First-tier Tribunal
(Immigration and Asylum Chamber)

Awuah and Others (Wasted Costs Orders – HOPOs – Tribunal Powers) [2017] UKFTT 555 (IAC)

THE IMMIGRATION ACTS

Heard at Taylor House, London	**Decision & Reasons Promulgated**
On 22 June 2017	
	……

Before

MR JUSTICE MCCLOSKEY, PRESIDENT OF THE UPPER TRIBUNAL,
SITTING AS A JUDGE OF THE FIRST-TIER TRIBUNAL
and
THE PRESIDENT OF THE FIRST-TIER TRIBUNAL, MR M CLEMENTS

Between

DARKWAH AWUAH, SJ, TN AND KHADIJA MUSU MOMOH

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants SJ and TN:	Ms Rebecca Chapman of counsel instructed by Wesley Gryk Solicitors
For the Appellant Awuah	Ms Helen Foot of counsel, instructted by Sutovic & Hartigan Solicitors

For the Appellant Momoh	Ms Helen Foot and Ms Rebecca Chapman, instructed by Nathan Aaron Solicitors
For the Respondent:	Mr Rupert Cohen, of counsel, instructed by the Government Legal Department, on behalf of the Respondent

(i) The First-tier Tribunal ("FtT") is not empowered to make a Wasted Costs Order ("WCO") against a Home Office Presenting Officer ("HOPO").

(ii) The relationship of Secretary of State and HOPO is governed by the Carltona principle.

(iii) The answerability of HOPOs to the tribunal is achieved through a range of judicial functions and duties.

(iv) In every case where a WCO is in contemplation common law fairness requires that the respondent be alerted to this possibility, be apprised of the case against him and be given adequate time and opportunity to respond.

(v) While expedition and summary decision making are desirable in WCO matters, the basic requirements of fairness to the respondent must always be respected.

(vi) A causal nexus between the impugned conduct of the respondent and the costs unnecessarily incurred by the aggrieved party is an essential pre-condition of a WCO.

(vii) The tribunal's "own motion" power to make a WCO is to be exercised with restraint.

DECISION

McCloskey P

Preface

1. This is the judgment of the panel to which both members have contributed. It is provided in the context of four appeals to the First-tier Tribunal (the "FtT") selected and conjoined for the purpose of promulgating guidance on certain aspects of the power of the FtT to make what is habitually described as a wasted costs order (hereinafter "WCO").

2. As a result of careful and focussed case management a series of questions, both general and specific, has been formulated for the decision of the panel. The answers provided to the general questions transcend the boundaries of the four appeals. In contrast, the issues raised by the four appeals are case specific and their determination will be guided by, *inter alia,* the Tribunal's resolution of the general questions.

3. In this judgment [No 1] we address and determine the following questions:

(i) Against whom can the FtT make a WCO? In particular, can such an order be made against a Home Office Presenting Officer ("HOPO")?

(ii) If the FtT is empowered to make a WCO against a HOPO, in what circumstances is such an order appropriate?

(iii) What are the procedural and evidential requirements for making a WCO?

(iv) In what circumstances is it appropriate for the FtT to make a WCO on its own initiative?

General

4. We begin by identifying the main provision of primary legislation and an important procedural rule. Section 29 of the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act") provides:

> "*(1) The costs of and incidental to–*
>
> *(a) all proceedings in the First-tier Tribunal, and*
>
> *(b) all proceedings in the Upper Tribunal,*
>
> *shall be in the discretion of the Tribunal in which the proceedings take place.*
>
> *(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.*
>
> *(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.*
>
> *(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may–*
>
> *(a) disallow, or*
>
> *(b) (as the case may be) order the legal or other representative concerned to meet,*
>
> *the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.*
>
> *(5) In subsection (4) "wasted costs" means any costs incurred by a party–*
>
> *(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or*
>
> *(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.*
>
> *(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct*

the proceedings on his behalf.

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

Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "2014 Rules"), in operation since 20 October 2014, provides:

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

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

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

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

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

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

Pausing here, whereas section 29 of the 2007 Act is directed to the litigation conduct of a party's "legal or other representative", rule 9(2) widens the net so as to enmesh the conduct of parties to litigation.

5. In our decision in Cancino (costs – First-tier Tribunal – new powers) [2015] UKFTT 0059 (IAC) we described rule 9(2) as a "*new power*" to award costs: see [2]. In [5] we emphasised that section 29 and rule 9, in tandem, are the two core elements of the FtT wasted costs regime.

6. It is convenient at this juncture to rehearse what Cancino decided:

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

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

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

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

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

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

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

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

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

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

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

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

The First Question

7. This question, in substance, asks whether the FtT is empowered to make a WCO against Home Office Presenting Officers ("HOPOs"). While this is a pure question of law it takes its colour from the context to which it belongs. This, we consider, must include the general "whats, why's and wherefores" of the HOPO: what are HOPOs and what do they do?

