Upper Tribunal for Scotland

2025UT42
Ref: UTS/AS/24/0085

DECISION OF

Lady Carmichael

ON AN APPLICATION TO APPEAL
IN THE CASE OF

Social Security Scotland,
per Scottish Government Legal Directorate,

Appellant

- and –

RF,
Per Glasgow Disability Alliance

Respondent

FTS Case reference: FTS/SSC/AE/24/01307

Representation
Appellant: Hannah Russell, Scottish Government Legal Directorate
Respondent: Kevin Johnston, Glasgow Disability Alliance

12 June 2025

Decision

The appeal by Social Security Scotland is allowed. The decision of the First-tier Tribunal for Scotland ("FTS") is quashed so far as relating to mobility activity 1. The matter will be remitted to the FTS which may, but not need, be constituted differently from the tribunal which dealt with the appeal, in relation to mobility activity 1 only.

The tribunal has determined that it does not have jurisdiction to decide the merits of the challenges to the decision of the FTS of which the respondent gave notice in his notice of response.

Reasons

Introduction

1. Following a redetermination, the appellant decided that the respondent was not entitled to Adult Disability Payment ("ADP") under the Disability Assistance for Working Age People (Scotland) Regulations 2022. The appellant's assessment was that the respondent satisfied descriptor (b) in relation to daily living activity 1; descriptor (b) in relation daily living activity 4, and descriptor (b) in relation to mobility activity 2.

2. The respondent appealed to the FTS against the decision of the appellant. The FTS found that the respondent satisfied the descriptors referred to in paragraph 1. It also found that he satisfied descriptor (b) in relation to daily living activity 6; descriptor (c) in relation to daily living activity 9; and descriptor (d) in relation to mobility activity 1.

3. It is not entirely clear from the decision of the FTS exactly what findings the respondent sought in relation to daily living activities 1 and 4 and mobility activity 2. He appears to have contended that he satisfied descriptor (b) in relation to daily living activities, 3, 5 and 6; descriptor (c) in relation to daily living activities 7, 9 and 10; descriptor (e) in relation to daily living activity 4; and descriptor (d) in relation to daily living activity 1.

4. The appellant made an application for review to the FTS, which was also treated as an application for permission to appeal. It then applied for a case management order to permit it to add a ground of appeal. Two grounds of appeal related to the FTS's approach to daily living activity 9, two related to its approach to mobility activity 1, and the final ground was to the effect that the FTS should have specified whether the respondent continued to be entitled to ADP for a fixed or indefinite period. The FTS granted the application for review in part.

5. It is not altogether easy to follow the decision of the FTS on those applications. It did, however, issue an amended notice of decision finding that the respondent satisfied descriptor (b) in relation to daily living activity 9. It also amended the decision notice by adding to a paragraph which summarised its decision as to the points to which the respondent was entitled the following words:

   "This from the relevant date 20th March 2023 for a period of three years."

6. The FTS granted permission to appeal in relation to daily living activity 9 "if the … amendment [to the decision notice] is not accepted". It granted permission to appeal in relation to the question of whether the FTS ought to have applied the reasoning in *MH* v *Secretary of State for Work and Pensions* [2016] UKUT 531, [2018] AACR 12, and in relation to a ground stating that the FTS had erred in law in failing to make adequate findings of fact in support of its conclusions regarding mobility activity 1.

7. In its notice of appeal to this tribunal, the appellant indicated that it was insisting in its appeal only in relation to the approach of the FTS to mobility descriptor 1; it was satisfied with the approach of the FTS on review to daily living activity 9, and to the question of whether the respondent was entitled to ADP for a fixed period or an indefinite period.

8. The respondent lodged a response to the appellant's notice of appeal. As well as responding to the appeal regarding mobility descriptor 1, the respondent complained in relation to the approach of the FTS to daily living activities 5, 7 and 9.

