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

Presidential Guidance Note No 1 of 2014:

The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

1. This note is guidance to judges of the First-tier Tribunal (Immigration and Asylum Chamber) on the interpretation and application of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. This guidance is for information only and is intended to assist individual judges in exercising their responsibilities but is not intended to detract from the duty of each judge to make decisions in proceedings before them.

2. Judges of the Chamber should have regard to the overriding objective of the Rules, in rule 2, which is to enable the Tribunal to deal with cases fairly and justly. In terms of rule 2(2) dealing with a case fairly and justly includes
   (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
   (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
   (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
   (d) using any special expertise of the Tribunal effectively; and
   (e) avoiding delay, so far as compatible with proper consideration of the issues.

3. In terms of rule 2(3) the Tribunal must seek to give effect to the overriding objective when exercising any power under the Rules or interpreting any rule or practice direction.

Time limits

4. In general under the Rules time limits are expressed from when a document is sent (or provided, in the Fast Track rules) rather than from when it is received. There is therefore no provision for deemed service.

5. There is a power in the case management powers in rule 4(3) to extend or shorten the time for complying with any rule, practice direction or direction. This power must, of course, be exercised judicially, that is to say having regard to the overriding objective and to any other relevant considerations.

Adjournments

6. Rule 4(3) gives the power to adjourn or postpone a hearing. This power must be exercised in accordance with the overriding objective and having regard to any other relevant considerations. The decision of the Upper Tribunal in Nwaigwe (adjournment; fairness) [2014] UKUT 00418 (IAC) emphasises the importance of the test of fairness and the question of whether a party will be deprived of a fair hearing if an adjournment is refused.

7. Each application to adjourn must be considered on its own merits, examining all the factors brought to the Tribunal's attention. When reaching a decision on such an application, the Tribunal may also have regard to information already held and its own special expertise (see rule 2(2)(d)).

8. Factors weighing in favour of adjourning an appeal, even at a late stage in proceedings, include.

    (a) Sudden illness or other compelling reason preventing a party or a witness attending a hearing. Normally such a reason should be supported by medical or other relevant evidence, unless there has been insufficient time to obtain such evidence. However, where there is no likelihood that the party will be able to attend a hearing within a reasonable period, a hearing may proceed in absence where the tribunal considers that this is in the interests of justice in terms of rule 28.

    (b) Late changes to the grounds of appeal or the reasons for refusal which change the nature of the case. The terms of rules 19(7), 23(2)(b) and 24(2) should be taken into account, as appropriate, when considering changes to the grounds or reasons.

    (c) Where further time is needed because of a delay in obtaining evidence which is outside the party's control, for example, where an expert witness fails to provide a report within the period expected.

9. The following factors, where relevant, may weigh against the granting of an adjournment.

    (a) The application to adjourn is not made at the earliest opportunity.

(b) The application is speculative, such as, for example, a request for time for lodging further evidence where there is no reasonable basis to presume that such evidence exists or could be produced within a reasonable period.

(c) The application does not show that anything material would be achieved by the delay, for example, where an appellant wants more time to instruct a legal representative but there is no evidence that funds or legal aid is available.

(d) The application does not explain how the reason for seeking an adjournment is material to the case, for example, where there is a desire to seek further evidence but this evidence does not appear to be material to the issues to be decided.

(e) The application seeks more time to prepare the appeal when adequate time has already been given. In such circumstances, the Tribunal may take into consideration a failure to comply with directions. However, a failure to comply with directions will not be sufficient of itself to refuse an adjournment.

Fast Track

10. In appeals assigned to the Fast Track, in addition to the above guidance, judges will also have regard to the Schedule to the 2014 Procedure Rules when considering whether to adjourn. Rules 12 and 14 of the Schedule are of particular relevance when considering adjournment issues in such appeals.

Related procedural matters

11. In terms of Practice Direction 9 an application prior to the hearing should be made no later than 4 p.m. one clear working day prior to the hearing.

12. If a decision to adjourn is made during a hearing the judge will complete the relevant adjournment forms to ensure that a new notice of hearing is given to each party in terms of rule 26.

13. A judge adjourning a hearing should consider whether further directions under rules 4 or 14 are required, even if not requested by a party. Directions may be given with the notice of hearing or separately.

14. If a judge receives an adjournment application at a hearing and refuses it, the judge should give reasons to the parties. The reasons should be noted in the Record of Proceedings with the expectation that the adjournment application and decision will be included in the decision and statement of reasons subsequently issued.

Withdrawals

Withdrawal by the appellant

15. Where an appellant seeks to withdraw an appeal in terms of rule 17, provided the Tribunal is satisfied that the appellant is doing so freely and understands the consequences of the withdrawal, the Tribunal will be satisfied that the appeal is withdrawn. Where an appellant is legally represented and the request to withdraw is made by the representative, the Tribunal will assume that the representative has explained the consequences of the action to the appellant and that this is the intention of the appellant.

