Upper Tribunal
(Immigration and Asylum Chamber)

Thapa & Ors (costs: general principles; s 9 review) [2018] UKUT 00054 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 December 2017	

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Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE MCWILLIAM

Between

ANITA DAMMARPAL THAPA

SURYA BAHADUR DAMMARPAL THAPA

KAMALA DAMMAR PAL THAPA

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation :

For the Appellants: Mr S Ali, Solicitor, Everest Law Solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

(1) What emerges from the guidance in Cancino (costs – First-tier Tribunal – new powers) [2015] UKFTT 00059 (IAC) is that the power to award costs in rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 is to be exercised with significant restraint and that detailed examinations of other decided cases are unlikely to assist in deciding whether to award costs under either of those rules.

(2) Section 9 of the Tribunals, Courts and Enforcement Act 2007, read with the relevant procedure rules, enables the First-tier Tribunal to review, set aside and re-decide a case where, on the materials available to the judge deciding an application for permission to appeal, an error of law has occurred and (as in the present case) a party has thereby been deprived of a fair hearing. In the present case,

such a course would have avoided the need for the matter to come before the Upper Tribunal and have resulted in a more expeditious outcome.

DECISION AND REASONS

1. Introduction

1.
On 19 December 2017, the Upper Tribunal heard the appellants' application for an order under rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) R ule s 2008 that the respondent be required to pay the appellants the sum of £2,332, representing the costs said to have been incurred by the appellants as a result of the respondent having unreasonably defended the appellate proceedings in the Upper Tribunal.

2.
The appellants appeal ed against the decisions of the respondent on 30 September 2015 to refuse them entry clearance to the United Kingdom as adult dependent relatives of their father, who was an ex-Gurkha soldier. The appellants' appeals were heard in the First-tier Tribunal on 25 January 2017 by First-tier Tribunal Judge Majid. Mr M Chowdhury, Presenting Officer, attended on behalf of the respondent. The appellants were not represented.

3.
It is now common ground that Counsel for the appellants had been taken ill the night before the hearing and had informed his instructing solicitors that he would be unable to attend that hearing. The sponsor father of the appellants had also been taken ill, with the result that he too could not attend.

4.
It is also now common ground that a fax had been sent to the First-tier Tribunal's administration on the morning of the hearing, confirming Counsel's illness and seeking an adjournment. A further fax in this regard had also been sent, in addition to which instructing solicitors telephoned the Tribunal before the scheduled start of the hearing.

5.
It is finally common ground that, regrettably, Judge Majid was not informed of the adjournment request or of the indisposition of Counsel a nd the sponsor. The judge proceeded with the hearing.

6.
In a written decision promulgated on 30 January 2017, the judge held as follows:-

" 2. I have dismissed this appeal due to lack of interest.

3. Fairness required by the overriding objective does not demand that this case should be left unresolved. Therefore in the interest of expeditious and just disposal of cases I deal with this appeal without any further delay under Paragraph 28 (sic) of the Tribunal Procedure (First-tier Tribunal) Immigration and Asylum rule s 2014, SI2604 (as amended) (sic).

4. Adhering to the usual practice the Presenting Officer requested me to draw the appropriate inference from the omission of the Appellant (sic) to arrange any representative to attend the hearing.

5. Without cogent rebutting evidence on various significant issues nobody can expect this appeal to succeed.

6. Accordingly, bearing in mind that the burden of proof is on the Appellant, I find that the Respondent's decision to be sound in law and it stands.

NOTICE OF DECISION

Appeal Dismissed."

2. Challenging the decision of the First-tier Tribunal Judge

7.
The appellants applied to the First-tier Tribunal for permission to appeal the decision of Judge Majid. Paragraph 3 of the grounds stated that the appellants' solicitors had faxed and telephoned the Tribunal, as described above. The grounds noted that the judge did not appear to have been aware of the application to adjourn.

8.
Ground 1 was, accordingly, that the judge "arguably proceeded on a mistaken view of the facts (that there was no interest in the case by the appellants, and no application to adjourn)". The case of E & R v Secretary of State for the Home Department [2004] EWCA Civ 49 was relied upon in this regard. The judge's mistake of fact as to the reasons why there was no representation of the appellants at the hearing was submitted to amount to an error of law.

