In the Upper Tribunal (Immigration and Asylum Chamber)

R (on the application of Bakhtiyar) v Secretary of State for the Home Department (Costs on AoS) IJR [2015] UKUT 519 (IAC)

Heard at
Field House on
19 and 20 May 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE CLIVE LANE

Between

The Queen on the Application of
MAZANOV BAKHTIYAR

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Mr A Tear of Duncan Lewis Solicitors appeared behalf of the Applicant.

Ms N Greaney, instructed by the Government Legal Department appeared on behalf of the Respondent

1. *The costs recoverable by the respondent on a Mount Cook basis include the costs incurred in considering whether to contest the claim and, if so, summarising the grounds of defence; they are to be assessed on the same basis as if the respondent had engaged a solicitor in private practice.*

2. *The respondent in cases nominally brought against the Secretary of State is the government, and it is the government's costs that are recoverable.*

3. *Internal payments and charges within government are not an indication of the government's recoverable costs, and cannot therefore demonstrate a breach of the indemnity principle.*

4. *A rate of charge for the AoS that is below the relevant Guideline Hourly Rate for the relevant grade of lawyer is not shown to be unreasonably high and will be allowed on summary assessment.*

DECISION ON COSTS

Background

1. The applicant, a national of Azerbaijan, came to the United Kingdom on 13 October 2013. Although he had a visit visa (valid for only a short time thereafter) he was refused entry as a visitor. He thereupon claimed asylum. He was refused asylum; an appeal was dismissed and permission to appeal to the Upper Tribunal was refused. On 6 December he made an application for assisted voluntary return to his own country, and by 9 December all his appeal rights had been exhausted. His application for assisted voluntary return was approved, whereupon he withdrew it. On 3 January 2014 removal directions were set for 10 January. On 6 January he made further submissions, and on 9 January, the day before his proposed removal, he filed a judicial review application with the Upper Tribunal, also seeking urgent consideration and interim relief by way of a stay on his removal.

2. The application for interim relief was dealt with by Judge Latter who granted the stay, but observed as follows:

> "Whilst I have considerable concerns about why further representations relying on a newspaper article published on 5 December 2013 were only made on 8 January 2014 when notice was given on 3 January 2014 of removal directions for 10 January 2014, I cannot at this stage discount the possibility that the application for a fresh claim might not be completely devoid of merit. In these circumstances I am satisfied that this is a proper case for a stay on removal pending consideration of the fresh claim and in particular the provenance and reliability of the newspaper article relied on, and if an adverse decision is reached, the applicant and his representatives having a reasonable opportunity of considering a decision."

3. The next step was for the Secretary of State to put in her acknowledgement of service and summary grounds ("AoS"). The AoS was submitted on 20 February 2014. The Secretary of State also sought prompt consideration of the applicant's claim, because he remained in detention. The summary grounds of defence run to 11 pages; 22 pages of documents are appended to them. The grounds begin by setting out the recent history, including reference to a new decision dated 20 February 2014. They then set out the applicant's immigration history at paragraph 3. Paragraphs 4 to 26 set out the relevant law in general terms. Paragraphs 27 to 28 summarise the applicant's grounds. Paragraphs 29 to 33 set out the respondent's case. Paragraph 34 summarises the latter, and seeks an order that the applicant pay the respondent's costs for "filing the Acknowledgement of Service, summary assessed at £400 (based on 2 hours time spent at £200 per hour)". The appended

documents include the respondent's decision letters of 16 January 2014 and 20 February 2014, both of which post-date the issue of the claim.

4. The application for permission came before Judge Storey on the papers. He refused permission. He noted as follows:

> "In November 2013, the First-tier Tribunal had concluded that the Applicant had not given a credible account of risk on return in Azerbaijan. The Respondent has since considered the new evidence relied on by the Applicant, including the newspaper and online articles, and was quite entitled to find that it was unreliable, applying Tanveer Ahmed principles.
>
> As regards Article 8, it is clear that the applicant could not meet the requirements of the Immigration Rules. The evidence placed before the Respondent – on the Applicant's own account he had only come to the UK in October 2013 – failed to disclose any compelling or exceptional circumstances such as might justify a grant of leave outside the Immigration rules on Article 8 grounds.
>
> The Respondent was entitled to conclude that there was no realistic prospect of a hypothetical tribunal judge applying anxious scrutiny and considering both the new materials and those considered previously, finding in the Applicant's favour."

5. Judge Storey also directed that oral renewal of the application for permission was not without further order to operate as a bar to the applicant's removal from the United Kingdom.

6. There has, so far as we are aware, been no subsequent challenge to those parts of Judge Storey's order. It is not now suggested that the applicant's claim is, or ever was, properly arguable.

7. Judge Storey also ordered the applicant to pay the respondent's costs of the AoS in the sum of £400, unless within seven days from the date of his decision the applicant notified the Tribunal in writing that he objected to paying costs, or to the amount to be paid, in either case giving reasons. It is the issue of costs that remains outstanding. Again through his solicitors, the applicant appears to acknowledge his liability in principle to pay costs, but objects to the amount. The objection has, in the time since Judge Storey's order, separated into two strands. The first strand relates to the time spent on preparing the AoS. On considering the applicant's challenge, the Government Legal Department conceded that the charge for two hours' work was incorrect: the appropriate charge was for one hour, twelve minutes, that is to say twelve (6-minute) units of time.

8. The second strand of challenge, the live issue before us, relates to the Government Legal Department's hourly rate. The applicant argues that the Secretary of State is not entitled to costs based at a rate of £200 per hour, for two reasons. First, he asserts that costs paid at that level would breach the indemnity principle: that is to say, the Secretary of State would receive more than she is required to pay the Government Legal Department for the latter's services. Secondly, the applicant claims that the amount of £200 an hour is unreasonably high.

The legal structure

9. The application before us raises issues in relation to five separate but interlocking principles. The first, the "Mount Cook principle", is derived from the decision of the Court of Appeal in Mount Cook Land Ltd and another v Westminster City Council [2003] EWCA Civ 1346. In judicial review proceedings a defendant who has filed an AoS and successfully resists the application for permission is generally entitled to recover the costs of doing so but (again generally) no more than that. Mount Cook itself is largely concerned with the circumstances in which such a defendant may be awarded the costs of attending an oral permission hearing, but it confirms the decision of Collins J in R (Leach) v Commissioner for Local Administration [2001] EWHC 445 (Admin) in relation to the costs of the AoS. The reasons why those costs are recoverable is that given by Collins J and summarised in Mount Cook at [54]:

> "Since the new procedure imposes on a defendant who seeks to take part in and contest a judicial review claim an obligation to file an acknowledgment of service containing a pleading of his case, it is only fair that he should be awarded his costs if, as a result, he successfully resists it at the permission stage."

10. In the course of his submissions, Mr Tear argued that Mount Cook costs are limited to the actual acknowledgment of service itself, that is to say (in time terms) the time spent in filling in the form and writing the summary grounds of defence, with no allowance for reading the file or other preparation. We suppose that submission is based on a phrase used by Collins J in Leach at [15], where he refers to the 'costs incurred in actually producing the acknowledgement'. But the submission is clearly wrong. As Auld LJ giving the lead judgment in Mount Cook said at [51]:

> "There is now a positive obligation on a defendant or other interested party served with the claim form to acknowledge service and to consider in doing so: 1) whether to contest the claim, and, if so, on what grounds and at what stage; and 2) if he decides to contest it, to summarise his grounds at the permission stage."

11. That is the obligation imposed on the defendant, and it follows that that is the work for which he can claim his costs. An interpretation of the principle as allowing costs only for a lesser amount of work would be inconsistent with the reasoning of both Collins J and the Court of Appeal.

12. The second principle is the "indemnity principle". An award of costs is compensation (or, more usually, partial compensation) for the successful party's expenditure on legal advice and assistance. The award of costs is made to the party, but it is not intended to enable the party to make a profit. Therefore the award may not exceed the party's legal costs. So far as solicitor and client costs are concerned, the indemnity principle is traceable back as far as Harold v Smith (1860) 5 H & N 381. It appears in s 60(3) of the Solicitors Act 1974, but the statement of the principle is there confined to cases 'to which a contentious business agreement relates'. However, the principle in statutory form goes back at least to the proviso to s 5 of the Attorneys and Solicitors Act 1870, and in Eastwood (which we discuss below) Brightman J (sitting with assessors at first instance) noted at pp.120-1 that

there is no difference in principle for these purposes between the effects of a contentious business agreement where a solicitor is paid a salary or retainer and the Crown's use of the Treasury Solicitor.