9. The appellant responded, submitting that this tribunal did not have jurisdiction to consider the points of law raised by the respondent in relation to daily living activities 5, 7 and 9, because they had not been the subject of a grant of permission by either the FTS or this tribunal. The appellant did not offer any submissions on the merits of the points raised by the respondent regarding the decision of the FTS regarding daily living activities 5, 7 and 9. After the submission of the notice of appeal, the response to the notice of the appeal, and the response by the appellant to the response to the notice of appeal, I ordered parties to provide further written submissions in relation to the question of jurisdiction. I determined that I could make a decision in this matter without a hearing.

Mobility activity 1

10. This tribunal considered the relevance of *MH* in *Social Security Scotland* v *AH and others* 2024 UT 63. The approach of the FTS to mobility activity 1 is set out at paragraph 41 of its decision. It is plain that it did not construe descriptor (d) for mobility activity 1 as it was construed by the Upper Tribunal in *MH.* That is an error of law. It is material in the context of this case. The fact-finding of the FTS does not engage with the regulations properly construed. It follows that the decision of the FTS must be quashed at least so far as relating to mobility activity 1.

Daily living activities 5, 7 and 9

11. In order to determine whether this tribunal has jurisdiction to consider the points raised by the respondent in his response to the notice of appeal, it is necessary to construe parts of the Upper Tribunal for Scotland Social Security Rules of Procedure 2018 ("the 2018 rules"). Rule 5 provides:

"5.—(1) Subject to any order given by the Upper Tribunal, a respondent may provide a written response to a notice of appeal.
(2) Any response provided under paragraph (1) must be sent or delivered to the Upper Tribunal so that it is received before the end of the period of 30 days beginning with the day on which the respondent is presumed to have received the copy of the notice of appeal as sent by the Upper Tribunal.
(3) The response must state—
(a) the name and address of the respondent;
(b) the name and address of the representative (if any) of the respondent;
(c) an address where documents for the respondent may be sent or delivered;
(d) whether the respondent opposes the appeal;
(e) the grounds on which the respondent relies, including any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely on in the appeal.
(4) The response may include a request that the case be dealt with at a hearing or without a hearing.
(5) If the respondent provides the response to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 8(3)(a) (power to extend time), the response must include a request for an extension of time and the reason why the response was not provided in time.
(6) When the Upper Tribunal receives the response it must send a copy of the response and any accompanying documents to the appellant."

12. Rule 6 makes provision for a further written response by the appellant.

13. The appellant submits that the phrase in rule 5(3)(e), "including any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely on in the appeal" should be construed narrowly. The proceedings which are the subject of the appeal can include only points of law in respect of which permission has been granted. In the present case the FTS did not grant permission in respect of any ground relating to daily living activity 5 or 7. The point of law in respect of which it did grant permission in respect of daily living activity 9 was not identical to the point of law raised by the respondent.

Authorities referred to by the parties

14. Parties drew to the attention of the tribunal three authorities relating not to the 2018 rules, but to Tribunal Procedure (Upper Tribunal) Rules 2008 ("the 2008 rules"), under which appeals to the Upper Tribunal, including appeals to the Administrative Appeals Chamber – which deals with social security appeals – proceed. The appellant relied on the reasoning in: *EG and NG (UT rule 17: withdrawal; rule 24 scope) Ethiopia* [2013] UKUT 00143

(IAC); *HMRC* v *SSE Generation Limited* [2021] EWCA Civ 105. The respondent referred to *Smith (appealable decisions; PTA requirements; anonymity* [2019] UKUT 216 (IAC), [2019] Imm AR 1325. Neither party identified any case in point in relation to social security appeals.

15. *EG and NG* was an appeal brought by the Secretary of State for the Home Department. The First-tier Tribunal ("FTT") allowed the appeals by EG and NG ("the claimants") against decisions to remove them from the United Kingdom on the grounds that they were "foreign criminals" as defined in the UK Borders Act 2007. The FTT allowed the appeals on the grounds that removal would not be compatible with the claimants' rights under Article 3 of the European Convention on Human Rights ("ECHR"), but indicated that it would not have allowed the appeals on Article 8 grounds. If the claimants could have been returned safely, the interference with their family and private lives would have been justified and proportionate. The Secretary of State was given permission to appeal which was unlimited permission to challenge the decision to allow the appeal with reference to Article 3 ECHR. The Secretary of State eventually withdrew her appeal, and explained that it was her intention to seek assurances from the Ethiopian authorities to address the risk that the claimants would be subjected to torture or inhuman and degrading treatment in the event of their return. She intended, if she obtained such assurances, to make a fresh deportation order in each case and certify that any appeal would like to the Special Immigration Appeals Commission ("SIAC").

16. The 2008 rules provided for withdrawal of a case with the consent of the Upper Tribunal. Before the Upper Tribunal had dismissed the case, the claimants lodged grounds under rule 24(3) of the 2008 rules, which related to a respondent's response to the notice of appeal.

17. Rule 24(3)(e) of the 2008 rules as then drafted required the respondent to state in the response:

    "The grounds on which the respondent relies including (in the case of an appeal against the decision of another Tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely on in the appeal".

18. The claimants contended that the FTT should not have concluded that their conduct had deprived them of the protection of the Refugee Convention and the Qualification Directive, and that the FTT had been wrong to conclude that removal would not be a disproportionate interference with the rights protected by Article 8 ECHR. They submitted that the Upper Tribunal should not consent to the withdrawal of the Secretary of State's appeal, as they wished to argue those matters. The existing decision of the FTT would stand as a starting point in any future proceedings before SIAC. Parties agreed that the Secretary of State's decision to withdraw her appeal did not deprive the Upper Tribunal of jurisdiction to hear the appeal unless it had consented to the withdrawal. The Upper Tribunal required to

consider whether the claimants could properly raise the grounds that they did in a rule 24 notice.

19. The Upper Tribunal rejected the claimants' argument that rule 24 had no meaningful content unless it were interpreted to mean, without qualification, that the respondent could raise, without seeking permission, any ground that was unsuccessful before the FTT. Its reasoning appears at paragraphs 46 and 47. The Upper Tribunal sought to distinguish between situations in which a party was seeking a result "materially different" from the one decided by the first instance tribunal, and where a respondent was seeking that the result remain the same, but challenging some of the conclusions reached by the first instance tribunal.

20. In *SSE Generation Limited,* the Court of Appeal of England and Wales reached a similar conclusion as to the construction the rule at paragraphs 77 to 79 of the judgment:

"77. […]I agree with HMRC's submission that rule 24(3)(f) [sic] cannot obviate the need for permission set out in section 11 TCEA . The grounds referred to there are the grounds on which the party relies in its character as a respondent to appeal. Certainly if the respondent succeeded on an issue before the FTT because the FTT accepted one of a number of arguments while rejecting other arguments for the same result, the respondent can raise those unsuccessful arguments if its success is challenged on appeal by the opposing party. But the respondent cannot raise an issue which it lost before the FTT unless it obtains permission to appeal for itself.

78. Mr Peacock argued that the value of the expenditure disallowed by the FTT in respect of the fabrication on site of the 'cut and cover' conduit was comparatively small. It would not have been worth SSE's while to appeal that point in isolation. However, once the appeal was mounted by HMRC, SSE wished to argue that the FTT erred in disallowing that part of the expenditure. It would be wrong, he submitted, to require a respondent in SSE's position to have to lodge its own appeal, without knowing whether the other party is going to bring an appeal first. There is no requirement in the FTT Rules that the opposing party is notified of an application for permission having been made by a party. By the time the respondent is made aware that a successful application has been made either to the FTT or to the Upper Tribunal, Mr Peacock pointed out, the time limit in rule 39 of the FTT Rules may well have passed. That would deprive the respondent of the opportunity then to lodge its own appeal. Mr Peacock submitted that HMRC's concern that a broad interpretation of rule 24(3)(f) of the UT Rules would entitle a respondent to re-run every issue on which it lost before the FTT without the filter of the permission stage was alleviated by the Upper Tribunal's case management powers conferred by rule 5 of the UT Rules. The Upper Tribunal must exercise those powers in a way which gives effect to the overriding objective in rule 2 of dealing with cases fairly and justly, including by dealing with the case in ways which are proportionate. In the present case, the Upper Tribunal expressly considered

