IN THE UPPER TRIBUNAL **Case No** HS/3083/2017
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is dismissed. The costs decision of the First-tier Tribunal dated 2 August 2017 under reference EH335/17/00004 did not involve the making of an error of law.

REASONS FOR DECISION

1. In a case that is unusual, if not unique so far in the life of this Chamber of the Upper Tribunal, the appellant local authority had sought an award of costs against the second respondent ("the representative"), who had been the representative of the first respondent ("the parent") in proceedings before the First-tier Tribunal.

2. The application was refused by Judge Tudur DCP and the local authority appealed, with my permission. Neither party seeks an oral hearing of the appeal, to hold one would be likely to add significantly to the doubtless already high costs of this satellite litigation, I have received detailed written submissions and I am satisfied that I can properly decide the case without one.

3. The case concerns a relatively small sum of money: the claim is for £1829.22 and, as will be seen, even that figure is arrived at by what I regard as the unjustifiable inclusion of one element of the costs claimed.

4. The representative is closely associated with a registered charity which assists parents of children with special educational needs. He is a volunteer but the charity is paid a fee of around £1000 by parents who require representation. The charity does not confine itself to any one geographical area, but a significant proportion of its cases are drawn from that of the local authority. The tenor of much of the correspondence, and the manner in which this litigation has been conducted, does not suggest that relations between the representative and at any rate parts of the local authority are all that they might be. I do not seek to attribute responsibility for that, but I do encourage those concerned to adopt a less adversarial approach.

5. The substantive case, though doubtless, and understandably, important to the parties, was in many ways an unremarkable one. In the usual way, the parties had made attempts to narrow down the issues before the hearing and a succession of working documents, marked up to show the parties' respective proposed amendments and the evidential source for them passed back and forth. By the time of the hearing, version 7 of the working document had been reached (WDv7) and it (but not earlier versions) was before the tribunal. It was only section F of the EHC plan that remained in dispute.

6. It appears that the local authority uses a particular format for section F. This consists of a section F1 in the form of a two column table, with columns

for “Provision actions/interventions to achieve the outcome” and “How/When will we review?” In the former appear a series of bullet points. Section F then sets out a table with 6 columns, respectively headed “Short term targets towards long term outcomes in Section E” “What help do I need to achieve this?” “Who will provide this help?” “How often?” ”Additional Resource implications (time/cost) Budget?” and “Date of Review”. By merging cells in that table a number of rows are created in each of which appears the text of an outcome drawn from section E. Under each outcome so listed, a couple of rows are devoted to providing relevant targets and addressing the questions posed by the headings quoted above in relation to those targets. However, in WDv7, the last two columns were left blank.

7. The position of the parent as set out in WDv7 by the representative was (put shortly) to delete all the material from the six column table and to add it as additional bullet points into the two column table. There were 13 such amendments in all.

8. It is not materially in dispute that the evidential basis for the material so included (by whichever party) was the advice of the local authority’s educational psychologist.

9. I remind myself that EHC plans are regulated by s.37 of the Children and Families Act 2014 and by reg 12 of the Special Educational Needs and Disability Regulations 2014. Materially for present purposes, reg 12(1) stipulates that:

> “When preparing an EHC plan a local authority must set out – (f) the special educational provision required by the child or young person (section F)”.

Para 9.61 of the Code of Practice indicates that “The format of an EHC plan will be agreed locally”, subject to a baseline of the statutory requirements.

10. The hearing took place on 12 May 2017. The local authority had instructed London-based counsel. The representative appeared for the parent. At the outset he gave four reasons behind the amendments to the EHC plan for which he was holding out. The tribunal invited representations in relation to each the 13 amendments, testing them against the four reasons which had been put forward. It rejected each of the four criticisms, for reasons which it gave, found that none of the representative’s points was well-founded and thus declined to make any of the 13 amendments.

11. At the end of the hearing, counsel for the local authority made an application for costs against the parent if the tribunal were to find for his client. The tribunal noted that applications for costs are required to be made in writing but indicated its willingness to give a provisional indication of its view of the application lest such an application be made. This it did in five paragraphs which were basically flagging up points which would need to be considered in the event of such an application. In the course of doing so it did however remark that:

> "The Tribunal has found that none of the parent's proposed amendments had any merit, and that the reasons advanced by [her representative] for making them were misconceived. [Counsel] is correct in characterizing the proposed amendments as drafting points, and not substantive. In the Tribunal's experience, parties who have reached the level of agreement on substantive issues which was reached in this case generally agree a disposal without a hearing."

