Awuah and Others (No 2) (……) [2017] UKFTT ….. (IAC)

First-tier Tribunal

(Immigration and Asylum Chamber)

Appeal Numbers: HU/04300/2015

PA/13321/2016

IA/27184/2015

HU/06514/2016

THE IMMIGRATION ACTS

Heard at Taylor House, London

On 14 September 2017

Further submissions: 27 September 2017

Promulgated on

08 DEC 2017

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Before

Mr Justice McCloskey, President of the Upper Tribunal,

Sitting as a judge of the First-tier Tribunal

and

The President, Mr M Clements

Between

DARKWAH AWUAH, SJ, TN AND KHADIJA MUSU MOMOH

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellants SJ and TN:	Ms R Chapman, of counsel, instructed by Wesley Gryk Solicitors
Appellant Awuah:	Ms H Foot, of counsel, instructed by Sutovic & Hartigan Solicitors
Appellant Momoh:	Ms H Foot and Ms R Chapman, instructed by Nathan Aaron Solicitors
Respondent:	Mr R Cohen, of counsel, instructed by the Government Legal Department.

CONJOINED APPEALS: DECISION

McCloskey P

Preface

1. This is the judgment of the panel to which both members have contributed. It represents a further stage in the adjudication of the issues in these appeals, following upon our earlier judgment: see Awuah and Others (Wasted Costs Orders - HOPO's - Tribunal Powers) [2017] UKFT 555 (IAC) (hereinafter "*our principal judgment*"). This decided, *inter alia*, that there is no power to make a Wasted Costs Order ("WCO") against a Home Office Presenting Officer ("HOPO") representing the Secretary of State for the Home Department (the "Secretary of State"). This completed the first stage of this discrete chapter in the finalisation of these four conjoined appeals. Our principal judgment addressed, and determined, certain questions of principle.

2. At this, the second, stage, the Tribunal has considered the parties' arguments relating to (a) one further question of principle and (b) a series of discrete issues relating to the four individual appeals.

UNREASONABLE CONDUCT

3. As set forth in [5] of our principal judgment, Rule 9(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "2014 Rules") empowers the First-tier Tribunal ("FtT") to make an order in respect of costs:

> "... *if a person has acted unreasonably in bringing, defending or conducting proceedings.*"

In Cancino (Costs - First tier Tribunal - New Powers) [2015] UKFTT 0059 (IAC) (hereinafter "Cancino"), this panel decided, *inter alia*, that awards of costs are always discretionary, even in cases where the qualifying conditions are satisfied; orders for costs under Rule 9 will be very much the exception, reserved to the clearest cases; and there must be a causal nexus between the conduct in question and the wasted costs claimed. It was further decided, with some emphasis, that one of the supreme governing principles is that every case will be unavoidably fact sensitive.

4. Against the background sketched above, the Tribunal has been urged by the Appellants' representatives to provide some guidance on the meaning of unreasonable conduct within the compass of Rule 9(2)(b). It is contended that, by reference to certain recurring phenomena in the Secretary of State's defence of statutory appeals, there is a demonstrated need for such guidance.

5. Developing this contention Ms Chapman (appearing with Ms Foot on behalf of the Appellants) emphasised in particular the distinction between the Secretary of State and its officials - case workers, HOPOs *et al* - on the one hand and the typical litigant in person, whether assisted or not by a friendly neighbour or helpful relative, on the other; the consideration that many of the Secretary of State's decisions entail the

application of legal rules to ascertained facts rather than the exercise of discretion; the obligation on the Secretary of State's servants and agents to identify, and then apply, the applicable legal rules in every decision making process; the need for re-assessment when an appeal materialises and the unsustainability of the Secretary of State's published policies in this respect; and the overarching duty to further the overriding objective and co-operate with the tribunal; and the distinction between the tests to be applied in the differing contexts of a wasted costs order and unreasonable conduct under rule 9(2)(b).

6. As will become clear, we consider that there is merit in the submissions. Moreover, following a detectable shift in the Secretary of State's position on the main issues to which these submissions were directed there was, ultimately, relatively little distance separating the parties.

7. We consider that the elastic nature of the criterion to be applied – unreasonable conduct – in tandem with the fact sensitive principle combines to defeat any quest for the provision of a detailed code of guidance by this Tribunal. This restraint is an unavoidable consequence of these two considerations. While alert to the desirability of providing the maximum guidance to litigants and their representatives, there is a limit to what can be achieved in this respect.

8. This judicial self-restraint is evident in the leading authority in this field, Ridehalgh – Horsefield [1994] CH205, Cancino (Costs – First-tier Tribunal – New Powers) [2015] UKFTT 00059 (IAC) and other prominent decisions of Chambers of the Upper Tribunal, such as MORI – v – Commissioners for Her Majesty's Revenue and Customs [2015] UKUT 0012 (TCC) at [49]:

> *"It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to Tribunals ....*
>
> *It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done."*

As the Tribunal added, the legal standard to be applied is *"imprecise"*. We wholeheartedly agree. There is a striking lack of statutory description and we consider this to be a classic illustration of a discrete legal sphere in which the law will develop incrementally through the jurisprudence of the various chambers of the First - tier and Upper Tribunals. It is not for the Upper Tribunal to trespass upon the realm of the legislature or rule making authority. While we shall highlight *infra* the main guidance to be derived from existing jurisprudence, further guidance will evolve through judicial decision making in individual cases. What follows is subject to the foregoing.

9. The guidance to be derived from the existing case law is a reflection of the caution expressed above. The main established principles are, in brief compass:

(i) The conduct under scrutiny is to be adjudged objectively and the Tribunal is the arbiter of unreasonableness.

(ii) The fundamental enquiry is whether there is a reasonable explanation for the conduct under scrutiny.

(iii) Unreasonable conduct includes that which is vexatious, designed to harass the other party rather than advance the defence and ultimate outcome of the proceedings.

(iv) While the test of unreasonableness is objective, its application will not be divorced from the circumstances of the individual case and those of the person or party in question.

(v) The objective standard to be applied to the Secretary of State's case workers, HOPOs and others is that of the hypothetical reasonably competent civil servant.

(vi) Thus it will be appropriate to presume - a rebuttable presumption - that HOPOs are properly qualified and sufficiently trained so as to adequately discharge the important function of representing a high-profile Government Minister in the self-evidently important sphere of immigration and asylum legal proceedings in a society governed by the rule of law.

(vii) The measurement of this standard in the individual case will take into account all that is recorded in [8] of our principal judgment.

(viii) In every case the Secretary of State must undertake an initial assessment of the viability of defending an appeal within a reasonable time following its lodgement. Where this does not result in a concession or withdrawal or something comparable, this duty, which is of a continuing nature, must be discharged afresh subsequently. (see our elaboration at [24] - [31] *infra*).

(ix) It will, as a strong general rule, be unreasonable to defend - or continue to defend - an appeal which is, objectively assessed, irresistible or obviously meritorious.

The principles formulated above are traceable to the jurisprudence considered in our principal judgment and in Cancino. We refer also in this context to Catana v Commissioners for Her Majesty's Revenue and Customs [2012] UKUT 172 (TCC) at

[14], one of many judicial formulations of principle which, in our judgement, are not to be treated as rigid prescriptions.

10. The latter observation applies fully to the following passage in Wallis v Commissioners for Her Majesty's Revenue and Customs [2013] UKFTT 081 (TC), at [27]:

> *"The rules clearly do not intend that just because a party is wrong that party should be ordered to pay the other's costs ....*
>
> *In our judgement, before making a wrong assertion constitutes unreasonable conduct in an appeal, that party must generally persist in it in the face of an unbeatable argument that he is wrong. Thus, **for example**, a party who persists in a legal argument which is precisely the same as one recently dismissed by the Supreme Court and which has been drawn to his attention, or who proceeds on the basis of facts which that party accepts, or can only reasonably accept, are wrong, could be acting unreasonably in defending or conducting the appeal."*

[Emphasis added.]

