



TRIBUNALS  
JUDICIARY

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

**Presidential Guidance Note No 1 of 2015:**

**Wasted Costs and Unreasonable Costs**

- 1) The Procedure Rules introduced last autumn confer on Judges of the First-tier Tribunal the power to make orders for wasted costs or for unreasonable costs (rule 9(2), Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, SI 2014/2604). The purpose of this note is to provide guidance on the making of these orders. In relation to Scotland any reference to costs is to be read as a reference to expenses (s 29(7), Tribunals, Courts and Enforcement Act 2007).

**Legislative background**

- 2) Provision is made by section 29 of the Tribunals, Courts and Enforcement Act 2007 for costs to be awarded at the discretion of the First-tier Tribunal. The wording of section 29 makes it clear that the power to award costs only has effect subject to Tribunal Procedure Rules. This power could not be exercised until provision was made by the Procedure Rules for awards of costs.
- 3) In terms of section 29(4) of the 2007 Act, in any proceedings in the First-tier Tribunal the Tribunal may –
  - a) disallow, or
  - b) (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
- 4) “Wasted costs” are defined in section 29(5) as meaning any costs incurred by a party –
  - a) as the result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
  - b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it as unreasonable to expect the party to pay.
- 5) The term “legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf (s 29(6)).

**Rule 9**

- 6) The terms of section 29 of the 2007 Act were not given effect in the Immigration and Asylum Chamber of the First-tier Tribunal until the coming into force on 20 October 2014 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. In these Rules, provision is made at rule 9(2)-(9) for the Tribunal to make orders in respect of wasted costs or unreasonable costs. It should be noted that rule 9(1), which is not a new power, relates to fee awards, that is to say the award to a successful appellant of an amount of any fee paid or payable under the Fees Order. This provision is the subject of separate guidance issued previously.
- 7) As stated by section 29(4) of the 2007 Act, an order for wasted costs may be made only against a legal or other representative in the proceedings and not against a party. Rule 9(2) makes further provision, however, for the making of costs order where a person has acted unreasonably in bringing, defending or conducting proceedings. An order for unreasonable costs may be made against a party to the appeal.
- 8) It is of fundamental importance to note that the power to make an order for wasted costs or for unreasonable costs is completely different from the ordinary cost-shifting or “party and party” costs which are routinely awarded in civil litigation. The power to award wasted or unreasonable costs is not a provision for cost-shifting and there is no expectation that an order for costs will follow success. The normal rule, as will be seen below, is that no order for costs should be made by the Tribunal whichever party is successful. It should be noted also that rule 9 is the only power the Tribunal has to award costs and section 29 of the 2007 Act is not a free-standing power (see Cancino, cited below, at paragraph 5).
- 9) The application of the new Rules was considered in the reported case of Cancino [2015] UKFTT 00059. Although this was a decision of the First-tier Tribunal it was heard before both the President of the Upper Tribunal and the President of the First-tier Tribunal for the purpose of providing guidance and, exceptionally for a decision of the First-tier Tribunal, it was reported.
- 10) In its decision the Tribunal drew attention to the distinction between rule 9(2)(a) (wasted costs) and rule 9(2)(b) (unreasonable costs). It was pointed out that awards of costs are always discretionary, even in cases where the qualifying conditions are satisfied. It was further stated that orders for costs under rule 9 should be very much the exception, rather than the rule and would be reserved to the clearest cases. It was emphasised that the powers in rule 9(2) apply only to appeals coming in existence subsequent to the commencement date for the Procedure Rules of 20 October 2014. The provision has no application to appeals commenced before this date.

### **Wasted costs**

- 11) In Cancino the Tribunal referred at paragraph 13, and subsequently, to the leading authority on wasted cost orders, which is the decision of the Court of Appeal in Ridehalgh v Horsefield [1994] Ch 205. This decision emphasises that the jurisdiction to make a wasted costs order is directed to the representatives of a party.
- 12) The decision in Ridehalgh envisages a 3 stage test as follows:

- i) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?
- ii) If so, did such conduct cause the applicant to incur unnecessary costs?
- iii) If so, is it in all the circumstances of the case just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

There must be a causal nexus between the conduct complained of and the wasted costs claimed.

13) Acting “improperly” was described by the Court of Appeal as covering, but not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It would cover any significant breach of a substantial duty imposed by a relevant code of professional conduct but was not limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion could be fairly stigmatised as such whether or not it violated the letter of a professional code.

14) In Ridehalgh “unreasonableness” was defined 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 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.”