whether HMRC had been prejudiced by SSE being able to argue that all the expenditure incurred in the 'cut and cover' conduit and concluded that they had not. Mr Peacock referred to the 'venerable principle' that the task of the FTT and the Upper Tribunal is to arrive at the collection of the correct amount of tax: see *Investec Asset Finance plc and another v HMRC* [2020] EWCA Civ 579 [60] and [100]. He argued that the Upper Tribunal was therefore entitled to give effect to the logic of its conclusion that the FTT had erred in finding that the conduit was an aqueduct.

…

79. Although I accept that a party who has lost on a minor issue may well find itself in the same position as SSE, neither that argument based on practicalities nor the venerable principle can override the statutory requirement for permission to appeal. […] A respondent in the position of SSE which, once an appeal is on foot, wants to reverse a point decided against it in the FTT must apply for permission to the FTT. If the time limit for doing so has expired, it must request an extension of time, giving the reasons why the application notice was not provided in time: see FTT Rule 39(4) . At that stage the FTT will consider whether the proposed appeal meets the test for the grant of permission and whether time should be extended. The latter point will require consideration of how far the respondent's appeal will enlarge the scope of the appeal and whether it is consistent with the overriding objective to grant permission. The fact that the respondent's application would open up several new fronts in the appeal leading to a longer and more complicated hearing, does not rule out the grant of permission. The original appellant is not entitled to insist that the scope of the appeal remains within the limited compass of the grounds that it has raised. The fact that a late application for permission may widen the scope of the appeal is a risk that the appellant takes, if the respondent has properly arguable issues that could result in the appellant being worse off than if they had let the FTT's decision lie."

21. The Court of Appeal referred with approval to the decision of the Upper Tribunal in *Price v Revenue and Customs Commissioners* [2015] UKUT 164 (TCC).

22. In relation to *SSE Generation Limited*, the respondent submitted that counsel for the taxpayer in that case had been wrong in conceding that the Upper Tribunal could not have granted permission to appeal, because there had been no application to the First-tier Tribunal ("FTT"). An application for permission first to the FTT was required by rule 21(2) of the 2008 rules. The Upper Tribunal had power to waive that requirement under rule 7(2) of the 2008 rules. That provision permitted the Upper Tribunal to waive a requirement, where a party had failed to comply with a requirement in the rules. The Upper Tribunal in *EG and NG* had also proceeded on the basis that a failure to apply for permission to the FTT could not be "corrected" by the Upper Tribunal: *EG and NG*, at paragraph 37.

23. In *Smith* a panel of the Upper Tribunal chaired by the Chamber President took issue with that part of the reasoning in *EG and NG*, and referred to the power of the Upper Tribunal to waive a requirement of the rules where a party had failed to comply with that

requirement: paragraph 51. The Upper Tribunal also observed that there was considerable force in a submission to the effect that, in general, it would be undesirable if individuals were encouraged to seek permission to appeal against adverse decisions which, if decided differently, would confer upon them no tangible benefit, given the decision in their favour. Other than in relation to the jurisdiction of the Upper Tribunal to waive the requirement that permission first be sought from the FTT, the tribunal endorsed the reasoning in *EG and NG*.

24. The Upper Tribunal set out its conclusions at paragraph 61.

"(i) […]

(ii) If an appellant's appeal before the First-tier Tribunal succeeds on some grounds and fails on other grounds, the appellant will not be required to apply for permission to appeal to the Upper Tribunal in respect of any ground on which he or she failed, so long as a determination of that ground in the appellant's favour would not have conferred on the appellant any material (ie tangible) benefit, compared with the benefit flowing from the ground or grounds on which the appellant was successful in the First-tier Tribunal.