9.
Ground 2 contended that the judge failed, in any event, to determine the grounds of appeal against the respondent's decision. That decision was said to constitute the refusal of the appellants' human rights claims, by reference to Article 8 of the ECHR. A bundle of evidence was before the judge, running to 86 pages, which included witness statements "going to emotional ties" between the appellants and the sponsor, as well as "money transfer receipts going to financial support".

10.
Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 20 June 2017. The judge who granted permission stated as follows:-

"2. Counsel for the Appellants was taken ill the night before the hearing. The Sponsor was also separately taken ill and could not attend the hearing. The grounds set out that the Appellants' solicitor sought an adjournment on the morning of the hearing by fax at 9.27am. Counsel's indisposition was also confirmed by his clerk by way of a fax sent to the Tribunal administration at 9.17am. The Appellant's (sic) solicitors further telephoned the Tribunal administration at 9.30am, 11.30am and 16.30pm that day. From the Decision & Reasons it would appear that the Judge was not made aware that an application to adjourn the case had been made when he decided that " I have dismissed this appeal due to lack of interest". It is an arguable error of law that had the Appellants' Representative been available to conduct the hearing and the Sponsor been available to give oral evidence then it may have made a material difference to the outcome or to the fairness of the proceedings."

3. Events in the Upper Tribunal

11.
On 3 July 2017, the respondent filed with the Upper Tribunal a response to the grounds of appeal, pursuant to rule 24 of the 2008 rule s. The substantive provisions of the response read as follows:-

“2. The respondent opposes the appellant’s appeal. In summary the respondent will submit inter alia that the Judge of the First-tier Tribunal directed himself appropriately.

3. If it was the case as asserted in the grounds, that an application to adjourne (sic) was made but not passed to the judge to consider, then this could well be a procedural error amounting to an error of law. Unfortunatly (sic) the permission is unclear as to whether the Tribunal can confirm that the adjournment request was made as asserted. In the absence of that confirmation the Secretary of State must reserve her position on the point.

4. The respondent request s an oral hearing.”

12.
It is now accepted by the appellants that, in composing the response, the respondent had seen only the appellants’ grounds of application for permission to appeal against the decision of the First-tier Tribunal Judge. The First-tier Tribunal had, however, been sent not only the application for permission to appeal, with the attendant grounds, but also a witness statement of Mr Syed Ali, of the appellants’ solicitors, dated 1 February 2017, detailing the attempts that had been made to secure an adjournment on the basis of the ill-health of Counsel and the sponsor. There were also a number of attendance notes of Everest Law, made on 25 January 2017 , concerning Mr Ali’s actions; a fax transmission report showing that a letter from Everest Solicitors was sent to the First-tier Tribunal on 25 January 2017, regarding the illness of Counsel, with the consequent application to adjourn; and a letter from a doctor in Brecon Group Medical Practice, dated 26 January 2017, regarding the sponsor’s indisposition.

13.
The appellants’ appeals to the Upper Tribunal were heard by Upper Tribunal Judge Southern on 25 October 2017. Mr Jesurum, of Counsel, attended on behalf of the appellants. Mr Jesurum had been the Counsel due to attend before Judge Majid.

14.
At paragraph 2 of his decision, Upper Tribunal Judge Southern noted that, unknown to Judge Majid “because it appears that nobody had told him” , the First-tier Tribunal had received a number of communications regarding the non-attendance of Counsel, and that:-

“3. It seems clear that none of this was communicated to Judge Majid. That is sufficient to establish that there has been procedural unfairness such as to amount to an error of law and for that reason alone, as was readily, and properly, conceded by Ms Ahmad, [the respondent’s Presenting Officer] the decision of the judge cannot stand.”

15.
Upper Tribunal Judge Southern also found as follows:-

“4. Although Judge Majid cannot be held responsible for the fact that he was not informed of the reasons for counsel’s absence, I accept Mr Jesurum’s submission that it was, in any event, an error of law for the judge to fail to engage with the material before him and to dismiss the appeal simply upon the basis that the appellants were unrepresented and no one had appeared to give support for the appeal.”

16.

At paragraph 5, Upper Tribunal Judge Southern noted that it was common ground between the parties that “the only proper outcome is to remit this appeal to the First-tier Tribunal so that the appellants may have the hearing of their case to which they are entitled.”

4. The remitted appeal

17.
The remitted hearing in the First-tier Tribunal began before First-tier Tribunal Judge A Spicer on 27 November 2017. The judge’s Record of Proceedings discloses that there was extensive cross-examination of the sponsor and the sponsor’s wife. Mr Jesurum then applied for an adjournment, which was not opposed by the respondent’s Presenting Officer.

18.
Judge Spicer agreed to the adjournment, with the result that the appeal is, currently, part-heard.

5. The application for costs

19.
At the hearing on 19 December 2017, Mr Ali, for the appellants, spoke to the skeleton argument on costs, which Mr Jesurum had prepared on 14 December. There, it was submitted on behalf of the appellants that the respondent’s conduct was unreasonable “in not making the concession made at the hearing earlier”.

20.
So far as ground 1 was concerned, the appellants submitted that the mere fact the grounds accompanying the application for permission to appeal had been settled by Counsel should have led the respondent to the conclusion that Judge Majid had, in effect, proceeded on the basis of an error of fact, involving procedural fairness, and which was therefore an error of law , on E & R principles . It was, according to the appellants, unreasonable of the respondent to “reserve her position on the point”, as stated in paragraph 3 of the response of 3 July 2017.

21.
Regarding ground 2 , the appellants submitted that Upper Tribunal Judge Southern had “specifically found an error of law on ground 2” and that there was “no lawful basis upon which” Judge Majid “could have dismissed the appeal … for ‘lack of interest’“. It was said that at no point had the respondent suggested other than that the First-tier Tribunal Judge had been under a duty to hear the appeal and consider relevant matters, including the grounds, evidence and authorities submitted.

22.
The appellants submitted that delaying the making of concessions deprive s the other party of their benefit and cause s that party to incur unnecessary costs, as well as constituting a waste of judicial time and public money. “The late making of concessions tends to promote passive approach to litigation, adding to the burden the Tribunal faces”. According to the appellants, penalising such conduct by way of a costs order “where appropriate gives effect to the overriding objective, protects the orderly administration of justice and stands as a reminder to the parties of their duties to the Tribunal and to each other”.

23.
Mr Wilding had provided a written response to the costs application, in the form of a letter to the Upper Tribunal dated 8 December 201 7, with attachments. Responding to ground 1 , Mr Wilding submitted that the r ule 24 response was correct i n stating that it was “unclear from the grant of

permission” whether the First-tier Tribunal had been provided with evidence of the adjournment application. Mr Wilding said that it was only at the hearing before Upper Tribunal Judge Southern that the respondent, through her Presenting Officer, had been made aware of the supporting evidence.

24.
Turning to ground 2 , Mr Wilding submitted that , since the respondent was under no obligation to file a response pursuant to r ule 24, it was difficult to see how she could be categorised as unreasonable for what she had chosen to say in that response. In any event, even if the respondent had conceded the appeal, prior to the hearing before Upper Tribunal Judge Southern, that would not have necessarily dispensed with the need for a hearing. Under the 2008 Rules , the Tribunal needs to give its consent to the withdrawal of a party’s case. Mr Wilding submitted that, although it had been clearly an error on the part of Judge Majid to dismiss the appeal in the way he did , “that did not necessarily mean the error was material given it would have depended on the evidence before the FtT which would need to have been considered by the Upper Tribunal as capable of succeeding to assess whether the error was material or not”.

6. Cases

25.
In Cancino (costs – First-tier Tribunal – new powers) [2015] UKFTT 00059 (IAC), the then President of the Immigration and Asylum Chamber of the Upper Tribunal, sitting in the First-tier Tribunal with the President of the Immigration and Asylum Chamber of th at Tribunal, gave guidance on the issue of costs, including rule 10(2)(b) of the 2008 R ule s (which corresponds with rule 9(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) R ule s 2014) . In Cancino , the Tribunal drew upon a number of judgments of the Court of Appeal, including Ridehalgh v Horsefield [1994] Ch 205. At [232] in that case, the Court held that the word “unreasonable” was such as aptly to describe -

“ … c onduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner’s judgment but it is not unreasonable.”