We construe *assertion"* as roughly equivalent to advancing a case or defence. We draw attention also to the immediately following sentence, with which we concur:

> *"Unreasonable conduct of the appeal is in our view more likely to be found in the way in which an appeal is pursued – in, for example, the unnecessary examination of witnesses or the lengthening of an appeal with irrelevant or unnecessary evidence or behaviour."*

11. In Willow Court Management v Alexander [2016] UKUT 290 (LC), the Lands Chamber of the Upper Tribunal noted that in Cancino one of the recurring themes is the fact sensitive nature of the enquiry in every case. Deputy Chamber President Rodger QC continued at [24]:

> *"An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in Tribunal proceedings ought not to be set at an unrealistic level ....*
>
> *Unreasonable conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's 'acid test': is very reasonable explanation for the conduct complained of?"*

Once again the judicial self-restraint in avoiding the formulation of prescriptive rules or principles is noteworthy. Equally worthy of attention is the Tribunal's statement at [28] that the evaluation of whether a party's conduct has been unreasonable does not involve the exercise of discretion. Rather, it entails "*the application of an objective standard of conduct to the facts of the case*".

12. Insofar as the argument of Mr Cohen on behalf of the Secretary of State sought to elevate [24] of the decision in Willow Court, in particular the 'vexatious/harassment' sentence, to the state of an inflexible legal principle we disagree for the reasons given above. We do, however, draw attention to the Tribunal's emphasis on "*a reasonable person in the position of the party* [concerned]". This in no way detracts from the objectivity of the test to be applied. But the test is not applied in a vacuum. Rather, it entails identification of the position of the party under scrutiny. Reverting to the present context, which is concerned only with the Secretary of State *qua* respondent in statutory appeals, any purported analogy with the notionally typical unrepresented litigant is plainly misconceived.

13. Nor is the Secretary of State's HOPO to be equated with the notional litigant in person, assisted or not by a friendly neighbour or helpful relative acting as "McKenzie" friend. To ignore the attributes and qualifications of the Secretary of State's servants and agents would be fallacious. Equally, a HOPO is not to be equated with a qualified advocate. These propositions, ultimately, were not contentious. In this context we refer to, but do not repeat [8] of our principal judgment. Thus the avoidance of comparing apples with pears is essential in every Rule 9(2) judicial exercise.

14. In every case where a tribunal is required to measure the reasonableness of a party's conduct in prosecuting or defending an appeal, the exercise will be one of evaluative assessment. This exercise will fall to be performed within a framework of facts which are agreed and/or uncontested and/or, where necessary, found by the tribunal. In most cases the facts will be objectively ascertainable from documentary evidence and there will be little scope for serious dispute. In a minority of cases witness statements and/or oral evidence, with cross examination, may be required.

15. Evaluative assessment is one of the themes of the decision of the Upper Tribunal Tax and Chancery Chamber in Mori v Commissioners for Her Majesty's Revenue and Customs [2015] UKUT 0012 (TCC). The Tribunal, firstly, rejected the argument that the conduct of HMRC should be equated with that of all other litigants. See [56]:

> "... *The test of reasonableness must be applied to the particular circumstances of a case, which will include the abilities and experience of the party in question. The reasonableness or otherwise of a party's actions fall to be tested by reference to a reasonable person in the circumstances of the party in question. This is a single*

standard, but its application, and the result of applying the necessary value judgment, will depend on the circumstances."

The immediately succeeding passage embodies many familiar principles:

> *"In our judgment, viewed overall, the approach of the FtT was impeccable. It properly instructed itself in the relevant law. It set out the proper approach to be adopted. It applied that approach. Its references to matters not being obvious, were nothing more than constituent parts of the FtT's exercise of a value judgment, applying the correct legal principles and having regard to all relevant circumstances and no irrelevant ones."*

These are the well-established touchstones to be applied in error of law appeals against decisions of tribunals generally: see Edwards v Bairstow [1954] AC 14.

16. The duties imposed upon the Secretary of State when an appeal comes into existence invite some elaboration. We consider first the initial duty. It is not contested that there is a duty on the Secretary of State to assess the viability of defending an appeal following notification. There is, of course, a corresponding duty on an appellant and his representatives to review the feasibility of pursuing an existing appeal from time to time. Both duties are rooted in the overriding objective and the specific obligations to help the tribunal to further the overriding objective and to co-operate with the tribunal generally: see Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chambers) Rules 2014 (the *"2014 Rules"*).

17. The aforementioned initial duty on the Secretary of State will not, in the real world, fall to be performed on the date when an appeal is first received from the FtT under Rule 19(6). Having invited the parties' specific submissions on this issue, we say the following. First, the failure of the Secretary of State to undertake a timeous assessment of the viability of defending an appeal, following notification may, in principle, generate a liability in costs under Rule 9(2)(b). Two separate types of this species of failure are identifiable. The first is an outright failure to perform this duty. The second is a failure to discharge the duty timeously. Either type of failure could potentially, whether singly or in combination with other factors, constitute unreasonable conduct in defending an appeal. The question of whether it does qualify for this condemnation will, as ever, be intensely fact sensitive. Moreover, the fact of performance of this duty will not insulate the Secretary of State against an unreasonable conduct costs order.

18. We reject the submission on behalf of the Secretary of State that the relevance of either of the failures identified above will be confined to the context of withdrawal of the underlying decision. There is no warrant in the language of the rule or in principle for such a confined approach. Furthermore, either of these failures may, depending upon the case sensitive context, be relevant to the issue of calculating the

period of unreasonable conduct which, in turn, will sound on the measurement of an appellant's recoverable costs, if any.

19. The contextual nature of the Secretary of State's initial assessment of an appeal will be informed by, *inter alia*, the state, presentation and completeness of the papers served. It will also depend upon the adequacy and quality of the pleading: poorly formulated and/or opaque grounds of appeal will complicate and undermine the efficacy of the exercise to be performed. While best practice dictates that the documents to be provided upon filing an appeal should normally include copies of the underlying application, all of the accompanying documents and the impugned decision, the language of Rule 19 (5)[c] confines an appellant's duty in this respect to *"any documents in support of the appellant's case which have not been supplied to the respondent"* In some cases there may be a legitimate justification for failing to provide everything required by the Rule: for example, where a change of representative has occurred or something has been lost or mislaid or due to genuine ill health or other human inhibition. Furthermore, a judge determining an unreasonable conduct costs application will take into account that all of the extant material documents should normally be accessible by the Secretary of State's officials. Self-evidently, where there is a failing of this kind on the part of an appellant, this could also affect the timing of the initial assessment.

20. In inviting the parties' further submissions on this discrete issue of timing, we canvassed the tentative suggestion that, as a general rule, the Secretary of State's initial assessment of the viability of defending an appeal should normally be performed within a period of one month of receipt. The response on the part of the Secretary of State evinced a misunderstanding of the Tribunal's invitation. In particular, the suggestion that the Tribunal was contemplating the prescription of *"a specific period"* for this assessment exercise is misconceived. In addition, the further submission on behalf of the Secretary of State was replete with bare, unsubstantiated assertions. While, in the abstract, one might have expected to receive some evidence – or agreed facts -about the practical feasibility of normally assessing the viability of defending an appeal within one month of receipt, there was none.

21. We take into account that while there are unavoidable periodic fluctuations, the FtT aims to list asylum and protection appeals within three months of receipt, whereas in human rights appeals the period is at present of the order of six months. We are also mindful of Rules 23 and 24 of the 2014 Rules which stipulate that in every appeal against a refusal of entry clearance or a refusal to grant an EEA family permit and in all other appeals, the Secretary of State must provide the FtT with specified documents within 28 days of receipt of the notice of appeal. We can think of no good reason, practical or otherwise, why the Secretary of State's duty of initial assessment of the viability of defending an appeal should not, as a general rule, be measured by reference to these time periods. We consider it reasonable to expect that in all cases this exercise be normally be performed within six weeks of receipt of an appeal.

22. We supplement the guidance given immediately above with the following. First, as all of the periods specified above are deliberately and carefully formulated in the terms of a general rule, the inter-related mischiefs of blunt instruments and rigid prescription are avoided. Thus in some cases the Secretary of State will be expected to perform the duty with greater expedition. Equally, in others, a failure to achieve these target time limits may, on account of the particular context, be excusable. Second, the duty of initial assessment of the viability of defending an appeal obviously does not arise until notification of the appeal has been received from the FtT in accordance with Rule 19(6). Third, where a case management review is considered appropriate, the FtT should endeavour to choreograph this with the general time limits outlined above. Fourth, where a suitably choreographed case management review is held, the FtT will normally expect confirmation from the Secretary of State's representative that the aforementioned duty has been performed, augmented by such elaboration and in particulars as may reasonably be required.