(iii) In the event that the respondent to the appeal before the First-tier Tribunal obtains permission to appeal against that Tribunal's decision regarding the grounds upon which the First-tier Tribunal found in favour of the appellant, then, ordinarily, the appellant will be able to rely upon rule 24(3)(e) of the 2008 Rules in order to argue in a response that the appellant should succeed on the grounds on which he or she was unsuccessful in the First-tier Tribunal. Any such response must be filed and served in accordance with those Rules and the Upper Tribunal's directions.

(iv) If permission to appeal is required, any application for permission should be made to the First-tier Tribunal in accordance with rule 33 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, within the time limits there set out. This includes cases where the appellant has succeeded on some grounds but failed on others, in respect of which a material benefit would flow (see (ii) above).

(v) There is, however, no jurisdictional fetter on the Upper Tribunal entertaining an application for permission to appeal, even though the condition contained in rule 21(2)(b) of the 2008 Rules has not been met, in that the First-tier Tribunal has not refused (wholly or partly), or has not refused to admit, an application for permission to appeal made to that Tribunal. Rule 7(2)(a) of the 2008 Rules permits the Upper Tribunal to waive any failure to comply with a requirement of the Rules. The guidance in *EG and NG (UT rule 17: withdrawal; rule 24: Scope) Ethiopia* [2013] UKUT 143 (IAC) is otherwise confirmed.

(vi) The Upper Tribunal is, nevertheless, unlikely to be sympathetic to a request that it should invoke rule 7(2)(a), where a party (A), who could and should have applied for permission to appeal to the First-tier Tribunal against an adverse decision of that Tribunal, seeks to challenge that decision only after the other party has been given permission to appeal against a decision in the same proceedings which was in favour of A."

25. For the sake of completeness, I record that I became aware of an Upper Tribunal case decided by Upper Tribunal Judge Poole QC (as she then was) in which a respondent was allowed to rely, without seeking permission to appeal, on a matter raised in its response to the notice of appeal. It is, however, clear that the judge was not referred to *EG and NG*, and that the issue that arises in the present case was not raised for her consideration: *FT v Perth and Kinross Council & Anor* [2019] PTSR 1493, at paragraph 29.

Decision

26. The jurisprudence referred to by the parties supports the following propositions.

    (a) A respondent who seeks only to uphold a decision on grounds different from those relied on by the lower tribunal does not need permission to rely on those grounds.

    (b) A respondent does not need to permission to appeal in respect of a ground so long as a determination of it in his favour would not have conferred on the appellant any material benefit, compared with the benefit flowing from the ground or grounds on which the appellant was successful in the First-tier Tribunal.

    (c) A respondent who wishes positively to challenge a decision adverse to him made by the lower tribunal does need permission, where a decision in his favour on that ground would have conferred a material benefit on him or where he is seeking an outcome that is materially different from the outcome of the proceedings at first instance.

27. The jurisprudence also contains references to differences between the 2008 rules as they were at the time of the decisions, and the Civil Procedure Rules ("CPR") in England and Wales. One of the differences was that the CPR made provision for a respondent's notice which seeks permission to appeal from the appellate court, as well as asking the appeal court to uphold the decision of the lower court for reasons different from, or additional to, those given by the lower court.

28. The 2008 rules were amended with effect from 6 April 2022 the Tribunal Procedure (Amendment) Rules, SI 2022/312. Rule 21, which would otherwise require an application for permission to the FTT before an application to the Upper Tribunal could be made was amended. An application to the FTT for permission is not necessary where an application for permission is made in a response to notice of appeal: Rule 21(1A). Rule 24 was also

amended by the insertion of provision for an application for permission to be made within the response to the notice of appeal. The amendment appears to be a response to the jurisprudence set out above.