8. The latter question was one of those which arose in Home Office v the Information Commissioner and Yeo [2016] UKFTT 2015 0213 (GRC). There the evidence included a witness statement of Daniel Hobbs, formerly the Director of Appeals, Litigation and Subject Access Requests Directorate of the Home Office. This contains the following notable averments:

(a) The Secretary of State for the Home Department (the "Secretary of State") is represented in 98% of appeal hearings in the FtT and in all cases, both statutory appeals and judicial reviews, before the Upper Tribunal (the "UT").

(b) In the twelve month period ending in the second quarter of 2016 the FtT received 91,127 appeals. In the next succeeding twelve month period this figure

was not significantly different. During each of these twelve month periods the total UT yearly intake of new cases was close to 30,000, divided roughly equally between new judicial reviews and appeals from the FtT or renewed applications for permission to appeal.

(c) There are 145 HOPOs nationally distributed throughout nine Home Office centres. Of these 37 are Senior Presenting Officers ("SPOs"), who present all cases in the UT.

(d) Many HOPOs have "*qualifications and experience in law*".

(e) SPOs have the rank of Senior Executive Officer. All other HOPOs are of Higher Executive Officer grade which is the first "significant" management grade in the Civil Service. All HOPOs are employees of the Home Office, assigned to the Appeals, Litigation and Subject Access Request Directorate which is part of UKVI ("United Kingdom Visas and Immigration").

(f) The role of HOPOs is "*… to represent the Home Office before the Tribunal …. This involves advocacy and also making decisions about case management based on fact, guidance and an interpretation of the law*".

(g) The majority of HOPOs have completed a module of the Chartered Institute of Legal Executives Level 3 course.

(h) All newly appointed HOPOs are required to complete an internal eight day training course, followed by a two month period of supervision and occasional further training thereafter.

(i) HOPOs "*… are expected to demonstrate a high degree of professionalism and behave consistently in line with the values of UKVI including being consistently competent, high performing and customer focussed*".

(j) The Home Office has also recruited a limited number of law graduates at the grade of Executive Officers, on fixed term contracts. This occurs typically as a response to bulging appeal numbers. These persons are deployed in the more straightforward cases. The Home Office instructs counsel in the "*most complex*" cases.

9. The evidence of Mr Hobbs further discloses that it is the established policy of the Home Office to develop particular litigation strategies and "lines to take" in immigration cases. This promotes consistency of presentation and argument among HOPOs. It is achieved in part by ensuring that HOPOs are familiar with relevant published Home Office guidance relating to specific subjects and issues. Thus, for example, HOPOs are, as a group, instructed to advance specified arguments on the meaning and scope of certain statutory provisions and important judicial decisions: see generally [19] – [22] of the reported decision. In this context we take cognizance also of the Home Office published guidance on the withdrawal of immigration decisions, conceding appeals and applying for adjournments. All of these functions are performed by HOPOs.

10. Other aspects of the wider context are highlighted in the following passages from VOM (Error of law – when appealable) Nigeria [2016] UKUT 410 (IAC) which have some purchase in the present context:

> *"[17] … the delivery of swift, inexpensive and uncomplicated justice has long been the overarching ethos of tribunal adjudication. See, for example, the discussion in Wade and Forsyth, Administrative Law (10th Edition), per pp 773 – 774. This forms part of the context in which the 2007 Act was introduced. The background to this enactment includes the report of Sir Andrew Leggatt, followed by a White Paper (CM.6243/2004) which accepted many of its recommendations. Sir Andrew's report contains the following noteworthy passage, at paragraph 1.2:*
>
> > *'… Tribunal's procedures and approach to overseeing the preparation of cases and their hearing can be simpler and more informal than the courts, even after the civil justice reforms.'*
>
> *One of the main aims of the legislation which followed, in the form of the 2007 Act, was to introduce the "user-oriented service" strongly recommended by Sir Andrew (see paragraph 1.4 of his report).*
>
> *[18] A second, inter-related aspect of the context in which the 2007 Act was devised is the overriding objective, with its emphasis on expedition, finality and the suppression of avoidable delay. The overriding objective was, by 2007, firmly established in civil proceedings, was gaining a foothold in criminal proceedings and was being introduced in tribunal proceedings, at both tiers. As regards the Upper Tribunal, it is contained in Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, which came into operation on 3 November 2008. Generally, in the United Kingdom legal system the overriding objective and related measures, including wholesale reform of rules of procedure in both courts and tribunals, progressively gained traction during a period in which the imperative of defeating the so-called unholy trinity of avoidable delay, excessive costs and unwarranted complication became increasingly dominant. By 2007 the Civil Procedure Rules were firmly entrenched, having been introduced on 26 April 1999.*
>
> *[19] While the developments in civil and tribunal procedure noted above have occurred during the last two decades, there is nothing novel about them. The principle that legal proceedings should be concluded as expeditiously as possible is expressed in the longstanding Latin maxim interest rei publicae ut sit finis litium. Over a century has passed since this maxim was recognised as possessing "extreme value": by Lord Loreburn LC in Brown v Dean [1910] AC 373, at 374. The operation of this maxim in the discrete context of statutory construction and appeal rights is illustrated in R v Pinfold [1988] QB 462, where Lord Lane CJ stated at 464:*
>
> > *'… One must read those provisions against the background of the fact that it is in the interests of the public in general that there should be a limit or a finality of legal proceedings, sometimes put in a Latin maxim, but that is what it means in English'.*
>
> *This maxim was also applied in a comparable legal context, albeit in matrimonial proceedings, in Hewitson v Hewitson [1995] 1 ALL ER 472 (see particularly per*

Butler-Sloss LJ at [63] – [65]. Finally, in this context, we remind ourselves of the presumption of statutory construction that the law should serve the public interest: Bennion on Statutory Interpretation (Sixth Edition), page 722.

