyn. Thirdly, where a wasted costs application is made against a representative, legal professional privilege may, in certain contexts, arise. The privilege is, of course, that of the client and, hence, can be waived by the client only. The decisions in Ridehalgh and Medcalf both recognise that, in certain

circumstances, this may result in a legal representative being at a grave disadvantage in resisting a wasted costs application. The solution is framed in the following terms:

> "*Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order.*"

See Ridehalgh, at pages 236 – 237, endorsed in Medcalf at [61].

Fourthly, there must be a causal nexus between the unacceptable conduct alleged and the wasted costs claimed: Ridehalgh at page 237. Fifthly, where a solicitor wishes to advance, in defence or mitigation, reliance on the advice of Counsel this may be relevant, particularly where specialist advice is concerned: Ridehalgh, at page 237.

19. The decision in Ridehalgh also endorses the adoption of a three stage test when a wasted costs application is made:

    (i) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?

    (ii) If so, did such conduct cause the applicant to incur unnecessary costs?

    (iii) If so, is it in all the circumstances of the case just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

    We consider that the same approach should be adopted in applications for an order under Rule 9 of the 2014 Rules.

20. One of the discrete issues addressed in Ridehalgh is worthy of separate and specific consideration. It concerns the vulnerability of a representative to a wasted costs order in circumstances where a hopeless case has been pursued. The principle enunciated in the judgment is crystal clear:

    > "*A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail.*"

    (Per Sir Thomas Bingham MR at page 234.)

    The rationale of this principle is the following:

    > "*Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure.* ***But clients are free to reject advice and insist that cases be litigated. It is rarely, if ever, safe for a***

Court to assume that a hopeless case is being litigated on the advice of the lawyers involved."

[At page 234, emphasis added.]

This passage highlights the distinction which must be observed, in appropriate cases, between the conduct of a representative and that of the legal representative's client viz a party to the proceedings. In practice, the client will almost invariably be the Appellant in the proceedings before the FtT. This distinction underlines one of the key differences between rule 9(2)(a) and rule 9(2)(b) of the 2014 Rules. Cases in which there is a finding by the FtT that a legal representative knowingly promoted and encouraged the pursuit of a hopeless appeal, thereby warranting a wasted costs order under rule 9(2)(a), are likely to be rare. Furthermore, in any case where an assertion of such conduct is made, the Tribunal should be especially alert that the burden rests on the moving party and will examine the supporting evidence scrupulously.

21. As the remainder of this passage makes clear, conduct on the part of a legal or other representative which lapses into the abyss of abusing (or misusing) the process of the Tribunal will not be insulated against a wasted costs order under rule 9(2)(a). However, the Tribunal must always be alert to distinguish between the conduct of the representative (on the one hand) and the client (on the other). Furthermore, it is not the function of the Tribunal to conduct a full scale disciplinary investigation, not least because it is not equipped with the resources or expertise to do so. Rather, the Tribunal must confine itself to the evidence available to it, bearing in mind always that the onus of proof rests on the moving party. See also, in this respect, Re O (A Minor) (Wasted Costs Application) [1994] 2 FLR 842. The passage in Persaud v Persaud [2003] EWCA Civ 394, at [24], on which reliance was placed in argument on behalf of the Respondent, is to be understood in this way. Insofar as it was further argued that a wasted costs order can be made only where a representative's conduct constitutes an abuse of the Court or Tribunal, we cannot agree. The context in which this issue was addressed in Ridehalgh is all important. Properly understood, this serves to illuminate and confine the passage in Mitchells Solicitors v Funkwerk Information Technologies [2008] UKEAT 0541, at [28], on which the Respondent also relied.

22. As the combined researches of both parties' representatives in this case have demonstrated, there are many judicial decisions belonging to this sphere. In our exposition of the governing principles, we have quite deliberately confined ourselves to the two leading authorities, namely Ridehalgh and Medcalf. For the reasons explained, these authorities have a direct bearing on rule 9 of the 2014 Rules and, further, being decisions of the Court of Appeal are binding on this Tribunal. A correct appreciation of the doctrine of precedent on the part of both representatives and Tribunals will, we trust, serve to discourage any temptation to embark upon detailed examinations of other decided cases in the determination of wasted costs applications. This is unlikely to serve any useful purpose, descending into the less than fruitful exercise of simply comparing the facts of the instant case with those of other cases. While exercises of this kind are, as emphasised above, generally arid and

frequently unreliable, they suffer from the further infirmity of misunderstanding and misapplying the doctrine of precedent.

Rule 9 (2)(b)

23. The power contained in rule 9(2)(b) is framed in language which differs from that of rule 9(2)(a). Its focus is that of parties. It is concerned only with one species of unacceptable conduct, namely that which is unreasonable. We consider that the question of whether conduct is unreasonable under this limb of rule 9 is to be determined precisely in accordance with the principles which relate to unreasonable conduct under rule 9(2)(a). We find nothing in either the 2007 Act or the rule itself to suggest otherwise. Thus the basic test will be whether there is a reasonable explanation for the conduct under scrutiny. We consider that the words "*a person*" include an unrepresented litigant. However, they do not extend to a "Mackenzie" friend.