23. We are mindful that in Cancino this Tribunal decided that the impugned decision should have been withdrawn, not later than three months from receipt of the appeal. We added, at [45]:

> *"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."*

The Secretary of State's further submission suggests that the approach which we have outlined in the immediately preceding paragraphs is "*inconsistent with*" Cancino. This is fallacious, for two reasons. First, it overlooks the critical words " *in these circumstances*" in [45]. Second, this Tribunal's consideration of this discrete issue in these combined appeals has been undertaken on a considerably better informed basis and has entailed ample opportunity to the Secretary of State to demonstrate that the general time period specified in [21][above is inappropriate.

24. Following an initial assessment of the viability of defending an appeal, subsequent reassessment on the part of the Secretary of State will normally be expected. While eschewing any attempt to formulate prescriptive guidance, we would observe that the Secretary of State's duty of reassessment will arise when any material development occurs. Material developments include (inexhaustively) the completion of the Appellant's evidence (by whatever means), the outcome and outworkings of judicial case management directions, the impact of any further decisions of the Secretary of State (for example affecting a family member), any relevant changes in or development of the law and any relevant changes in or development of the

Secretary of State's policy, whether expressed in the Immigration Rules or otherwise. While the above list ought to encompass most eventualities in the real world of Tribunal litigation, we make clear that it is not designed to be exhaustive in nature.

25. The duties to which the parties in judicial review proceedings are subject provide a useful analogy. These were considered by this Tribunal in R (Mahmood) v Secretary of State for the Home Department (Candour/Reassessment Duties); ETS Alternative Remedy) IJR [2014] UKUT 439 (IAC) at [26]:

> *"(a) The lodgement of permission and/or interim relief papers is a beginning, not an end.*
>
> *(b) If an application for permission is overtaking by supervening events, or is otherwise rendered moot, there is a duty on the Applicant's solicitors to take appropriate and immediate action. This will include proactively communicating with this Chamber and the Respondent's representatives.*
>
> *(c) From the inception of the proceedings and in particular following receipt of the Respondent's Acknowledgment of Service, there is a duty on every Applicant's legal Representatives, to conscientiously reassess the viability and propriety of their client's application for judicial review and to consider whether any further procedural step is required. If the Acknowledgement of Service renders the challenge unsustainable, appropriate withdrawal steps must be initiated promptly."*

This passage, with appropriate modifications, applies to every party in both judicial review proceedings and statutory appeals.

26. In the course of these appeals we have been alerted to the existence of the Home Office policy document "Withdrawing Decisions and Conceding Appeals: Guidance for Presenting Officers" and the related Home Office policy document: "Reconsiderations".

27. At the outset we draw attention to the correct legal characterisation of these instruments. In common with the Immigration Rules, they do not have the status of law, primary or secondary. Rather they are conventionally characterised as statements of policy which the Secretary of State has, by legal obligation or otherwise, devised and published. The policy statements of every public authority are governed by the "Lumba" principle: as they take the form of an assurance, or promise, by the executive to the population as a whole (and, in passing, may sometimes engage the principles of substantive legitimate expectations) there is a general principle that they fall to be honoured in cases in which they apply.

28. In Lumba v Secretary of State for the Home Department [2012] 1 AC 245 and [2011] UKSC 12 Lord Dyson, delivering the unanimous decision of the Supreme Court, identified at [20] three uncontroversial principles regarding every policy:

> *"First, it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations."*

For a recent example of the impact of Government policy in the sphere of immigration, see Ahmed and Others (Deprivation of Citizenship) [2017] UKUT 118 (IAC) at [56] - [68].

29. Though policy documents of this kind are incapable of emasculating a person's legal rights they can sometimes enlarge them, as the Lumba principle and the doctrine of substantive legitimate expectations show. The submissions of Ms Chapman and Ms Foot demonstrated that certain passages in the two aforementioned policy instruments are irreconcilable with the Secretary of State's duties of assessment and reassessment as we have formulated these. A detailed judicial forensic analysis is not necessary taking into account in particular the uncontentious nature which this discrete issue, via Mr Cohen's submissions, ultimately assumed. It suffices to say that if and to the extent that any aspect of the policies in question is incompatible with the Secretary of State's duties of assessment and reassessment of the viability of defending an appeal or, indeed, any of the other principles highlighted in our principal judgment or above, they are unlawful. Our final observation is that in the interests of good administration the policies should be reconsidered in the light of these judgments.

30. We would add that it may be appropriate for tribunals in certain cases to require evidence of review/reconsideration of an appeal on behalf of the Secretary of State. This exercise is, presumably, documented and is therefore susceptible to production via documentary evidence. The bare assertion of the fact of a review or reconsideration or the content or outcome thereof may not, without supporting documentary evidence, be considered acceptable or sufficient by the tribunal in certain cases. Furthermore, review by an official of a rank higher than that of the decision maker is, in principle, likely to carry greater weight than review by one of equivalent rank.

31. We make some final observations on the Secretary of State's duty of initial assessment of the viability of defending an appeal. There will be positive benefits from the timeous, diligent and conscientious discharge of this duty. Moreover, the benefits to be gained will be enjoyed by all concerned. Appellants whose appears should not properly be contested will be spared both the prolongation of anxiety and uncertainty and the expenditure of scarce financial resources. The two tiers of the Immigration and Asylum Chamber will avoid the investment of limited

administrative and judicial resources in the preparation, processing and hearing of appeals which should properly have been conceded. This, in turn, will facilitate the more expeditious processing and determination of other appeals in the system. And, finally, the Secretary of State will avoid the investment of resources in appeals which should not properly have progressed to the stage of a full hearing. In short, every stakeholder will be a winner. In prescribing the guidance contained in this judgment, we do not overlook the imperfections of the real world. However, this cannot deter us from exhorting adherence to the highest, but reasonable, standards on the part of all concerned.

32. We preface our consideration and determination of the specific issues raised in the individual appeals with the following. We trust that what follows will be instructive for litigants, practitioners and judges in other cases. However we must emphasise that these are fact sensitive illustrations of this Tribunal's evaluation of unreasonable conduct by the Secretary of State under Rule 9(2)(b). They may be a yard stick or touchstone in other cases. But they will be no more than a starting point. They will not be determinative of other cases – except, perhaps, in the highly unlikely event of a virtually identical case. In any case where unreasonable conduct is being considered under Rule 9(2)(b) attempted comparisons with other cases will normally be an arid and time wasting exercise.

33. We gratefully adopt the three stage approach espoused by the Land Chamber of the Upper Tribunal in Willow Court at [28]:

> *"At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be."*

The attractions of this orderly, structured framework are, fundamentally, that it focuses the attention of the tribunal on correct self-direction in law and minimises the risk of lapsing into legal error.

34. Finally, there is much guidance of a general nature to be harvested from our decision in Cancino: the distinction between Rule 9(2)(a) and Rule 9(2)(b) - see [20] and [23]; the basic questions arising in every Rule 9(2)(b) enquiry - at [24]; the issues of concessions and withdrawals - at [25]; the general approach to "typical" unrepresented litigants – see [26]; the issue of procedural safeguards – at [38] – [40]; and, finally, the self-evidently important general principle that the exercise of the

tribunal's discretionary power under both limbs of Rule 9(2) is reserved to the clearest cases – see [27].

THE INDIVIDUAL APPEALS

Awuah

35. The Secretary of State refused the application of this Appellant, a citizen of Ghana then aged 47 years, for leave to remain in the United Kingdom based on Article 8 ECHR. The Appellant had been lawfully resident in the United Kingdom during approximately half of his total sojourn of 13 years in the United Kingdom. He was the father of two children, aged 10 and 7 years respectively, whose entire lives had been spent in the United Kingdom. The central issue canvassed in his ensuing appeal was that the Secretary of State's refusal constituted a disproportionate interference with the right to respect for private and family life enjoyed by all members of the family.

36. It was further contended that the impugned decision was made in breach of the Secretary of State's duties under section 55 of the Borders, Citizenship and Immigration Act 2009 (the "2009 Act"). It is of note that the impugned decision was the product of the Secretary of State's acceptance that an earlier decision was unlawful by reason of a failure to consider section 55.