13. The third principle is the "summary assessment principle". Where costs are assessed summarily, the amount ordered to be paid will be the amount sought in the statement of the successful party, subject to reduction or refusal for any claim that is unreasonable or disproportionate. The process is not a detailed examination, which is a different process. It follows from this principle that, where there is to be summary assessment, a small difference between what is sought and what might have been obtained after detailed assessment does not affect the award.

Eastwood

14. The two remaining principles are derived from RC Eastwood deceased, Lloyds Bank v Eastwood [1975] Ch 112, a decision of the Court of Appeal, of course binding on us. The litigation in Eastwood was a construction summons of a will involving charitable gifts. The Attorney General was therefore involved and was the eleventh defendant. Following the resolution of the litigation, the Attorney General, who had been represented throughout by the Treasury Solicitor, sought his costs. The amount sought, in addition to £73 disbursements, was £130, all properly described as "profit costs", that is to say costs other than disbursements. Of the £130, £75 was justified as "instructions for hearing". It was expressed to include the perusal and consideration of the originating summons, will, affidavits and exhibits and opinions of counsel, and also various attendances, conferences and letters, and:

> "General consideration, care and conduct of this fairly troublesome matter on behalf of HM Attorney-General, over a period of some two years, the case being dealt with throughout by a senior solicitor".

15. The reported litigation relates solely to that £75. The Taxing Master proposed reducing the amount to £45, and made a decision to that effect despite the objections of the Attorney General. Based apparently on what he thought was a concession by the Attorney General, he decided that £45 "is adequate to cover the actual costs incurred in doing all the work done". The additional £30 "therefore represents the fee which would have been charged to his client by a solicitor in private practice for the general care and conduct of the matter and in recognition of the legal knowledge and professional skill brought to the matter by the solicitor; that is, shortly put, the profit element". He decided that, because of the indemnity principle, if a party uses a solicitor in salaried employment, "the bill of costs may not include any sum for care and conduct which is in the nature of profit".

16. As Brightman J pointed out in hearing the Attorney General's appeal against the Taxing Master's decision, there is an element of ambiguity in the use of the word "profit". All of the £75 was claimed as "profit cost"; the £30 represented what he called the "top part": the bottom part was the profit costs attributable to the salary of the solicitor engaged in the case in the Treasury Solicitor's office and the other

expenses of the office. Brightman J accepted the advice of the assessor sitting with him, which was that the usual practice at the time in taxing a bill of costs was to quantify the amount of work done and attribute to it an appropriate hourly rate, including a reasonable estimate of the overhead expenses of the solicitor's firm and salaries. This was described as the "A" element. To this would be applied a discretionary uplift, the "B" element reflecting further profit costs. Brightman J was persuaded by the arguments of counsel for the executors that where the solicitor is a salaried solicitor, the A element accounts for all the costs actually incurred by that party and that to add a B element would therefore infringe the Indemnity Principle. He accordingly endorsed the decision of the Taxing Master.

17. The Attorney General appealed to the Court of Appeal, which as Brightman J had also done, reviewed the authorities. In the Court of Appeal, the Attorney General made it clear that the concession apparently relied upon by the Taxing Master had never been made. The Court took the view that, whatever may be the general approach in relation to taxing the costs between a solicitor and a private client, the AB approach only works on the basis that there is going to be a B element. As Russell LJ, who gave the judgment of the Court, said (at p.131):

> "If you embark on an AB exercise, in which A is really meaningless unless accompanied by B, you cannot stop short with A alone. If it were, because it is not a case of an independent solicitor, inappropriate to use the AB exercise at all, some quite different exercise would be called for."

18. In argument, Mr Peter Gibson (as he then was) pointed out that there is no good reason for supposing that, in general, the remuneration of employed solicitors will be less than the remuneration of solicitors in private practice. The cost of providing the appropriate part of the remuneration lies with the litigant in either case. Russell LJ cited the following example (ibid):

> "Suppose a solicitor in independent practice with an assistant solicitor, two legal executives, clerks and typists and other overheads, who in year 1 works in fact exclusively for corporation X. For year 2 it is arranged that his whole office and staff is taken over as a department of corporation X, the solicitor also becoming an employee of the corporation at a salary commensurate with a profit made by him in year 1 doing the corporation's legal work. Suppose that in year 1 the corporation was successful in a piece of litigation in which in fact one of the legal executives did all the work: in taxing the corporation's costs the taxing master would apply the A and B conventional method and the figure for the discretionary item would be £75. Suppose in year 2 the corporation is successful in exactly comparable litigation, again with the legal executive doing the work: if the method of taxation adopted in this case were followed, only A (£45) would be allowed for the item, though the change would not have effected any saving to the corporation, who, instead of paying the profit to the solicitor in respect of that litigation, would have paid to him the equivalent in the form of a proportion of his salary. This example seems to us to demonstrate that there must be something wrong in an approach which uses only the A of the A B conventional method in the case of an employed solicitor."

19. Russell LJ went on to say that the Court of Appeal viewed "with horror" the immensity of the task of calculating, for each piece of litigation, the actual cost of all

the resources used, in an organisation employing its own solicitors: there might be rare cases where the taxed costs would exceed what was necessary for the purposes of indemnity, but even that was preferable to a detailed calculation in all cases. The conclusion was summarised in four propositions as follows:

> "(1) It is the proper method of taxation of a bill in a case of this sort to deal with it as though it were the bill of an independent solicitor, assessing accordingly the reasonable and fair amount of a discretionary item such as this, having regard to all the circumstances of the case.
>
> (2) There is no reason to suppose that the conventional A B method is other than appropriate to the case of both independent and employed solicitor.
>
> (3) It is a sensible and reasonable presumption that the figure arrived at on this basis will not infringe the principle that the taxed costs should not be more than an indemnity to the party against the expense to which he has been put in the litigation.
>
> (4) There may be special cases in which it appears reasonably plain that that principle will be infringed if the method of taxation appropriate to an independent solicitor's bill is entirely applied: but it would be impracticable and wrong in all cases of an employed solicitor to require a total exposition and breakdown of the activities and expenses of the department with a view to ensuring that the principle is not infringed… ."

20. The decision in Eastwood has survived attacks in the High Court in Maes Finance Ltd v W G Edwards & Partners [2000] 2 Costs LR 198 (Elias J) and in the Court of Appeal in Cole v British Telecommunications plc [2000] 2 Costs LR 310. In the latter case the principle of assessing costs as though they were the costs of a privately engaged solicitor was applied despite the fact that the successful defendant supplied figures said to be the hourly costs of solicitors in its legal department that were not immediately reconcilable with the bill of costs it had tendered. Both those cases, like Eastwood itself, demonstrate the difficulty in the case of an employed solicitor, of determining to which of A and B a particular item of costs should be attributed.

21. In terms of the A B method, the decision in Eastwood has no doubt been overtaken by the introduction of composite fees and guideline hourly rates. That, however, is a mere matter of the method of calculation. Eastwood is clear authority for the proposition that the process of calculation of the costs to which the successful party has been put by the litigation is the same whether that party has engaged a solicitor in private practice or employed a solicitor as part of his or its organisation. That principle, which we call the "employed solicitor principle", is the fourth of the five principles to which we referred earlier.

22. The fifth principle we will call the "presumed indemnity principle". It is to be derived from para (4) in the Court's conclusions in Eastwood. It is perhaps not entirely clear whether the Court was saying that in a "reasonably plain" case the calculation should be undertaken, or whether it was saying that even in such a case the calculation should not be undertaken. Bearing in the mind the status of the

indemnity principle, however, and the Court's use of the phrase "in all cases" (our emphasis), we are prepared to assume that the Court considered that in a case where it was "reasonably plain" that the indemnity principle would be infringed, a more detailed calculation might be necessary.

23. In the present case, the applicant accepts the position as set out by Eastwood. He accepts both the employed solicitor principle and the presumed indemnity principle. He submits, however, that this is a case where it is reasonably plain that the indemnity principle will be infringed if the Secretary of State's costs are awarded on the basis upon which she has claimed them.

The representation of the Respondent

24. In this litigation, the respondent is represented by the Government Legal Department, under the Treasury Solicitor. The Treasury Solicitor is incorporated as a corporation sole by the Treasury Solicitor Act 1876. The Treasury Solicitor's department and staff, called since 1 April 2015 "The Government Legal Department", is a non-ministerial department of government: it is an executive agency. It represents a large number of government departments in litigation and assists in other legal matters. Since 1991 it has operated a system under which it charges for legal services supplied to other government departments and agencies. (Here and elsewhere we make our findings of fact about the nature and practice of the Treasury Solicitor and the Government Legal Department on the basis of witness statements by Tim Hurdle, the department's finance director, Caroline Featherstone, a deputy director and James Heyhoe, a grade 6 lawyer).

The applicant's submissions

25. The introduction of the Treasury Solicitor's billing system means that identifiable sums of money passed between the Government Legal Department and other departments. Mr Tear bases his submissions about breach of the Indemnity Principle on his identification of such sums of money and the relevant charging rates. In order to understand what is meant by phrases such as "employed solicitor" and "party to litigation" in a case like this, and like Eastwood, where the successful party is represented by the Government Legal Department we must make an excursus into the nature of government. We do that with the assistance of the speeches of the House of Lords in Town Investments Ltd & others v Department of the Environment [1978] AC 359.

26. Statutory counter-inflation measures in force in the early 1970s prevented an increase in rent on the renewal of certain business tenancies. For present purposes it is sufficient to say that the impact of the relevant provision, article 2(2) of the Counter-inflation (Business Rents) Order 1972 was limited to:

> "Any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes… ."

27. The Minister of Public Buildings and Works, and his successor, the Secretary of State for the Environment (to whom the relevant functions were transferred in 1970) had as one of his functions the provision of accommodation for civil servants employed in all departments of government. In the exercise of that function the minister took leases of office buildings in Oxford Street and North Audley Street in London. They were occupied as government offices, housing civil servants and others undertaking a variety of business including, for reasons which are likely to remain mysterious, an agency of the US Navy in a large part of one of the buildings. At no relevant time was anyone in the buildings occupied in the work of the Ministry of Public Buildings and Works or of the Department of the Environment. On the expiry of the leases in 1972, the landlords offered to grant renewed leases at substantially increased rents. They could do so only if the counter-inflation provisions did not apply. At first instance and in the Court of Appeal the landlord succeeded on the ground that the tenant was the person named in the lease, that is to say the Minster of Works and his successor the Secretary of State for the Environment, and that, as no part of either of the premises was occupied "for the purposes of a business carried on by him", article 2(2) did not apply. The House of Lords reversed the decision of the Court of Appeal by a majority: the leading speech was given by Lord Diplock; Lord Morris of Borth-y-Gest was the only dissentient. The speeches raise a number of issues, only one of which is relevant for present purposes.

28. So far as concerns the issue we have identified, Lord Diplock said that it was necessary to decide who the tenant was. The Court of Appeal was wrong to treat this:

> "as a pure question of construction of the leases themselves, as if Her Majesty, the Ministry of Works and the Secretary of State for the Environment were all persons to whose relationships to one another and to third parties the ordinary principles and concepts of private law applied."

The truth of the matter is that:

> "It is not private law but public law that governs the relationships between Her Majesty acting in her political capacity, the government departments among which the work of Her Majesty's government is distributed, the ministers of the Crown in charge of the various departments and civil servants of all grades who are employed in those departments. … [Acts of government are commonly attributed to 'the Crown', but some difficulties of comprehension could be] eliminated if instead of speaking of 'the Crown' we were to speak of 'the government' – a term appropriate to embrace both collectively and individually all of the minsters of the Crown and parliamentary secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. It is through them that the executive powers of Her Majesty's government in the United Kingdom are exercised, sometimes in the more important administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of government that are done by any of them are acts done by any of them are acts done by 'the Crown' in the fictional sense in which that expression is now used in English public law. … The leases were executed under his official designation by the Minister of the Crown in charge of the government department to which, for administrative and accounting

> purposes, there is entrusted the responsibility for acquiring and managing accommodation for civil servants employed in other government departments as well as that of which the minister himself is the official head. In my opinion, the tenant was the government acting through its appropriate member or, expressed in the term of art in public law, the tenant was the Crown."(at 380-381)

29. Thus, the distinction between different departments and their minsters was for these purposes irrelevant. The tenant was the government, and the business done in the premises was government business. The counter-inflation provisions applied.

30. In the course of his speech agreeing with Lord Dipock, Lord Simon of Glaisdale remarked at p.399 that "the mere fact of incorporation, which is only for administrative convenience, does not make a Secretary of State or a minister or a ministry an entity separate from the Crown", and at p.400 drew attention to: "The fundamental constitutional doctrine that the Crown in the United Kingdom is one and indivisible". Interestingly, in his dissenting speech, Lord Morris of Borth-y-Gest noted at p.394 that certain provisions of the leases would have "no possible reason" if the tenant is to be regarded as the government as a whole, rather than some smaller unit. But the decision of the majority makes it clear that those considerations simply do not apply. It is a matter subject to the principles of constitutional and public law, not the choices of private law.

31. The present case is not about a lease, nor is it about counter-inflation provisions. It is, however, about government. Town Investments makes a number of things clear beyond argument for the purposes of the present application. First, the respondent, although nominally the Secretary of State for the Home Department is, in truth, the government, or 'the Crown'. Secondly, the Government Legal Department, under the Treasury Solicitor, is part of the same "one and indivisible" entity. Thirdly, the costs that can properly be claimed by the respondent are therefore to be based on the costs to which the government (not merely the Secretary of State or her department) is put to in defending the claim. Fourthly, internal payments, for example between the Secretary of State and the Government Legal Department, cannot be relied upon as demonstrating the cost to the respondent, because neither of them is 'the government' or 'the Crown'. Fifthly, whatever accounting arrangements may be imposed between the Government Legal Department and any other department or agency, the Treasury Solicitor and the Government Legal Department remain part of the executive process of government, part of 'the Crown'. They are the government's in-house solicitor and the payment arrangements do not separate them or give any reason to treat them like a solicitor in private practice engaged by a client.

The finances of the Government Legal Department

32. On behalf of the applicant, Mr Tear has submitted a table of hourly rates for chargeable hours for "Litigation Group, Employment Group and Central Advisory Team" in the Treasury Solicitor's department, current on 25 June 2013. The rates are as follows:

	£
Head of Division	165.00
Senior Civil Service	128.00
Senior Lawyer (G6)	108.00
Lawyer (G7), Junior Lawyer (LO)	93.00
Senior and Higher Executive Officers (SEO, HEO)	78.00
Legal Trainee, Executive and Administrative Officers (ET, EO, AO)	61.00

33. These are the rates at which the work of the Government Legal Department is charged to other departments when that work is subject to an hourly rate. Mr Tear on behalf of the applicant appears to assume that all the work of the respondent was done by a Grade 7 or Junior Lawyer and argues that the appropriate amount is therefore to be based on an hourly rate of £93.00. Any greater recovery by the Secretary of State would, he argues, infringe the indemnity principle, and would obviously do so, because it is clear that the rates in the table are the rates that the Secretary of State pays the Treasury Solicitor or Government Legal Department for services in litigation. If it be said that it is appropriate for the Secretary of State to claim more by way of costs because of some other (and apparently undisclosed) costs of running the Government Legal Department as a whole, that is either an unauthorised process of taxation or a claim by way of costs for more than is required to indemnify against the costs of litigation.

34. The evidence before us shows the following. First of all, the work was undertaken by Mr Heyhoe, whose chargeable rate is £108.00 per hour. In any event, however, the Government Legal Department's billing system is not strictly comparable to the process used by a solicitor in private practice when calculating the charge to clients or *inter partes* costs. There are a number of differences, partly deriving from the simple fact that the Government Legal Department's charges to other departments are calculated on the basis of government policy in such calculations rather than the considerations that apply to the calculation of a bill of costs by a private solicitor. Unlike in the private sector, where the hourly charge relates only to those doing legal work, and thus incorporates the appropriate proportion of any associated clerical work, the Government Legal Department's hourly rates are, as the table shows, charged in relation to each member of staff. Thus in order to discover the chargeable time it is necessary to add the time spent on non-legal work (at the appropriate rate) to time spent on legal work (at the appropriate rate). Secondly, the assessed cost of office overheads is divided equally amongst all members of staff from the head of department down to the most junior. There is no attempt to attribute them to those who in the private sector would be chargeable fee earners. The invoice raised by the Treasury Solicitor, which we have seen in a redacted version, is for £1,518.90 for work and this case, including work by two EOs, two AOs and a Senior Civil Servant.

