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Presidential Guidance Note No. 2 of 2018: Further guidance on wasted costs and unreasonable costs and on the correct approach to applications for costs made in proceedings before the First-tier Tribunal (IAC)

Introduction

On 27 September 2017, the First-tier Tribunal (IAC) heard several appeals, as a Presidential Panel (the President, Mr Michael Clements and the President of the Upper Tribunal (IAC), Mr Justice McCloskey), HU/04300/2015, PA/13321/2016, IA/27184/2015 and HU/06514/2016.

The decision of the Presidential Panel followed an earlier judgment in the same appeals, Awuah and Others (Wasted Costs Orders) [2017] UKFtT 555 (IAC) and concerned a series of discrete issues relating to the individual appeals and one important point of principle. Although the decision has not been reported, this short Guidance Note has been prepared to assist judges in deciding applications for costs. The appeals may conveniently be described for the purpose of this Guidance Note as Awuah and Others (2).

This Guidance Note should be read with Guidance Note No 1 of 2014 and Guidance Note No 1 of 2015.

The guidance consists of short points of principle and practice, drawn from the reported cases of Cancino [2015] UKFtT 00059 and Awuah and Others and from the unreported decision in Awuah and Others (2).

1. Wasted Costs Orders

In what follows, a Wasted Costs Order is referred to as a WCO.

1.1. The procedural requirements for making a WCO:

A convenient starting point is provided by the FtT Presidential Guidance Note [*2015*], [24] – [29] (appended to **Cancino**). Next we draw attention to the general guidance provided in **Cancino** at [6] – [8], [18] – [19] and [27]. The fundamental procedural requirements are those which the common law has espoused since time immemorial: the respondent must be alerted to the possibility of a WCO, must be apprised of the case against him and must

be given adequate time and opportunity to respond. In a context where the tribunal must strive also to give effect to expedition and summary decision making, astute to deter the development of a 'cottage industry', the balance struck must always respect these overarching requirements of procedural fairness: in short, they are inalienable. (**Awuah and Others**, [45])

1.2. The evidential requirements for making a WCO:

Finally, we adopt in full the same reasoning of Eder J in **Nwoko v Oyo State Government of Nigeria [2014] EWHC 4538 (QB)**, a case where proceedings were issued to secure the appointment of an arbitrator, successfully and a WCO application ensued, at [8]:

> "As far as the costs incurred up to 3 September 2014, there was a schedule which had been put before the court. I am not going to go through that in detail, but it is a schedule which totals almost £28,000. The difficulty with that schedule is that it does not, and does not even begin, to identify what costs are supposedly said to have been wasted by the relevant conduct on behalf of CNA. Mr Newman originally suggested that I should somehow summarily assess those costs by taking a broad brush. At one stage it was suggested that the relevant figure was 20 per cent, another time it was suggested it should be 80 per cent of that figure. That approach is quite unacceptable."

> "In order for the court to deal with it, even on a broad brush basis, it is incumbent upon a party to come before the court with proper evidence to identify what costs have been caused by what deficient conduct. I accept that in many cases it may be that some estimates have to be made, but it is unacceptable for any party simply to throw at the court a large schedule, a schedule containing a large bunch of figures which the court is then expected to plough through in order to arrive at some principled decision. It is simply impossible for the court to do that." (**Awuah and Others**, [47])

1.3. A WCO can never be made where the causal link between conduct and costs incurred does not exist:

We draw particular attention to the requirement of causation. The impugned conduct of the respondent must be causative of the costs unnecessarily incurred by the aggrieved party: the second of the three stage Ridehalgh test (see Cancino at [19]). Where this causal nexus does not exist a WCO can never be made. (**Awuah and Others**, [46])

1.4. The Tribunal should exercise its power to make a WCO of its own motion with restraint. (**Awuah and Others**, [headnote (vii)])

1.5. WCOs cannot be issued against Home Office Presenting Officers (HOPOs):

We are of the opinion that the Carltona principle applies to the relationship of Secretary of State and HOPOs. While this principle is, as Lord Donaldson MR recognised in Oladehinde at 125E, capable of being "negative or confined by express statutory provisions", or by "clearly necessary implication", neither is identifiable in the present context. In this

context we take cognisance of the analysis in Yeo (supra) that the Secretary of State and HOPO's are a single entity and may be regarded as a litigant in person. It follows that the Secretary of State – and the Secretary of State alone – is fully responsible for the actions of HOPOs. No separate individual liability or responsibility attaches to such persons. As the Secretary of State and the HOPO are indistinguishable in law it follows that in the language of section 29(6) of the 2007 Act a HOPO does not conduct proceedings on behalf of the Secretary of State. Rather, the HOPO is, in this discrete context, the alter ego of the Secretary of State, one and the same person. (**Awuah and Others**, [29])

1.6. WCOs are likely to be rare where a legal representative is acting on instruction of their client:

Cases in which there is a finding by the FtT that a legal representative knowingly promoted and encouraged the pursuit of a hopeless appeal, thereby warranting a wasted costs order under rule 9(2)(a), are likely to be rare. (**Cancino**, [20])

… the Tribunal must always be alert to distinguish between the conduct of the representative (on the one hand) and the client (on the other). (**Cancino**, [21])

2. **Rule 9(2)(a) – Costs (Unreasonable Conduct)**

2.1. The basic test is 'whether there is a reasonable explanation for the conduct under scrutiny':

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

2.2. Possible type(s) of enquiry the Tribunal may need to pursue:

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

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

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

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

The rule clearly embraces the whole of the "proceedings". Thus the period potentially under scrutiny begins on the date when an appeal comes into existence and ends when the appeal is finally determined in the Tribunal in question. It embraces all aspects of the Appellant's conduct in pursuing the appeal and all aspects of the Respondent's conduct in defending it. This, clearly, encompasses interlocutory applications and hearings and case management hearings. (**Cancino**, [24])

2.3. Unrepresented litigants must be afforded appropriate latitude but cannot be permitted to misuse Tribunal procedures:

As regards unrepresented litigants, we consider it inappropriate to attempt comprehensive and prescriptive guidance. … Stated succinctly, every unrepresented litigant must, on the one hand, be permitted appropriate latitude. On the other hand, no unrepresented litigant can be permitted to misuse the process of the Tribunal. The overarching principle of fact sensitivity looms large once again. (**Cancino**, [26])

2.4. The meaning of '*bringing, defending or conducting proceedings*':

Although none of the questions formulated for our decision is directed specifically to rule 9(2)(b) of the 2014 Rules, we are alert to the possibility of an increasing emphasis on this discrete provision and, hence, add the following. Judges, parties and practitioners should be alert to the decision in Catana v HMRC [2012] UKUT 172 (TCC) which considers, inter alia, the meaning and scope of the phrase "bringing, defending or conducting proceedings". The Tax and Chancery Chamber of the Upper Tribunal held that this is -

> "…. an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal or either party has acted unreasonably in the course of proceedings, for example by persistently failing to comply with rules and directions to the prejudice of the other side." (**Awuah and Others**, [37])

2.5. Application of Rule 9(2)(b) will be '*unavoidably fact sensitive*'; Judge should take care to express the reasons for their decisions '*clearly and adequately*':

We confine ourselves to two general observations. The first is that the application of the Rule 9(2)(b) test will be unavoidably fact sensitive. The second is that the presiding Judge will be especially well equipped and positioned to make the evaluative judgment necessary in deciding whether the exercise of the discretionary power is appropriate. Thirdly and finally, Judges should take care to express the reasons for their decisions clearly and adequately. While this will not require a disproportionately detailed essay, the general principles, tailored to each individual context, apply: see **MK (Duty to give reasons) Pakistan [2013] UKUT 641** (IAC).

2.6. In cases where unreasonable conduct is being considered, attempted comparisons with other cases will normally be a time wasting exercise:

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. (**Awuah (2)**, *unreported*, [32])

2.7. Guidance derived from caselaw or established principle

(*note the objective standard to be applied to the SSHD's employees at (v)below*):

(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 (**Awuah and Others**).

(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. (**Awuah (2)**, *unreported*, [9])

2.8. **Unreasonable does not mean 'wrong', the party must generally persist with their argument; unreasonable conduct is more likely to be found in the way in which an appeal is pursued**. (**Awuah (2)**, *unreported*, [10])

2.9. Duty upon the SSHD to conduct an '*initial assessment*' of the viability of defending an appeal:

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"). (**Awuah (2)**, *unreported*, [16])

2.10. The assessment will be informed by the state of presentation / completeness of papers and the quality of pleading (poor grounds will obfuscate the process):

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… (**Awuah (2)**, *unreported*, [19])

2.11. That assessment to be conducted within *six weeks* of being notified that the appeal was lodged:

… 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. (**Awuah (2)**, *unreported*, [21])

2.12. The above timeframe for initial assessment reflects a '*general rule*' and may be extended / shortened depending on individual cases:

… 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. (**Awuah (2)**, *unreported*, [22])

2.13. The SSHD will normally be expected to conduct subsequent reassessment(s) when any material development occurs:

… 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. (**Awuah (2)**, *unreported*, [24])

3. Summary Assessment

3.1. In the majority of cases a summary assessment will be fair and reasonable:

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. (**Awuah (2)**, *unreported*, [74])

4. Indemnity

4.1. Indemnity principles established by Noorani:

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. (**Awuah (2)**, *unreported*, [78])

5. Detailed Assessment

5.1. **Inviting detailed assessment will be rare**. (**Awuah (2)**, *unreported*, [87])

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