[20] We further take into account that, while this has manifested itself in contexts other than the present, one of the emerging features of the modern legal system is that of strong resistance to what has become known as "satellite" litigation. This species of litigation takes the form of proceedings in a higher court or tribunal, frequently via judicial review challenges, brought in circumstances where the process of the lower court or tribunal is incomplete. This is illustrated particularly, and perhaps most famously, in R v Director of Public Prosecutions, ex Parte Kebeline [2000] 2 AC 326, at 371 per Lord Steyn. This is further illustrated in the rejection of judicial review challenges to aspects of inquest proceedings pursued at a stage when the process is not complete. See in particular McLuckie v Coroner for Northern Ireland [2011] NICA 34, at [26]."

11. The correct answer to the first question is also informed by an array of statutory provisions. While section 29 of the 2007 Act provides the foundation and starting point the enquiry ranges further, extending to certain other provisions of primary legislation. Section 29, we recall, establishes that the FtT is empowered to make a WCO against "*the legal or other representative concerned*", defined as "*any person exercising a right of audience or right to conduct the proceedings on* [a party's] *behalf.*"

12. Section 51(1) and (2) of the Senior Courts Act 1981 ("SCA 1981") provide:

> "*(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –*
>
> *(a) the civil division of the Court of Appeal;*
>
> *(b) the High Court;*
>
> *(ba) the family court; and*
>
> *(c) the county court,*
>
> *shall be in the discretion of the court.*
>
> *(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs.*"

Section 51(6) – (7A) provide:

> "*(6) In any proceedings mentioned in subsection (1), the court may disallow, or (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 rules of court.*

(7) In subsection (6), "wasted costs" means any costs incurred by a party –

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

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

(7A) Where the court exercises a power under subsection (6) in relation to costs incurred by a party, it must inform such of the following as it considers appropriate –

(a) an approved regulator;

(b) the Director of Legal Aid Casework."

As noted by this Tribunal in Cancino, at [10], the definition of "*wasted costs*" in section 29(5) of the 2007 Act replicates *verbatim* that contained in section 51(7) of the SCA 1981. The latter provision is clearly the derivation of the former. We consider the nexus inextricable.

13. The Office of Immigration Services Commissioner ("*OISC")* was established by section 83 of the Immigration and Asylum Act 1999 (the "1999 Act"), one of a series of provisions arranged in Part 5 of the statute under the heading "Immigration Advisors and Immigration Service Providers". Section 83(1) – (3) provide:

"*(1) There is to be an Immigration Services Commissioner (referred to in this Part as "the Commissioner").*

(2) The Commissioner is to be appointed by the Secretary of State after consulting the Lord Chancellor, the Department of Justice in Northern Ireland and the Scottish Ministers.

(3) It is to be the general duty of the Commissioner to promote good practice by those who provide immigration advice or immigration services."

By section 83(5):

"*(5) The Commissioner must exercise his functions so as to secure, so far as is reasonably practicable, that those who provide immigration advice or immigration services –*

(a) are fit and competent to do so;

(b) act in the best interests of their clients;

(c) do not knowingly mislead any court, tribunal or adjudicator in the United Kingdom;

(d) do not seek to abuse any procedure operating in the United Kingdom in

connection with immigration or asylum (including any appellate or other judicial procedure);

(e) do not advise any person to do something which would amount to such an abuse."

By section 84(1) and (2):

"*(1) No person may provide immigration advice or immigration services unless he is a qualified person.*

(2) A person is a qualified person if he is–

(a) a registered person,

(b) authorised by a designated professional body to practise as a member of the profession whose members the body regulates,

(ba) a person authorised to provide immigration advice or immigration services by a designated qualifying regulator,

(c) the equivalent in an EEA State of–

(i) a registered person, or

(ii) a person within paragraph (b) or (ba),

(d) a person permitted, by virtue of exemption from a prohibition, to provide in an EEA State advice or services equivalent to immigration advice or services, or

(e) acting on behalf of, and under the supervision of, a person within any of paragraphs (a) to (d) (whether or not under a contract of employment)."

Section 82(1) contains some pertinent definitions. First, "*immigration advice*" –

"'*immigration advice' means advice which –*

(a) relates to a particular individual;

(b) is given in connection with one or more relevant matters;

(c) is given by a person who knows that he is giving it in relation to a particular individual and in connection with one or more relevant matters; and

(d) is not given in connection with representing an individual before a court in criminal proceedings or matters ancillary to criminal proceedings;"

Next, "*immigration services*" –

"'*immigration services' means the making of representations on behalf of a*

particular individual –

(a) in civil proceedings before a court, tribunal or adjudicator in the United Kingdom, or

(b) in correspondence with a Minister of the Crown or government department,

in connection with one or more relevant matters;"

"*Qualified person*" is defined as "*a person who is qualified for the purposes of section 84*".

"*Registered person*" is defined as "*a person who is registered with the Commissioner under section 85.*"

Section 82(2) provides:

"*In this Part, references to the provision of immigration advice or immigration services are to the provision of such advice or services by a person –*

(a) in the United Kingdom (regardless of whether the persons to whom they are provided are in the United Kingdom or elsewhere); and

(b) in the course of a business carried on (whether or not for profit) by him or by another person."

It is appropriate to note also the definition of "*Designated Qualifying Regulator*", which is contained in section 86(A):

"*(1) 'Designated qualifying regulator' means a body which is a qualifying regulator and is listed in subsection (2).*

(2) The listed bodies are–

(a) the Law Society;

(b) the Institute of Legal Executives;

(c) the General Council of the Bar."

14. The most recent statutory prescription of note is found in certain provisions of the Legal Services Act 2007 ("LSA 2007"). The subject matter of Part 3 of this statute is "Reserved Legal Activities". Section 12 provides, in material part:

"*(1) In this Act "reserved legal activity" means–*

(a) the exercise of a right of audience;

(b) the conduct of litigation;

(c) reserved instrument activities;

(d) probate activities;

(e) notarial activities;

(f) the administration of oaths.

(2) Schedule 2 makes provision about what constitutes each of those activities."

Section 13 governs the topic of entitlement to carry on a reserved legal activity. It provides:

> *"(1) The question whether a person is entitled to carry on an activity which is a reserved legal activity is to be determined solely in accordance with the provisions of this Act.*
>
> *(2) A person is entitled to carry on an activity ("the relevant activity") which is a reserved legal activity where–*
>
> *(a) the person is an authorised person in relation to the relevant activity, or*
>
> *(b) the person is an exempt person in relation to that activity.*
>
> *(3) Subsection (2) is subject to section 23 (transitional protection for non-commercial bodies).*
>
> *(4) Nothing in this section or section 23 affects section 84 of the Immigration and Asylum Act 1999 (c. 33) (which prohibits the provision of immigration advice and immigration services except by certain persons)."*

The term "*authorised person"* is defined in section 18(1) thus:

> *"(1) For the purposes of this Act "authorised person", in relation to an activity ("the relevant activity") which is a reserved legal activity, means–*
>
> *(a) a person who is authorised to carry on the relevant activity by a relevant approved regulator in relation to the relevant activity (other than by virtue of a licence under Part 5), or*
>
> *(b) a licensable body which, by virtue of such a licence, is authorised to carry on the relevant activity by a licensing authority in relation to the reserved legal activity."*

This discrete statutory jigsaw is completed by Part 1 of Schedule 4 to the 2007 Act which provides *inter alia*:

> *"(1) Each body listed in the first column of the Table in this paragraph is an approved regulator.*
>
> *(2) Each body so listed is an approved regulator in relation to the reserved legal activities listed in relation to it in the second column of the Table.*

TABLE

Approved regulator	***Reserved legal activities***
The Law Society	*The exercise of a right of audience.* *The conduct of litigation.* *Reserved instrument activities.* *Probate activities.* *The administration of oaths.*
The General Council of the Bar	*The exercise of a right of audience.* *The conduct of litigation.* *Reserved instrument activities.* *Probate activities.* *The administration of oaths.*
The Master of the Faculties	*Reserved instrument activities.* *Probate activities.* *Notarial activities.* *The administration of oaths.*
The Institute of Legal Executives	*The exercise of a right of audience.* *The administration of oaths.*
The Council for Licensed Conveyancers	*Reserved instrument activities.* *The administration of oaths.* *Probate activities.*
The Chartered Institute of Patent Attorneys	*The exercise of a right of audience.* *The conduct of litigation.* *Reserved instrument activities.* *The administration of oaths.*
The Institute of Trade Mark Attorneys	*The exercise of a right of audience.* *The conduct of litigation.* *Reserved instrument activities.* *The administration of oaths.*
The Association of Law Costs Draftsmen	*The exercise of a right of audience.* *The conduct of litigation.* *The administration of oaths.*

The Institute of Chartered Accountants of Scotland	*Probate activities.*
The Association of Chartered Certified Accountants	*Probate activities.*

15. As we are engaged in an exercise of construing certain provisions of primary and secondary legislation, we remind ourselves of some basic dogma. It is a truism that the interpretation of any statute is far removed from an academic jaunt. Exercises in statutory interpretation are per Lord Bingham of Cornhill -

> "*… directed to a particular statute, enacted at a particular time, to address (almost invariably) a particular problem or mischief.*"

R v Z [2005] UKHL 35 at [17]. In R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687, Lord Bingham stated at [8]:

> "*The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's intention. So the controversial provisions should be read in the context of the statute as a whole and the statute as a whole should be read in the historical context of the situation which led to its enactment.*"

16. The arguments of the parties' respective counsel revolved around the assorted statutory provisions noted above; the distinction between HOPOs and other kinds of representative; the distinctive character of tribunal proceedings; the overriding objective; equality of arms; the maintenance of high standards of representation; and the need to deter unacceptable standards of representation. The core submission of Ms Chapman and Ms Foot on behalf of the Appellants is that HOPOs are "*other representative(s*)" within the meaning of section 29(5) of the 2007 Act and a "*representative*" within the meaning of rule 10 of the 2014 Rules. Mr Cohen, on behalf of the Secretary of State, argues the contrary, placing particular emphasis on the correlation between section 29(5) of the 2007 Act and section 51(7) of the 1981 Act, coupled with the jurisprudence associated with the latter provision.

17. While none of the reported decisions addressed in argument determines directly the first question which we are deciding some nonetheless contain a series of identifiable signposts. In Medcalf v Mardell [2003] 1 AC 120 the House of Lords held that a WCO can be made in respect of the conduct of counsel not only when exercising rights of audience in court but also in relation to surrounding, or anterior, conduct such as settling pleadings, notices of appeal and skeleton arguments. Thus the applications by a party against opposing counsel under section 51 of the 1981 Act for a WCO designed to recover the costs of investigating and rebutting serious allegations of fraud in a draft amended Notice of Appeal were, in principle, properly made.

18. Lord Steyn noted the following, at [35]:

"The barrister must promote and protect fearlessly and by all proper and lawful means his lay clients' interests: paragraph 203 of the Code of Conduct."

Lord Hobhouse made some notable observations about the function and responsibilities of advocates in the United Kingdom legal system. Firstly at [51]:

"*The starting point must be a recognition of the role of the advocate in our system of justice. It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed. The judicial system exists to administer justice and it is integral to such a system that it provide within a society a means by which rights, obligations and liabilities can be recognised and given effect to in accordance with the law and disputes be justly (and efficiently) resolved. The role of the independent professional advocate is central to achieving this outcome, particularly where the judicial system uses adversarial procedures.*"

Lord Hobhouse continued, at [52]:

"*It follows that the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. In England the professional rule that a barrister must be prepared to represent any client within his field of practice and competence and the principles of professional independence underwrite in a manner too often taken for granted this constitutional safeguard. Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the Executive, the Judiciary or by anyone else. Similarly, situations must be avoided where the advocate's conduct of a case is influenced not by his duty to his client but by concerns about his own self-interest.*"

Having then noted that the advocate owes no duty to his client's opponent and that what the advocate says in the course of legal proceedings cannot give rise to an action in defamation, Lord Hobhouse continued at [54]:

"*The professional advocate is in a privileged position. He is granted rights of audience. He enjoys certain immunities. In return he owes certain duties to the court and is bound by certain standards of professional conduct in accordance with the code of conduct of his profession. This again reflects the public interest in the proper administration of justice; the public interest, covering the litigants themselves as well, is now also expressed in Part I of the Civil Procedure Rules. ... The advocate must respect and uphold the authority of the court. He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time. The codes of conduct of the advocate's profession spell out the detailed provisions to be derived from the general principles. These include the provisions relevant to barristers which preclude them from making allegations, whether orally or in*

writing, of fraud or criminal guilt unless he has a proper basis for so doing. Paragraph 606(c), which has already been quoted by my noble and learned friend, requires express instructions and reasonably credible material which as it stands establishes a prima facie case of fraud. All this fits in well with an appropriate constitutional structure for a judicial system for the administration of justice."

19. Lord Hobhouse, in his reflections on the "constitutional" framework to which advocacy belongs, also gave consideration to the impact of WCOs at [55]:

> "*The introduction of a wasted costs jurisdiction makes an inroad into this structure. It creates a risk of a conflict of interest for the advocate. It is intended and designed to affect the conduct of the advocate and to do so by penalising him economically. Ideally a conflict should not arise. The advocate's duty to his own client is subject to his duty to the court: the advocate's proper discharge of his duty to his client should not cause him to be accused of being in breach of his duty to the court (Arthur Hall v Simons [2000] 3 WLR 543.) But the situation in which the advocate finds himself may not be so clear cut. Difficult tactical decisions may have to be made, maybe in difficult circumstances. Opinions can differ, particularly in the heated and stressed arena of litigation. Once an opposing party is entitled to apply for an order against the other party's legal representatives, the situation becomes much more unpredictable and hazardous for the advocate. Adversarial perceptions are introduced. This is a feature of what happened in the present case. The factors which may motivate a hostile application by an opponent are liable to be very different from those which would properly motivate a court.*"

Lord Hobhouse distinguished between WCOs made at the suit of an advocate's own client and those of his adversary. Whereas the former have a compensatory character, the latter are "penal" in nature. He continued, at [56]:

> "*The risk of such an application can, at best, only provide a distraction in the proper representation of his own client and, at worst, may cause him to put his own interests above those of his client. The construction of the section and the application of the jurisdiction should accordingly be no wider than is clearly required by the statute.*"

The next succeeding passage is of particular note:

> "*Secondly, the fault must, in the present context, relate clearly to a fault in relation to the advocate's duty to the court not in relation to the opposing party, to whom he owes no duty.*"

In the same passage, having noted that the terms "*improper*" and "*unreasonable*" qualify for no special meaning, Lord Hobhouse opined that the term "*negligent*" –

> "*… is directed primarily to the jurisdiction as between a legal representative and his own client.*"

His Lordship further contrasted the advocate (on the one hand) with a person "exercising a right to conduct litigation", a "litigation agent" in shorthand (on the other).