Withdrawal by the respondent

16. Where the respondent withdraws the decision appealed against, in terms of rule 17(2) the Tribunal will treat the appeal as withdrawn unless there is good reason not to do so. It is unlikely without more that the appellant's intention to seek a fee award would constitute good reason for refusing to treat an appeal as withdrawn.

17. Where the respondent withdraws the decision no later than 21 days prior to the hearing (28 days for out of country appeals) a notice will be sent to the appellant asking if there is good reason why the appeal should not be treated as withdrawn. If a response is received, or the time for replying expires without a response, then a judge will be asked to decide if the appeal should be treated as withdrawn. If there is insufficient time to consult the appellant prior to the hearing then the question of whether the appeal will be treated as withdrawn will be considered at the hearing.

18. If a judge decides that the appeal is withdrawn, the judge will mark the appeal file and Record of Proceedings accordingly and take no further action as there will be no appeal pending. No decision or statement of reasons will be produced.

19. In all cases where the appeal is withdrawn, the Tribunal will issue the notice required by rule 17(3).

20. If a judge decides that the appeal is not withdrawn, then the hearing will proceed. The judge will advise the parties of the decision and will record it in the Record of Proceedings with a view that the decision and reasons will be included in any statement of reasons subsequently produced.

Decisions

21. Notwithstanding that there is power in rule 29 to give a decision notifying the parties of the outcome of an appeal orally at the hearing the Tribunal will continue to reserve the substantive decision in an appeal and issue a notice of decision and statement of reasons as a single document in every case. It will be inappropriate to give an *ex tempore* decision without giving a full statement of reasons at the same

time. This is because the factual questions and other issues in dispute in appeals to the Immigration and Asylum Chamber are usually complex and the parties are entitled to receive a full statement of reasons for the decision.

22. The Tribunal will send the notice of decision and statement of reasons to the parties as soon as practicable. A period of 14 days, (2 working days in respect of Fast Track appeals), for preparing the statement of reasons should be adequate and judges are expected to have their decisions and statements of reasons completed within this period. Having regard to the overriding objective judges should recognise that delay in preparing a decision and written statement of reasons may be incompatible with rule 2(1)(e).

23. Where, for example, the parties consent to a particular outcome at a hearing but the appeal is not withdrawn under rule 17, the judge may give an indication of what the notice of decision and statement of reasons will contain. It should be made clear to the parties, however, that this is only an indication and that the notice of decision and statement of reasons will follow in writing.

Fast Track

24. Rule 29(2) to (6) does not apply to Fast Track appeals. Instead, judges will follow rule 10 of the Schedule to the 2014 Procedure Rules, which sets out the time scale for producing a notice of decision with reasons.

Other procedural matters

25. Judges will continue to have regard to the "Format etc of determinations" in the Senior President of Tribunal's Practice Statement of 25 September 2012. Reference to a determination should be regarded as a reference to a notice of decision and statement of reasons. Judges will continue to be expected to use a Word template issued by the Chamber President for formatting notices of decision and statements of reasons. This will be headed "Decision and Reasons" in place of the former heading of "Determination and Reasons" in the form annexed hereto.

26. It is for the judge (or, as appropriate, the panel) who heard the appeal to decide on the contents of the written statement of reasons but regard should be had to the overriding objective (rule 2) to ensure that a statement of reasons is proportionate and that unnecessary formality is avoided. In this regard, judges will have regard to current developments in decision/reasons writing as expressed for example in the Upper Tribunal's decision, Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC).

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

ANNEX:

IAC-AH- -V1

First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Number:

THE IMMIGRATION ACTS

Heard at **Decision & Reasons Promulgated**
On

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Before

JUDGE OF THE FIRST-TIER TRIBUNAL

Between

APPELLANT'S NAMES
(ANONYMITY DIRECTION MADE/NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
ENTRY CLEARANCE OFFICER - CITY
IMMIGRATION OFFICER

Respondent

Representation:

For the Appellant:
For the Respondent:

DECISION AND REASONS

1.

Notice of Decision

The appeal is allowed/dismissed on asylum grounds/ humanitarian protection grounds / human rights grounds/ under the immigration rules

No anonymity direction is made.

OR

Direction Regarding Anonymity – rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Judge

Judge of the First-tier Tribunal

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award / to make a reduced fee award of £ / to make a whole fee award of £ / to make a fee award of any fee which has been paid or may be payable (adjusted where full award not justified) for the following reason.

OR

No fee is paid or payable and therefore there can be no fee award.

OR

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Judge

Judge of the First-tier Tribunal

Appeal Number:

Approval for Promulgation

Name of Judge issuing approval:	
Appellant's Name:	TO BE COMPLETED BY TYPIST
Case Number:	TO BE COMPLETED BY TYPIST

Oral determination (please indicate) ☐

I approve the attached Decision and Reasons for promulgation

Name:

Date:

Amendments that require further action by Promulgation section:

Change of address:

Rep: ☐ Appellant: ☐

Other Information:
