Neutral Citation Number: [2017] EWCA Civ 352

Case No: C1/2015/0848

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
ADMINISTRATIVE COURT
HIS HONOUR JUDGE WORSTER (sitting as a High Court Judge)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2017

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE DAVID RICHARDS
and
THE RIGHT HONOURABLE LORD JUSTICE MOYLAN

- -

Between:

THE QUEEN (ON THE APPLICATION OF GUDANAVICIENE)	**Appellant**
- and -	
IMMIGRATION AND ASYLUM FIRST TIER TRIBUNAL	**Respondent**

- -
- -

Mr Richard Drabble QC & Mr Ranjiv Khubber (instructed by **Turpin Miller LLP**) for the **Appellant**
Mr Alex Hutton QC & Mr Paul Joseph (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 27th April 2017

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Approved Judgment

Lord Justice Longmore:

Introduction

1. The issue in this appeal is whether the First Tier Tribunal should be ordered to pay the costs of a successful application to judicially review its decision to refuse an adjournment of an appeal.

2. On 7th September 2012 Ms Teresa Gudanaviciene (to whom I shall refer as "the appellant") was convicted of unlawfully wounding her partner pursuant to section 20 of the Offences Against the Person Act 1861. She had stabbed him with a knife. She was sentenced to 18 months imprisonment. The Secretary of State for the Home Department decided on 10th December 2012 to deport the appellant but after much litigation she has been allowed to remain.

3. She was able to instruct solicitors, Turpin & Miller LLP ("Turpins") who lodged a notice of appeal to the First Tier Tribunal ("the FTT") on her behalf but she had no money of her own. Legal Aid is not available in deportation cases unless an Exceptional Case Determination ("ECD") is made by the Director of Legal Aid Casework to grant Exceptional Case Funding ("ECF"). This can only be done under section 10(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 if failure to make the service available would be a breach of

> "(i) the individual's Convention rights (within the meaning of the Human Rights Act 1998) or
>
> (ii) any rights of the individual to the provision of legal services that are enforceable EU rights,"

or if there is a risk that such failure would be such a breach. Turpins applied for ECF but the application was refused in early July 2013. They requested a review but the decision was maintained on 26th July 2013. It was, therefore, necessary to seek permission for the Director's decision to be judicially reviewed.

4. The FTT conducted a case management review hearing ("CMRH") of the appeal on 5th August 2013 which was not attended by either Turpins or the appellant but Turpins did write to the FTT requesting the appeal to be adjourned. There were further CMRHs on 30th October and 4th November 2013 at which it was decided that the appeal would be heard after 2nd January 2014. That decision was maintained in spite of further letters requesting an adjournment on the basis that application was being made to judicially review the refusal of the Director to grant ECF. The response from the Resident Judge of the FTT was that the FTT was not concerned with funding. (This was an unappealable decision for reasons explained in para 36 below).

5. Turpins then informed the FTT that they would have to apply for judicial review of the refusal of an adjournment of the appeal pending the resolution of the application for judicial review of the decision of the Director to refuse ECF. They made an ex parte paper application to Jay J who directed the appeal be so adjourned. He gave both the FTT and the Secretary of State permission to set aside his order on 48 hours notice but neither the FTT nor the Secretary of State availed themselves of that opportunity or took any other part in the judicial review application.

6. The solicitors then applied for the costs of the judicial review proceedings against the FTT to be paid by the FTT. That application was refused by HHJ Worster on the basis that costs would only be ordered against a tribunal if there had been a "flagrant instance of improper behaviour on its part" as required by R (Davies) v Birmingham Deputy Coroner [2004] 1 WLR 2739 and that no such behaviour had occurred. Lloyd Jones LJ has granted permission to appeal on the sole ground that it is arguable that the test laid down in Davies should be modified in the light of subsequent authority. The question for us is thus whether, in the light of authority subsequent to Davies, the FTT should be ordered to pay the costs of the successful ex parte application before Jay J.

Factual Background in more Detail

7. Between May and October 2013 Turpins entered into correspondence with the Legal Aid Authority ("the LAA") and the Lord Chancellor in order to obtain funding under the ECF regime for the FTT appeal. The LAA and the Lord Chancellor refused to accept that the case required ECF.

8. The FTT appeal was listed for a second CMRH on 30th October 2013. By letter of the same date Turpins wrote to the FTT

   i) apologising for their non-attendance at the CMRH listed on that day. This was because they did not have funding to represent the appellant;

   ii) saying that were continuing in their attempts to resolve the funding issue in relation to the FTT appeal with the LAA. They had recently received funding to proceed with a judicial review against the LAA and this was to be issued shortly;

   iii) stating that they were aware that family court proceedings in relation to the appellant and her daughter were due to be listed for a hearing on the first available date after 1st November 2013; the outcome of those proceedings was likely to have a significant impact on the extant deportation appeal;

   iv) requesting an adjournment so that the case be listed not before 30th December 2013, when a better understanding could be given as to the funding position and how the parallel family proceedings would impact on the extant appeal; and

   v) further requesting the FTT to consider making a direction that funding be provided, or a direction that in the absence of such representation there was a real risk of injustice. They relied on the recent observations by the (then) President of the Immigration and Asylum Chamber Mr Justice Blake in the case of Farquharson [2013] UKUT 146 (IAC) at para 93.

   No response was received to this letter before the next CMRH on 4th November.

9. At that CMRH the FTT ordered that the matter be listed to be heard after 2nd January 2014, irrespective of the family proceedings having been completed by then.

10. The appellant lodged her application for judicial review challenging the decision to refuse ECF legal aid on 12th November 2013.

11. By letter dated 18th November 2013 Turpins wrote again to the Tribunal and requested an adjournment of the FTT appeal that was now listed for 8th January 2014. The letter stated that:

    i) the adjournment request was made pursuant to Rule 21 of the Asylum and Immigration Tribunal (Procedure) Rules;

    ii) the FTT had previously been notified of the steps that were being taken to secure funding from the LAA and that a judicial review claim was due to be issued. That claim had now been issued and was listed for a hearing on 15th January 2014; and

    iii) the solicitors requested that the hearing of 8th January 2014 be adjourned in order to allow the High Court to consider the outstanding judicial review claim against the LAA. Further, it was suggested that the FTT matter could be listed for a further CMRH which would allow the FTT to be updated on developments in relation to the now extant judicial review of the refusal of legal aid.

12. By letter dated 22nd November 2013 the FTT responded refusing the request for an adjournment and saying:-

> "Reasons
>
> At the hearing on the 4th November the judge directed the appeal to be heard after the 2nd January 2014 irrespective of Family Court Proceedings being completed or not.
>
> In the Interest of Justice, Rule 4 overriding public interest in this matter being concluded will be over a year's delay in this case already."

13. Turpins responded to this letter on 6th December 2013:-

    i) once again relying on Rule 21 of the procedure rules for the purposes of their adjournment request;

    ii) saying that the claim against the funding decision made by the LAA was currently with the Administrative Court. A directions hearing had occurred on 3rd December 2013 before Simler J where various directions were made including that the matter was to be listed for 2 days as a rolled up hearing;

    iii) repeating their request that the FTT appeal be adjourned in the light of importance of the issues in the appeal to the claimant, the wider public interest and the application to adjourn the appeal being necessary in the interests of justice; and

    iv) requesting that the matter be listed for review after 3rd February 2014.

14. By letter of 9th December 2013 the FTT responded again refusing the adjournment request and saying:-

> "The application by the appellant for the adjournment of the hearing of this appeal from 8th January 2014 is refused for the following reason(s);
>
> **The Resident Judge indicates that the Tribunal is not concerned with funding**."