12. Having flagged up the points, while making clear that the decision was the local authority's it indicated that it

> "questioned whether going through all these stages in the hope of recovering the costs incurred during what may be only a limited period of unreasonable conduct would be proportionate, having regard to the overriding objective set out in Rule 2."

I am doubtful whether the overriding objective could apply to a decision by the local authority whether to proceed with its application; nonetheless, the tribunal's expression of concern for the proportionality (in general terms) of such a step was well made.

13. The tribunal also noted that:

> "whether or not such an application is made on this occasion, it is rare for a parent or her representative in the First-tier Tribunal to be the subject of a credible application for costs. To have been in that position should, the Tribunal suggests, lead to some reflection by [the representative] as to the manner in which he represents those who (presumably) pay for his services."

14. In short, the tenor of its remarks suggested that an application for costs might be "credible" albeit possibly disproportionate. The tribunal's concern for proportionality did not deter the local authority from making its application, to which I turn below. Before doing so, I set out the relevant legislation.

15. Section 29 of the Tribunals, Courts and Enforcement Act 2007 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.
…"

16. Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008/2699 provides:

"(1) Subject to paragraph (2), the Tribunal may 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 the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.

(2) The Tribunal may not make an order under paragraph (1)(b) in mental health cases.

(3) The Tribunal may make an order in respect of costs on an application or on its own initiative.

(4) A person making an application for an order under this rule must—
(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
(b) send or deliver a schedule of the costs claimed with the application.

(5) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 14 days after the date on which the Tribunal sends—
(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b) notice under rule 17(6) that a withdrawal which ends the proceedings has taken effect.

(6) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—
(a) giving that person an opportunity to make representations; and
(b) if the paying person is an individual, considering that person's financial means.

(7) The amount of costs to be paid under an order under paragraph (1) may be ascertained by—
(a) summary assessment by the Tribunal;
(b) agreement of a specified sum by the paying person and the person entitled to receive the costs ("the receiving person"); or
(c) assessment of the whole or a specified part of the costs , including the costs of the assessment, incurred by the receiving person, if not agreed.

(8) Following an order for assessment under paragraph (7)(c), the paying person or the receiving person may apply to a county court for a detailed assessment of costs in accordance with the Civil Procedure Rules 1998 on the standard basis or, if specified in the order, on the indemnity basis.

> (9) Upon making an order for the assessment of costs, the Tribunal may order an amount to be paid on account before the costs or expenses are assessed."

17. The local authority proceeded on the assumption that the parent would not have gone ahead to the hearing without encouragement or advice to do so from the representative and so its primary case was for an award of costs, stated to be under rule 10(1)(b), against the representative. If, and only if that assumption was shown to be wrong did it seek an award against the parent. Its application was limited to costs incurred during a two day period – those of its solicitor and counsel in preparing for and attending the hearing. It referred back to the tribunal's remarks that

> "The Tribunal does not know why the parent and her representative took the approach which was taken in this case. Was it through ignorance? Was it tainted by malice? The Tribunal cannot say without further investigation."

It drew attention to the experience in SEN hearings claimed by the charity under whose auspices the representative appeared and the fees charged, submitting that the decision to persist to a hearing could not have been taken through ignorance. Relying on this it argued that the representative had acted unreasonably in conducting the proceedings and so that the test in rule 10(1)(b) was "manifestly" met. It then submitted that the tribunal's discretion should be exercised in favour of an award of costs, referring to various emails said to display "aggression and personal animus/malice" by the representative against the local authority. It finally submitted that even if the parent had achieved the changes in wording sought at the hearing, that would have been wholly disproportionate to the cost of continuing.

18. The representative provided a lengthy response. Among other things, the response provided a reasoned critique, emphasising the need for sufficient specificity, of the tribunal's findings in support of a submission that

> "it cannot be suggested that the decision actually reached by the tribunal was inevitable or that it could fairly be suggested that there was no merit in any argument put forward on behalf of the [parent]".

It drew attention to relevant authorities, namely *HJ v LB Brent* [2011] UKUT 191(AAC); *Ridehalgh v Horsefield* [1994] Ch 205, *MG v Cambridgeshire* [2017] UKUT 0172(AAC). It pointed out that, in context, the tribunal's rhetorical questioning "Was it through ignorance? Was it tainted by malice?" did not mean that if it was not one, it must be the other and that the evidence did not support malice. It sought to provide context by making a number of criticisms of the local authority's own conduct, including its very late concession of a change in the school to be named. It suggested a degree of personal animus on the part of the local authority. It submitted that it could hardly be characterised as disproportionate to proceed to a hearing, when the local authority considered the remaining issues so important that it instructed counsel, when the parent had a lay representative. It challenged the amount claimed on a number of grounds, including the inclusion of the costs of the attendance by the local authority's solicitor and the amount of the cost of preparing the costs application. Finally, it made a number of more general

points about the negative implications for the provision of the services of representatives in this jurisdiction if a costs order were to be made against a volunteer representative.

19. Judge Tudur had permitted the local authority to make any final comments, which it did, in a submission running to a further 12 pages. The local authority criticised the representative's submission for being unevidenced. It submitted that the amendments sought were in fact less specific than those the local authority had included; in any event, it was submitted that a perceived lack of specificity was not the true reason for proceeding but rather an unhappiness with the layout of the plan. Case law was briefly reviewed. There was no principle that because counsel had been instructed, the appeal must have had some merit. The appellant is not a volunteer but is paid £1000 for a hearing. Charitable status should not be a shield to escape the operation of the rules provided by Parliament.

20. The representative sought permission to comment on the local authority's "final comments" and filed those comments, to which the local authority promptly objected.

21. After such an assiduously pursued exchange, Judge Tudur was not lacking in rival contentions as to the context or submissions as to what followed. In a decision dated 2 August 2017, running to 18 paragraphs, she rejected the application for costs. She set out s.29 and rule 10 (see [15] and [16] above) and the overriding objective (which, as she was being asked to exercise a power under the rules, was relevant). She directed herself in the following terms:

> "8. Unreasonable conduct is a precondition to ordering costs. Unreasonable conduct is conduct which is vexatious, designed to harass the other side even if as a result of excessive zeal and not improper motive. The test is whether conduct permits of a reasonable explanation." (*HJ v Brent* and *Ridehalgh v Horsefield* cited).

She then set out an extract from *MG* (a decision now reported as [2017] AACR 35):

> **"Guidance**
> The exception rather than the rule
> 26. It is crucially important for me to begin by emphasising that nothing in this decision should be taken as encouraging applications for costs. The general rule in this jurisdiction is that there should be no order as to costs. There are good and obvious reasons for the rule. Tribunal proceedings should be as brief, straightforward and informal as possible. And it is crucial that parties should not be deterred from bringing or defending appeals through fear of an application for costs.
>
> 27. Furthermore, tribunals should apply considerable restraint when considering an application under rule 10, and should make an order only in the most obvious cases. In other words, an order for costs will be very much the exception rather than the rule. The observations of Openshaw J in *In the matter of a Wasted Costs Order made against Joseph Hill and Company Solicitors* [2013] EWCA Crim 775, albeit made in the context of wasted costs orders in criminal proceedings, are no less relevant to applications for costs under rule 10:

> "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."

22. She summarised the local authority's grounds in terms which, as criticism is made of them in the present appeal, I set out verbatim:

> "11. The LA relies on the following grounds: that the parent would not have continued to substantive appeal hearing "without encouragement or advice to do so by her representative" and urges the tribunal in the absence of evidence to the contrary to reach the same conclusion.
>
> 12. Secondly, the LA relies on the comments of the tribunal in its decision issued on the 25 May 2017 where there was discussion of the potential application for costs at paragraph 27 of the decision and a submission that the representative, by comments on the charity's website and claims for fees for representation in appeals could not be ignorant of the position relating to the appeal, and ought to have known the legal and costs consequences of his actions.
>
> 13. Finally, the LA submits that the conduct of the representative more generally should be brought into consideration and the tone and nature of pre-hearing correspondence from him included in the consideration of the evidence in support of the conclusion that his conduct was unreasonable."

