IAC-FH-LW-V1

Upper Tribunal
Immigration and Asylum Chamber

JR/2801/2019

Field House,
Breams Buildings
London
EC4A 1WR

Heard on: 17 February 2020

BEFORE

UPPER TRIBUNAL JUDGE KEITH

Between

The Queen (on the application of Rohit Singh Mehta)

Applicant

v

Secretary of State for the Home Department

Respondent

Mr L Lourdes, Counsel, instructed by JML Diplock Solicitors, on behalf of the Applicant
Mr Z Malik, instructed by the Government Legal Department appeared on behalf of the Respondent.

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APPLICATION FOR JUDICIAL REVIEW
JUDGMENT

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(1) These are a written record of the oral reasons given for the judgment at the hearing.

The application

Background

(2) The applicant, an Indian national, applied on 21 May 2019 for judicial review of the respondent's decisions of 17 December 2018 and 22 February 2019 to refuse the applicant's application for leave to remain as the dependant of a Tier 4 (General) Migrant.

(3) As summarised by Upper Tribunal Judge Norton-Taylor in his later grant of permission to proceed with the application, the respondent initially refused the applicant's application under paragraph 319C of the Immigration Rules in the December 2018 decision, on the basis of the applicant was not in a genuine and subsisting relationship with his sponsoring wife, and in addition, could not satisfy the maintenance requirements of the Immigration Rules. In respect of the latter point, the respondent relied in the absence of a sponsorship declaration from the claimed provider of funds, namely the applicant's father-in-law.

(4) In the second decision of February 2019, which was in response to a request for administrative review, the respondent accepted that the applicant's relationship with his wife was genuine and subsisting and so reissued the initial decision, while maintaining her refusal of the application because the applicant did not meet the maintenance requirements.

Grounds

(5) In the grounds, the applicant challenged both decisions on the basis that he had submitted a sponsorship declaration from his father-in-law, with his application for leave to remain, and that the respondent had erred in failing to have regard to that evidence. Alternatively, it was said that if the evidence had not in fact been uploaded with the application, the respondent had erred in failing to apply evidential flexibility in his case.

The basis of the respondent's resistance to the orders sought

(6) In the Acknowledgement of Service, the basis of the respondent's rejection of the application appeared to change once again. As set out at paragraphs [16] to [23], the respondent acknowledged that the decisions referred to the financial maintenance requirement by reference to sponsorship from the applicant's father-in-law. The decisions gave the impression that the reason that the application was refused was because the applicant did not provide a letter of consent from his father-in-law for access to his funds. The respondent acknowledged that that was not correct. Rather, the requirements of appendix E were that the funds must be available to the applicant or his wife. Nevertheless, the AoS asserted that the decisions were taken on the correct basis, namely that reliance on funds from the

applicant's father-in-law was not a satisfactory source of finance, as defined in appendix E, so that any request for further information under the respondent's evidential flexibility policy would serve no purpose, because it would not alter the fact that the funds themselves were not from an acceptable source. The respondent accepted that it would have been preferable if the reasoning as recorded in its own internal 'GCID' notes had been provided in the December 2018 decision, but that the end-result was the same. The applicant was seeking to rely on funds in a third-party account held in the name of his father-in-law, which was not acceptable. In further detailed grounds of defence dated 20 August 2019, the respondent, in the alternative, resisted the application because it was inevitable that the application would fall for refusal in light of the absence of evidence of the required funds in the bank account of the applicant or his wife, so that section 31(2A) of the Senior Courts Act 1981 applied.

The grant of permission

(7) On 5 July 2019, Upper Tribunal Judge Norton-Taylor granted permission on the papers, in light of the position adopted by the respondent in the Acknowledgement of Service. In doing so, he regarded there as being two points flowing from the respondent's revised position that only funds held in the name of the applicant or his wife could be relied on to prove maintenance. First, it was arguable that the respondent's original decision and the administrative review decision were flawed. Second, if the respondent's contention on the maintenance requirements is correct, it may be the case of the applicant's application would have been refused in any event, but the correctness of that assertion would need to be assessed.

