IN THE UPPER TRIBUNAL **Case No.** CAF/1847/2016
ADMINISTRATIVE APPEALS CHAMBER

Before E A L BANO

Decision: My decision is that this appeal by the Secretary of State succeeds. I set aside the decision of the First-tier Tribunal and remit the case for re-hearing before a differently constituted tribunal.

REASONS FOR DECISION

1. This is an appeal by the Secretary of State, brought with the permission of Judge Levenson, against the decision of the First-tier Tribunal given on 9 February 2016 allowing the claimant's appeal against a decision made on 11 March 2015 refusing his claim for compensation under the Armed Forces Compensation Scheme 2011 (AFCS 2011). The claimant has now moved to Australia and has played no part in these proceedings.

2. The claimant was a Royal Marine who was deployed to Norway in January 2014 to take part in a cold winter warfare course. He returned to camp on 7 February 2014 in order to prepare his kit for the next phase of his training and, as he was walking back from the galley at about 18.30, he slipped on some ice. As a result of extending his arm while falling, the claimant injured his right shoulder and was subsequently repatriated and medically downgraded.

3. The claim for compensation was made on 16 June 2014. On 11 March 2015 a decision was made rejecting the claim, accompanied, as required by article 51 of AFCS 2011, by the reasons for the decision. The claimant appealed against the decision on 5 May 2015, but the decision rejecting the claim was maintained on reconsideration on 24 July 2015. At a hearing on 9 February 2016 at which the claimant was represented, but not present, the tribunal allowed the appeal for the following reasons:

> "It was accepted by the Appellant that he had slipped and it was not suggested by him that he was in a hazardous environment or participating in an activity of a hazardous nature. On the evidence before it, the Tribunal accepted that this was the case. His case was that he was training to improve or maintain the effectiveness of the forces.
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> The Tribunal was aware from its own knowledge that such exercises for Marines involve going away for a period of time, during which period they are required to return to barracks to change/clean their kit before setting off on the next phase. They are under direction and not on operational stand down. The tribunal noted that this was corroborated by the EMIS records which referred to him as being "deployed" and being returned to his unit. It is therefore arguable that he was involved in training at the time of his injury.

> In any event the law only requires that he is participating in training to maintain or improve the effectiveness of the forces and does not specify that he must actually be training at the time. The Tribunal found that the Appellant was participating in a training exercise from which he had not been stood down. That was to improve or maintain the effectiveness of the forces and accordingly he is not precluded from receiving benefit. The exception in article 11(3) does not apply as a result of the operation of Article 11(4). Accordingly it allowed the appeal."

4. In the grounds of appeal, settled by counsel, the Secretary of State contends that the claimant was not covered by the exception to the exclusion from entitlement under AFCS 2011 created by article 11(4)(c) because he was not actually participating in training when his injury occurred. The Secretary of State further submits that the tribunal's decision was in error of law because it failed to consider whether the claimant's injury was caused wholly or partly by service.

5. Entitlement to benefit for injury caused by service under AFCS 2011 is conferred by article 8, which provides:

> "(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."

Article 11 provides for exclusions from entitlement in respect of injury caused by slipping, tripping or falling, with exceptions in certain cases, as follows:

> "(3) Except where paragraph (4) [or (9)] applies, benefit is not payable to or in respect of a person by reason of an injury sustained by a member, the worsening of an injury, or death which is caused (wholly or partly) by that member slipping, tripping or falling.
> (4) This paragraph applies where the member was participating in one of the following activities in pursuance of a service obligation—
> (a) activity of a hazardous nature;
> (b) activity in a hazardous environment; or
> (c) training to improve or maintain the effectiveness of the forces."

6.. In support of the first ground of appeal, the Secretary of State relies on the decision of Judge Lloyd-Davies in *CAF/2260/2014.* The claimant in that case was guarding the perimeter of an exercise ground where physical training was taking place. After coming off duty, he went to his tent and while trying to get into bed he slipped against the metal bed frame and broke his wrist. Judge Lloyd-Davies allowed the Secretary of State's appeal against the tribunal's decision upholding the claim, for the following reasons:

> "It is clear that the applicant was not himself a trainee on the exercise…His was a supporting role of being on "maintenance duty", which included guard

> duty. In my judgment it is clear that in order for Article 11(4)(c) to apply the applicant must be actually taking part in the programme to improve or maintain the effectiveness of the forces. Taken in the context of Articles 11(4)(a) and (b), it is clear that the exceptions provided for are where the applicant is participating in activity of a non-routine nature. It does not suffice if the applicant is part of a team which is facilitating the training activity to take place: active participation in the training is necessary."

7. As the Secretary of State concedes, this case is not on all fours with *CAF/2260/2014* because the claimant in that case was not in fact taking any part in the training which was being conducted at the location where the injury occurred. Nevertheless, I agree with the Secretary of State's submission that the purpose of Article 11(4) is to provide an exception to the general principle that slipping, tripping and falling injuries are excluded from the scope of AFCS 2011 in cases where a claimant is put at increased risk as a result of requirements resulting from a 'service obligation' of a type specified by article 11(4). In the case of training, that will only be the case for so long as the person is subject to some form of direction, control or other constraint resulting from the training in which the claimant is participating. I do not consider that article 11(4)(c) applies to cases where there is no causal relationship between a claimant's injury and training which the claimant is undergoing, and I therefore agree that paragraph 4(c) of article 11 does not apply to a claimant who suffers injury at a time when the requirements imposed on the claimant as part of the training have ceased to apply. In my judgment, in order to come within the scope of paragraph 4(c) of article 11, it is not enough if injury occurs during a deployment for the purpose of participating in training if there is no connection between the training which the claimant is undergoing and the injury which the claimant has received. That approach is also consistent with the approach of Judge Knowles in *Secretary of State for Defence v A* [2016] UKUT 0500 (AAC) at [50]. I therefore uphold the Secretary of State's first ground of appeal.