23. Judge Tudur noted how, "unusually", the tribunal had set out its concerns about the representative's conduct. She noted that the representative's comments and disagreement with the decision was not relevant to the costs application". Her conclusion was expressed thus:

> "17. The threshold set for a conclusion that a party acted unreasonably is a high one, and in this case I am not satisfied that it has been met. There was a large volume of email correspondence between the parties in the final stages of the appeal and agreement on the issues in the appeal were *(sic)* not substantially made until two days prior to the hearing. It is of concern that the issues in the appeal could not have been resolved by discussion and negotiation, however, the time for such discussions between the LA's concession in relation to Section I and the hearing was short. If the time between the concession and the hearing had been longer and the representative had not taken time to reflect on the position and the merits of proceeding to hearing, then the position might have been diferent.
>
> 18. I conclude therefore on the facts and the information before me that the LA in this case have not demonstrated that the parental representative or the parent has been unreasonable in the conduct of the appeal to the extent that the high threshold set by the legislation and the caselaw is met."

24. It appears to me that there may be some ambiguity in the costs provisions: in particular, does a power to award costs against a representative arise only under section 29(4), so as to be permitted under r.10(1)(a), or can the power under r.10(1)(b) also be used to make an award of costs against a representative? Unreasonable conduct is a feature common to both, the point has not been raised by the experienced QC now acting for the representative, I have no wish to introduce additional layers of

complication into this satellite litigation and, as my conclusion for the reasons below is that (assuming in the local authority's favour that the power under r.10(1)(b) is potentially available) Judge Tudur did not err in law in her decision in relation to its exercise, I do not pursue the point of construction further here.

25. A different judge of the First-tier Tribunal refused permission to appeal. The local authority criticises the grounds for that refusal at some length. I have taken those criticisms into account in the conclusions I have reached, but as the appeal is against Judge Tudur's decision, not the refusal of permission to appeal against it, it is on the former that I concentrate. I address each of the local authority's grounds of appeal in turn.

26. I note that there was evidence from the parent that it was her decision to proceed to a hearing, but the local authority's application was made against the representative. The local authority no longer pursues a fall-back application for costs against the parent. It is a matter of dispute whether and to what extent, even if that was the parent's decision, the representative was instrumental in the decision to proceed to a hearing, but I do not need to linger on it because Judge Tudur's decision, even effectively assuming that the representative was instrumental in the decision to proceed, was that costs should not be awarded against him.

Ground 1: "Failure to correctly apply the legal test or set out adequate reasoning evincing the same"

27. The ground criticises the decision for relying, without more, on the fact that the threshold is a "high one". The criticism is misplaced in that the tribunal did not so rely on it; rather it (quite correctly in view of the authorities) used it as a yardstick by which to evaluate the material before it.

28. I do not agree with the local authority that the tribunal was right to identify the irrelevance of the representative's criticism of the tribunal's substantive decision. The point being made was that though the parent may have lost on the points, they were not hopeless ones. The arguability of an ultimately unsuccessful point is not irrelevant to consideration of the reasonableness of actions: see *Buckinghamshire CC v ST* [2013] UKUT 468 (AAC) at [26]. On this point I respectfully differ from Judge Tudur, but it does not help the local authority.

29. The tribunal did not fail to set out any reasonable explanation. Its explanation was to be found in the shortness of time between the local authority's concession on a key aspect and the hearing. That was to be distinguished from a situation where the representative might have had more time to reflect.

Ground 2: "Reliance on irrelevant consideration"

30. The local authority submit that the final five lines of para 17 of the costs decision was a fundamental misunderstanding of fact, amounting to a legally irrelevant consideration. The local authority attributes to Judge Tudur the view that the representative had failed to respond to the offer because of taking time to reflect. That, however, is not what her decision says. In my view its natural reading is that if more time had been available, a representative who failed to reflect would be open to criticism. Though she does not say it, the implication is that more considered reflection might have been expected had more time been available. But the key factor is a reluctance to second guess decisions taken when there is a shortage of time. The local authority's point in its Reply in the Upper Tribunal proceedings that the representative had taken a positive step to reject the offer of settlement the day before the hearing and thus that more time would have made no difference does not in my view undermine Judge Tudur's reasoning. It is unsurprising that the representative felt the need to reply to the latest offer of settlement before the hearing due to take place the following day; that response may conceivably even have been a poor reflection on his judgment (I am not in a position to say) but, as found by Judge Tudur, taken under time pressure did not amount to unreasonable conduct for cost purposes.

31. The local authority submit that the lateness of the offer is also irrelevant. The point is in my view grossly overstated. It does not amount to "a rule that any attempt at settlement two days (or more) from the hearing cannot achieve the avoidance of proceedings", nor is it an "unlawful fetter" and contrary to the statutory intent. The judge was simply addressing the facts of this particular case and evaluating them, as she was required to do. Contrary to the submission, the ruling does not (or should not) remove the incentive on local authorities to seek even late settlement, first because they ought to be seeking to reach agreement where possible in the interests of the child concerned, secondly because even if late agreement is reached it may save the authority's own resources from needing to be deployed in a hearing and thirdly because even late settlement affords the local authority (and the other party) the advantage of certainty, compared with the potential for a specialist tribunal exercising an inquisitorial jurisdiction to take an independent-minded view, different from what either party may have anticipated. The local authority's further submission that the ruling "incentivis[es] representatives to reject such offers as a means of ensuring a substantial appearance fee (as here)" is disingenuous. If all that is meant is that in this case a substantial fee was payable, that appears to have been true. If what is being said is that in this case settlement was rejected in order to obtain the fee, I have not been taken to any evidence that that was so and can find none. It might have been wise to have avoided what is at best an unfortunate ambiguity and at worst an apparently unwarranted smear.

32. The local authority then submit that there is not a scintilla of evidence that the representative would have changed his mind even if he had had longer to

reflect. That is true, but none is to be expected or required. Judge Tudur was engaged in an evaluative process, using her experience of cases in the jurisdiction, to say in effect that she would regard pressing on on doubtful grounds as more culpable when a person has had more thinking time than in cases where he has not. That is applying an objective test, in the sense in which the local authority's submission uses the term and as it contends should be done.

Ground 3: "Frustrating Parliamentary intent and the operation of Parliamentary legislation"

33. The local authority is of course right to note that save where express provision is made otherwise (as in relation to mental health cases), rule 10 has to be applied. It further notes, correctly, that reg 40 of the former SENDIST Regulations referred to "wholly unreasonable" conduct , whereas r.10 refers to "unreasonable" conduct. However, given how on the authorities "unreasonable" is to be understood in the present context, any difference between "wholly unreasonable" and "unreasonable", though it may exist, is liable to be very small indeed.

34. The local authority submits that if the facts of this case were held not to amount to unreasonable conduct, then the rule 10(1)(b) threshold is raised to the point of inaccessibility. This, it seems to me, is an attempt to dress up disagreement with Judge Tudur's conclusion as a point of law. In its Reply in the Upper Tribunal proceedings, the local authority submits that it is not arguing the decision was perverse, but rather that it is an instance of a decision frustrating the purpose of secondary legislation. However, either Judge Tudur was entitled to conclude that the representative's conduct did not amount to unreasonable conduct for the purposes of rule 10, when it is interpreted in the light of the legislative history, or she was not. Perversity, as noted, is not alleged. I cannot see how taking a non-perverse decision consistent with the legal framework can be said to be frustrating the purpose of the secondary legislation, when it appears when interpreted in the light of the authorities to envisage a judge making precisely the sort of evaluative determination which Judge Tudur carried out.

35. The authority argues that all that was left were

> "minor changes to the wording that could be raised in relation to every EHCP issued by a local authority, however lawfully Parts B, F and I are rendered, and even when, as in this case, the wording of the EHCP was directly copied from the agreed evidence of the [local authority's] educational psychologist."

However, an appeal to the First-tier Tribunal is not confined to the legality of a local authority's actions but also extends to disputes of fact and seeking the application of informed judgement. Nor should it be overlooked that, as noted in *East Sussex CC v KS (SEN)* [2017] UKUT 273(AAC)

> "an EHC plan is used to fulfil a number of roles: for instance, as a procedural document for use in the classroom, as a list of what needs to happen and as a form of pleading before tribunals. I accept that it may have that multiplicity of roles and that each may have differing implications for how it is drafted. A document for use by

> professionals delivering services to a child or young person it may be, yet its statutory underpinning means that it also defines rights and responsibilities."

I consider therefore that there may be occasions when matters of drafting can legitimately be raised, even where the authority's preparation of the plan is legally compliant.