15) The Court of Appeal in Ridehalgh found that while “mere mistake or error of judgment would not justify an order, misconduct, default or even negligence” was enough if the negligence was serious or gross. Subsequent amendments to the Rules of the Supreme Court, referred to in Cancino at paragraph 15, indicated that a wasted costs order could be made by reference to the ordinary standard of negligence, rather than a higher standard requiring proof of gross neglect or serious dereliction of duty. Negligence, according to the decision in Ridehalgh, was to be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. It was not suggested, however, that an applicant for a wasted costs order need prove anything less than such a person would have to prove in an action for negligence. In terms of a decision of the House of Lords in Saif Ali v Sydney Mitchell [1980] AC 198 the standard in an action for negligence against a solicitor is “advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well informed and competent would have given or done or omitted to do.”

16) The power to make a wasted costs order is discretionary. The Court in Ridehalgh stated as follows (*per* Sir Thomas Bingham MR at 239e):

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

17) As stated by Lord Rodger in Medcalf v Weatheril [2003] 1AC120 at [76]:

“All kinds of mitigatory circumstances may be relevant to the exercise of that discretion.”

18) In considering the exercise of discretion to make an award of costs it was pointed out by the Upper Tribunal in R(LR) v FtT (HESC) and Hertfordshire CC (Costs) [2013] UKUT 0294 (AAC) 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.

19) In circumstances where there has been a breach of a direction by, for example, failure to lodge documentary evidence, the party in breach should normally be given the opportunity to remedy the situation before any order for wasted costs is made. The issuing of a reminder to this party 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. 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.

20) Both the decision in Ridehalgh and Medcalf recognised that the doctrine of legal profession privilege may be relevant to the outcome of an application for wasted costs (see Cancino at para 18). Where the client has not waived this privilege then the legal representative may be at a grave disadvantage in resisting a wasted costs application. Accordingly where there is room for doubt, the lawyers against whom such an application is sought are entitled to the benefit of the doubt. It is only when with all allowance is made the conduct of the proceedings is quite plainly unjustifiable that it is appropriate to make a wasted costs order.

21) It was also pointed out in Ridehalgh that a legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or defence which is plainly doomed to fail (see Cancino at para 20). Legal representatives advise clients of the perceived weakness of their case and of the risk of failure but the clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved.

## **Unreasonable costs**

- 22) This point emphasises the distinction between a wasted costs order under rule 9(2)(a), which is made against the representative, and an order for unreasonable costs made under rule 9(2)(b) against a party. An order under Rule 9(2)(b) is concerned only with conduct which is unreasonable. The questions to be asked, according to paragraph 24 of Cancino, are as follows:
- a) Has the appellant acted unreasonably in bringing an appeal?
  - b) Has the appellant acted unreasonably in his conduct of the appeal?
  - c) Has the respondent acted unreasonably in defending the appeal?
  - d) Has the respondent acted unreasonably in conducting its defence of the appeal?
- 23) Allowance has to be made for the conduct of litigants in person, whose conduct cannot normally be evaluated by reference to the standards of qualified lawyers (see Cancino at para 26). In any appeal concessions can play an important part. A concession will sometimes extend to abandoning an appeal by the appellant or withdrawing the decision challenged by the respondent. An application for costs in these circumstances should not be routine and rule 9(2) should not be invoked without good reason (see Cancino at para 25(i)). The making of an order for costs should be reserved only for the clearest cases otherwise more time, effort and cost goes into making and challenging the order than was alleged to have been wasted in the first place (see Cancino at para 27).

## **Procedure**

- 24) Under rule 9(3) the Tribunal may make an order under rule 9 on an application or on its own initiative. A person making an application for an order for costs must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made and may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal (rule 9(4)). An application may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends either a notice of decision recording the decision which disposes of the proceedings or a notice that a withdrawal has taken effect under rule 17 (rule 9(5)). The amount of costs to be paid under an order is to be determined by either (a) summary assessment by the Tribunal; (b) by agreement; or (c) by detailed assessment (rule 9(7)). Rule 9(9) specifies how a detailed assessment is to be made.
- 25) Of particular significance is rule 9(6) which provides that 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.
- 26) As stated in rule 9(5) an application for an order for costs may be made at any time during the proceedings or within 28 days after the proceedings before the First-tier Tribunal are concluded. When an application is made while the case is still with the National Business Centre for case creation purposes, then when the appeal is either ready for listing or when a decision has been taken that no further proceedings will be

taken, the appeal will be sent to the Manchester hearing centre for the costs application to be dealt with in accordance with directions made by the Resident Judge there.