37. The First-tier Tribunal ("FtT") allowed the appeal. It stated at [14] of its decision:

> *"..... There has been a complete failure by the Respondent to fulfil the statutory obligations imposed by Section 55 ..."*

And at [16]:

> *"In the absence of any proper assessment of the children's best interests having been undertaken by the Respondent, I consider I have sufficient material to make my own assessment."*

The Secretary of State did not seek permission to appeal.

38. An application for costs under Rule 9(2)(b) followed, in the following terms:

> *"It is clear ..... that the Respondent did act unreasonably in defending this appeal. As long ago as ..... over 2 ½ years before the appeal hearing the Respondent accepted that her decision was unlawful. It took a year and a half until the Respondent allowed the Appellant to appeal to the FtT to have the matter finally resolved ....*
>
> *It is clear from Judge Ross's determination that the facts were not in dispute. Had the Respondent applied section 55 BCIA 2009 properly, as she was required to do, and as she admitted failing to do 2 ½ years before the appeal the family would have, we submit,*

been given leave to remain. We note that, at that time, the eldest child had been in the UK for seven years."

It was contended that in these circumstances there was no basis for contesting the appeal. The costs claim totalled £1800.

39. In [14] of its decision the FtT, referring to section 55 of the 2009 Act, correctly employed the plural *"duties"* and *"obligations"*. As repeated decisions of this Tribunal have emphasised, section 55 subjects the Secretary of State to two separate, though inter-related, duties. The first is to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. The second is to have regard to the Secretary of State's published guidance, which is "Every Child Matters" [2009]. Both duties are couched in mandatory terms (*"must"*) and admit of no exception. The contrary was not argued in any of the leading decisions of the Upper Tribunal (*infra*) and was not argued in the present case.

40. The first of the Secretary of State's duties under section 55 has been considered *in extenso* in the jurisprudence of the Upper Tribunal: see JO and Others (Section 55 Duty) Nigeria [2014] UKUT 00517 (IAC) and MK (Section 55 - Tribunal Options) Sierra Leone [2015] UKUT 00223 (IAC). JO Nigeria emphasised that it is manifestly insufficient for a decision maker to pay mere lip service to the two statutory duties. The substance of the first of the duties must be properly acknowledged, the children must be identified and their best interests must then be considered, to be followed by an appropriate balancing exercise. Furthermore, it must be apparent from the terms of the decision that the best interests of each affected child, as assessed, are ranked as a primary consideration and accorded a primacy of importance as required by ZH (Tanzania) [2011] UKSC 4 at [26] and [33] especially. This Tribunal further stated at [11]:

"Being adequately informed and conducting a scrupulous analysis are elementary pre-requisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations. This balancing exercise is the central feature of cases of the present type. It cannot realistically of sensibly be undertaken unless and until the scales are properly prepared."

This Tribunal further cautioned, at [12], that *"a process of deliberation, assessment and final decision of some depth"*, contrasting this with *"something cursory, casual or superficial"*, is required.

41. In MK Sierra Leone the interplay between the two duties enshrined in section 55 was analysed by the Upper Tribunal in the following way, at [10]:

"While the first may be regarded as the overarching, or umbrella, duty it cannot be viewed in isolation from the second. Moreover, the second of the two duties incorporates, through the statutory guidance, both substantive considerations and

procedural mechanisms designed to facilitate and promote the due discharge of the first duty."

This Tribunal also highlighted the importance of the terms in which the Secretary of State's decisions are composed, at [13]:

> *".... We consider it incumbent on the Tribunal to examine carefully the letter of decision. In doing so, we would observe that, in the fields of immigration and asylum decision making, the importance of the letter of decision cannot be over stated. In the great majority of cases, this is the only mechanism which conveys to the Applicant – and, where challenged, the Tribunal – the substance of the Secretary of State's decision, the main factors considered, the underlying reasoning and the legal rules to which effect was purportedly given."*

At [18] this Tribunal acknowledged that reasonable inferences can be made where appropriate. It further held that the onus of establishing a breach of either of the section 55 duties rests on the Appellant, the standard of proof being the balance of probabilities.

42. In the submissions of the parties' counsel there was, inevitably, as in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, considerable focus on the terms of the Secretary of State's decision letter. We take into account the observation of Lord Hodge JSC at [23] that the Secretary of State *".... does not have to record and deal with every piece of evidence in her decision letter"*. We consider, however, that this is not to be elevated to the status of a general legal principle, applicable in every case. To do so would be to over-look the reality that each case is fact sensitive, a consideration which extends to and embraces in terms of the impugned decision. Furthermore, Lord Hodge's statement cannot have the effect of diluting either of the overarching legal duties imposed by section 55. Lord Hodge's observation at [23] must also be considered in tandem with [28]:

> *"It is of course the task of the Secretary of State and not this Court to decide the content of any template for decision letters. But we venture the view that challenges, such as this one, would be less likely if her advisors were to express the test in the way in which it was expressed in the ZH (Tanzania) case [2011] 2 AC 166 and to expand the explanation of the separate consideration that was given to the interests of the children."*

The central theme of ZH (Tanzania) is that the best interests of any child in the United Kingdom affected by any decision to which section 55 applies must rank as a primary consideration in the decision making exercise.

43. In cases where an application for a costs order under Rule 9(2) eventuates, it is the practice of the FtT to refer such applications to the Resident Judge of the hearing centre in question for adjudication: see [27] -[28] of Presidential Guidance Note No 1 of 2015. The Resident Judge will pay close attention to the terms in which the

decision is couched and, in doing so, will form a view on any suggestion (such as in the present case) that there is a demonstrable material misconception or error. We stress the word "material" because any aberration will be irrelevant unless it has a bearing on the exercise of the Resident Judge's discretion to make the costs order pursued. The Resident Judge will bring to this exercise the maturity, experience and expertise possessed by the holders of this post. In this present group of test cases this exercise, of course, is being performed by a panel constituted by the Presidents of the Upper and Lower Chambers.

44. Mr Cohen, on behalf of the Secretary of State, submitted that there is a demonstrable misconception in [14] of the decision of the FtT noted in [31] above. This states in material part:

> *"I find that there has been a complete failure by the Respondent to fulfil the statutory obligations imposed by section 55 .... which are twofold ....*
>
> *These duties are not referred to at all in the refusal letter, notwithstanding that the Respondent purportedly considered the position of the Appellant's two children."*

It is a fact that the first of the Secretary of State's statutory duties was mentioned in two parts of the decision letter, [5] and [53]. But the Judge made no error as regards the second of the statutory duties: this features nowhere in the text.

45. In evaluating whether the Secretary of State acted unreasonably in defending this appeal, the starting point is simplicity itself. It is manifest from the decision letter that no attempt was made to discharge the second of the statutory duties enshrined in section 55 of the 2009 Act. On this ground alone the Secretary of State's prospects of successfully defending the appeal were negligible. The failure to discharge this statutory duty is beyond argument. The contrary was not contended before us. The resulting incurable frailty of the Secretary of State's case should have been apparent to the reasonably competent civil servant upon first consideration of the appeal. A perusal of the decision letter is all that was required in order to expose the failure - stark and abject - of the Secretary of State's decision maker to perform the freestanding duty under section 55(3). The conclusion that the Secretary of State acted unreasonably in defending this appeal follows inexorably. This conclusion, logically, embraces the entirety of the lifetime of the appeal.

46. This conclusion is unaffected by the main submission in the Secretary of State's further written representations, which is that no new evidence was served between July 2015 and 10 August 2016 and the Appellant's appeal hearing bundle was not received until 11 August 2016, the eve of the hearing. This submission does not sound on the indelible fact that the impugned decision involved no attempt to comply with the statutory duty imposed by section 55(3) of the 2009 Act or the irresistible legal consequence, namely that the decision was unlawful accordingly. Furthermore, the bundle served on the eve of hearing was a collection of

supplementary documents. While it undoubtedly augmented the documents already in the Secretary of State's possession when the appeal was lodged, its contents did not prompt the Secretary of State's representatives to undertake any review/reconsideration of the impugned decision. Nor did they apply for an adjournment of the hearing.