24. The scope of rule 9(2)(b) is identifiable by listing the several types of enquiry which, depending on the context, may be required of the Tribunal. These are:

    a. Has the Appellant acted unreasonably in bringing an appeal?

    b. Has the Appellant acted unreasonably in his conduct of the appeal?

    c. Has the Respondent acted unreasonably in defending the appeal?

    d. Has the Respondent acted unreasonably in conducting its defence of the appeal?

    The rule clearly embraces the whole of the "*proceedings*". Thus the period potentially under scrutiny begins on the date when an appeal comes into existence and ends when the appeal is finally determined in the Tribunal in question. It embraces all aspects of the Appellant's conduct in pursuing the appeal and all aspects of the Respondent's conduct in defending it. This, clearly, encompasses interlocutory applications and hearings and case management hearings.

25. While reiterating our emphasis on the fact sensitive nature of every case, the following illustrations may be of assistance to Tribunals in deciding whether to exercise the discretionary power conferred by rule 9(2)(b):

    (i) Concessions are an important part of contemporary litigation, particularly in the overburdened realm of immigration and asylum appeals. In appeals which must be heard and determined, concessions on factual issues bearing on the appeal can be of great assistance to judges and, simultaneously, further several aspects of the overriding objective. Occasionally, a concession may extend to abandoning an appeal (by the Appellant) or withdrawing the impugned decision (by the Respondent). We consider that applications for costs against a representative or party should not be routine in these circumstances. Rule 9 cannot be invoked without good reason. To do otherwise would be to abuse this new provision. Accordingly, representatives or parties must be

conscientiously satisfied that it is appropriate to have recourse to the rule. This will require, in every case, a considered decision dictated by the standards, principles and constraints of good professional practice. In every case, the fundamental enquiry for the Tribunal will be why the withdrawal has occurred, coupled with the related enquiry of why it did not materialise sooner. This draws attention to the intrinsically fact sensitive nature of every appeal.

(ii) Subject to the above, the belated withdrawal of an appeal is unlikely to be adequately explained on the bare ground that legal advice was to this effect, particularly if the Appellant was legally represented from the outset. On the other hand, a change of representative or the late engagement of a lawyer might, in appropriate cases, provide a satisfactory explanation for this course. Judges will be alert to the balance to be struck so as to ensure that withdrawals are not discouraged.

(iii) A belated withdrawal of a Home Office decision is unlikely to be satisfactorily explained simply on the basis of the timing of the Presenting Officer's involvement. The Home Office is a large government department and the belated commendable conduct of one of its servants cannot, in this context, excuse or justify the acts or omissions of others at earlier stages of the appeal process. Absent exceptional factors or circumstances, a protestation of inadequate resources will be unyielding in this context. Striking the appropriate balance as in (ii) above will be necessary.

(iv) Where a Tribunal is satisfied that an appeal has been withdrawn as a result of the belated production of documents or other evidence by the Respondent, this could, in certain circumstances, justify the consequential assessment that the Respondent had acted unreasonably in conducting its defence of the appeal, thereby attracting a costs order against the Respondent under rule 9(2)(b).

(v) The converse applies, in principle. Thus where a Tribunal is satisfied that the Respondent has withdrawn the impugned decision as a result of the belated production of evidence or witness statements on behalf of the Appellant, particularly where this involves a breach of case management directions, an order for costs under either limb of rule 9 could be appropriate. As ever, the specific context will be determinative.

26. As regards unrepresented litigants, we consider it inappropriate to attempt comprehensive and prescriptive guidance. While reiterating the importance of the fact sensitive nature of each individual case, we confine ourselves to the following general observations. First, the conduct of litigants in person cannot normally be evaluated by reference to the standards of qualified lawyers. Thus the same standard of reasonableness cannot generally be applied. On the other hand, the status of unrepresented litigants cannot be permitted to operate as a *carte blanche* to misuse the process of the Tribunal. The appropriate balance must be struck in every case. In conducting this exercise, Tribunals will be alert to the distinction between pursuing a doomed appeal in the teeth of legal advice and doing likewise without the benefit thereof. Judges will bear in mind that the consideration that appeals to the FtT are

pursued in the exercise of a statutory right is likely to carry greater weight in the case of unrepresented litigants. On the other hand, judges will also be alert to those cases where it is clear that a litigant whilst having no representative on record has no formal or official legal representative has had the benefit of legal advice from some quarter. This phenomenon, where it occurs, is normally discernible from the terms in which grounds of appeal or written submissions, in whatever form, have been devised. Stated succinctly, every unrepresented litigant must, on the one hand, be permitted appropriate latitude. On the other hand, no unrepresented litigant can be permitted to misuse the process of the Tribunal. The overarching principle of fact sensitivity looms large once again.