26.
At paragraph 25 of Cancino , the Tribunal had this to say about concessions and withdrawals:-

“While reiterating our emphasis on the fact sensitive nature of every case, the following illustrations may be of assistance to Tribunals in deciding whether to exercise the discretionary power conferred by rule 9(2)(b):

(i) Concessions are an important part of contemporary litigation, particularly in the overburdened realm of immigration and asylum appeals. In appeals which must be heard and determined, concessions on factual issues bearing on the appeal can be of great assistance to judges and, simultaneously, further several aspects of the overriding objective. Occasionally, a concession may extend to abandoning an appeal (by the Appellant) or withdrawing the impugned decision (by the Respondent). We consider that applications for costs against a representative or party should not be

routine in these circumstances. R ule 9 cannot be invoked without good reason. To do otherwise would be to abuse this new provision. Accordingly, representatives or parties must be conscientiously satisfied that it is appropriate to have recourse to the rule. This will require, in every case, a considered decision dictated by the standards, principles and constraints of good professional practice. In every case, the fundamental enquiry for the Tribunal will be why the withdrawal has occurred, coupled with the related enquiry of why it did not materialise sooner. This draws attention to the intrinsically fact sensitive nature of every appeal.

(ii) Subject to the above, the belated withdrawal of an appeal is unlikely to be adequately explained on the bare ground that legal advice was to this effect, particularly if the Appellant was legally represented from the outset. On the other hand, a change of representative or the late engagement of a lawyer might, in appropriate cases, provide a satisfactory explanation for this course. Judges will be alert to the balance to be struck so as to ensure that withdrawals are not discouraged.

(iii) A belated withdrawal of a Home Office decision is unlikely to be satisfactorily explained simply on the basis of the timing of the Presenting Officer's involvement. The Home Office is a large government department and the belated commendable conduct of one of its servants cannot, in this context, excuse or justify the acts or omissions of others at earlier stages of the appeal process. Absent exceptional factors or circumstances, a protestation of inadequate resources will be unyielding in this context. Striking the appropriate balance as in (ii) above will be necessary.

(iv) Where a Tribunal is satisfied that an appeal has been withdrawn as a result of the belated production of documents or other evidence by the Respondent, this could, in certain circumstances, justify the consequential assessment that the Respondent had acted unreasonably in conducting its defence of the appeal, thereby attracting a costs order against the Respondent under rule 9(2)(b).

(v) The converse applies, in principle. Thus where a Tribunal is satisfied that the Respondent has withdrawn the impugned decision as a result of the belated production of evidence or witness statements on behalf of the Appellant, particularly where this involves a breach of case management directions, an order for costs under either limb of rule 9 could be appropriate. As ever, the specific context will be determinative."

27.
At paragraph 27 of Cancino , the Tribunal considered it valuable to set out the following observation of the Court of Appeal in the case of In the matter of a Wasted Costs Order made against Joseph Hill and Company Solicitors [2013] EWCA Crim 775:-

" We end with this footnote: there is an ever pressing need to ensure efficiency in the Courts: the Judges, the parties and most particularly the practitioners all have a duty to reduce unnecessary delays. We do not doubt that the power to make a wasted costs order can be valuable but this case, and others recently before this Court, demonstrate that it 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. "

7. Discussion

28.
Wh at emerges from Cancino is that the power to award costs under rule 10 of the 2008 R ule s (or rule 9 of the 2014 R ule s) is to be exercised with significant restraint. In particular, the parties and their representatives must realise that these powers are of a fundamentally different character from

the procedural provisions and practices found in the courts and some tribunals, whereby costs regularly “follow the event”; in other words , where a successful party will normally be awarded his or her costs.

29.
Cancino is also important for making it plain that “detailed examinations of other decided cases in the determination of wasted costs applications” are “unlikely to serve any useful purpose, descending into the less than fruitful exercise of simply comparing the facts of the instant case with those of other cases” (paragraph 22).