47. We are also bound to observe that the assertions in the Secretary of State's written representations to the Tribunal concerning compliance with policy guidance are made in an evidential vacuum. There are no particulars - much less evidence - of any review/reconsideration carried out on behalf of the Secretary of State at any time. Nor is there any material upon which we could reliably infer that this occurred. We add that the second issue raised in the Secretary of State's representations, namely the absence of separate decisions in relation to the Appellant's children – is remote from the heart of the issues to be considered by us in determining the application for an unreasonable conduct costs order.

48. Given the conclusion expressed in [37], a detailed examination of the purported discharge of the first of the Secretary of State's duties under section 55 by reference to the impugned decision becomes otiose. However, in the interests of fulfilling one of the central aims of identifying and conjoining these four appeals as test cases, namely the provision of the maximum guidance possible, and mindful that what follows is *obiter*, we add the following.

49. The question of whether the impugned decision was made in breach of the Secretary of State's freestanding duty under section 55(1) of the 2009 Act is a more nuanced and borderline one. As the extant jurisprudence makes clear, a child's best interests fall to be assessed, and weighed, in the Article 8(2) ECHR proportionality balancing exercise, wherein they have the status of *"a primary consideration"* in every case. The Secretary of State's decision maker, in considering Article 8 ECHR, formulated a standard of *"exceptional circumstances"*. The Secretary of State's primary duty under section 55 was considered under the same rubric. The standard, or touchstone, of *"exceptional circumstances"* is nowhere to be found in either section 55 or its genetical roots, Article 3(1) UNCRC. This unmistakable misdirection in law was then compounded by a failure to recognise that the best interests of the two children concerned were a primary consideration. In short, legal error abounded.

50. The consideration which was given to this key issue in the letter was at best cursory. Furthermore, there was no attempt to assess their best interests. Indeed the phrase "best interests" features nowhere. We elaborate as follows. In the span of five sentences of modest length, the decision maker stated that the children were aged 10 and 7 years respectively, they had been living in the United Kingdom since birth, they would be returning to Ghana with their parents and they would receive parental support and state education there. The exercise of juxtaposing these few sentences with the material which had been assembled by the Appellant's solicitors and furnished to the Secretary of State provides little foundation for inferring that the

Secretary of State's decision maker engaged properly and conscientiously with the evidence provided. In making this assessment, we are alert to the clear distinction between the evidence then assembled and the further evidence generated for the purpose of the appeal hearing at a later date.

51. This concern is merely exacerbated when one takes into account that the protracted interaction between the Appellant's solicitors and the Secretary of State prior to the making of the impugned decision included an acknowledgment that previous decisions were legally unsustainable by virtue of the Secretary of State's failure to discharge her duties under section 55. Thus, contextually, the need to demonstrate full and conscientious engagement with the Appellant's "best interests" case was of particular force. The final consideration of note is that the decisions in ZH (Tanzania), JO (Nigeria) and MK (Sierra Leone) all preceded the date of the impugned decision. There is in our judgement an unmistakeable gulf between the guidance to be derived from these decisions and the impugned decision.

52. At this juncture, we return to Mr Cohen's submission. The statement in the decision of the FtT that the two duties imposed by section 55 of the 2009 Act did not feature in the text of the Secretary of State's impugned decision is correct as regards the second of the statutory duties. In respect of the first of the statutory duties, the statement is erroneous. However, this error is in our judgement of little moment, having regard to the judge's subsequent statement – unassailable – that there had been no *"proper assessment"* of the best interests of the affected children, amply demonstrated by our analysis above.

53. Gathering these various considerations together and adding to the equation the uncompromising terms in which the Judge rejected the Secretary of State's decision, our continued development of the hypothesis which we are addressing is as follows. We see much merit in the contention that if the section 55(1) duty had been the only ingredient in the Appellant's application for costs under Rule 9(2)(b) the application would have succeeded. We are alert to the need to apply what might be considered the overarching test namely whether this case belongs to the cohort of the *"clearest cases"*: Cancino at [27]. Recalling our acknowledgement (above) that the section 55(1) issue is more nuanced than its section 55(3) counterpart, our evaluative conclusion, based on the foregoing analysis, is that the unreasonable conduct threshold is also overcome on this discrete ground.

54. At this point, we remind ourselves that the surpassing of the unreasonable conduct threshold – in common with its wasted costs counterpart – does not lead ineluctably to the making of a costs order. There is a discretion to be exercised. As the decision in Cancino cautions:

> *"Awards of costs are always discretionary, even in cases where the qualifying conditions are satisfied."*

(Headnote at [5]).

We draw attention also to [18] of Cancino:

> *".... 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."*

We consider this consistent with Ridehalgh, 239E. We also repeat the exhortation of Lord Rodger in Medcalf v Weatheril [2003] 1 AC 120 at [76] that the exercise of this discretion must be alert and receptive to *"all kinds of mitigatory circumstances"*.

55. It was not submitted, correctly, that if this Tribunal were to diagnose a stark and outright failure by the Secretary of State to discharge the second of the statutory duties - under section 55(3) - the judicial discretion should disincline to make an unreasonable conduct costs order. We can identify no reason to do otherwise. It being the consistent experience of this Tribunal and, indeed, the Judges of both Chambers that the Secretary of State's decision letters suffer routinely from the legal frailties diagnosed above, we discern (in the language of Ridehalgh *supra*) no *"sustainable reasons"* for absolving the Secretary of State from the sanction which will normally follow upon a diagnosis of unreasonable conduct. Accordingly, if this had been the only issue it would have sufficed to satisfy the *"clearest cases"*.

56. It is appropriate to add that the notional category of *"clearest cases"* may include members not partaking of precisely the same level of cogency. While the threshold is unquestionably of an elevated nature, the question of whether it is overcome will always have the two fundamental elements of the application of an evaluative assessment to a fact sensitive matrix.

57. It follows that Mr Awuah's application for costs under Rule 9(2)(b) succeeds. We are satisfied that costs are recoverable for the entirety of the lifetime of the appeal *viz* from inception, when the Notice of Appeal was lodged to termination, a stage which has not quite been reached. The costs incurred during the most recent phase, which began with promulgation of the decision of the FtT on 13 September 2016, are included as they are embraced by the statutory language of *"costs of and incidental to* [the] *proceedings"*: see section 29(1)(a) of the 2007 Act. The amount of the costs recoverable will be assessed summarily by the Tribunal in default of agreement. As any disagreement would simply add to the costs, we urge consensual resolution.

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58. The Appellant is a citizen of Sierra Leone, now aged 28 years. The underlying decision is that of the Secretary of State who refused her application for leave to remain in the United Kingdom under the Immigration Rules and Article 8 ECHR. As

regards the Rules, the critical assessment was that the Appellant's case did not satisfy the "very significant obstacles to integration" test. As regards Article 8, the sole expressed reason for refusal was that the Appellant was born in Sierra Leone and had lived there previously for 12 years. Finally, the decision stated that as the Appellant's child, born on 14 December 2012, "*.... has only lived here for 2 years and 9 months ... it would be reasonable for the child to leave the UK*".

59. The relevant particulars of this Appellant's immigration history are these:

(a) In January 2002 she first entered the United Kingdom, aged 12.

(b) In February 2002 she applied for leave to remain *qua* child of a settled person.

(c) On 16 July 2012 (10 ½ years later) this application was determined: while indefinite leave to remain was refused, leave outside the Rules extending to 15 July 2014 was granted.

60. The Appellant's grounds of appeal to the FtT contended, *inter alia,* that her circumstances were, as a minimum, as compelling and compassionate as they had been when limited leave to remain had been granted; there had been a failure to properly consider her circumstances in their totality; neither the length nor legality of her protracted sojourn in the United Kingdom had been properly considered; and she had been wrongly penalised for her financial inability to pay the additional fees required (£2298) to include her son in the application. The main thrust of the first of these grounds was that two years previously the assessment on behalf of the Secretary of State had been that the Appellant <u>did</u> satisfy the "very significant obstacles" test.

61. The essence of the "financial penalty" ground of appeal (*supra*) was this. The twin requirements enshrined in the Rules were those of being aged under 25 years when making the application and having spent at least half of one's life living continuously in the United Kingdom. When the Appellant first attempted to make her application she was aged 24 and destitute. However, by reason of the Secretary of State's refusal to waive payment of the requisite fee, there was ensuing delay, with the result that when the application was later lodged afresh the Appellant had attained her 25th birthday.