15. In the light of this response Turpins, pursuant to the relevant Pre-Action Protocol, sent a detailed letter before claim dated 11th December 2013 challenging the refusal to adjourn. In essence they submitted that the decision to refuse to adjourn and the reasons for maintaining that decision were contrary to a proper interpretation of the FTT procedure rules and the common law including the guidance given in the reported deportation appeal of Farquharson. The letter requested a response by 18th December 2013.

16. By letter dated 11th December 2013 the FTT responded maintaining its previous decision to refuse to adjourn. It stated:-

> "The Resident Judge indicates that the decision of the 6th December 2013 is repeated. The issue is one of funding and the appellant is legally represented."

17. By letter dated 13th December 2013, Turpins said:-

    i) the reference in the response to the appellant being legally represented was incorrect – the appellant's solicitors were representing the appellant in the judicial review claim against the LAA and the purpose of that challenge was to allow funding to permit the claimant to be legally represented at the FTT appeal; and

    ii) they were unable to represent the appellant at the FTT appeal as they had no funding and the request for an adjournment was made to assist in the claimant being funded.

18. The letter requested an urgent response by the end of the day. The FTT responded maintaining its previous decisions by letter dated 16th December 2013.

19. On 19th December 2013 the appellant lodged her claim for judicial review challenging the refusal of the FTT to agree to adjourn the matter. By order dated 30th December 2013 Jay J ordered that the substantive deportation appeal should not take place until the determination of the appellant's challenge in relation to the refusal to grant ECF. The FTT then, in the light of Jay J's order, agreed to adjourn the deportation appeal proceedings. The parties further agreed to resolve the issue of costs through the court making a decision on written submissions filed and served by the parties.

20. By an order made on 7th November 2014 (dated 14th November 2014) the Administrative Court made no order for costs. HHJ Worster said:-

> "1. The principles applicable are those set out in R (Davies) v Birmingham Deputy Coroner [2004] EWCA Civ 207.

> 2. The defendant filed no acknowledgement of service and did not actively resist the application.
>
> 3. The defendant adjourned the appeal before it after the service of these proceedings. Whilst the effect of that adjournment, the interim order made by Jay J and in the events which have happened, the claimant has in effect obtained the relief sought in these proceedings, the established practice of the Court when dealing with an inferior tribunal is to make no order for costs against such a defendant unless there was some flagrant instance of improper behaviour on its part.
>
> 4. Whilst it may be that this defendant made an error, nothing it did or did not do amounted to improper behaviour in that sense."

21. Turpins have in fact provided sterling service to the appellant since not only was the judicial review application of the refusal of the adjournment successful but so also was the judicial review of the refusal of ECF before both Collins J [2014] EWHC 1840 and this court [2014] EWCA Civ 1622; [2015] 1 WLR 2247. The result of her obtaining legal aid was that the appellant's appeal to the FTT was allowed on 27th May 2015, and that decision was subsequently upheld by the Upper Tribunal on 9th March 2016, despite the Secretary of State appealing the first instance decision.

22. It is worth pointing out that the FTT was correct to observe on 22nd November 2013, when refusing an adjournment, that over a year had passed since the date of the appellant's conviction on 7th September 2012. Nearly two and a half more years were to elapse before the conclusion of the appellant's appeal. No doubt when refusing the adjournment the FTT had regard to the overriding objective contained in Rule 4 of the Asylum and Immigration Tribunal (Procedure) Rules 2005:-

> "The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest."

It may also have had in mind Rule 21(2):-

> "The Tribunal must not adjourn a hearing of an appeal … unless satisfied that the appeal cannot otherwise be justly determined."

Grounds of Appeal

23. The first ground of appeal was that the FTT had played an active role in the litigation and that, even in the light of Davies, that justified an order for costs being made against it. Lloyd Jones LJ refused to grant permission for this ground. He only granted permission for the second ground of appeal namely that

> "the approach to costs subsequent to relief being obtained should be less restrictive [than that set out in Davies] and closer to the

> approach taken in R (M) v Croydon London Borough Council [2012] EWCA Civ 595; [2012] 1 WLR 2607."

