DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the Appellant's appeal.

The decision of the First-tier Tribunal dated August 13, 2014 under file references AFCS/00260/2014 does not involve an error on a point of law.

The decision of the First-tier Tribunal accordingly stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The legal context of this appeal

1. This appeal is about the test for establishing whether there is a service cause to an injury sustained by a serviceman. I appreciate the outcome of this appeal will be a major disappointment to the Appellant. However, my conclusion is that the First-tier Tribunal properly applied the legal principles involved. Furthermore, even if the Tribunal's reasoning might have been better expressed, it reached the only decision realistically open to it, applying those legal principles.

The facts of this case

2. The facts are not in dispute. The Appellant, a former Flight Sergeant in the RAF, was the Convoy Imprest Officer for an exercise in North Africa in November 2010. He gave this account of what happened:

> 'We were on the return leg of the convoy, travelling that day from Marrakesh in Morocco to Algeciras in Southern Spain. There had been a major delay in the port of Algeciras due to one of our vehicles breaking down on the ferry and the problems I encountered effecting a suitable repair to allow the vehicle to disembark. Unnecessary personnel had been transported to their accommodation.
>
> After this delay I had stopped for something to eat and was walking to my overnight accommodation on one of the major roads outside the port complex, it was dark and the area was lit with sodium lighting. I had crossed from one road to the next and was half way over a bridge/flyover, I was walking along a pedestrian pavement. This was the last thing I remember.
>
> I woke in an intensive care ward of the local Spanish hospital.'

3. The Appellant, who was dressed in civilian clothes, had been struck from behind by a vehicle which did not stop and which knocked him over the parapet, dropping onto the road below. He suffered a broken pelvis and damage to his left hip and arm amongst other injuries. There is no dispute over the serious extent and ongoing effects of his injuries. The Appellant was medically discharged in March 2013.

The relevant legislation

4. Article 8 of the Armed Forces and Reserve Forces (Compensation Scheme) order 2011 (SI 2011/517; "the 2011 Order") provides as follows:

> **'Injury caused by service**
>
> **8.**—(1) Subject to articles 11 and 12, benefit is payable to or in respect of a member or former member by reason of an injury which is caused (wholly or partly) by service where the cause of the injury occurred on or after 6th April 2005.
> (2) Where injury is partly caused by service, benefit is only payable if service is the predominant cause of the injury.'

5. It followed that the critical question was whether, for the purposes of the Armed Forces Compensation Scheme (AFCS), the Appellant's injury was "caused (wholly or partly) by service" and, if the latter, whether service was "the predominant cause of the injury." This is referred to below as "the two-stage test". Article 2(1) further provides that "'predominant' means more than 50%."

The Secretary of State's decision on the Appellant's AFCS claim

6. On March 20, 2013, the Service Personnel and Veterans Agency (now Veterans UK; here simply "the Agency") refused to make an award under the AFCS. Its reason was that "as the driver of the vehicle was the cause of the accident the Secretary of State does not accept on the balance of probabilities that your injuries were predominantly due to service". The Appellant's then legal representatives challenged that refusal.

7. On August 13, 2013 the Agency reconsidered the decision but refused to change it. The Agency's letter explained its reasoning as follows:

> 'It is true that you would not have been where you were when the accident occurred If you were not serving in the armed forces at the time, however this still does not mean that service was the predominant cause. These facts cannot be differentiated from many other background factors in the absence of which, you would not have been where you were at any particular time. These factors merely form part of the background setting.'

The Appellant's appeal to the First-tier Tribunal

8. The Appellant appealed to the First-tier Tribunal. The Agency prepared a response to that appeal. This stated that the issue for determination was whether the Appellant's injuries were "predominantly caused by or predominantly made worse by service" in accordance with the 2011 Order. The Agency's response repeated the reasoning in its letter of August 11, 2013 and included the following "Comment by the Secretary of State":

> '…The Secretary of State does not dispute that [the Appellant] was fulfilling an obligation of his service at the time of the accident, and does not dispute that the injuries for which [the Appellant] is seeking benefit arose from that accident. This is one of a multitude of factors leading to his injuries, not all of which are related to [the Appellant's] service. The Secretary of State accordingly invites the Tribunal to

determine whether service was the predominant cause, or the predominant cause of any worsening.'