30.
In the present case, we are entirely satisfied that the appellants’ application for costs must fail. In the particular circumstances, the respondent did not act unreasonably.

31.
In the present case, the respondent was, we find, entitled to reserve her position regarding ground 1. Importantly, she had not been sent a copy of Mr Ali’s signed witness statement or the other significant materials, described in paragraph 12 above, which had been before the First-tier Tribunal Judge who had granted permission to appeal. It was only at the hearing before Upper Tribunal Judge Southern that the responde nt was made aware of this evidence. As Upper Tribunal Judge Southern’s d ecision makes plain, it was at this point that the respondent’s Presenting Officer conceded that Judge Majid’s decision did, indeed, contain an error of law.

32.
We do not find it was unreasonable of the respondent to reserve her position , notwithstanding that the grounds of application for permission to appeal had been settled by Counsel and set out times of communications between the appellants’ solicitors and the First-tier Tribunal’s administration, which we can now see corresponded with the accompanying evidence. In sayi ng this, we are not to be taken as casting any aspersion upon the professionalism of Mr Jesurum or Everest Solicitors.

33.
For the respondent, Mr Wilding emphasised the discretionary nature of rule 24. The respondent, in an appeal in the Upper Tribunal brought by the original appellant, has liberty to file a response. T here is no duty on her to do so. Although we agree that it would be wrong to construe the power in rule 10 to award costs so widely as, in effect, to turn the rule 24 power into a general duty, th e submission goes too far. There will be cases where (regardless of whether the respondent files a response), she will be at risk of costs for unreasonable behaviour; for example, if she does not concede an appeal which is, on the facts of which she is aware, simply bound to succeed. That, however, is not the position in the present case.

34.
So far as ground 1 i s concerned, we have found that, in the particular circumstances of this case , the respondent was entitled not to make the concession recorded in the Upper Tribunal’s decision , until the issue regarding accompanying evidence had been clarified, at the Upper Tribunal hearing.

35.
We must deal with Mr Wilding’s submission that, even if the respondent had conceded the error of law issue before the date of the hearing in the Upper Tribunal, one could not categorically say that the hearing would not still have taken place. The withdrawal of the respondent’s case, as contained in the rule 24 response, would have required the Upper Tribunal’s consent, pursuant to rule 17. The Upper

Tribunal would, in particular, have needed to be satisfied that the agreed error of law was a material one and that, if the First-tier Tribuna l's decision w ere set aside, remittal to the First-tier Tribunal was, in all the circumstances, the appropriate course. Once the notice of h earing in the Upper Tribunal ha d been sent ou t, one could well see that the Tribunal, faced with such a "concession" by the respondent, might reasonably have conclude d that the overriding objective would be best served by having these matters dealt with at a hearing. In such a scenario, any claim for costs w ould have to demonstrate that the need for a substantive hearing could have been avoided by conceding the case before (perhaps significantly before) the case was listed for hearing.

36.
What we have just said applies to both grounds 1 and 2. So far as ground 2 itself is concerned, however, we agree with Mr Wilding that it was not unreasonable for the respondent to decline to concede the appeal on that ground . Unlike ground 1, where the issue was procedural fairness, ground 2 depended upon Judge Majid's error being material to the outcome of the appeal. We note that Upper Tribunal Judge Southern's decision makes it plain that, at the hearing before him, the respondent 's Presenting Officer did not make a concession in respect of ground 2 . It is, we consider, noteworthy that the Article 8 issue remains firmly in contention between the parties, as can be seen from what happened at the remitted hearing.

37.
For these reasons, the appellants' appl ication for costs fails.

8. Power of review

38.
The circumstances of this case raise a procedural point of some general significance.

39.
I n common with the rule s of other Chambers of t he First-tier Tribunal, rule 34 of the 2014 Rules requires the Immigration and Asylum Chamber of the First-tier Tribunal, upon receiving an application for permission to appeal to the Upper Tribunal, to consider whether to review the appeal decision under section 9 of the Tribunals, Courts and E nforcement Act 2007. Rule 35 provides that a review may only be undertaken (a) on receiving such an application and (b) if the First-tier Tribunal is satisfied "that there was an error of law in the decision" (our emphasis); not merely that there was arguably such an error.