20. The precondition of a WCO that the advocate has acted in breach of his duty to the court emerges clearly from Medcalf. It has been emphasised in, *inter alia,* Ridehalgh v Horsefield [1994] Ch 205 at 232H - 233A. It was on this ground that the Court of Appeal in Ridehalgh rejected the argument that a breach of the advocate's duty to his client must also be demonstrated in order to justify a WCO.

21. The duties which the advocate, whether solicitor or barrister, owes to the court arise out of the distinctive role and position of the advocate in our legal system and the special relationship between the advocate and the court. We consider it far from coincidental or casual that Lord Hobhouse, in his exposition of this subject, employed the phrase "*professional advocates":* see Medcalf at [52]. These duties, in one sense, represent the price which the professional advocate must pay for the privileges and immunities he enjoys. Furthermore, the professional advocate is duty bound to honour the standards and obligations enshrined in the professional conduct code of his profession. Such codes impose ethical and professional duties of a high order.

22. The framework which we have outlined and expounded above simply cannot be applied to HOPOs. They are not officers of the court. They belong to none of the regulated professional cohorts. They do not enjoy the privileges and immunities of the advocate. They are not subject to any of the detailed codes regulating the professional and ethical conduct of advocates and others and, in consequence, they lie outwith the jurisdiction of the various regulatory bodies. Stated succinctly, HOPOs are unregulated.

23. That is not to say that HOPOs owe no duties to the tribunal. We consider that rule 2(4) of the 2014 Rules, a discrete element of the overriding objective and its UT analogue, framed in identical terms, clearly apply to HOPOs. Thus HOPOs are subject to the positive obligations of helping the Tribunal further the overriding objective and cooperating with the Tribunal generally. The generality of these duties encompasses a potentially broad series of specific requirements and obligations many of which will be recurrent in most cases. Others may be more case sensitive.

24. The proposition that HOPOs are answerable to the judge or panel of judges before which they appear is in our view unassailable. It arises from the basic judicial functions and duties, in tandem with rule 2(4) of the 2014 Rules. The efficacy of this answerability is not, in our estimation, dependent upon prescribed regulatory, disciplinary or enforcement arrangements. In practice it is achieved, satisfactorily, by the mechanisms of judicial oversight, judicial disapproval, simple judicial warnings, the Tribunal's insistence upon strict compliance with its orders, directions and rules and kindred measures. Answerability is further achieved by correspondence between the Tribunal and the appropriate agency when necessary and the contents of the Tribunal's decisions. See in this context Wagner (advocates' conduct – fair hearing) [2015] UKUT 655 (IAC).

25. Giving effect to our analysis above, we conclude as follows: Given the inextricable link between section 29(6) of the 2007 Act and section 51(13) of SCA 1981, which in turn engages the jurisprudence and principles considered above, HOPOs are not

vulnerable to a WCO since the precondition that they owe, and have breached, a duty or duties to the tribunal, correctly understood, cannot be satisfied. As they are not professional advocates it follows that they are not a "*legal or other representative*" within the embrace of section 29(5) of the 2007 Act.

26. This analysis may be developed. Having regard to the totality of the statutory framework considered above, the related conclusion that a HOPO exercises neither a "*right of audience*" nor a "*right to conduct the proceedings on* [the Secretary of State's] *behalf*" must in our judgement be correct. Section 29 of the 2007 Act does not exist in isolation. Rather, when it was introduced it became part of the broader, pre-existing statutory landscape sketched above. Furthermore section 29 was devised during an era when regulation of the legal professions had become a hot topic. Successive legislatures had paid particular attention to the legal professions, professional advocates and regulators. We consider that unequivocal statutory language would have been required in order to bring HOPOs within the scope of section 29(5) and (6). There is none. On the contrary there is discernible in these provisions, considered in both their narrow and broader contexts, a clear underlying intention to subject professional advocates only to the risk of a WCO.

27. Likewise, we take cognizance of the terms in which the primary legislation enabling power relating to the FtT and UT procedural rules is framed. This is found in section 22 of Schedule 5 to the 2007 Act. Paragraph 9 of Schedule 5 provides:

> "*Rules may make provision conferring additional rights of audience before the First-tier Tribunal or the Upper Tribunal.*"

We consider, in this context, that "*additional*" denotes rights of audience over and above those conferred by existing legislation. The relevant provision of the 2014 Rules in this respect is rule 10. In our judgement the terms of rule 10 make abundantly clear that the Tribunal Procedural Committee, in devising the 2014 Rules, did not invoke the power available in paragraph 9 of Schedule 5.

28. Still further reasons can be offered in support of the conclusions expressed above. It is well-established that there is no distinction in law between a government minister and his civil servants. In the present context the minister is the Secretary of State and the civil servants are the HOPOs employed by the Home Office, the organisation which gives effect to the Secretary of State's decisions and policies and is directly answerable to him. The principle engaged was formulated by the Court of Appeal in Carltona v Commissioners of Works and Others [1943] 2 All ER 560, at 563A, in these terms:

> "*In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministers. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible*

officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

This principle has been applied to the immigration context: in R v Secretary of State for the Home Department ex-parte Oladehinde [1990] 2 WLR 1195 at 1218B/D especially, per Lord Donaldson MR.

29. 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.

30. The conclusion expressed immediately above is reinforced by the decision in Brown v Bennett [2002] 1 WLR 713 which held, *inter alia,* that the phrase "*a right to conduct litigation on* [a party's] *behalf in section 51(13) of the 1981 Act denotes a right "granted by the client to the lawyers to conduct litigation",* per Neuberger J at 727 H.

31. Furthermore, we can find nothing in the range of legislative provisions outlined above supporting the view that HOPOs have the status of "*legal or other representative*", defined as "*any person exercising a right of audience or right to conduct the proceedings on* [a party's] *behalf*", within the meaning and scope of section 29(6) of the 2007 Act. In particular, the Appellants' argument to the contrary is unable to overcome the combined effect of the material provisions of the 1999 Act considered in tandem with LSA 2007.

32. Section 84 of the 1999 Act establishes a discrete cohort of immigration advisers and immigration service providers. All members of this group must either possess one of the specified authorisations or have the status of "*registered person*" *viz* registered with OISC. LSA 2007 is concerned with the six types of legal service specified in section 12(1). Of these, the only two of note in the present context are "*the exercise of a right of audience*" and "*the conduct of litigation*". The interaction and coexistence between the 1999 Act and LSA 2007 is achieved by section 12(4) which expressly

leaves section 84 of the 1999 Act unaffected. This explains why OISC is not one of the "*approved regulators*" listed in the Table found in Part 1 of Schedule 4 to LSA 2007: see [14] above. HOPOs are clearly not embraced by either section 84 of the 1999 Act or the regime established by LSA 2007.

33. In passing, one of the consequences of the above analysis is that a registered OISC practitioner is vulnerable to a WCO. We consider that such persons clearly fall within the embrace of section 29(4) of the 2007 Act.

34. On behalf of the Appellants the protest is made that to exclude HOPOs from section 29(6) of the 2007 Act would give rise to an absurdity in two specific respects. First, the vulnerability of the legal representatives of Appellants to a WCO would be considerably greater than that of the Secretary of State, leading to inequality of arms. Second, this would encourage a culture of impunity on the part of HOPOs. We recognise of course the well-established principle that Parliament, in legislating, is presumed not to have intended absurd consequences. However, absurdity entails an elevated threshold, one which in our judgement is plainly not overcome in this context.

35. There several reasons for this. The first is the availability of the power conferred on the FtT by rule 9(2)(b) to order costs against the Secretary of State for unreasonably defending or conducting proceedings. This, in our estimation, is a wide and potent provision which is complementary to the "*wasted costs*" definition in section 29(5). Second, HOPOs owe to the tribunal, without qualification, the broad range of duties enshrined in rule 2(4). Third, HOPOs act at all times subject to the deterrence and scrutiny noted in [23] – [24] above. Furthermore, they are answerable to the Secretary of State who, in turn, is answerable to Parliament and, ultimately, the electorate. Fourth, the conduct of HOPOs must at all times accord with the expressed and implied standards of their contractual engagement. Finally, the discretions and duties of judicial office, traceable ultimately to the statutory oath of office, are both extensive and efficacious in practice, more than sufficient to ensure a level playing field between the parties in every case. For this combination of reasons our construction of the relevant statutory provisions gives rise to no absurdity.

36. The exercise which we have conducted above and the interim and principal conclusions which we have reached have unfolded in the imperfect world of Parliamentary legislation. In the ideal world the legislation itself would provide a clear answer to all questions relating to its meaning and scope. In the real world it frequently fails to do so. We recognise that there is some attraction in the contention that a HOPO is an "*other representative*" within the meaning of section 29(5)(A) of the 2007 Act, as the unreported decision of the UT in Secretary of State for the Home Department v PR [AA/11637/15], which we gave permission to cite, confirms. However, with the benefit of extensive argument and reflection, we consider that this attraction is superficial only, failing to withstand the penetrating analysis which we have endeavoured to conduct.

37. 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.*"

See [14].

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).

Our Answer to the First Question

38. On the grounds and for the reasons elaborated above, we conclude:

    (a) HOPOs are not vulnerable to a WCO under section 29 of the 2007 Act.

    (b) Nor do they have any such vulnerability under Rule 9(b) of the 2014 Rules.