The Threshold

27 The exercise of the power to make a costs order under either of the limbs of Rule 9 of the 2014 Rules is reserved to the clearest cases. This is clear from Ridehalgh v Horsefield and more recent decisions, both first instance and appellate: Gill v Humanware Europe [2010] EWCA Civ 799, Jackson v Cambridgeshire County Council [2011] UKEAT 0402 and In the matter of a Wasted Costs Order made against Joseph Hill and Company Solicitors [2013] EWCA Crim 775. It suffices to quote the following passage from the judgment of Openshaw J in the last mentioned case, in which an appeal against a wasted costs order made against a firm of solicitors under the Practice Direction (Costs in Criminal Proceedings), which enshrines the "*improper, unreasonable or negligent act or omission*" test, was allowed by the Court of Appeal. The cautionary words in [46] are noteworthy:

> "*We end with this footnote: there is an ever pressing need to ensure efficiency in the Courts: the Judges, the parties and most particularly the practitioners all have a duty to reduce unnecessary delays. We do not doubt that the power to make a wasted costs order can be valuable but this case, and others recently before this Court, demonstrate that it should be reserved only for the clearest cases otherwise more time, effort and cost goes into making and challenging the order than was alleged to have been wasted in the first place.*"

This was echoed in Gill (*supra*) where the Court of Appeal highlighted the undesirability of detailed judicial investigation in wasted costs applications, particularly those requiring the resolution of conflicting evidence. The varying cautionary formulations in each of these cases serves to reinforce the admonition contained in [25](i) above that rule 9 "*cannot be invoked without good reason*". This applies to both limbs of the new rule.

The Transitional Provisions Issue

28 As noted above, the 2014 Rules came into operation on 20 October 2014. Rule 9 is new, having no directly corresponding provision in the predecessor regime. The opening words of rule 9(1) are:

> "*If the Tribunal allows an appeal ……* "

There is no indication in the text of whether the wasted costs power contained in rule 9 applies to all appeals of which the FtT is seized from 20 October 2014. Rule 46, under the rubric "*Transitional Provisions*", provides:

> "*(1) The Tribunal may give any direction to ensure that proceedings are dealt with fairly and, in particular, may -*
>
> *(a) Apply any provision of the Asylum and Immigration Tribunal (Procedure) Rules 2005 or the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 which applied to the proceedings immediately before the date these Rules came into force; or*
>
> *(b) Disapply provisions of these Rules (including the Fast Track Rules).*
>
> *(2) A time period which has started to run before the date on which these Rules come into force and which has not expired shall continue to apply.*"

Reference may be made also to rule 1:

> *(1) These Rules may be cited as the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and come into force on 20 October 2014.*
>
> *(2) They apply to proceedings before the Immigration and Asylum Chamber of the First-tier Tribunal.*"

Notably, there is no specific provision repealing the 2005 Rules. However, it seems clear that the principle of repeal by implication applies, subject to rule 46.

29. Rule 46 operates to preserve the 2005 Rules in a limited way. In our judgment, it was inserted in recognition of the reality that, for a period of time, the FtT would be seized of appeals which, prior to 20 October 2014, had been processed under the old regime. On the other hand, the whole of the 2014 Rules came into operation on 20 October 2014. Rule 46 balances these two factors. It empowers the FtT to give effect to either regime, or both, in the exercise of a discretion to give directions. We consider that the underlying intention must have been to confine this power to appeals predating 20 October 2014. An appeal comes into existence on the date when it is filed with the FtT: see rule 6(2) and rule 55(1) of the 2005 Rules and rule 19(1) of the 2014 Rules. Accordingly, to summarise:

(i) The 2014 Rules will apply in their entirety to all Notices of Appeal post dating 19 October 2014.

(ii) As regards appeals which were filed prior to 20 October 2014, the FtT has a discretion to apply provisions of either the 2005 Rules or the 2014 Rules or both, subject to [35] *infra* .

(iii) The mechanism for exercising this discretion is by making directions. This applies to both the pre-hearing phase and the hearing itself.

(iv) The criterion to be applied is that of ensuring that "*proceedings are dealt with fairly*".

(v) In considering whether to give any such direction, the FtT must give full effect to the overriding objective enshrined in rule 2.

30. In the present case, the Tribunal is seized of an application for costs against the Respondent under rule 9(2)(b) of the 2014 Rules. No question of making any direction arises in this context. Furthermore, neither party has applied for a direction to be made. This impels us to conclude that rule 46 is not directed to the application we are determining. The 2014 Rules are silent on the question of whether rule 9 applies to appeals pre-dating the commencement date of 20 October 2014. This issue is, therefore, to be determined by resort to first principles.