29. I have considered the legislative history of the 2018 rules. A Partial Business and Regulatory Impact Assessment ("PBRIA") prepared by the Cabinet Secretary for Social Security and Older People, dated 11 September 2018 discloses that the objective of the 2018 rules was:

> "To define and standardise the rules for the First-tier Tribunal for Scotland (FtT) Social Security Chamber and Upper Tribunal for Scotland (UT) which will apply to all appeals regarding devolved benefits."

30. The PBRIA records that the "generic" rules of procedure for the Upper Tribunal for Scotland (that is those set out in the Upper Tribunal for Scotland Rules of Procedure 2016 ("the 2016 rules")) and the rules of procedure for the Upper Tribunal, as they apply to social security cases (that is the 2008 rules) were looked at when considering what rules to draft for Upper Tribunal for Scotland in relation to appeals regarding devolved benefits.

31. The PBRIA considered four options: i) using the existing regulations from the existing tribunals, ii) basing the proposed regulations on the existing regulations with appropriate amendments to reflect the Social Security (Scotland) Act 2018, iii) creating a bespoke set of rules, and iv) doing nothing. The recommended option was ii), and the "existing regulations" in this context were the 2016 rules and the 2008 rules.

32. The Policy Note which accompanied the 2018 rules records:-

> "The draft rules of procedure take as their starting point the generic rules of procedure for the Upper Tribunal for Scotland, set out in the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016. Modifications have been made where this is thought necessary in the social security context. This partly reflects the outcome of consultation; and partly changes otherwise thought necessary to give effect generally to the principles underlying the Scottish social security system. The modifications are highlighted below."

33. None of the modifications set out in the Policy Note has any direct relevance to the present issue. Both the 2018 rules, and the 2016 rules on which they were based, were drafted after the judicial interpretation of the 2008 rules in *EG and NG.* The choice to use language nearly identical to that in rule 24(3)(e) of the 2008 rules as it stood in 2016 must be presumed to have taken place in the knowledge of that judicial interpretation: *Barras* v *Aberdeen Steam Trawling and Fishing Co Ltd* 1933 SC (HL) 21. That supports the construction of rule 5(3)(e) of the 2018 for which the appellant contends.

34. Rule 5 of the 2018 rules relates to responses to a notice of appeal. Among the things that the response must state is whether the respondent opposes the appeal: rule 5(3)(e). With that in mind, the reference in paragraph (f) to "the grounds on which the respond relies" is obviously to be construed as a reference the grounds on which he relies in opposing the appeal of which notice is given in the notice of appeal. That construction is based on the plain meaning of the words in rule 5(3)(f), read in the context of rule 5 as a whole. It is supported by reference to the requirement for permission in the 2014 Act. A procedural rule cannot override a statutory requirement. I agree with the reasoning in *SSE Generation Limited* to that effect.

35. A point of law on the basis of which either party seeks to challenge the decision of the FTS requires to be the subject of permission to appeal. An application for permission must be made to the FTS before it is made to this tribunal.

36. Section 46 of the Tribunals (Scotland) Act 2014 provides:

"46(1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.

(2) An appeal under this section is to be made—
(a)by a party in the case,
(b)on a point of law only.

(3) An appeal under this section requires the permission of—
(a)the First-tier Tribunal, or
(b)if the First-tier Tribunal refuses its permission, the Upper Tribunal.

(4) Such permission may be given in relation to an appeal under this section only if the First-tier Tribunal or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal."

37. The statute gives this tribunal jurisdiction to grant permission **if** the FTS refuses permission. The requirement that the FTS be asked first for permission is not a provision of the 2018 rules with which compliance might be waived under rule 10, but a requirement imposed by statute. To that extent the legislation for Scottish tribunals is different from that for UK tribunals. Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides that permission may be given by the FTT or the Upper Tribunal. The requirement to seek permission first from the FTT is one imposed by the 2008 rules, not the statute. That means that the reasoning in *Smith*, regarding the power of the Upper Tribunal to waive the requirement to apply to the FTT, does not assist.