The Second Question

39. The second of the agreed questions asks: if a WCO can be made against a HOPO, in what circumstances should such an order be made? While this question has been rendered moot by our determination of the first question, we nonetheless answer it in order to cater for the possibility of correction by an appellate court.

40. The FtT Presidential Guidance Note No 1 of 2015, in particular paragraphs [7] – [19] and [37], featured in the parties' submissions in this context. There was no suggestion from any quarter that this instrument is in any way defective or inadequate. It is appended to our decision in Cancino and reproduction of any of its contents in this context is unnecessary. The provisions of the Guidance Note have a clear bearing on the answer to this hypothetical question.

41. Next, in every individual case it will be necessary to give effect to the helpful definitions of the terms "*improperly*", "*unreasonably*" and "*negligently*" supplied by the Court of Appeal in Ridehalgh (see Cancino, at [16]). It will also be necessary to observe the "*golden rules*" devised in Cancino, at [12]. Alertness to [13] – [27] of Cancino in every case will also be essential.

42. A perusal of the passages in Cancino highlighted immediately above (which, in passing, tend to confirm the correctness of our answer to the first of the four questions) points out that if HOPOs are vulnerable to a WCO some particular considerations arise. These were summarised in the submissions of Mr Cohen as the absence of a personal liability insurance, the contractual obligation of performing one's employment duties owed to the Secretary of State and the related duty of confidentiality. We reject Mr Cohen's submission that in the hypothetical scenario under consideration it would never be "*just*" to make a WCO against a HOPO. This is too sweeping and experience amply demonstrates that absolute rules or principles generally have no place in the United Kingdom legal system. That said we accept the submission that the features just mentioned could arise and, where they do, would fall to be considered. The evaluation of the second and third factors in particular would be highly case specific. As regards the first, it was confirmed, in response to our enquiry, that the policy of the Secretary of State for the time being is to indemnify HOPOs against WCOs.

43. It is also appropriate in this context to reflect on the nature and purpose of a WCO. We consider that the WCO jurisdiction encompasses compensatory, penal and deterrent elements. We reject Mr Cohen's submission that the second and third of these elements do not apply. There are sufficient indications in the leading cases to confirm that they do. The decided cases also make abundantly clear that in circumstances where the costs wasted by the aggrieved party have been paid, from whatever source, there is no loss and, hence, nothing to compensate. This is illustrated by D v SMH [2008] EWHC 559 (Fam). There it was held that a WCO had been inappropriately made because the aggrieved party (the husband) had both financed the other party (his spouse) for the purpose of meeting the order and had agreed not to enforce it in any event.

The Third Question

44. This question asks: what are the procedural and evidential requirements for making a WCO? We observe at once that this question is framed in notably general terms and invites a correspondingly general response.

45. A convenient starting point is provided by the FtT Presidential Guidance Note (*supra*), [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.

46. 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.

47. 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.*"

Eder J continued:

> "*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.*"

Amen to that we say.

The Fourth Question

48. In what circumstances is it appropriate for the FtT to make a WCO on its own initiative? This is what the fourth question asks.

49. Once again, this is a broadly phrased question. It has been largely answered by what the Court of Appeal said in Ridehalgh at 238E:

> "*Under the rules, the court itself may initiate the inquiry whether a wasted costs order should be made. In straightforward cases (such as failure to appear, lateness, negligence leading to an otherwise avoidable adjournment, gross repetition or extreme slowness) there is no reason why it should not do so. But save in the most obvious case, courts should in our view be slow to initiate the inquiry. If they do so in cases where the inquiry becomes complex and time-consuming, difficult and embarrassing issues on costs can arise: if a wasted costs order is not made, the costs of the inquiry will have to be borne by someone and it will not be the court; even if an order is made, the costs ordered to be paid may be small compared with the costs of the inquiry. In such cases courts will usually be well advised to leave an aggrieved party to make the application if so advised; the costs will then, in the ordinary way, follow the event between the parties.*"

Thus caution and restraint occupy centre stage in the exercise of the "own notion" power. This is reflected in [24] and [29] of the Presidential Guidance Note *(supra)*. We emphasise again that all FtT judges must be cognizant of these provisions.

50. While the "own notion" power undoubtedly entails the exercise of a broad discretion such discretion will be exercised paying careful attention to the restraint exhorted in Ridehalgh *(supra)*. Where discretions of this kind are in play prescriptive guidance is generally inappropriate. Subject thereto, we identify some merit in the submission of Ms Chapman and Ms Foot that by analogy with PD46 paragraph 5.7 of the CPR, the exercise of this discretion will rarely be appropriate unless (a) the tribunal is satisfied that the material available, if unanswered, would be likely to generate a WCO and (b) it is just and appropriate to make the order having considered the representations of the parties/their representatives. This is a useful, though not prescriptively exhaustive, gateway. Furthermore, and self-evidently, the "own notion" discretion will not be engaged in circumstances where a party to the appeal has made a WCO application, absent some special circumstance - for example, where the party's WCO application is considered excessively limited.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the second and third Appellants 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.

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

Date: 25 June 2017