(8) In granting permission, UT Judge Norton-Taylor noted that the applicant's representatives may wish to consider making application to amend the grounds of challenge, but that that was a matter for them. He also gave standard case management directions, including in relation to the production of a hearing and authorities bundle and skeleton argument. The applicant did not comply within the stipulated timeframes with those directions and this resulted in a hearing of the application on 11 October 2019 being adjourned, as a result of which wasted costs were ordered against JML Diplock Solicitors. I gave further orders on 22 November 2019, permitting the applicant's application to amend the grounds of challenge and to allow the respondent to serve additional grounds in response.

The applicable law

(9) The following provisions of the Immigration Rules are relevant:

"319C. Requirements for entry clearance or leave to

remain

To qualify for entry clearance or leave to remain as the Partner of a Relevant Points Based System Migrant …an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance or leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

(g) Unless the applicant is applying as the Partner of a Relevant Points Based System Migrant who is a Tier 1 (Investor) Migrant or a Tier 1 (Exceptional Talent) Migrant, there must be a sufficient level of funds available to the applicant, as set out in Appendix E."

(10) Appendix E in turn states:

"Immigration Rules Appendix E: maintenance (funds) for the family of Relevant Points Based System Migrants

A sufficient level of funds must be available to an applicant applying as the Partner ….of a Relevant Points Based System Migrant …A sufficient level of funds will only be available if the requirements below are met.

(aa) Paragraphs 1A and 1B of Appendix C also apply to this Appendix.

(c) Where the applicant is applying as the Partner of a Relevant Points Based System Migrant or Appendix W Worker the relevant amount of funds must be available to either the applicant or the Relevant Points Based System Migrant [my emphasis] or Appendix W Worker.

(f) In all cases, the funds in question must be available to: (i) the applicant, or
(ii) where they are applying as the partner of a Relevant Points Based System Migrant…, either to them or to that Relevant Points Based System Migrant

(g) The funds in question must have been available to the person referred to in (f) above on the date of the application and for:

(ii) a consecutive 28-day period of time, if the applicant is applying as the Partner of a Tier 4 (General) Student

(j) In all cases the applicant must provide the specified documents as set out in paragraph 1B of Appendix C…"

(11) Appendix C concludes:

"Immigration Rules Appendix C: maintenance (funds)

1A. In all cases where an applicant is required to obtain points under Appendix C, the applicant must meet the requirements listed below:

(a) The funds specified in the relevant part of Appendix C must be available to the applicant on the date of the application (as defined in Part 1 of these Rules)…

1B. In all cases where Appendix C or Appendix E states that an applicant is required to provide specified documents, the specified documents are:

(a) Personal bank or building society statements which satisfy the following requirements:

(i) The statements must cover:

(3) a consecutive 28-day period of time, if the applicant is applying as a Tier 4 Migrant or the Partner ….of a Relevant Points Based System Migrant who is a Tier 4 Migrant

(ii) The most recent statement must be dated no earlier than 31 days before the date of the application;

(iii) The statements must clearly show:

(1) the name of:

i. the applicant,

iii. the name of the Relevant Points-Based System Migrant, if the applicant is applying as a Partner of a Relevant Points-Based System Migrant. [my emphasis]"

(12) In relation to Evidential Flexibility, paragraph 245AA states:

*"**245AA.Documents not submitted with applications***

(a) Subject to sub-paragraph (b) and where otherwise indicated, where Part 6A or any appendices referred to in

Part 6A state that specified documents must be provided, the decision maker (that is the Entry Clearance Officer, Immigration Officer or the Secretary of State) will only consider documents received by the Home Office before the date on which the application is considered.

(b) If the applicant has submitted the specified documents and:

(i) specified evidence is missing from the documents; or

(ii) a document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(iv) a document does not contain all of the specified information;

the decision maker may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 10 working days of the date of the request.

(c) Documents will not be requested where the decision maker does not think that the submission of missing or correct documents will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has omitted to provide specified evidence, or submitted it in the wrong format, but the missing information is verifiable from other documents provided with the application or elsewhere, the decision maker may grant the application despite the error or omission, if they are satisfied that the applicant meets all the other requirements of the Rules."