9. The Agency's response cited the relevant provisions of the 2011 Order but made no reference to any relevant case law. Fortunately a Judge of the First-tier Tribunal, on reviewing the file, directed the Agency to file a copy of Upper Tribunal Judge Mesher's decision in *EW v Secretary of State for Defence* [2011] UKUT 186 (AAC), [2012] AACR 3 ("*EW v SSD*"). This in turn prompted the Agency also to file a "Further Comment by the Secretary of State", which referred to various passages in *EW v SSD* and expanded a little on its reasons for resisting the appeal. The Agency reiterated its view that "Whilst it is accepted that service placed [the Appellant] in Algeciras, Southern Spain on that day, service provided what was no more than a background setting to the accident, an accident that could have befallen any other pedestrian on that particular day." The Agency concluded that no payment was due under the AFCS as the Appellant's injuries "were not predominantly due to service".

The First-tier Tribunal hearing and decision

10. The First-tier Tribunal ("the Tribunal") heard the Appellant's appeal at Southampton on August 13, 2014. The Appellant gave evidence and was assisted by the regional Royal British Legion representative. The Tribunal dismissed the appeal. In its summary reasons, prepared on the day on what was then the standard template in use in the Chamber, the Tribunal briefly set out the facts (as described above) and also found there was no evidence that the Appellant had been targeted as a member of the British armed forces. Paragraph 11 of its reasons is the nub of its decision (I have added the sub-paragraph notations (a), (b) and (c) for ease of reference):

> **'11. <u>Given the Tribunal's findings of fact and the relevant law, the reasons for the Tribunal's Decision are as follows:</u>**
>
> (a) The Tribunal has considered Article 8 and whether or not the injury was predominantly caused by service.
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> (b) The Tribunal relies on the case of *EW v Secretary of State for Defence (AFCS)* [2011] UKUT 186 (AAC) which has very similar facts. In particular paragraph 27 which states: 'The injury on the journey to work being a manifestation of a risk run by the general public using the streets of Lille, that injury could not properly be regarded as caused by his service, let alone being predominantly caused by service.'
>
> (c) The Tribunal find that service was the setting and not the predominant cause of the injury. In making this finding we note that the appellant was in civilian clothing on a pedestrian pavement, in the dark and was hit by a hit and run driver. In the circumstances service cannot be the predominant cause. The driver of the vehicle was the cause of the accident and injuries. The Tribunal did not consider Article 11 which is relevant only if service is found to be the predominant cause of the injury.'

11. The Appellant applied for permission to appeal to the Upper Tribunal. This was granted by then Chamber President, on the basis that it was arguable the Tribunal may have elided the two-stage Article 8 test, or failed to have provided an adequate explanation of its reasoning on that issue, given the subsequent decision of the three-judge panel of the Upper Tribunal in *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC); [2016] AACR 3 ("*JM v SSD*").

The Upper Tribunal proceedings

12. I held an oral hearing of the Appellant's appeal on March 15, 2017. The Appellant attended, represented by Mr Glyn Tucker, Senior Pensions and Compensation Officer of the Royal British Legion, and Ms Galina Ward of Counsel appeared for the Secretary of State, instructed by the Government Legal Department. I am grateful to both representatives for their clear and well-argued oral submissions and for their earlier detailed and helpful skeleton arguments.

Some common ground between the parties: a case of one process cause

13. In *JM v SSD* the Upper Tribunal three-judge panel made the following observations:

> '80. "Cause" is a word with many overtones. It may refer to an event that immediately brings about an outcome or one that leads to it more remotely. It can also be used to mean attribution, *viz* that something is capable of bringing about an outcome, or can be regarded as bringing it about, or can explain an outcome. Whether something is capable of, or regarded as bringing about a particular result involves a degree of judgment which is not generally required in straightforward cases of physical cause and effect; for example, where *A* punches *B* on the nose which then bleeds.
> 81. Also the language of the test identifies "service" as the cause or predominant cause. But, like "negligence" or "employment", "service" is an abstract concept whilst "injury" is caused by one or more events or processes acting on the body or mind.
> 82. So in identifying the abstract cause of an injury it is necessary, as a matter of language and concept, to identify the events or processes – which we shall call the "process cause or causes" of the injury – and then to ask whether it is, or they are, sufficiently linked to service to satisfy the test that the injury due to each process cause is caused by service (or, using a shorthand, that that process cause is a service cause). Our use of the description "process cause or causes" is merely that and nothing else should be read into it.'