62. The final complaint in the grounds of appeal highlighted the Secretary of State's failure to even acknowledge the previous delay of 10 years in determining the 2002 application.

63. As recorded in its decision the FtT proactively raised with the Secretary of State's representative the following concerns:

"(i) *The unexplained 10 ½ year delay in dealing with the Appellant's 2002 application which, in the Tribunal's judgement, displayed an egregious indifference for the well-being of a vulnerable 12 year old girl who at the time may well have been entitled to some form of international protection.*

(ii) *The fact that the effect of the 10 ½ year delay was acknowledged by* [the representative] *as a primary reason for the Appellant being granted 2 years discretionary leave to remain in July 2012.*

(iii) *The fact that the Appellant's application for further leave was initially made in July 2014 when she was still under 25 years old and had spent at least half of her life living in the UK.*

(iv) *The further delay of over 1 year in dealing with the associated fee waiver application, following which the Appellant was no longer under 25 years old."*

The immediately following passage is of note:

"[The representative's] *response to all the above was to rely on the refusal letter ....*

The Tribunal was satisfied, given the agreement as to the background and issues and the undisputed documentary evidence, that it was not necessary to hear any oral evidence from the Appellant."

64. Next the FtT stated:

"Given the peculiar circumstances of this case we struggle to see how it was ever thought arguable that there would not be very significant obstacles to the Appellant's and her young child's integration into the country to which they would have to go ....

Even if we are wrong about that, the application certainly ought not to have been refused having regard to the wider application of Article 8 ECHR."

The Tribunal continued:

".... No reason has been given as to why in 2012 the Appellant was only granted discretionary leave for 2 years and was not granted indefinite leave to remain."

It characterised the further delay of over one year before refusing to waive the Appellant's application fee as *"manifestly unfair"* and the cause of the *"significant prejudice"* to the Appellant, given her transition from 24 to 25 years old. It described the Secretary of State's decision as *"unconscionable and manifestly unfair"*. The Tribunal added:

"We are satisfied that the arguments put forward on the Respondent's behalf in opposing the appeal were devoid of merit. We were conscious that the Appellant has

paid privately to bring this appeal which she should not have had to do in the first place. Accordingly, we turned our mind to Rule 9(2) of the [2014] Rules] ....

We considered Rule 9(2)(a) and (b) ....

We are entirely satisfied that in defending the appeal which arose from an unfair decision and without advancing any meritorious reasons for doing so, the Respondent has demonstrated a prima facie case of having acted unreasonably. Accordingly, we intend to make an order for the Respondent to show cause why a costs order should not be made ..."

[Our emphasis]

65. Having considered the Secretary of State's representations in response, we note the following in particular:

(i) When the Appellant's combined applications for further leave to remain in the United Kingdom and fee waiver were made initially she was aged under 25 years.

(ii) The initial applications consisted of a completed pro-forma [LR(O)] and an accompanying letter from her solicitors highlighting her destitute circumstances.

(iii) The Secretary of State's initial response to the application, made after the Appellant had attained her 25th birthday, asserted a failure to provide *"sufficient financial evidence"* in response of the fee waiver request, with some accompanying particulars

(iv) The Appellant's fee waiver application was then in limbo for a period of some ten months during which the Secretary of State pursued - and eventually withdrew - an appeal to the Court of Appeal in a case involving a challenge to the fee waiver policy and adopted a new policy.

It is clear from the correspondence now provided that the Appellant had a reasonable opportunity to submit a new or revised fee waiver application and to demonstrate that she satisfied the requirements of the new policy. Furthermore she was alerted periodically to all material developments in a fluctuating situation. Thus the Secretary of State cannot be criticised on this account.

66. However, the Secretary of State's further representations on costs fail to engage meaningfully with the other central pillars of the Appellant's appeal to the FtT, as summarised above. In particular, the (mere) assertion that the 10 year delay had been considered in making the grant of leave to remain outside the Rules in July 2012 is simply not to the point.

67. We consider this to be a clear and obvious case of unreasonable conduct on the part of the Secretary of State in defending the Appellant's appeal. From the initiation of the appeal it ought to have been apparent to the reasonably competent civil servant that the underlying decision suffered from the series of legal infirmities formulated in the grounds of appeal (disregarding the fee waiver issue) and highlighted in the later decision of the FtT. To these we would add that there was a manifest breach of the Secretary of State's duty under section 55(3) of the 2009 Act: see in this respect [45] - [46] above. The Secretary of State's defence was truly hopeless, being advanced and maintained in the teeth of an unanswerable appeal. The hypothetical reasonably competent civil servant should have realised this at the earliest stage, namely upon receipt of the appeal. This, in our judgement, is a plain and obvious case of unreasonable conduct in defending an appeal.

68. The Appellant is entitled to recover the entirety of her costs spanning the period of the lifetime of the appeal, beginning with its inception and ending upon termination, a stage which (as in Awuah) has not yet been reached. There is no identifiable reason for subjecting this Appellant's entitlement to recover costs to any temporal or percentage reduction: and we note that no case to the contrary has been made in the Secretary of State's further written representations to the Tribunal. Finally, we repeat our strong exhortation in [57] above.

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69. In this case the Appellant's entitlement to an unreasonable conduct costs order is conceded by the Secretary of State.

70. In brief compass the relevant milestones are the following:

(a) On 28 November 2016 the Secretary of State refused the application for asylum of the Appellant, a citizen of Pakistan aged 43 years.

(b) On 30 November 2016 a timeous appeal was lodged. The documents which accompanied this had all been provided to the Secretary of State previously.

(c) On 21 December 2016 the Appellant's appeal hearing bundle was lodged. This was received by the Secretary of State's representative the following day.

(d) On 13 January 2017 a further *"updating"* bundle of evidence was lodged, followed 3 days later by 3 further documents.

(e) The last mentioned events followed a pre-hearing review before the FtT.

(f) On 24 January 2017 the FtT heard the appeal.

(g) On 16 March 2017 the FtT promulgated its decision, allowing the appeal.

71. Next the Appellant's solicitors intimated an application for costs – then unquantified – under Rule 9(2)(b). By letter dated 08 May 2017 the Presenting Officer's Unit of the Home Office responded: *"I have carefully reviewed the merits of this costs application on behalf of the Secretary of State and determined that* [it] *should not be defended given the unique history of this case."* The Appellant's solicitors subsequently prepared a schedule of costs. The amount claimed is £25,840 including Counsel's fees (approximately 50% of the whole).

72. There are two main issues to be determined:

    (i) Should the Appellant be awarded costs on the indemnity or standard basis?

    (ii) To what period during the lifetime of the appeal should the costs award apply?

    We are not concerned with assessment of the amount claimed.

73. In the present context we would highlight two particular features of the Tribunal's costs regime. The first is that in every case where a party's entitlement to recover costs is clear, or established by judicial order, the amount is always susceptible to consensual resolution and the parties' duty of co-operation with and assistance to the tribunal under rule 2(4) is engaged with particular force. Reasonable and conscientious efforts to reach agreement are required in every case. Where such efforts do not yield agreement, the Tribunal will be required to assess the costs recoverable.

74. The second issue worthy of highlighting is that the assessment of costs to be conducted by the Tribunal will be of either the summary or detailed kind. We consider that in the large majority of tribunal cases in which costs have to be measured summary assessment will be fair and reasonable and compatible with the overriding objective and, hence, appropriate. [In passing, this has been observed repeatedly in the context of judicial review proceedings in the Upper Tribunal].

75. We turn to consider the issue of "standard versus indemnity" costs. While this issue would not be expected to arise with frequency, it must be confronted in the present case. Where it does arise the starting point for the FtT will be the approach enshrined in CPR44.3:

> *"(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –*
>
> *(a) on the standard basis; or*
>
> *(b) on the indemnity basis*

But the Court will not, in either case, allow costs which have been unreasonably incurred or are unreasonable in amount."

What is the main distinction between standard and indemnity costs? Per CPR44.3:

"(2) Where the amount of costs is to be assessed on the standard basis, the Court will –

(a) Only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) Resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(3) Where the amount of costs is to be assessed on the indemnity basis, the Court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amounts in favour of the receiving party."