(13) The respondent's policy on Evidential Flexibility which applied to the applicant's application, version 9.0, dated 3 December 2018, included at page [5], the following:

"If the application falls for refusal for a reason which could not be addressed by requesting additional information, for example:

- *on genuineness grounds*
- *where an application does not meet the other requirements in the rules*
- *where it will be refused under general grounds for refusal*

then you must not request further evidence under paragraph 245AA. If you are unsure, discuss this with your senior case

worker or line manager.

If you decide that evidential flexibility does not apply to the case, you must accurately and fully record on the caseworking system:

- *what evidence or information is missing*
- *whether evidential flexibility has been applied and if not, why not.*

You must explain in the decision letter why no request for further information has been made."

(14) Section 31(2A) of the 1981 Act states:

"Application for judicial review

(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

(15) In the amended grounds, the applicant also relied on CDS (PBS: "available": Article 8) Brazil [2010] UKUT 305 (IAC), for the proposition that an applicant could rely on funds from a third party (see paragraphs [13] and [14]):

"13. In the absence of specific additional requirements of the Immigration Rules, it seems to us that funds are "available" to a claimant at the material time if they belong to a third party but that party is shown to be willing to deploy them to support the claimant for the purpose contemplated. Gifts of money have always been acceptable for visitors who need to show they have resources available to them. The need for Immigration Rules to have unambiguous provisions preventing recourse to financial assistance from other persons, if that is what is intended, was spelt out in Mahad v ECO [2009] UKSC 16 [2010] 1 WLR 48 at [26] to [30]. That decision was concerned with the maintenance and accommodation requirements of working holiday makers, but its implications go beyond this category of applicant.

> *14. Accordingly, we are satisfied on the facts of this case that the appellant had sufficient funds "available" to her to meet the objective requirements of Appendix C at the relevant time. The word "available" can not be read restrictively to mean "available to her with no assistance from any other person save a parent or guardian", by reference to the Policy Guidance, and neither can such a requirement be imported by the reference in the Immigration Rules to proving maintenance by relevant documents."*

(16) The applicant asserted that this was consistent with the case of Ejifugha (Tier 4 – funds – credit) Nigeria [2011] UKUT 244 (IAC), paragraphs [18] and [19]:

> *"18. Further, In the case of CDS (PBS – "available" – Article 8) Brazil [2010] UKUT 00305 (IAC), a case decided on the same day as FA and AA by the same Tribunal, it was held that funds are "available" to a claimant at the material time if they belong to a third party but that party is shown to be willing to deploy them to support the claimant for the purpose contemplated.*
>
> *19. We find that there is no proper distinction to be made between the situation of the appellant who has funds available to him from his bank and that of the appellants in the cases referred to above who had funds available from third parties."*

Discussion of issues and conclusions

(17) I discussed and agreed with the representatives the three issues I was being asked to consider, by reference to the applicant's amended grounds of challenge and the respondent's response:

a. ground (1) – whether the applicant could rely on funds from his father-in-law and whether the respondent's decisions could be impugned for failing to permit this;

b. ground (2) – whether the respondent had impermissibly failed to apply her evidential flexibility policy and had instead changed the basis of refusal of the applicant's application;

c. ground (3) – even if the applicant succeeded on grounds (1) and (2), nevertheless, whether I was bound to apply the provisions of section 31(2A) of the Senior Courts Act 1981.

The applicant's submissions on ground (1)

(18) Mr Lourdes reiterated that the concept of 'available funds' in

appendix E could include those from a third party. When I asked him how this was to be read in the context of appendix C and the requirement of specified documents in the name of the applicant or the sponsoring migrant (his wife), Mr Lourdes said that the two appendices should be read separately, without cross-referring to one another. The respondent had ignored the fact that the sponsoring wife had, in turn, obtained her student visa on the basis of funds provided by her father, and if in doubt, the respondent should have made further enquiries about the source of the sponsoring wife's funds. The funds that were available to the sponsoring wife should be considered as being available to the applicant.