14. The Upper Tribunal three-judge panel also referred to Judge Mesher's decisions in *EW v SSD* and *SV v Secretary of State for Defence (AFCS)* [2013] UKUT 541 (AAC) ("*SV v SSD*"), further observing that "in both *EW* and *SV* there was only one cause of the claimant's injury: – being struck by a car in one case and diving into a sandbank in the other – and the issue was simply whether that cause was a service cause" (at paragraph 123). Based on that analysis, Mr Tucker and Ms Ward agreed, as I consider that they were compelled to do, that this too was a case in which there was only one process cause of the injuries: being struck by a vehicle. The question then was one of attribution – was that process cause, or was it not, a service cause?

15. I return to that issue of attribution later. First, however, I must deal with the Appellant's principal challenge to the reasoning of the First-tier Tribunal.

The Appellant's principal challenge to the First-tier Tribunal's decision

16. The primary focus of Mr Tucker's submission was the Tribunal's treatment of *EW v SSD*, which he argued disclosed an error of law. Mr Tucker noted that in its reasons the Tribunal had cited directly from Judge Mesher's decision in *EW v SSD* and in particular the very first sentence of paragraph 27 of that decision. However, as Mr Tucker correctly

pointed out, Judge Mesher had revisited that same passage in his later decision in *SV v SSD* in which he had described that single sentence as the "offending" words (at paragraph 35). In summary, Mr Tucker argued that the Tribunal had misread the import of the decision in *EW v SSD*. He contended that the Tribunal had treated the first sentence of paragraph 27 of that decision as a proposition of completely general application, with the result that it had not properly considered, or at the very least not given adequate reasons for finding, whether the Appellant's injury was not sufficiently linked to service to be categorised as caused by service. Moreover, given there was only one process cause in this case, considerations of the predominancy test did not come into play. Mr Tucker further argued that the attribution question required further findings of fact, e.g. as to whether the Appellant was following the most direct route to his temporary accommodation, why he needed to buy food on the way, the state of the traffic, etc. All that, he submitted, pointed to a need to set aside the Tribunal's decision for error of law and for the appeal to be remitted to be re-heard by a fresh panel.

17. Ms Ward acknowledged that the Tribunal's reasoning relied heavily on *EW v SSD*, but resisted the suggestion the Tribunal had erred in law. In doing so she made three particular submissions. The first was that Judge Mesher's decision in *SV v SSD* had subsequently been set aside by consent in the Court of Appeal, and so his reasoning re-visiting *EW v SSD* fell too. The second was that whether or not the first sentence of paragraph 27 was properly seen as a general statement of principle, there was no principled distinction on the facts between *EW v SSD* and the present appeal. The third was that even as qualified in *SV v SSD*, Judge Mesher found that there were no countervailing factors in *EW v SSD* to suggest that there was a service cause in that case, and the same applied here too.

The Upper Tribunal's analysis

18. I must start with the observation that this was a case in which neither the Appellant nor the Tribunal was assisted by the Secretary of State's written response to the appeal (nor indeed by the other explanations on file for the Agency's decision). The Agency's arguments prior to the Tribunal hearing never really properly engaged with the issue of attribution or with the two-stage nature of the test in Article 8.

19. However, the question for the Upper Tribunal is whether the Tribunal's decision involves an error of law. If the Agency's somewhat confused reasoning had infected the Tribunal's approach, then it might well be arguable that the Tribunal erred in law. However, I do not find that to be the case.

20. The Tribunal's reasoning is encapsulated in paragraph 11 of its summary reasons for the decision (see paragraph 10 above). This fell into three parts.

21. First, in paragraph 11(a) the Tribunal stated that it had "considered Article 8 and whether or not the injury was predominantly caused by service." This undoubtedly compresses the statutory test. As noted above, there is a two-stage test under Article 8: first, was the injury caused wholly or partly by service and, if the latter, was service the predominant cause of the injury. So, strictly speaking, the question was whether or not the injury was *solely or* predominantly caused by service (see *JM v SSD* at paragraph 123). However, I do not regard this as a material error of law – I bear in mind that these are the reasons of a busy Tribunal, formulated under considerable pressures of time, and not some legislative text devised with the benefit of ample time for reflection. A compressed statement as to the statutory test does not mean that the Tribunal

necessarily elided the two-stage process. As Holman J. put it in *B v B (Residence Order: Reasons for Decision)* [1997] 2 F.L.R. 602 (at 606):

> 'I cannot emphasise strongly enough that a judgment is not to be approached like a summing-up. It is not an assault course. Judges work under enormous time and other pressures, and it would be quite wrong for this court to interfere simply because an *ex tempore* judgment given at the end of a long day is not as polished or thorough as it might otherwise be.'