36. The complaint that the only way for a local authority to get out of a hearing would be to agree what it categorises as the de minimis linguistic changes proposed in this case would be to agree them can be met by the answer that whether or not to do is is a matter for it, in which it would have to weigh up the inconvenience of having its lawfully adopted EHCP format varied versus the inconvenience and cost of attending a (probably short) hearing. The appeal to the authority's fiduciary duty to ratepayers and council tax payers is misconceived: of course an authority has to have regard to that duty in the discharge of its functions, but it cannot be relied upon to create an artificially favourable legal position for it to get out of something merely because it would cost the local tax payers money. Sometimes in litigation it is necessary to take things on the chin.

37. Nor, contrary to the local authority, does the ruling absolve an appellant from all agency in determining whether proceedings should continue. The arguments at [36] above apply mutatis mutandis.

Ground 4: "Failure to grapple with relevant considerations"

38. The authority's complaint is that Judge Tudur's decision in paras 11-13 "inaccurately and erroneously delimited the submissions made by the local authority". It is said that this is apparent from "the briefest perusal of the LA's submission" and "the greatest scrutiny of the FtT decision". In the criticism of the refusal of permission below, the considerations said to have been overlooked are those identified in paras 9 to 11 of the local authority's costs application. Judge Tudur was writing a decision on a piece of satellite litigation. She was applying the procedure rules and was required to apply the overriding objective, which does require consideration of proportionality. As already noted, the period of time concerned was short and the sum claimed small. Further, she was writing not for a wider audience but for parties who knew what submissions had been made. She was entitled to summarise. Para 9 of the application is sufficiently reflected in para 12 of the decision; para 10 of the application in para 13 of the decision; and para 11, containing arguments as to the proportionality of proceeding to hearing, while not summarised within the same structure, is dealt with implicitly throughout and in particular in the conclusion at para 17. Judge Tudur's point that "the position might have been different", had the representative had more time available to him, is an acceptance that with time, additional continuing reflection would have been possible which might have led him not to proceed to a hearing. Her decision rests not on a conclusion that proceeding was, contrary to the local authority's position, not disproportionate but rather that - even if it was or might have been - it was not unreasonable for the representative, in the short time available, to fail to perceive that.

39. I would add, though it is academic in the light of the conclusion I have reached, that I can see no warrant for including in the costs claimed the cost of attendance, travel and waiting by the local authority's solicitor, a Principal Solicitor with over 8 years post qualification experience, when counsel was instructed. Shortly before the hearing the authority had made an application for the solicitor to attend for reasons of his professional development, which was granted. If he was attending for such a reason, that is perfectly legitimate, but there would be no reason why, even if the local authority's application for costs had succeeded generally, another party should foot the bill for it. It is not readily possible to see any other reason why the attendance of a relatively senior solicitor was required to sit behind counsel in such a straightforward case. I do not consider it necessary to address other issues on quantum in view of the decision I have reached.

40. The local authority suggest that it would assist the FtT by giving guidance that such matters should remain with and return to the FtT judge who set them in train. It seems to me that that is not matter for me. The composition of tribunals is dealt with by Practice Statements made by the Senior President of Tribunals, whilst the allocation of judges within the framework of the Practice Statement is a matter for the First-tier Tribunal.

41. I can understand that the remarks of the FtT judge in the substantive decision may have to a degree encouraged the local authority as to the potential merits of a costs application, though not as to the proportionality of pursuing it. Further, whilst I have come firmly to the view that Judge Tudur's decision did not involve the making of an error of law, aspects of it required a degree of evaluation and interpretation which is why, having decided to pursue its application to the Upper Tribunal, the local authority succeeded in obtaining permission to appeal.

42. Whatever the position in relation to this particular case, speaking more generally *MG v Cambridgeshire* is a reported decision of this Chamber of the Upper Tribunal. The criteria for reporting a decision include that

> "it commands the broad assent of the majority of the salaried Upper Tribunal Judges of the Chamber who regularly determine appeals in the jurisdiction to which the decision relates or which engage the issues that merit the decision being reported"

and for my own part, I respectfully agree with Upper Tribunal Judge Rowley's remarks in that case cited at [21] above.

CG Ward
Judge of the Upper Tribunal
31 January 2018