The respondent's submissions on ground (1)

(19) Mr Malik submitted that I was effectively being asked to rewrite the Immigration Rules. The two authorities relied on by the applicant, CDS (PBS: "available": Article 8) Brazil; and of Ejifugha (Tier 4 – funds – credit) Nigeria, had considered the issue of the availability of funds but had reached carefully caveated conclusions, (see [13] of CDS which refers to '*In the absence of specific additional requirements of the Immigration Rules.')* Both cases pre-dated the version of the Immigration Rules under which the applicant had applied and anticipated possible future versions of the rules. There were express additional requirements as anticipated in CDS – namely appendix C. There was no longer any general flexibility to waive express requirements of the Immigration Rules – see: Mudiyanselage v SSHD [2018] EWCA Civ 65. The version of the Immigration Rules which applied to the applicant was clear that the general availability of funds in a third party's account did not meet the requirements for the applicant's application. It was not enough to suggest that because the purpose behind the requirements was to avoid the applicant being a burden on UK taxpayers, the evidential requirement should be disregarded.

Conclusion on ground (1)

(20) I accept Mr Malik's submission that the provisions contained in appendix E on availability of funds cannot be read in isolation from appendix C, and indeed (j) of appendix E mandates that they should be read together:

"In all cases the applicant must provide the specified documents as set out in paragraph 1B of Appendix C..."

(21) Mr Lourdes does not dispute that 1B(iii)(1) of appendix C expressly refers to statements in the name of the applicant or his sponsoring wife, not her father. CDS does not assist the applicant and indeed supports the respondent's proposition that the issue of availability of finds needs to be considered in the context of additional specific requirements of the Immigration Rules (see [13] of CDS) – in this

case, appendix C. The respondent's decision to refuse the application on the basis of the lack of acceptance of bank statements relating to the applicant's father-in-law cannot be impugned on public law grounds. This ground of challenge therefore fails.

Ground (2) and evidential flexibility

The applicant's submissions on ground (2)

(22) Mr Lourdes relied on two elements. First, the respondent had changed over time the basis for refusing the applicant's application. The initial refusal of 17 December 2018 had challenged the genuineness of the relationship between the applicant and his spouse, and raised general concerns about the availability of funds, whereas by the time of the administrative review decision on 22 February 2019, the respondent had accepted the relationship as genuine and instead had focussed on the lack of consent from the father-in-law as to the availability of funds. One of the main reasons for refusal at the time, as recorded in contemporaneous GCID notes, namely that reliance on the father-in-law as a source of funds, was never conveyed to the applicant until the Acknowledgement of Service to this judicial review application.

(23) The second aspect of the challenge was around evidential flexibility. If the respondent had had concerns about the genuineness of the applicant's marriage or the applicant's father-in-law's consent to the availability of funds, then at that stage the respondent should have stopped, asked the applicant for further evidence and then consequently reviewed the application, and should not have considered whether the availability of funds from a third party was impermissible, before engaging with the applicant.

The respondent's submissions on ground (2)

(24) In relation to the first element, paragraph AR.2.2(d) of appendix AR Administrative Review expressly permits the respondent to maintain a decision with different or additional reasons to those specified in the decision under review. The original decision had taken general issue with the applicant not satisfying the maintenance requirements, and was correct to do so, so that the general issue was not a new one.

(25) Evidential flexibility under paragraph 245AA of the Immigration Rules could not assist the applicant: see Mudiyanselage, referred to above. It was not the case that the applicant had submitted a document in the wrong format or anything analogous – he had submitted the wrong document – i.e. a statement of his father-in-law's bank account, not his or his wife's account.