That accordingly is the only issue before the court; in essence the question is whether the approach of M (that a judicial review claimant who obtains the relief which he seeks, whether by court order or settlement, should normally be awarded his costs) should be applied not only in cases where costs are sought against the other party to the proceedings, such as a government department or local authority, but also in cases where the only other party is the tribunal which has made the decision subject to judicial review.

Two lines of authority

24. There is, of course, a well trodden line of authority to the effect that a successful litigant should be awarded her costs, unless there is good reason to make a different order. That is the starting point for any decision about costs as now set out in CPR rule 44.3(2). Difficulties may arise if proceedings are settled without reference to costs; if a court agrees (or is required) to consider costs in those circumstances, it will endeavour to determine who would have won but, if it cannot do so, the normal order is no order as to costs. R (Boxall) v Waltham Forest London Borough Council (2000) 4 CCLR 258 set out some applicable guidelines:-

> "(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs; (ii) It will ordinarily be irrelevant that the claimant is legally aided; (iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs; (iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties; (v) In the absence of a good reason to make any other order the fall back is to make no order as to costs; (vi) The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage."

25. These guidelines may not always have been applied in judicial review cases where, if a settlement was reached and a consent order made, it was not unusual for there to be no order as to costs. M changed that culture, in so far as it existed, and decided that, if the consent order gave the claimant substantially what she was seeking, she should have her costs.

26. These cases were, however, cases in which there was a defendant government department or local authority who was originally resisting the order sought but then settled the claim. They were not cases where a tribunal (or other court inferior to the High Court) was itself the only defendant against whom a costs order was sought.

27. As far as that situation is concerned there is a different line of authority exemplified by R (Davies) v Birmingham Deputy Coroner [2004] 1 WLR 2739 which held that an order for costs should only be made in favour of a successful claimant against an inferior tribunal if the tribunal appeared in court otherwise than in a neutral way or there had been a flagrant instance of improper behaviour. Otherwise there should be no order for costs. It was this line of authority which was followed by HHJ Worster and the question is whether he was right to do so.

28. Davies itself was a case where the defendant was a coroner who, according to Moses J at first instance, had rightly refused to hold an inquest but wrongly (as a result of subsequent development in the law in R (Khan) v Secretary of State for Health [2004] 1 WLR 971) according to this court. The claimant sought costs against the coroner, there being no other defendant. The coroner appeared below and in this court and played a full part in the argument. He was ordered to pay costs in this court but not the costs below. This court undertook a comprehensive review of the circumstances in which an inferior tribunal to the High Court could itself be liable for costs if it failed to uphold its own order; it expressly considered the position of magistrates and tribunals as well as the coroner.

29. The substantive judgment of the court was delivered by Brooke LJ with whom both Sir Martin Nourse and I agreed. He said (para 3) that four issues arose for consideration:-

> "(1) What is the established practice of the courts when considering whether to make an order for costs against an inferior court of tribunal which takes no part in the proceedings, except, in the case of justices, to exercise their statutory right to file an affidavit with the court in response to the application? (2) What is the established practice of the courts when considering whether to make an order for costs against, or in favour of, an inferior court or tribunal which resists an application actively by way of argument in the proceedings in such a way that it makes itself an active party to the litigation? (3) Did the courts adopt an alternative established practice in those cases in which the inferior court of tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction and procedure and such like but did not make itself an active party to the litigation? (4) Whatever the answers to the first three questions, are there any contemporary considerations, including the coming into force of the Civil Procedure Rules 1998, which should tend to make the courts exercise their discretion as to costs in these cases in a different way from the way in which it was regularly exercised in the past?"

Having considered a large number of authorities, he then concluded (paras 46-47):-

> "This judgment has been necessarily a long one, … because with the impending advent of a new Tribunals Service it seemed an opportune moment to state authoritatively the way in which the courts have exercised their discretion in these matters in the past, and to identify what are the governing principles today.