8. In those circumstances, I do not consider it necessary to decide the second ground of appeal. However, I would like to make some observations about the procedure in this case.

9. The certificate rejecting the claim on 11 March 2015 stated that it was accepted "…that an exception to Article 11 applies as [the claimant] was on exercise in Norway whilst training to improve or maintain the effectiveness of the forces", but then went on to find that service was not the predominant cause of the claimant's injury because "he was not carrying out a task or activity that directly formed part of the training at the time of his injury". The reconsideration decision notified to the claimant on 24 July 2015, stated that the original certificate had incorrectly informed him that an exception to article 11 applied in his case, but maintained the rejection of the claim on the basis that the 'hazardous environment' exception to the article 11 exclusion for slipping, tripping and falling in article 11(4)(b) was inapplicable. The 'Opening Statement' in the statement of case stated unhelpfully: "The appeal lies against the decision of the Secretary of State to reject the claimed condition: injury to right shoulder as not on the balance of probabilities, predominantly caused by service".

10. I reject the Secretary of State's submission that: "it is plain from the terms of the first decision letter that it was not accepted that [the claimant's] injury was caused by service, even if it was not excluded from compensation by article 11(3)".. The stated reason for finding that service was not the predominant cause of the claimant's injury related to whether the claimant fell within one of the article 11 exceptions. In so far as the rejection decision is intelligible at all, it suggests that the decision-maker committed the very error of which the Secretary of State now complains, namely, to treat the claimant's injury as not having been caused by service because none of the exceptions to the article 11 exclusions applied. In my view the result of the erroneous and confusing decision of 11 March 2015 was to leave it wholly unclear whether there were any causation issues to be decided by the tribunal under article 8 of AFCS 2011, other than whether any of the exceptions to the exclusions in article 11 applied.

11. I consider that the position was made worse by the Secretary of State's failure to comply with the requirements of rule 23(2)(e) of the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008, which requires the Secretary of State's response to state "whether the decision maker opposes the appellant's case and, if so, the grounds for such opposition". Although the rule applies only to appeals in England and Wales, I consider that compliance with it is important for a number of reasons. Given the complexity of the legislation, it is inevitable that from time to time decisions notified to claimants will generate some degree of confusion and uncertainty with regard to the precise reasons for rejecting a claim, particularly where the exceptions to the exclusions in article 11 are involved. In such cases, rule 23(2)(e) of the Procedure Rules provides the submission writer with an opportunity to clear up any confusion and to clarify the legal and factual issues which need to be considered by all those involved in the appeal. In a jurisdiction such as this where many appellants live abroad or are prevented from attending hearings for other reasons, it is in my view particularly important for parties to have a clear understanding of the issues which the tribunal has to consider in order that they and their representatives can make effective preparations for the hearing of the appeal.

12. A further reason for compliance with rule 23(2)(e) is that section 5B of the Pensions Appeal Tribunals Act 1943 provides that a tribunal "need not consider any issue that is not raised by the appellant or the Minister in relation to the appeal". The power to consider issues not raised by the parties is discretionary, but the tribunal must consciously consider whether to exercise the discretion and give reasons for its decision if asked to do so-see *R(IB) 2/04*. If the Secretary of State does not comply with the duty under rule 24(2)(e) to set out the grounds for opposing an appeal, it will in many cases be very much more difficult for the tribunal to identify the matters on which the Secretary of State relies in opposing the appeal and to exercise their powers under section 5B of the 1943 Act accordingly.

13. I am inclined to agree with Judge Wikeley in his determination of 20 May 2016 refusing permission to appeal that a finding hat the claimant's injury was caused by service is implicit in the tribunal's findings. However, as a result of the muddled and confusing decision letters and the Secretary of State's failure to comply with rule 23(2)(e) of the Procedure Rules, it is not clear whether that was even an issue in the

appeal, but since I am allowing the appeal for the reason given above, I do not have to decide that issue.

14. As the Secretary of State recognises, there may be a possible argument that the claimant was carrying out an activity in a 'hazardous environment', so as to bring him within the exception to the exclusion under article 11(3) created by article 11(4)(b) of AFCS 2011. This appeal was stayed pending determination of *CAF/2213/2015.* That appeal has now been decided by Judge Knowles as *Secretary of State for Defence v A* [2016] UKUT 0500 (AAC), but does not really assist in the present case. However, Judge Rowland is currently considering his decision in *CAF/2693/2016*, which also involves a fall in icy conditions. I am therefore remitting this case to the First-tier Tribunal to be reheard on the question of whether article 11(4)(b) applies in this case in the light of whatever Judge Rowland decides.

E A L BANO
31 March 2017