76. The FtT procedural code (the 2014 Rules) does not contain a costs regime of the kind found in CPR44 and the corresponding Practice Direction 44. Unless and until prescriptive intervention by the Tribunals Procedure Committee occurs, we consider that the central tenets and provisions of the CPR regime should apply, not least because it enshrines principles and procedures which are broadly recognised throughout the world of adversarial litigation generally. The arguments of the parties' Counsel proceeded on this basis.

77. Strikingly, neither CPR44 nor PD44 prescribes any principles to be applied in the judicial determination of whether the standard basis or the indemnity basis is appropriate. In the decided cases there is a surprising paucity of guidance on this issue. The decision in Munkenbeck and Marshall v McAlpine 44 Con LR 30 emphasises that there is a judicial discretion of some breadth in play. In Glyne Investments v Hill Samuel Life Assurance [17 June 1997, Unreported] Moses J held that an order for indemnity costs was justified by reason of the moral condemnation to be applied to the conduct of the litigation. To like effect is the decision of Turner J in R v British Coal Respiratory Disease Litigation [Unreported, 23 January 1998] and Clark v Associated Newspapers [The Times, 28 January 1998]. A similar approach is found in Wailes v Stapleton Construction [1997] 2 Lloyds Rep 112.

78. There is a valuable resume of the governing principles in the judgment of Coulson J in Noorani v Calver [2009] EWHC 592 (QB), which we gratefully adopt:

"(8) *Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: see Reid Minty v Taylor [2002] 1 WLR 2800). However, such conduct must be unreasonable "to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight": see Simon Brown LJ (as he then was) in Kiam v MGN Limited No2 [2002] 1WLR 2810.*

(9) *In any dispute about the appropriate basis for the assessment of costs, the court must consider each case on its own facts. If indemnity costs are sought, the court must decide whether there is something in the conduct of the action, or the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs: see Waller LJ in Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden and Johnson [2002] EWCA (Civ) 879. Examples of conduct which has lead to such an order for indemnity costs include the use of litigation for ulterior commercial purposes (see Amoco (UK) Exploration v British American Offshore Limited [2002] BLR 135); and the making of an unjustified personal attack by one party by the other (see Clark v Associated Newspapers [unreported] 21st September 1998). Furthermore, whilst the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order: see, for example, Wates Construction Limited v HGP Greentree Alchurch Evans Limited [2006] BLR 45."*

In short, in consequence of the advent of the various Court of Appeal decisions noted in [8] – [9] of Noorani there has been some liberation of the correct judicial approach and the earlier decisions noted in [69] above are to be viewed accordingly.

79. Thus the elevated threshold emerging from the earlier jurisprudence of morally improper or reprehensible behaviour on the part of the party concerned has undergone a certain dilution. One of the main effects of this has been to re-establish the primacy of the judicial discretion in play. On behalf of the Secretary of State Mr Cohen submitted that indemnity costs are reserved to those cases in which the paying party's conduct is demonstrated to have been vexatious, capricious or an abuse of process. No supporting authority was cited. We reject this broad submission for the reasons elaborated and having regard to the principles identified above. Conduct that is vexatious, capricious or an abuse of process in the conduct of litigation is, of course, a candidate in principle for the sanction of indemnity costs. But this is subject to two qualifications at least. First, we do not consider this to be the applicable threshold in every case: a lower threshold may suffice, depending upon the context. Second, even conduct of this kind might escape the sanction of

indemnity costs on, for example, the ground of compelling mitigating circumstances such as mental incapacity, duress or desperate personal circumstances.

80. We apply the approach formulated above to the present appeal in the following way. We have considered in particular the following stages in the evolution of the Appellant's evidence:

(a) The evidence which was before the Secretary of State when making the impugned decision.

(b) The evidence accompanying the Appellant's Notice of Appeal.

(c) The subsequent enlargement of this evidence at two separate stages prior to the appeal hearing.

(d) The further evidence adduced through the medium of oral testimony at the hearing.

The assessment that the evidential framework upon which the decision of the FtT was ultimately based differed significantly from that available to the Secretary of State when making the impugned decision and the Secretary of State's officials when the appeal was received seems to us unassailable.

81. The Tribunal was not invited to compare and contrast the various evidential documentary collections identified above. The important consideration, in our estimation, is that this Appellant's evidence evolved and grew to a material extent during the appeal process. Unsurprisingly, there is no suggestion that the second and third of the three documentary collections were immaterial or of negligible significance. This is the framework within which we weigh Ms Chapman's submission that the main flaw in the Secretary of State's decision was a failure to properly engage with the country and expert evidence assembled. We accept that this submission, in substance, prevailed in the decision of the FtT.

82. Taking into account that (mere) unreasonable conduct in defending an appeal does not suffice to warrant an award of costs on the indemnity basis, we have searched for clues to improper or reprehensible conduct in the decision of the FtT. In our judgment, considering the decision as a whole and in its full context, none are to be found. True it is that the tribunal was critical of the Secretary of State's decision. However this criticism is couched in balanced and measured terms. Read as a whole, the decision conveys the clear flavour of an appeal in which there were issues to be tried. By way of illustration a conclusion that certain aspects of the Secretary of State's arguments "*lack cogency*" and "*... are of variably cogency and overall are not of sufficient strength to displace the substantial evidence provided by the Appellants ...*" fall well short of establishing the threshold necessary for an award of indemnity costs. Moreover, it is clear from the decision that the Appellant's oral evidence was a

significant factor in the appeal succeeding. Finally, we are satisfied that the key issue highlighted in the submissions of Ms Chapman *viz* the threat to the Appellant to be deduced from a telephone conversation with a representative of the State actor in question was a nuanced and subtle one.

83. For this combination of reasons we conclude that the costs recoverable by this Appellant under Rule 9(2)(b) are to be measured on the standard basis.

84. The Secretary of State having conceded that the defence of this appeal entailed unreasonable conduct within the compass of Rule 9(2)(b), the next question is whether, by reference to the lifetime of the appeal, any temporal limitation is appropriate. Future tribunals will wish to note that the determination of this question does not entail the application of science. Rather, it requires the familiar judicial exercise of forming a reasonable evaluative judgement. A judgement of this kind must not be capricious and must have some objectively sustainable basis. This exercise also entails taking into account all material facts and factors while disregarding the immaterial. Subject to these constraints, a clearly identifiable judicial margin of appreciation is engaged. See R (Soreefan and Others) v Secretary of State for the Home Department (Judicial Review - Costs - Court of Appeal) IJR [2015] UKUT 594 (IAC) at [17] - [18]. To this we add the well - established principle that an appellate court will normally be very slow indeed to interfere with any first instance decision on costs, given the breadth of the judicial discretion in play.

85. Consistent with our analysis above, we consider that this Appellant's conceded entitlement to an unreasonable conduct costs order cannot extend to the entirety of the lifetime of the appeal. The significance of the substantial *"updating"* bundle of evidence provided to the Secretary of State on 13 January 2017 cannot, in our estimation, be gainsaid. We consider that the appeal could not reasonably be defended thereafter. Given the scheduled hearing date of 24 January 2017 this evidence, in conjunction with all pre-existing evidence, should have been fully considered within one week viz by 20 January 2017 at latest. By this stage the reasonably competent civil servant should have recognised that the continued defence of the appeal was not viable.

86. It follows that the Secretary of State is obliged to pay this Appellant's costs on the standard basis from 20 January 2017. We reject Mr Cohen's submission that the *"entitlement period"* should expire circa April/May 2017. This is one of four test cases identified by the FtT Resident Judge as suitable for general guidance and while it is correct that this Appellant's solicitors did not, in the event, present evidence of other suggested comparable cases, we are in no doubt that this Appellant's continued involvement in this test case exercise was entirely reasonable and falls within the umbrella of *"incidental"* costs. This was our initial assessment and it has been reinforced by the response to our formal direction for the production of the Tribunal's case management directions and the *inter-partes* correspondence belonging to the period under scrutiny. We are satisfied that the participation of this Appellant

and her representatives in the final, test case phase of these proceedings was entirely reasonable.

87. Subject to the foregoing, we repeat our exhortation in [57] above. In default of agreement on the *quantum* of costs we accept Mr Cohen's submission that this is a case (unusually, we would add) inviting detailed assessment.