> It will be apparent from this judgment that the answers to the questions I posed in para 3 above are: (1) the established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings; (2) the established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event; (3) if, however, an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application; (4) there are, however, a number of important considerations which might tend to make the courts exercise their discretion in a different way today in cases in category (3) above, so that a successful applicant, like Mr Touche, who has to finance his own litigation without external funding, may be fairly compensated out of a source of public funds and not be put to irrecoverable expense in asserting his rights after a coroner, or other inferior tribunal, has gone wrong in law, and [where] there is no other very obvious candidate available to pay his costs."

30. In the circumstances of the present case in which the FTT made no appearance before the Administrative Court and the claimant has not been granted permission to argue that there was any flagrant instance of improper behaviour on the part of the FTT (or that the tribunal unreasonably declined to sign a consent order to dispose of the proceedings), the right order on the basis of the Davies line of authority would be, as HHJ Worster decided, no order for costs. We are, of course, bound by the decision in Davies unless it can be said that it has been superseded by subsequent legislation or authority. That indeed was the submission of the appellant. The appellant was herself only marginally interested in the outcome since it was Turpins who financed the challenge to the refusal of the FTT to adjourn her appeal pending final determination of her application for ECF; it is Turpins who have the real interest in the success of the appeal. The appellant's case is not therefore similar to that of Mr Touche, referred to in para 47(iv) of the judgment in Davies who had financed the entire litigation himself.

Submissions

31. Mr Richard Drabble QC for the appellant relied on both the advent of the Civil Procedure Rules ("CPR") with their emphasis on Pre-Action Protocols and what he characterised as the "new approach" to costs in judicial review cases exemplified by M whereby there was no longer any presumption of "no order as to costs" when cases were conceded or settled. He pointed out that Brooke LJ had accepted (para 44) that it was arguable that the approach of earlier authority should be revisited in the light of

(inter alia) the codifying of the costs rules in the CPR and that this was one of the considerations which Brooke LJ would have had in mind as perhaps tending to make courts exercise their discretion in a different way today.

32. He relied further on the dicta of Lord Hope of Craighead in In re appeals by Governing Body of JFS [2009] 1 WLR 2353 in which a successful party to litigation in the Court of Appeal sought (and was refused) protection as to costs in an appeal to the Supreme Court. Lord Hope said (para 25):-

> "It is, of course, true that legally aided litigants should not be treated differently from those who are not. But the consequences for solicitors who do publicly funded work is a factor which must be taken into account. A court should be very slow to impose an order that each side must be liable for its own costs in a high costs case where either or both sides are publicly funded."

It should, however, be noted that these obiter comments were made in relation not merely to a case where there was an ordinary defendant (rather than a judicial tribunal) but also to a high costs case which the present case is not.

33. As far as M was concerned, Mr Drabble submitted that it was now clear that the prima facie position in public law cases was that a successful party (and particularly a claimant who had complied with the relevant pre-action protocol) should recover her costs unless there was a good reason to depart from that normal rule. The fact that that position applied to settlements as much as to orders made after application (or trial) reinforced the normal position, when there was a trial (or, as here, an ex parte decision which a defendant could (but did not) apply to have set aside). The dicta of Lord Hope had been referred to with approval. He relied on the conclusion of Lord Neuberger MR at para 52 that public law claims are:-

> "… subject to the CPR, and a successful claimant who has brought such a claim is just as much entitled to his costs as he would be if it had been a private law claim. The court's duty to protect individuals from being wronged by the state, whether national or local government, is every bit as vital as its duty to enable them to vindicate their private law rights. And the fact that the defendants are public law bodies should make no difference"

He submitted that in the light of this paragraph 47 of the judgment of Brooke LJ could no longer be regarded as good law and that the logic of Lord Neuberger's judgment (with which Hallett and Stanley Burnton LJJ agreed) is that the concept of the "state" must include not merely national or local government bodies but also its judicial system.