38. The appellant in this case seeks to challenge the approach of the FTS to daily living activities 5, 7 and 9 in response to an appeal directed at the FTS's treatment of mobility activity 1. He requires permission to do so. He does not have that permission. It follows that I have no jurisdiction to adjudicate on his challenges to the treatment of daily living activities 5, 7 and 9.

39. Expressions such as "materially different from" and "conferring a material benefit", which appear in the jurisprudence to which I was referred, may not always be helpful in the context of a social security appeal regarding awards of benefits depending on scoring under the ADP regulations. In the present case, there is little difficulty in concluding that, at least so far as the daily living component is concerned, the respondent's proposed response to the appeal, if successful, would bring him a material benefit, and that the outcome would be materially different from the decision of the FTS. If he were to achieve the points that he originally sought for activities 5, 7 and 9, he would achieve 14 points for daily living activities, rather than the 8 awarded by the tribunal. Matters might, however, be less straightforward in other cases.

40. By way of example, a claimant may have been awarded a total of 8 points for the daily living activities and been awarded ADP at the standard rate (which requires a score of at least 8 and no more than 11 points). The FTS awarded 2 points for each of activities 1, 2, 3 and 4. At the appeal the claimant argued for 4 points for daily living activity 4, and had he succeeded, he would have achieved a total of 10 points. Appealing successfully would not have conferred any material benefit on him, because he would have needed 12 points in order to qualify for the higher rate of benefit, and on his own case he could only achieve 10 at best.

41. If, in that case, Social Security Scotland were to be granted permission to appeal contending that the FTS erred in making an award of 2 points for daily living activity 1, then the claimant's award of benefit at the standard rate would be at risk, because, if the appeal were successful, the claimant would have only 6 points, and not be eligible for any award of benefit. At that point, it might become important for him to revisit his contention that he should have been awarded 4 points for daily living activity 4. It might enable him to achieve 8 points, and an award of benefit at the standard rate even if the appeal by Social Security Scotland were successful.

42. If the claimant were successful in responding to the appeal by advancing that argument, he would achieve 8 points (if the appeal by Social Security Scotland succeeded) or 10 (if the appeal by Social Security Scotland did not succeed). He would on either scenario still only be eligible for payment at the standard rate, and there would be no material benefit to him. The outcome, from the claimant's point of view, is unchanged. The outcome would, however, be different from the decision of the FTS to the extent that the overall scoring was higher than that decided upon by the FTS. In order to achieve it, he would probably have

to raise a point of law different from the point of law on which the appeal by Social Security Scotland was proceeding.

43. If the same claimant sought to argue that he should have been allocated 6 points, rather than 2 points, for daily living activity 3, and succeeded, he would achieve at least 12 points, and an award at a higher rate. In that case the outcome would be different from the decision of the FTS, and there would be material benefit conferred on the claimant.

44. These examples demonstrate that using "materially different outcome", or "material benefit" as touchstones as to when a respondent requires permission in order to raise a point is not straightforward. It is undesirable that a party should require to carry out the sort of analysis described in paragraph 26 in order to determine whether he needs permission to appeal. That is all the more so in a context where the claimant is very unlikely to have the assistance of a lawyer.

45. In the context of a claim for ADP, if the respondent seeks to do anything other than preserve the decision of the FTS in the terms in which it is made, then the respondent requires to seek permission to appeal. Any more involved analysis as to outcome and benefit is likely to be unworkable.

46. As I have pointed out, there may be no reason for a claimant to appeal against a decision unless he finds that Social Security Scotland have been given permission to appeal. That may result in late applications for permission to the FTS by claimants where Social Security Scotland is given permission to appeal. There might be merit in having a rule that permits an application for permission to this tribunal directly to be made in a notice of response. If my construction of section 46 of the 2014 Act is correct, that section would also have to be amended to permit that course.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Lady Carmichael
Member of the Upper Tribunal for Scotland