Conclusion on ground (2)

(26) Taking the two elements of ground (2) in reverse order, I accept Mr Malik's submission that the rules around evidential flexibility do not assist the applicant. Looking at paragraph 245AA(b), the bank statements adduced do not contain an omission in a series of documents; or are in the wrong format; or miss certain information. Even taking the applicant's case at its highest, that the father-in-law's bank statements at [97] to [101] of the applicant's bundle were submitted prior to the applicant's biometric interview on 4 December 2018, so that the respondent's assertion about a lack of consent by the father-in-law was incorrect, the point remains that the bank statements do not comply with the requirements of paragraph 1B(iii)(1) of appendix C. This is because they relate to the applicant's father-in-law's bank account, not the accounts of the applicant or his wife. This case is analogous to the facts described by Upper Tribunal Judge Lane, (as he then was) at [103] of Mudiyanselage:

"UTJ Peter Lane accepted Ms Negbenebor's case as regards (a) but he dismissed it as regards (b). He held that the Current Appointment Report was not a specified document. He said, at paras. 18-19 of his judgment:

"*18. … That document in my view plainly is not one that engages paragraph 245AA. It is not a document that failed to contain all of the specified information. On the contrary, it is a document which contains all the information it is designed to contain and which is entirely coherent and complete on its face.*

19. The problem with the document is that it is dated too early. It is, in other words, the wrong document. It would in my view be going much too far to interpret paragraph 245AA as encompassing documents that are the wrong kind of document because they are produced at points in time other than those required by the Rules."

(27) The provider of the funds was not as required in appendix C and there was, and is, no document before the respondent or this Tribunal, which complies with paragraph 1B(iii)(1) of appendix C. This element of challenge has no merit.

(28) In relation to the second element of the challenge, I see strength in the argument that whilst the respondent's principal reason for refusal, namely the lack of acceptability of third party funds, was recorded contemporaneously and so is not a post-decision rationalisation of refusal, that reason was not communicated to the applicant until the Acknowledgement of Service to this judicial review decision. That is distinct from the ground of challenge that the respondent was providing post-decision reasons, which were not in the mind of the respondent at the time.

(29) Instead, while the respondent's decision itself to refuse the application and the principal reason for that decision cannot be

impugned on public law grounds, other reasons were cited for refusal in the decision letters – namely that the applicant's relationship with his wife was not genuine and his father-in-law had not consented to make the funds available. On the one hand, I accept Mr Malik's submission that paragraph AR.2.2(d) of appendix AR allows the respondent to rely on different or additional grounds while maintaining a decision. On the other hand, the difficulty is that the principal reason now relied on by the respondent was not referred to in the administrative review decision.

(30) To the extent that the applicant asserts that the respondent did not, at the time of the decisions of 17 December 2018 and 22 February 2019, consider and take those decisions because of the unacceptability of third party funds and only afterwards sought to rely on that reason, I reject that ground, on the basis of the contemporaneous GCID notes, the contents of which have not been disputed.

(31) On the different issue of whether the decisions can be impugned because they fail to refer to the principal reason taken for the decisions at the time, I accept that there has been such a failure and in that narrow, but important sense, the decisions were defective and unlawful. The unlawfulness of the decisions in that narrow aspect does not, however, answer the question of whether it would appropriate to quash the decisions, which I considered in ground (3).

Ground (3) - section 31(2A) of the 1981 – discussion and conclusions

(32) Mr Lourdes did not deal with the issue in his written skeleton argument. In oral submissions on the issue, these were limited to reiterating the importance of ground (2), namely the lack of accurate reasons in the decisions.

(33) Mr Malik referred to a case pre-dating the introduction of section 31(2A), namely R (Alladin) v SSHD [2014] EWCA Civ 1334, which supported his proposition that even if the decisions had omitted to refer to the principal reason for refusal, relief should refused where the decisions were reached for reasons that cannot be impugned legally. He accepted that given the introduction of section 31(2A) of the 2002 Act which applies here, I should focus on the statutory provisions, rather than Alladin.

(34) Section 31(2A) confirms that I do not need to be satisfied that an outcome would inevitably have been the same, only that it is highly likely. Second, the outcome does not need to be precisely the same, provided it would not have been substantially different. Third, I do not have a discretion where the conditions set out in the statutory provision are met. I am under a duty to refuse relief. This duty is subject to the power to disregard that requirement if I consider that it is appropriate to do so for reasons of exceptional public interest.