Decision

34. To my mind Mr Drabble puts altogether too much weight on this court's decision in M. In the first place M was a case in which there was an identifiable authority which was a party to the litigation and it was that party who was liable to pay costs. Here there is no such party: the Secretary of State was, of course, a party to the appeal which the FTT

declined to adjourn; if the Secretary of State had unsuccessfully opposed the judicial review application to set aside that refusal, no doubt the Secretary of State could have been ordered to pay the costs. But the Secretary of State played no part and was therefore not amenable to a costs order. It does not follow (neither does M require) that the FTT itself should be liable for the costs. M did not consider the liability of inferior tribunals for costs orders at all, while Davies did. It is, therefore, Davies by which this court is bound.

35. Secondly M did not, in reality, constitute a new approach. In the first place it did not change the position as far as orders of the court were concerned. In such cases it is (and always has been) axiomatic that, if there was a substantial defendant who opposed the order made, that defendant should pay the costs, in the absence of strong reason to the contrary. The only way in which M could be said to have made new law was in relation to settlements but even in that respect its "newness" is more apparent than real. Guideline (iv) of Boxall presupposed that costs would be awarded to a party in "cases where it is obvious which side would have won"; in the absence of that position guideline (v) provided for no order as to costs. It was only "at first sight" (M para 58) that there was any tension between the rule that the winner should get her costs and the fifth guideline of Boxall. But on closer analysis there was "no inconsistency" (para 59) because the winner always got costs in the absence of good reason and guideline (v) of Boxall applied if the claimant obtained "only some of the relief" sought. In that "more nuanced" situation, M decided that "no order" might not be the right order in every case since it might be appropriate to assess the degree of success. It was only in this limited situation that M can be said to have broken new ground. That "new ground" has no relevance in the present case in which there is no doubt that the appellant was the victor and the only question is whether she should obtain an order for costs against the counter-party to the litigation. On this question M is silent and cannot be said to have departed from or overtaken the principles set out in Davies.

36. Thirdly, there are good reasons why M makes no mention of claims for costs against tribunals. Any consideration of the topic would have to take into account not only the stream of authority of which Davies is only the culmination but also the novelty of the idea that any tribunal should, as a matter of normal course, be liable for paying the costs of setting aside one of its orders if the party against whom proceedings are brought does not seek to defend the tribunal's order. The proposition for which Mr Drabble contends might apply to appeals just as much as to judicial review, at any rate if the tribunal were joined as a party to the appeal. The present case is only brought by way of judicial review rather than by way of appeal to the Upper Tribunal because it is an excluded decision pursuant to section 11(1) and 11(5)(f) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") and Article 3(m) of the Appeals (Excluded Decisions) Order 2009 made under that section. It would be a serious step to say that in any undefended appeal or judicial review, the tribunal would be at risk as to costs and any such conclusion cannot be implied into the decision in M. If such a step is to be taken, it cannot be by a court of co-ordinate jurisdiction with the court which decided Davies.

37. Any such step would, moreover, be a substantial inroad into the normal rule of judicial immunity. Mr Alex Hutton QC for the FTT made it clear that he did not submit that there was an absolute bar to holding the FTT liable in costs (indeed in the case of truly flagrant improper behaviour the tribunal would be liable even though it was constituted

by holders of judicial office) but he did submit with some force that there should be no such general extension of the kind contemplated by Mr Drabble's submission, since it would be inconsistent with the normal principle of judicial immunity set out in Sirros v Moore [1975] QB 118.

38. A further problem might be that, whereas there are express statutory provisions whereby coroners are indemnified in respect of any personal liability for costs (see Davies para 2), we were not shown any similar provision indemnifying members of the First Tier Tribunal all of whom (not merely the Resident Judge whom we understand to have been Judge Renton at the material time) might therefore be exposed to an unindemnified personal liability. There is no indication in the legislation that the FTT has a separate legal personality. Section 3(3) of the 2007 Act merely provides that the FTT (and the Upper Tribunal) is to consist of its judges and other members.

Conclusion

39. I would therefore reject the sole ground of appeal before this court and dismiss this appeal.

Lord Justice David Richards:

40. I agree.

Lord Justice Moylan:

41. I also agree.