31. The general principle which is engaged is expressed in Bennion, Statutory Interpretation (4th Edition), page 265, in these terms:

> "*Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation.*"

It is evident that, in this context, "*enactment*" embraces secondary legislation, which is the appropriate categorisation of the 2014 Rules, being made pursuant to primary legislation viz the relevant provisions of the 2007 Act. The origins of the principle noted above can be traced to the judgment of Willes J in Phillips v Eyre [1870] LR 6 QB1, at 23, in the statement that retrospective legislation is –

> "*…… contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.*"

There are clear elements of both fairness and legal certainty in this formulation. The principle is expressed in emphatic terms in Maxwell, On the Interpretation of Statutes (12th Edition), page 215:

> "*It is a fundamental rule of English law that no statute should be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct operation.*"

This is a general presumption which, being such, is capable of being displaced where the contrary intention appears. For Bennion, the rationale of this principle is the following:

> "*It is important to grasp the true nature of objectionable retrospectivity, which is that the past legal effect of an act or omission is retroactively altered by a later change in the law.*"

(At page 266.)

32. We consider that the question we are addressing also engages the principle against doubtful penalisation. The essence of this principle is sometimes expressed in the proposition that no one should suffer detriment by the application of a doubtful law. In this context, "doubtful is the adjective to be applied to a construction which, in the context of a competing construction or constructions, would if preferred, create an *ex post facto* legal rule. This principle is *a fortiori* if the doubtful construction also inflicts a detriment, that is to say –

> "*If it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed.*"
>
> (Yew v Kenderaan [1983] 1 AC 553, per Lord Brightman at 558.)

The basic concept of fairness also has a role in the determination of questions of this kind. Per Staughton LJ in Secretary of State for Social Security v Tunnicliffe [1991] 2 All ER 712, at 724:

> "*In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears.*"

33. The presumption against retrospective effect, expounded above, is *prima facie* applicable to rule 9 of the 2014 Rules. Notwithstanding, there is a competing principle to be considered. We are mindful that there is some authority for the proposition that legislative changes in procedural provisions apply to pending as well as future proceedings. However, this is a qualified, and not an absolute, principle. In R v Makanjuola [1995] 3 All ER 730, Lord Taylor CJ referred to "*the general presumption ….. that a statutory change in procedure applies to pending as well as future proceedings*" (at page 732E). However, this is but a general principle, or rebuttable presumption, which must yield in appropriate cases, particularly (per Bennion, page 269) where its application would infringe the principle that a person should not be penalised under a doubtful enactment (see [31] above).

34. Furthermore, the central importance of unfairness in any exercise in statutory construction of the present kind must be squarely acknowledged. In Secretary of State v Tunnicliffe [1991] 2 All ER 712, Staughton LJ stated, at 724:

> "*In my judgment, the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather, it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.*"

This passage was cited with approval by the House of Lords in L'Office Chérifien v Yamashita [1994] 1 AC 486, at 525. In the same case, Lord Mustill, delivering the judgment of the House, cautioned against excessive or mechanistic reliance on generalised presumptions and maxims:

> "*This is misleading, for the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule. True it is that to change the legal character of a person's acts or omissions after an event will very often be unfair; and since it is rightly taken for granted that Parliament will rarely wish to act in a manner which seems unfair it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adapt themselves to individual circumstances and which tend themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself.*"
>
> [At page 524.]

Their Lordships also recognised that in certain contexts the distinction between substantive and procedural rights is unclear and, further, that procedural rights can sometimes be of greater value than substantive rights. In consequence, their preferred approach was to scrutinise intensely the practical value and nature of the rights engaged and the statutory language itself.

35. We formulate the question to be determined in the following terms: is the power to order costs under rule 9(2) of the 2014 Rules exercisable in appeals which predate the commencement date of 20 October 2014? "Predate" in this context denotes that an appeal to the FtT was initiated by the filing of a Notice of Appeal with the Tribunal in accordance with rule 6(1) and (2) and rule 55(1) of the now superseded 2005 Rules. In giving effect to the principles rehearsed above, we take into account in particular the following considerations. First, there is no clear indication in the new 2014 Rules regime that rule 9 applies to pre-existing appeals. This is reinforced by the consideration that while the authors specifically addressed the question of transitional effect, in rule 46(1)(a) and (b), they did so in terms which cannot sensibly be applied to the determination of a costs application under rule 9, other than in respect of the handling and processing thereof. The third material consideration is that this is a new power which alters radically the corresponding provision in the previous regime, rule 23A of the 2005 Rules. The next material factor is that the effect of the exercise of the power contained in rule 9 is to subject the party or representative concerned to a clear detriment. Indeed, this may properly be viewed also as a penalty. Finally, considerations of fairness and legal certainty must be weighed. We consider that it would be unfair to penalise in costs a party or representative for conduct preceding the operative date of the new rule, for the elementary reason that such conduct occurred in circumstances where the shadow of this significant sanction did not exist. When one grafts onto this analysis the factor of legal certainty, the answer to the question posed above becomes even clearer. We are impelled to this conclusion: the power contained in rule 9(2) of the 2014 Rules is not exercisable in appeals predating 20 October 2014. It is, however, exercisable in all appeals dating from and including 20 October 2014.