(35) While I am not applying a test that the outcome would inevitably have been the same, only that it is 'highly likely', which is a lower test, I accept Mr Malik's submission that the refusal of the applicant's application would have been inevitable. As a consequence, the correct, lower legal test is met, namely that the outcome for the applicant would not have been substantially different, had the principal reason for refusal been referred to in the two decisions. Mr Lourdes has no answer to this and to re-iterate, the bank statements adduced do not contain an omission in a series of documents; or are in the wrong format; or have missing information – they are the wrong documents; and correct documents in the name of the applicant and his wife have never been adduced to the respondent or this Tribunal, nor is there any suggestion that they exist. If the respondent had included reference to the principal reason in the decisions, the outcome would not have been substantially different, for the same reason that I refused the challenge under ground (1), namely that the applicant's application does not meet the requirements of paragraph 1B(iii)(1) of appendix C.

(36) Except where it is appropriate to quash the decisions for reasons of exceptional public interest, under section 31(2B) of the 1981 Act, I must refuse to grant relief. Mr Lourdes made no submissions in relation to section 31(2B) applying, but I nevertheless considered it. I do not accept that there are such reasons of exceptional public interest, where the applicant's application could never have succeeded, for reasons already set out.

(37) In the circumstances, section 31(2A) of the 1981 applies and I must refuse relief.

Costs

(38) To the extent that the respondent's costs have already been ordered as a result of my previous wasted costs order against JML Diplock Solicitors, the respondent cannot recover their costs twice. I note the principles set out in the authority of M v London Borough of Croydon [2012] EWCA Civ 595 and order that the applicant shall pay the remainder of the respondent's reasonable costs, to be assessed, if not agreed. I do so for the following reasons.

(39) Despite my conclusion of unlawfulness on one narrow aspect of the respondent's decisions, I have been mandated to refuse relief and, in that sense, the applicant has 'lost'. Even where the respondent did not communicate the principal reasons for the decisions until the Acknowledgment of Service, I regarded it as appropriate to award the respondent her costs, noting that the applicant is professionally advised, and those advisors will, or ought to, have been aware of the provisions of paragraph 1B(iii)(1) of appendix C, as cross-referred to by paragraphs (aa) and (j) of appendix E.

(40) Mr Lourdes asserted that I should depart from the *prima face* principle that a successful party can look to the unsuccessful party for his costs. Mr Lourdes limited his submission to one that there should be no award of costs, on the basis that this was a 'landmark' case which dealt with a novel legal point. He cites no authority for that proposition, which I do not accept, i.e. that a party should be protected in costs purely on the basis of a novel legal point. Even had I concluded otherwise, the legal issues before me were not novel. I determined the issue simply by reading the passages from appendices A and C together, as the Rules expressly require and assist, in that regard, by the use of cross-references, to which I refer in [39] above.

Decision

(41) The application for judicial review is refused on grounds (1) and (3). While ground (2) succeeds on the limited grounds set above, I refuse to order relief, pursuant to section 31(2A) of the Senior Courts Act 1981.

(42) I order that the applicant pay the respondent's reasonable costs, to be assessed, if not agreed.

J Keith

Signed: _____

Upper Tribunal Judge Keith

Dated: **20 February 2020**

UTIJR6

JR/2801/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen (on the application of Rohit Singh Mehta)

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Keith

Having considered all documents lodged and having heard Mr L Lourdes, *Counsel,* instructed on behalf of the applicant and Mr Z Malik, *Counsel*, instructed by the Government Legal Department on behalf of the respondent at a hearing at Field House, London on 17 February 2020 and upon judgment being handed down on 17 February 2020

It is ordered that

(1) The judicial review application is dismissed in accordance with the judgment attached.

(2) I order, therefore, that the judicial review application be dismissed.

Permission to appeal to the Court of Appeal

(3) No application has been made seeking permission to appeal to the Court of Appeal. I refuse permission to appeal to the Court of Appeal for the same reasons that I have refused the orders sought for judicial review.

Costs

(4) To the extent that they are not already the subject of the wasted costs order I made against JML Solicitors on 11 October 2019, the applicant shall pay the respondent's reasonable costs, to be assessed if not agreed.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **20 February 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an applicant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).