35. The 2012-13 accounts show that the Treasury Solicitor had in that year a surplus of £3,539,000 (although that is not the difference between the income and the incurred costs). A surplus of this sort may arise because the charging rates are calculated in

advance, based on assumptions about the calls there will be on the time of various members of the department. The Government Legal Department, and the Treasury Solicitor's Department before it, does not seek to make a profit; a surplus of this sort is paid to HM Treasury and becomes part of general government funds.

36. Although the Government Legal Department is required to charge other government departments and agencies for its legal services, there are a number of other costs that are not covered by the chargeable hourly rates. Government Legal Department employees act as advisory lawyers to other government departments. In that capacity they give advice on litigation strategy, and in their capacity as advisory lawyers they may assist in formulating the response to a claim or attend conferences with counsel. The cost of that work is not included in the hourly rate but is paid for by way of a fixed fee paid by the department to the Government Legal Department.

37. There are, in addition, Government Legal Department costs falling generally on the government. HM Treasury and the Cabinet Office incur costs in providing what is described as "oversight, financing, advice and other services (e.g. access to cross-government framework contracts, management of the government estate)". Those costs are costs which, in the private sector, would be incorporated as appropriate, in a fee earner's hourly rate. They do not form part of any charge made by the Government Legal Department to other departments.

38. We therefore reject Mr Tear's submissions in relation to the indemnity principle. The consideration in paragraphs 33 and 35 show that the hourly rate of the lawyer would be the wrong figure to take if the rate paid by the Secretary of State to the Government Legal Department were to be the basis of assessment. The decision in Town Investments shows that all the figures in the table are irrelevant: the costs being repaid are the government's costs, not the sums of money paid by one department to another. No method has been proposed for determining how much of the costs of government are attributable to this application. That task is almost certainly impossible to accomplish accurately, and would be disproportionately expensive.

A reasonable rate

39. As this is a summary assessment there is, finally, the question whether £200 an hour is an unreasonably high rate for the Government Legal Department to charge. There is no direct point of comparison, because nobody else has to defend immigration judicial reviews brought against the Secretary of State. But the rate of £200 an hour is below even the Grade B guideline hourly rate for central London (£242); the hourly rate for someone like Mr Heyhoe, with 8 years' litigation experience would be the Grade A rate of £317 per hour. In the applicant's solicitors' firm, Duncan Lewis & Co, it appears that no work was done by anybody other than a Grade A lawyer, and the work is charged at £350 per hour. There is not the remotest scope for argument that £200 per hour is an unreasonably high rate.

Conclusions

(i) Following Eastwood, the Secretary of State for the Home Department, as a successful party to litigation, is entitled to claim costs calculated in the same way as costs of litigation would be calculated in the private sector. Like any other litigant, she is subject to the indemnity principle, that is to say, the rule that the costs claimed cannot exceed the expense to which the party has been put by the litigation.

(ii) The Secretary of State for the Home Department is the nominal defendant in an immigration judicial review; but the party to the litigation is in truth the government, technically called in public law 'the Crown'.

(iii) Even if the costs were to be calculated on the basis of the amounts of money the Secretary of State pays to the Government Legal Department, it would be wrong to confine the costs to the hourly rate for lawyers, because that rate does not take into account factors which would be taken into account if a charge was being made by a solicitor in private practice to a client. The appropriate sum could only be reached by adding to the lawyer's the rate, the rates for all other members of staff engaged in the work, and a part of the fixed fee paid for advisory lawyers.

(iv) Because, however, the successful party is the Crown, other general overhead costs of the Government Legal Department also fall for consideration and charge. It would be an unrealistically expensive and perhaps impossible task to calculate precisely the costs attributable to the production of an Acknowledgement of Service. The presumption in Eastwood applies. It is not "reasonably plain" that the indemnity principle will be infringed by payment at £200 per hour.

(v) £200 per hour is not, in the circumstances of the case, an amount that is unreasonably high. On a summary assessment there is therefore no basis for interfering with it.

40. We affirm the order in relation to costs made by Judge Storey.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 9 September 2015