- 27) In terms of rule 9(4)(a) an application may be made orally at a hearing without an application having been made in writing. If it appears to the judge at the hearing that the application is without merit then a decision refusing it should be made straightaway. If there is merit in the application it should be referred to the Resident Judge for the hearing centre in question. Directions will then be issued which require the service of a written application on the Tribunal and on the other party within 14 days and the filing of a skeleton argument and a schedule of the costs claimed (**Annex A**). The directions will state that the application will be decided on the papers unless either party requests an oral hearing.
- 28) Where the application for costs is made after the substantive hearing it will be referred to the Resident Judge for the hearing centre where the appeal was heard. If it is without merit the Resident Judge may refuse the application without further procedure, otherwise the Resident Judge will instruct that the standard directions referred to in the preceding paragraph will be issued. If there is to be an oral hearing it will be heard either before the Resident Judge or before such other judge as the Resident Judge considers appropriate. This will not necessarily be the judge who heard the substantive appeal.
- 29) Where a judge considers there is a good case for the Tribunal making an order on its own initiative, this should similarly be referred to the Resident Judge for directions to be issued if appropriate.

### **Recording of decision**

- 30) Where the application is considered at the substantive hearing and is refused as being without merit, a decision to this effect can be incorporated into the standard template following the decision on the fee award (**Annex B**). The judge will need to give reasons for refusing the application but these may be brief. It is assumed that reasons will have been given orally at the hearing itself.
- 31) Where the application is considered either at a separate hearing, or without a hearing where neither party has requested one, then the decision will be issued using a separate template, a copy of which is attached (**Annex C**).

Michael Clements  
President FtTIAC  
18 May 2015

**ANNEX A (see para 27)**

Date : March 2015

(PAYING PARTY)  
(RECEIVING PARTY)

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**THE IMMIGRATION ACTS**

Appeal No:  
Applicant:  
Respondent:

HO Ref:  
Port Ref:  
FCO Number:  
Reps Ref:

**To the Applicant (Receiving person) and the Respondent (Paying person)**

**COSTS/EXPENSES APPLICATION – DIRECTIONS**

1. An application has been made for an award of costs/expenses arising from the conduct of proceedings in this appeal.
2. This application will be decided without a hearing unless either party makes a request for a hearing within 21 days from the date of this notice. If a hearing is requested a notice of hearing will follow.

**Directions**

**a) The applicant for the costs/expenses order is to file and serve on the other party within 14 days a written application for costs/expenses, a skeleton argument and schedule of the costs/expenses claimed (if not already done).**

**b) The Respondent is to file and serve a response within 7 days thereafter.**

**3. If either or both parties do not attend or submit representations, the Tribunal may make its decision in their absence based on the information before it.**

**Clerk to the First-tier Tribunal**

Copy issued to applicant.

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**ALL CORRESPONDENCE SHOULD BE SENT TO THE ADDRESS AT THE TOP OF THIS NOTICE QUOTING  
THE APPEAL NUMBER AND ANY HEARING DATE**





ANNEX B (see para 30)



IAC-AH- -V1

**First-tier Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at  
On**

**Decision & Reasons Promulgated**

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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**

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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/Order 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.

**DECISION REFUSING COSTS/EXPENSES ORDER** (where relevant)

On [insert date] the Appellant/Respondent made application for an award of costs/expenses under Rule 9(2) of the Procedure Rules against the [insert party].

The application for a wasted/unreasonable costs/expenses order is refused.

My reasons for refusing the application are...[continue as necessary]

Signed

Date

Judge

Judge of the First-tier Tribunal

## 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:

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Other Information:

ANNEX C (see para 31)



**First-tier Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: XX/00000/2015

**THE IMMIGRATION ACTS**

**Considered on the papers/at a hearing at  
On [DATE]**

**Decision Issued**

.....

**Before**

**JUDGE [NAME]**

**Between**

**MR NAME SURNAME**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**DECISION ON APPLICATION FOR A COSTS/EXPENSES ORDER  
UNDER RULE 9(2)**

1. On [insert date] the Appellant/Respondent [or the Tribunal of its own motion] made application for an award of costs/expenses under Rule 9(2) of the Procedure Rules against the [insert party].
2. The basis on which the application was made was...
3. My reasons for refusing/granting the application are...[continue as necessary]

**DECISION**

4. The application for a wasted/unreasonable costs/expenses order is duly refused/granted.
5. The amount of costs/expenses to be paid under this order -

- i. are summarily assessed in the amount of [insert amount]
- ii. are agreed by the paying person and the receiving person as [insert amount], or
- iii. will be determined by detailed assessment in accordance with rule 9(9). [Select as appropriate]

Signed

Date

Judge [insert name]  
Judge of the First-tier Tribunal

## Approval for Promulgation

|                                 |  |
|---------------------------------|--|
| To be emailed to:               | Loughborough AIT   |
| Email address:                  | <a href="mailto:LoughboroughEdets@tribunals.gsi.gov.uk">LoughboroughEdets@tribunals.gsi.gov.uk</a> |
| Name of Judge issuing approval: |  |
| Appellant's Name:               | <b>MR</b>  |
| Case Number:                    |  |

I approve the attached Decision for promulgation

Name:

Date:

Amendments that require further action by Promulgation section:

Change of address:

Rep:

Appellant:

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Other Information:

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