36. As regards the operation of the other provisions of the 2014 Rules, excluding rule 9, we offer the following guidance. Having regard to the principles expounded above, coupled with rule 46, we consider that in the case of appeals predating the commencement date of 20 October 2014, the Tribunal should give effect to the provisions of the new Rules insofar as it is fair and just to do so. In cases where to do so would give rise to unfairness or injustice, resort should be had to the broad discretionary power contained in rule 46(1). The guiding principle will be the party's right to a fair hearing. Tribunals should be particularly alert to the time limit provision in rule 46(2), reproduced in [27] above, which is expressed in unambiguous terms.

37. In those cases to which rule 9 applies ie all appeals postdating 19 October 2014, we consider that where the Tribunal is invited to make a wasted costs order, it is empowered to consider the totality of the party's or representative's conduct from the commencement of the process, that is to say the initiation of the appeal in accordance with rule 19. We address this specific issue in light of an argument on behalf of the Respondent in the present case that the word "*proceedings*" should be construed as relating only to the actual, substantive hearing of the appeal. We have no hesitation in rejecting this contention.

Procedure

38. We draw attention to, without reproducing *seriatim*, the elaborate procedural provisions enshrined in rule 9. In doing so, we would highlight in particular the following:

    (a) The power enshrined in rule 9(2) may be exercised by the Tribunal of its own volition. It is not dependent upon the making of an application.

    (b) The mechanisms for applying for an order are an oral application at a hearing or a subsequent written application, in accordance with the specified time limit. While the former procedure clearly has the advantages of expedition and minimising further costs, it will plainly be inappropriate in cases where fairness requires a more elaborate process.

    (c) This latter observation is linked to the requirement that the so-called "*paying person*" must be given an opportunity to make representations.

    (d) Furthermore, a pause will facilitate the possibility of consensual resolution of costs issues.

    (e) In addition, it will enable the preparation of a schedule of the costs claimed which, per rule 9(4)(b), is not an automatic requirement.

    (f) In the generality of cases, bundles of authorities and skeleton arguments will be unnecessary. It should normally suffice to bring to the attention of the FtT this judgment and rule 9 itself.

39. Where the Tribunal resolves to exercise its power under rule 9(2), there are three possible mechanisms for measurement of the costs to be paid. These are adumbrated in rule 9(7) and are (a) summary assessment by the Tribunal, (b) agreement and (c) detailed assessment, which involves applying to the County Court. We would strongly encourage the first and second of these options. In cases where a Tribunal has made an "in principle" decision to exercise its power under rule 9(2), it will normally be appropriate to afford the parties an opportunity to reach agreement on the amount to be paid. It follows from this that the Tribunal's ruling must identify clearly the nature, timing and duration of the offending conduct, since there will undoubtedly be cases in which an order will properly be framed in focused, targeted terms.

40. Clearly, there must be fairness to the "*paying party*". Furthermore, the Tribunal must ensure that it is sufficiently informed and equipped to enable its discretion to be exercised judicially. Subject to these requirements, we would urge Tribunals to eschew unnecessary elaboration and avoidable delay in the processing and determining of applications under rule 9(2). The principles enshrined in the overriding objective will apply fully. Furthermore, we would emphasise rule 2(4):

> "*Parties must –*
>
> *(g) help the Tribunal to further the overriding objective; and*
>
> *(h) co-operate with the Tribunal generally.*"

Caution must be exercised to prevent the development of a cottage industry. The factor of limited resources applies to everyone involved in the process: the parties, their representatives and the Tribunal itself. The main touchstones are fairness, expedition and proportionality.

41. We also draw attention to the question of how a Tribunal's decision under rule 9(2) should be formulated. By virtue of rule 29(3)(b) of the 2014 Rules, a written reasoned decision is not obligatory. In such cases, the parties have a right to apply within 28 days for a written statement of reasons. Rule 29(1), which empowers the FtT to give a decision orally at a hearing, clearly embraces decisions under rule 9. We would encourage Tribunals to exercise this power in determining applications under rule 9(2). In cases where the Tribunal does not do so, it would be considered good practice to include a brief statement of the reasons for its order in the notice of decision. Where this latter mechanism is invoked, the emphasis should be on succinct, focused reasons, to be contrasted with the recitation of *tranches* of evidence or the parties' arguments. In cases where it is necessary to do so, a Tribunal's decision under rule 9(2) should also include any appropriate findings of fact. Findings of this kind will, by definition, relate to the unacceptable conduct alleged. In appropriate cases, it may be necessary to resolve disputed issues relating to dates, documents, conversations or like matters.

This Application

42. In the present case, the impugned decision of the Respondent is dated 05 March 2014. This determined the Appellant's EEA application, dated 09 September 2013. The Notice of Appeal is dated 17 March 2014. The Notice of Hearing is dated 01 April 2014. The hearing was conducted on 20 October 2014 (coincidentally, the date of commencement of the new 2014 Rules). We have concluded in [34] above that the power contained in rule 9(2) does not apply to appeals pre-dating the commencement date. It follows that the Appellant's application must be refused.

43. Taking into account the cost and effort expended by both parties in preparing and presenting the application and the desirability of promulgating the maximum guidance possible through the medium of this judgment, we propose to express our views on the merits of the application in any event.

44. The Appellant's application was brought under the second limb of rule 9(2), the material wording whereof is "*if a person has acted unreasonably in bringing, defending or conducting the proceedings*". The Appellant's case was that the Respondent had acted unreasonably in defending the proceedings. We summarise the material facts upon which the Appellant relied as follows:

    (i) Following the initiation of the appeal, the Appellant's solicitors made repeated requests of the Respondent for the production of the audio recordings of the separate interviews of the Appellant and his spouse, together with the transcripts thereof. The first request was made immediately following service of the Notice of Appeal and the requests continued until shortly before the hearing.

    (ii) The Appellant's solicitors were driven to make a subject access request under the Data Protection Act 2004. Some five months after serving the Notice of Appeal, these elicited the provision of transcripts of the interviews, but not the audio recordings.

    (iii) One week in advance of the hearing date one of the recordings, that relating to the Appellant's interview, was provided. As a result, the Appellant's Solicitor and Counsel, having listened to the recording, prepared their own transcript of the interview and served this on the morning of hearing.

    (iv) On the date of hearing, the Respondent's representative was not in possession of all documents, in particular one of the interview transcripts. This resulted in the hearing being interrupted and a brief adjournment, following exchanges with the Judge.

    (v) When the hearing resumed, the Tribunal was informed that the Respondent's representative had taken instructions and that, in consequence, the impugned decision was being withdrawn.

45. It is difficult to conceive of a more belated withdrawal decision. It was made, figuratively, at the 59th minute of the 11th hour. The proceedings had been

consistently defended up to this point. The Tribunal is not privy to what precisely motivated those agents of the Respondent involved in the withdrawal decision. The Respondent's representative was unable to enlighten us on this issue. Furthermore, there is no clear evidence of what was stated to the FtT by the Respondent's representative. The first finding which is readily and obviously made is that the view was formed that the impugned decision could not be defended. Secondly, we readily infer that this decision was motivated by what we shall describe in shorthand as the "interviews issue". We probed the question of why the interview recordings and transcripts were not provided timeously to the Appellant's solicitors. The response was that no explanation could be provided. The conduct of the Respondent throughout the period under scrutiny must be viewed in the context of rule 13 of the 2005 Rules, whereby it was obliged to file with the FtT, *inter alia*, any record of interview with the Appellant, together with all other material documents. The next factor to be considered is that, from the initiation of the appeal, there was clearly an issue of substance relating to the interviews. The several repetitions of the request to provide the materials in question also have a bearing on the Respondent's conduct.

46. Given the matrix outlined above, the question is whether the Respondent acted unreasonably in defending the appeal. We remind ourselves of the pithy statement in Ridehalgh that the acid test is whether the conduct permits of a reasonable explanation. We take into account that the interview recordings and transcripts thereof were at all material times available to the Respondent. Furthermore, the Respondent was on notice from an early stage that there was a substantial issue relating to the interviews of the Appellant and his spouse. The essential elements of this issue would have been clear to the Respondent as they stemmed from the omnibus assessment in the impugned decision that "*…. there were a number of inconsistencies and conflicting answers given during your marriage interview …..*", followed by particularisation. The Respondent's ultimate surrender in the precincts of the Tribunal bears all the hallmarks of a long overdue concession. The appeal had a lifetime of approximately nine months. The Respondent did not make the case that the timing of the concession was explicable and justifiable by reference to some specific event or development, for example new information. In these circumstances, we consider that a period of some three months should have been ample to enable the concession entailing the withdrawal of the impugned decision to be made. This measurement of time takes into account the factors of normal pressures on resources, the period typically elapsing between Notice of Appeal and listing and the reality, of which we take judicial notice, that legal costs tend to escalate, sometimes rapidly, during the latter stages of the pre-hearing phase. These stages are frequently characterised by cost incurring steps such as the assembling of written evidence, the preparation of bundles, instructing Counsel, dealing with Counsel's advices and directions and, in appropriate cases, the preparation of skeleton arguments and bundles of authorities.

Conclusion

47. We have concluded that this application under rule 9(2) must fail on account of our assessment of the retrospectivity issue. Had we not thus concluded, our decision would have been that the Respondent acted unreasonably in defending the

Appellant's appeal from the beginning of June 2014. We can conceive of no reason why, having made such conclusion, we would not have proceeded to exercise our discretion to make a costs order against the Respondent. Finally, the order would have required the Respondent to bear all of the Appellant's costs from 01 June 2014, to include the costs incurred by the application under rule 9. We would have assessed these costs summarily and, in the absence of any challenge of substance to the costs schedule presented, we would have awarded 75% of the costs claimed (£3,352.79).

Anonymity

48. While we are conscious that an anonymity direction applied to the Appellant at an earlier stage of the proceedings, no application for the extension thereof has been made and we are satisfied, given the subject matter of this judgment, that there are no grounds for continuing to afford the Appellant anonymity.

Signed

MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
SITTING AS A FIRST-TIER TRIBUNAL JUDGE

Date: 26 January 2015

APPENDIX 1: Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

9.— Orders for payment of costs and interest on costs (or, in Scotland, expenses)

(1) If the Tribunal allows an appeal, it may order a respondent to pay by way of costs to the appellant an amount no greater than—

(a) any fee paid under the Fees Order that has not been refunded; and

(b) any fee which the appellant is or may be liable to pay under that Order.

(2) The Tribunal may otherwise make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs; or

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a) a notice of decision recording the decision which disposes of the proceedings; or

(b) notice that a withdrawal has taken effect under rule 17 (withdrawal).

(6) The Tribunal may not make an order for costs against a person (in this rule called the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (in this rule called the "receiving person");

(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person, if not agreed.

(8) Except in relation to paragraph (9), in the application of this rule in relation to Scotland, any reference to costs is to be read as a reference to expenses.

(9) Following an order for detailed assessment made by the Tribunal under paragraph (7)(c) the paying person or the receiving person may apply—

(a) in England and Wales, to the county court for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to that application and assessment as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply;

(b) in Scotland, to the Auditor of the Sheriff Court or the Court of Session (as specified in the order) for the taxation of the expenses according to the fees payable in that court; or

(c) in Northern Ireland, to the Taxing Office of the High Court of Northern Ireland for taxation on the standard basis or, if specified in the order, on the indemnity basis.

APPENDIX 2: Extract from Presidential Guidance Note No 1 of 2014: The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Wasted and unreasonable costs (or, in Scotland, expenses)

27. The new Rules implement a power in the Tribunals, Courts and Enforcement Act 2007 to award wasted or unreasonable costs. The conferring of this power, however, carries with it considerable responsibility to ensure that its use is appropriate and that it is used fairly and judiciously. In nearly all instances the existence of the power should act as a restraint on the behaviour of parties and their representatives so that the power itself is rarely exercised.

28. The scope of rule 9(2) covers at part (a) wasted costs and costs incurred in applying for such costs and at part (b) costs if a person has acted unreasonably in bringing, defending or conducting proceedings. The Tribunal may make an order on an application or under its own initiative. An order may be made against a party, which may be the respondent, or against a representative (or both).

29. A test for unreasonable conduct was set out by the Court of Appeal in Ridehalgh v Horsefield [1994] Ch 205 at 232 (quoted in R(LR) v FtT (HESC) and Hertfordshire CC (Costs) [2013] UKUT 0294 (AAC)), as follows:

> "'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

30. The Upper Tribunal went on to point out that both the appellant and the respondent in tribunals are substantially dependent on representatives who present cases to the best of their ability, often very helpfully, and that is not something which it would be right to discourage merely because it has not gone smoothly on a particular occasion. A party being wrong or misguided is not the same as being unreasonable.

31. In circumstances where there has been a breach of a direction, for example, a failure to lodge documentary evidence, the offending party should always be given the opportunity to remedy the situation before any order for wasted costs is made. The issuing of a reminder to the party in breach should be a prerequisite before a wasted costs order is made. Even where a hearing has to be adjourned because of an avoidable omission by one party, such as inadequate preparation, it would not normally be appropriate to make an order for costs. Not only has the paying party the right to offer an explanation but it should be remembered that representatives

have many demands on their time and are subject to a multitude of pressures, which may lead even in well-managed organisations to occasional lapses. The making of an order for wasted or unreasonable costs should be a very rare event.

32. Under rule 9(6) the Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations. Where an application for costs is made at a hearing it will be considered at the hearing, provided the paying party is present. Otherwise the application will be considered without a hearing unless the Tribunal is contemplating making an order when the application will be listed for hearing to give the paying party the opportunity to make representations. It is anticipated that the power to award costs will be rarely exercised.

33. A decision on costs is an "excluded decision" and is not subject to an appeal. (See the Appeals (Excluded Decisions) Order 2009, SI 2009/275 and also the Tribunal Courts and Enforcement Act 2007, s 12(4)(a).)

34. Where a costs order is made the amount of costs is assessed in accordance with rule 9(7) either by summary assessment by the Tribunal, by agreement, or by detailed assessment in accordance with rule 9(9).

35. The power to make a fee award is a separate power contained in rule 9(1). This remains the subject of existing guidance.

Michael Clements
President FtTIAC
17 October 2014

APPENDIX 3: Section 29 of the Tribunals, Courts and Enforcement Act 2007 Act

29 Costs or expenses

(1)The costs of and incidental to—

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—

(a)disallow, or

(b)(as the case may be) order the legal or other representative concerned to meet,

the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) "wasted costs" means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

(7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.