TN

88. In this case, in common with that of SJ, the Appellant's entitlement to an "*unreasonable conduct*" costs order under Rule 9(2)(b) is conceded. The two fundamental issues in dispute are:

    (i) the period to which the order should apply – or, alternatively phrased, the recoverable period; and

    (ii) whether costs should be assessed on the standard or indemnity basis.

    Assessment, or measurement, of the Appellant's recoverable costs is an exercise to be carried out in the wake of our decision and giving effect thereto, in the absence of consensual resolution.

89. This is one of the starkest cases likely to be encountered in applications under Rule 9(2)(b). It is truly irresistible. Thus the briefest of chronologies will suffice.

90. This Appellant, a citizen of Vietnam now aged 29 years, entered the United Kingdom in September 2009 and, thereafter, was lawfully present in the United Kingdom pursuant to successive grants of limited leave to remain. She married a British citizen on 19 September 2011. A son of the marriage was born on 14 December 2013. In June 2015 the Appellant applied for indefinite leave to remain as a parent under Appendix FM, D-LTRPT of the Immigration Rules. By a decision made on behalf of the Secretary of State dated 21 July 2015 this application was refused on the sole ground that in the absence of DNA evidence the asserted paternity of the child was not accepted.

91. On 29 July 2015 an appeal to the FtT was initiated. This was listed for hearing on 15 December 2016. On the eve of the hearing the Secretary of State's representative informed the Appellant's solicitors that the impugned decision had been withdrawn. Between the aforementioned dates the decision was maintained notwithstanding attention being drawn to the evidence accompanying the application, which included the child's birth certificate identifying his father and the marriage certificate and to Section 50(9A) of the British Nationality Act 1981, which provides, *inter alia*, that the father of a child is the person who, at the time of the child's birth, is the husband of the child's mother. On 19 April 2016 the Nationality Department of the Home Office acceded to the application made by the Appellant's solicitors for confirmation of her

son's nationality. This stimulated a further request for reconsideration of the impugned decision which was rejected on the sole ground that the Appellant had a right of appeal. Further correspondence followed, to no avail and the *status quo* continued until the belated eve of hearing concession.

92. The aforementioned withdrawal obviated the need for a tribunal hearing. The FtT seems to have made no order disposing of the appeal: a reminder of the requirements of the Rules, considered by the Upper Tribunal in TPN (FtF Appeals - Withdrawal) Vietnam [2017] UKUT 295 (IAC) is appropriate in this discrete context. The Appellant's solicitors immediately intimated their intention to apply for a costs order under Rule 9(2). Ultimately, on 20 March 2017 the Appellant was granted what she had been seeking for two years, namely indefinite leave to remain in the United Kingdom *qua* parent, receiving her British residence permit.

93. The Appellant's entitlement to an unreasonable conduct costs order is, properly, not contested. It was conceded following certain case management directions of the FtT which, *inter alia,* involved conjoining this appeal with the other three and listing all before this joint Presidential Panel. However, the amount claimed, £2,287.50, was disputed. The grounds of dispute (4) included primarily the fundamentally misconceived assertion that evidence of the child's British nationality had not been provided until December 2016. Compelling evidence of this had been furnished to the Secretary of State in mid-2015.

94. When pressed by the Tribunal on the precise terms of the Appellant's conceded entitlement to an unreasonable conduct costs order, Mr Cohen stated that this was based on an acknowledged fundamental misunderstanding by the Secretary of State's agents of the relevant legal requirements *ab initio.*

95. We consider that the handling of the underlying application and the ensuing appeal was manifestly and disturbingly inept. Having regard to the terms of the concession, noted immediately above, it follows inexorably that a reasonably competent civil servant should have realised, upon receipt of the appeal, that an immediate and unqualified concession was required. This did not occur and multiple subsequent opportunities to rectify this unjustifiable failure came and went. We calculate that the appeal was listed for hearing on the 504th day of its lifetime. The Secretary of State's concession was notified at a late hour on the 503rd day.

96. In these circumstances, what is there for this Tribunal to decide? There are three issues. First, it is submitted by Mr Cohen that the period in respect of which costs are recoverable should not begin to run until August 2016. The submission that no costs should be awarded in respect of the period July 2015 to August 2016 (a) is based on the provision by the Appellant's solicitors to the Secretary of State's agents of the nationality status confirmation letter in May 2016 and (b) (as in Cancino) adds a period of three months from this date. We shall address this argument *infra.*

97. At this juncture it is convenient to introduce the second of the contentious issues. Whereas the Appellant seeks costs on an indemnity basis, the Secretary of State contends that the standard basis should apply. We can dispose of this issue swiftly. Having regard to the terms of the Secretary of State's concession noted in [85] above, considered in tandem with our assessment in [86], we are satisfied that the threshold formulated in [70] is comfortably overcome. From day one of this appeal the Secretary of State's position was truly hopeless. This was so by reason of the fundamental and irredeemable flaws in the impugned decision noted above. In some cases an appeal stumbles along from the date of its initiation to the listing before the FtT, with little or no intervening developments of note. That, emphatically, is not this case.

98. Furthermore, as a result of the skill and industry of the Appellant's solicitors the Secretary of State's representatives were presented with repeated opportunities to rectify their earlier unjustified failure to (figuratively) raise the white flag. Each of these opportunities was spurned and nothing approaching an even arguable explanation for these failures has been provided. Meantime the Appellant was exposed to all of the anxiety and uncertainty inevitably arising in cases of this kind.

99. Finally, we would highlight the grave misconception in the Secretary of State's main objection to the initial costs schedule, namely the following assertion:

> *"Documentation relating to the child of the appellant and the gaining of British citizenship was not provided until December 2016."*

This is manifestly incorrect: sufficient evidence of the child's British citizenship had been in the Secretary of State's possession from receipt of the underlying application viz in June 2015. Nothing of significance was provided to the Secretary of State in December 2016. Furthermore, there was an outright failure to attempt any engagement with the Appellant's solicitors. In clear breach of the overriding objective the Home Office simply washed its hands of all costs issues and left everything to the Tribunal: see its letter dated 17 May 2017.

100. Given the facts, factors and circumstances highlighted above we consider this a clear case for awarding costs on an indemnity basis. As appears from our analysis above we reject Mr Cohen's optimistic submission that the Appellant's recoverable costs should be reduced by a temporal limitation dating from August 2016. The Appellant, for the reasons given, is clearly entitled to recover her costs for the full lifetime of the appeal.

101. We turn to the third of the contentious issues separating the parties. As a result of the Secretary of State's challenge to the *quantum* of costs claimed and the subsequent managing and programming of this appeal by the Tribunal in its selection of four

conjoined test cases the lifetime of this appeal has not yet concluded. At this juncture the schedule of costs claimed specifies £5,177.50. In written submissions the guillotine date advanced on behalf of the Secretary of State was 17 May 2017. In Mr Cohen's oral submissions this was altered to 25 July 2017.

102. We are unable to identify any sustainable basis upon which the guillotine should fall on either of the dates advanced by the Secretary of State. That the conduct of the Appellant and her representatives is to be evaluated by the criterion of reasonableness is not in dispute. We have conducted a careful review of the Tribunal's notices and directions and the associated *inter-partes* correspondence provided in response to our most recent direction. This yields the following analysis and conclusion. Having regard to the misconceived and cryptic terms of the Secretary of State's objection to the quantum of costs claimed, the absence of any subsequent engagement with the Appellant's representatives, the intervention of the Tribunal in selecting this case as one of four conjoined test cases, the absence of any timeous suggestion by the Secretary of State's representatives that this case should not be thus processed and the continuing failure on the part of the Secretary of State to attempt consensual resolution of the amount of costs claimed, we are satisfied that the conduct of this Appellant and her representatives during the most recent phase of the proceedings viz from approximately April 2017 to date has been entirely reasonable. We resolve this issue in favour of the Appellant accordingly.

103. Summary assessment of this Appellant's claimed costs will follow, giving effect to the conclusions and findings rehearsed above. We repeat our exhortation in [57] above.

ANONYMITY

The Appellants TN and SJ are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their families. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Edward McCloskey.

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

Date: 06 OCTOBER 2017