22. Secondly, the nub of the Tribunal's reasoning is to be found in paragraph 11(c). On the facts that the Tribunal found, its reasoning and conclusion there were eminently sustainable. It is true that it would have been better if the Tribunal had referred to "the *sole or* predominant case" or "the *only or* predominate cause" rather than simply "the predominant cause of the injury". However, the same observations as to the realities of tribunal life as referred to in the previous paragraph apply equally here. As ever, it is important to focus on the substance and not the form of the Tribunal's decision. With that focus on the substance, I am satisfied that the Tribunal in effect approached the two-stage test in the proper manner. It found that the cause of the accident was the action of the hit-and-run driver and that service was only the setting, i.e. service was non-causative. As the Tribunal found there was a sole non-service process cause of the injury, it necessarily followed that service was neither the only nor the predominant cause of the injury.

23. That takes us thirdly to paragraph 11(b) of the Tribunal's reasoning and its reference to *EW v SSD*, which was the main target of Mr Tucker's attack. This passage formed part of the underpinning for the Tribunal's central conclusions in paragraph 11(c). Notwithstanding the careful way in which Mr Tucker put his arguments, I am not persuaded that the Tribunal erred in law here. It is perfectly true that the very first sentence of paragraph 27 of *EW v SSD* was revisited and qualified by Judge Mesher in *SV v SSD*. Ms Ward advanced three reasons (see paragraph 17 above) to support her contention that the Tribunal had not erred in this regard.

24. The first of these was that Judge Mesher's further reasoning in *SV v SSD* necessarily fell when that decision was set aside by consent in the Court of Appeal. I do not regard this as particularly compelling. There are undoubted complications where a decision of a Social Security Commissioner (or now the Upper Tribunal) is set aside by consent in the Court of Appeal (see e.g. R(FC) 1/97, discussing the fate of CFC 4/1991 in *Kostanczwk v Chief Adjudication Officer* (August 21, 1992) in the Court of Appeal). The decision in *SV v SSD* raised a number of discrete issues, and Judge Mesher's general approach on causation was relied on in part by the three-judge panel in *JM v SSD*, albeit that was decided before the Court of Appeal's consent order in *SV v SSD*. In any event, it is fair to say that Miss Ward did not press this argument with any great conviction at the oral hearing. I was, however, persuaded by her second and third arguments.

25. The second argument was that there were in any event no principled points of distinction between the facts in *EW v SSD* and in the present case. In both cases the victims were travelling between two places where they were required to be for service reasons; they were travelling on foot where that was either the only option or a reasonable choice; the hit-and-run drivers were never traced and there was no evidence as to motive, if any; road conditions were poor; and the victim was in a pedestrian space

(a pedestrian crossing and a pavement respectively). The fact that the serviceman in *EW v SSD* was in uniform was not a material consideration. Mr Tucker laid stress on the fact that the officer in *EW v SSD* was on his way to work, so it was effectively a commuting accident, whereas the Appellant here was still on duty as part of the convoy operation. However, as Ms Ward noted, the test is not whether or not the claimant was on or off duty (see *EW v SSD* at paragraph 25 and *JM v SSD* at paragraph 100(vi)). Given all that, I am satisfied the Tribunal was entitled to say that there were "very similar facts" as between the two cases and so the same outcome followed.

26. I find Ms Ward's third reason to be equally persuasive. She argues that even as qualified by *SV v SSD*, Judge Mesher's point was that his observation in the first sentence of paragraph 27 of *EW v SSD* presupposed that there were no other competing factors. As Judge Mesher explained at paragraph 36 of *SV v SSD* (emphasis added):

> '36. The first sentence of paragraph 27 of *EW* appears to set out a proposition of completely general application. However, it is in my judgment plain from the overall context and in particular what was said in paragraph 28 that the conclusion in the first sentence of paragraph 27 was limited to the particular circumstances of the case in *EW*, where there were not any countervailing factors of the kind mentioned in paragraph 28. There is a warning in that paragraph that each case must be considered on its merits, i.e. not regarded as conclusively determined according to the result reached on the facts in *EW*. Accordingly, in the present case, the factor that the claimant's injury was a manifestation of a risk run by members of the general public using the same public beach was not conclusive against causation by service. There were other relevant factors also to be taken into account. Those circumstances leave the case short of the required degree of certainty that there was only one result that the tribunal of 15 June 2012 could legally and rationally have reached on the evidence if it had properly considered the issue of causation.'

27. The "countervailing factors" to which Judge Mesher was referring to were, in the context of *EW v SSD*, those such as "a person being targeted because of their uniform or of carrying service equipment that is linked to the occurrence of the incident" (*EW v SSD*, paragraph 28). In the course of oral argument Ms Ward gave another hypothetical example which might potentially qualify, such as where a serviceman stationed in the middle of the road directing traffic round a broken down convoy vehicle was accidentally struck by a passing motorist. In the present case, however, there simply were no countervailing factors, the Tribunal having found as fact that there was no evidence to support the theory that the Appellant may have been targeted as British service personnel. This was, very simply, a tragic accident that could have happened to anyone, whether serviceman or civilian. I agree with Ms Ward that the various possible factual matters to which Mr Tucker referred – e.g. the route taken and the state of the traffic – were not matters which would have gone into the balance as potential countervailing factors. I note in any event that the Appellant was represented by RBL at the Tribunal hearing and it is clear from the members' various records of proceedings that they carefully and fully explored the factual circumstances leading up to the incident itself.

28. In conclusion, I agree with Ms Ward's comment that the Tribunal might have used more words, but there was not a great deal more that could be said. The Tribunal's reasons were undoubtedly compressed, but they were just about adequate and did not disclose any material error of law. This was a case in which there was only ever one

process cause, so the Tribunal did not need to go through the series of four steps subsequently identified by the Upper Tribunal three-judge panel in *JM v SSD* (at paragraph 118), which was plainly a multi-factorial case. This was a case in which service was why the Appellant was where he was and when he was, but service was not a cause of the injuries he sustained. The Tribunal was also right not to address the arguments that had been put around Article 11, as that provision only came into play if the Appellant otherwise fell within the terms of Article 8.

29. I should add that I have considered in the alternative the position if I am wrong about the adequacy of the Tribunal's reasoning. I am driven to the conclusion that this would have had no material bearing on the outcome of the appeal. This is a classic case where service is the setting rather than the only or predominant cause. The only link with service is that the accident took place at a time and in a place where he was only present due to his service. But in taking a pedestrian route along the streets of Algeciras outside the port he was exposed to the same risk of being struck by a hit-and-run driver as any member of the public.

30. As the three-judge panel of the Upper Tribunal held in *JM v SSD*, "deciding whether a process cause is a service cause is an exercise of attribution, and so, of categorisation" (at paragraph 83). Furthermore:

> '87. It was also common ground that the change in wording from "attributable" in the war pensions instruments to "caused by" in the AFCS did not mark a change in the attributive, and hence categorisation, exercise involved in causation in the latter.
> 88. We agree and we therefore consider that the principles in the old case law relating to "attributable to service" remain relevant because they give guidance on the link that is required between the process cause and service to make it a service cause and so to satisfy the test that the injury be caused wholly or partly by service.
> 89. It follows that they provide assistance in the exercise of categorisation of process causes that is involved.'

31. In that context Ms Ward relied in particular on the dicta of Denning J in *Minister of Pensions v Chennell* [1947] KB 250 (cited by Judge Mesher in *EW v SSD* at paragraph 30) to the effect that "Persons may be more likely to be involved in an accident in a London street than in a country road, but the cause of an injury in any particular case is not the visit to London but the negligence of someone or other."

32. Given the attribution principles developed in the war pensions case law, I therefore conclude in any event that this was a classic case of service as setting rather than cause, and for much the same reasons as Judge Knowles QC set out in *Secretary of State for Defence v PA (AFCS)* [2016] UKUT 500 (AAC) (at paragraphs 42-44).

Conclusion

33. For the reasons explained above, the Tribunal's decision involves no material error of law. I must therefore dismiss the appeal (Tribunals, Courts and Enforcement Act 2007, section 11).

Signed on the original
on 30 March 2017

Nicholas Wikeley
Judge of the Upper Tribunal