APPENDIX 4 : Rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Orders for costs

10. (1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) except—

(a) in proceedings on appeal from another tribunal, to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs (or, in Scotland, expenses); or

(b) in proceedings other than on appeal from another tribunal or under section 4 of the Forfeiture Act 1982(1)—

(i) under section 29(4) of the 2007 Act (wasted costs); or

(ii) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.

(2) The Upper Tribunal may make an order for costs (or, in Scotland, expenses) on an application or on its own initiative.

(3) A person making an application for an order under paragraph (1) must—

(a) send or deliver a written application to the Upper Tribunal and to the person against whom it is proposed that the order be made; and

(b)send or deliver a schedule of the costs or expenses claimed with the application.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 14 days after the date on which the Upper Tribunal sends the decision notice recording the decision which finally disposes of all issues in the proceedings.

(5) The Upper Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

(6) The amount of costs to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Upper Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs ("the receiving person"); or

(c) assessment of the whole or a specified part of the costs (or, in Scotland, expenses) incurred by the receiving person, if not agreed.

(7) Following an order for assessment under paragraph (6)(c), the paying person or the receiving person may apply—

(a) in England and Wales, to the High Court for a detailed assessment of costs in accordance with the Civil Procedure Rules 1998(2) on the standard basis or, if specified in the order, on the indemnity basis;

(b) in Scotland, to the Auditor of the Court of Session for the taxation of the expenses according to the fees payable in the Court of Session; or

(c) in Northern Ireland, to the High Court for the costs to be taxed.

APPENDIX 5: Joint Presidential Guidance – Fee Awards in Immigration Appeals

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

MICHAEL CLEMENTS
PRESIDENT OF THE FIRST-TIER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER

JOINT PRESIDENTIAL GUIDANCE

FEE AWARDS IN IMMIGRATION APPEALS

Preamble

On the 19 December the First-tier Tribunal (Immigration and Asylum Chamber) Fees order comes into force requiring those who appeal to the First tier Tribunal to pay a fee[1].
By rule 23A(2) of the Asylum and Immigration Tribunal (Procedure) Rules 2005(as amended by SI 2011 No. 2840) there is a power in the judge to direct the repayment of a fee in the case of an appellant whose appeal succeeds.
This guidance is issued to assist judges who have to decide on fee awards

Introduction

1. In the courts, where there is power to award costs, it is usual for the unsuccessful party to pay the costs of the successful party which would include any fees paid to a court to bring an action

2. Provision for a "fee award" is a new element for appeals to the FtTIAC. The making of an award is to be decided by the judge on the evidence before him or her and dealt with in the determination following the decision on outcome. The decision on fees is not part of the determination and is an excluded matter for the purposes of ss.11 and 13 of Tribunal Courts and Enforcement Act 2007.

[1] http://www.legislation.gov.uk/uksi/2011/2840/pdfs/uksi_20112840_en.pdf

3. Where the Upper Tribunal sets aside a decision of the FtT judge and remakes it in favour of the appellant, FtT award decision will fall away. The UT judge will need to consider the question of fees made in respect of the FtT appeal. In so doing the UT judge will be exercising functions of the FtT judge under s.12 (4)(a) of the Tribunal Courts and Enforcement Act 2007.

4. Although each case will turn on the exercise of a judicial discretion in the light of the issues, the following guidelines should be considered by judges making these decisions.

Guidance

5. As a first principle, if an appellant has been obliged to appeal to establish their claim, which could and should have been accepted by the decision-maker, then the appellant should be able to recover the whole the fee they paid to bring the appeal.

6. On the other hand, a different outcome may be appropriate if an appeal has been allowed principally because of evidence produced only at the appeal stage that could or should have been produced earlier, or if the appellant has otherwise contributed to the need for the appeal by their own action or inaction.

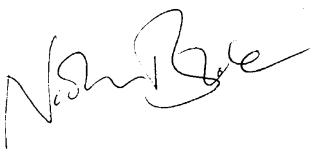
7. When deciding whether to make a fee award or the amount of such an award (up to the maximum of the appeal fee paid), a Judge sitting as a judge of the FtTIAC will have regard to all the circumstances. These will include the conduct of the parties, the reasons why the appeal succeeded, whether the appellant should have produced any fresh evidence that would have materially contributed to the success of the appeal at an earlier stage in the application.

8. The Judge must make a decision in accordance with the principles of proportionality, taking into all available information at the date of the hearing:

a) Where there is no good reason to displace the first principle it should apply. Examples of good reason might include failure to produce evidence that should have been produced before the decision in question; delay in complying with judicial directions or responding to the submissions of the other party; other conduct that results in adjournments that could have been avoided.

b) Judicial time spent on the question must be proportionate to the maximum level of the fee award. The parties should be prepared to make any submissions on fees at the hearing orally or in writing. In the absence of attendance at the hearing the parties cannot expect the judge to give a further opportunity to make submissions on fees.

9. Brief reasons should be given for a fee award decision.



The Hon Mr Justice Blake Michael Clements

Chamber Presidents