40.
S ection 9 provides as follows:-

" **Review of decision of First-tier Tribunal**

(1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).

(2) The First-tier Tribunal's power under subsection (1) in relation to a decision is exercisable—

(a) of its own initiative, or

(b) on application by a person who for the purposes of section 11(2) has a right of appeal in respect of the decision.

(3) Tribunal Procedure R ule s may—

(a) provide that the First-tier Tribunal may not under subsection (1) review (whether of its own initiative or on application under subsection (2)(b)) a decision of a description specified for the purposes of this paragraph in Tribunal Procedure R ule s;

(b) provide that the First-tier Tribunal's power under subsection (1) to review a decision of a description specified for the purposes of this paragraph in Tribunal Procedure R ule s is exercisable only of the tribunal's own initiative;

(c) provide that an application under subsection (2)(b) that is of a description specified for the purposes of this paragraph in Tribunal Procedure rule s may be made only on grounds specified for the purposes of this paragraph in Tribunal Procedure R ule s;

(d) provide, in relation to a decision of a description specified for the purposes of this paragraph in Tribunal Procedure R ule s, that the First-tier Tribunal's power under subsection (1) to review the decision of its own initiative is exercisable only on grounds specified for the purposes of this paragraph in Tribunal Procedure R ule s.

(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—

(a) correct accidental errors in the decision or in a record of the decision;

(b) amend reasons given for the decision;

(c) set the decision aside.

(5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either—

(a) re-decide the matter concerned, or

(b) refer that matter to the Upper Tribunal.

(6) Where a matter is referred to the Upper Tribunal under subsection (5)(b), the Upper Tribunal must re-decide the matter.

(7) Where the Upper Tribunal is under subsection (6) re-deciding a matter, it may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-deciding the matter.

(8) Where a tribunal is acting under subsection (5)(a) or (6), it may make such findings of fact as it considers appropriate.

(9) This section has effect as if a decision under subsection (4)(c) to set aside an earlier decision were not an excluded decision for the purposes of section 11(1), but the First-tier Tribunal's only power in the light of a review under subsection (1) of a decision under subsection (4)(c) is the power under subsection (4)(a).

(10) A decision of the First-tier Tribunal may not be reviewed under subsection (1) more than once, and once the First-tier Tribunal has decided that an earlier decision should not be reviewed under subsection (1) it may not then decide to review that earlier decision under that subsection.

(11) Where under this section a decision is set aside and the matter concerned is then re-decided, the decision set aside and the decision made in re-deciding the matter are for the purposes of subsection (10) to be taken to be different decisions.”

41.
As we have seen, the First-tier Tribunal Judge who granted permission to appeal had before her not only the grounds of appeal but, importantly, the signed witness statement of Mr Ali and the other evidential materials mentioned in paragraph 12 above. The cumulative effect of these materials was to make it evident that Judge Majid had proceeded under a material misapprehension. He had committed an error of fact going to procedural fairness, which was in the circumstances plainly an error of law .

42.
The First-tier Tribunal Judge was, accordingly, in a position to see that the submissions recorded in the gr ant of permission, taken from the groun ds of application, were fully made out. In the circumstances, th e First-tier Tribunal , in our view, would have been entitled to undertake a section 9 review and conclude (on the well-known E & R pr inciple) that Judge Majid's decision contained an error of law, not merely an arguable one : see paragraph 40 above .

43.
Appl ying section 9, the Tribunal could , in these circumstances, have issued a review decision, finding such an error and setting aside Judge Majid's decision. The n ature of the error was plainly such as to require the decision in the appeals to be re-made by the First-tier Tribunal.

44.
This case is, in short, a good example of the usefulness of the power of review in section 9. Instead of granting permission to appeal, with its attendant inevitable delay, recourse to review would have meant the appeals would have be en re-heard, in all probability long before December 2017 , without the Upper Tribunal being involved .

Signed Date: 1 5 January 2018

The Hon. Mr Justice Lane

President