IN THE UPPER TRIBUNAL **Case No.** CAF/22/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

The Appellant was represented by Ms Galina Ward of counsel, instructed by the Government Legal Department.

The Respondent was represented by Mr Glyn Tucker of the Royal British Legion.

Decision: The Secretary of State's appeal is allowed. The decision of the First-tier Tribunal dated 25 August 2016 is set aside and there is substituted a decision that the injury suffered by the claimant on 2 December 2009 was not caused by service.

REASONS FOR DECISION

1. This is an appeal, brought by the Secretary of State with permission given by the First-tier Tribunal, against a decision of the First-tier Tribunal dated 25 August 2016 whereby it allowed the claimant's appeal against a decision of the Secretary of State dated 23 January 2013, refusing the claimant's claim under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) on the ground that the claimant's injury was not caused by service. The First-tier Tribunal decided that the injury was caused by service.

2. Articles 8, 11 and 12 of the 2011 Order provided at the material time –

> "**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."
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> "**Injury and death – exclusions relating to travel, sport and slipping and tripping**
> **11.**—(1) Except where paragraph (2) or (9) apply, 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 travel from home to place of work or during travel back again.
> (2) This paragraph applies where the travel referred to in paragraph (1) is—
> (a) from the member's home or place of work to the place where an activity referred to in paragraph (6) is happening or during travel back again; or
> (b) from home or place of work where a member is changing a place of work in the United Kingdom to a place of work outside the United Kingdom or during travel back again.
> (3) Except where paragraph (4) and (9) apply, 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.

(5) Except where paragraph (6) or (9) apply, 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 participation in sporting activity as—

(a) a player;

(b) a referee;

(c) an organiser or a representative of a particular sport or sporting organisation.

(6) This paragraph applies where—

(a) the Defence Council have approved the sport or sporting activity as being a sport which enhances the fitness, initiative and endurance of members of the forces, and prior to the event, the relevant Service has recognised the particular sporting event and the organisation and training for it; or

(b) the sporting activity is approved by the Defence Council which is undertaken for the purpose of meeting and maintaining the physical standards required of members of the forces.

(7) For the purposes of paragraph (6)(a), the Defence Council may approve a single sport or sporting activity or a class of such activities and may approve such activities unconditionally or subject to any specified condition.

(8) Except where paragraph (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 reason of—

(a) attendance at a social event unless attendance was required by an order; or

(b) free time or a social event associated with the activities specified in paragraph (5).

(9) This paragraph applies where the injury, the worsening of the injury or death was caused (wholly or partly) by reason of—

(a) acts of terrorism or other warlike activities in each case directed towards the person as a member of the forces as such; or

(b) the member being called out to and travelling to an emergency.

(10) In this article—

(a) “home” means accommodation, including service accommodation, in which a member has lived or is expected to live for 3 or more months, and a member may have more than one home;

(b) “place of work” means the place of work to which a member is assigned or temporarily attached;

(c) “sporting activity” includes an adventurous course or an adventurous expedition approved by the Defence Council.

Injury and death – other exclusions

12.—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—

(a) the use or effect of tobacco;

(b) the consumption of alcohol;

(c) the non-therapeutic use of drugs;

(d) consensual sexual activity;

(e) except where article 9 applies, events, experiences, exposures and activities occurring before the member or former member entered service;

(f) an illness which is—

(i) caused by a single gene defect or is predominantly hereditary in origin;

(ii) a personality disorder;

(iii) an endogenous infection; or

(iv) an exogenous infection except where the infection is acquired in a non-temperate region and the person infected has been exposed to the infection in the course of service or where, in a temperate region,

there has been an outbreak of the infection in service accommodation or a workplace; or

(g) a self-inflicted injury whether or not causing death except where the self-inflicting of injury is a result of a mental illness caused by service."

(Since the time material to this case, drafting errors in article 11(3) and (9)(b) have been corrected and, in article 12 (which has now become article 12(1), "predominantly" has replaced "partly" – although it may be noted that a similar amendment has not been made in article 11(1), (3), (5) and (8) – and paragraph (f)(iv) has been amended.)

3. The underlying facts of the case may be shortly stated. The claimant joined the Royal Navy when aged 16. Having completed his basic training in HMS Raleigh, he joined HMS Collingwood at Fareham for Phase 2 training as a specialist in communications information systems. By then he was aged 17. On 2 December 2009, he attended a "gig" at the Royal Sovereign Sports Pavilion, which was located near playing fields across a public road from the rest of the establishment. The gig was organised by one of the physical training instructors and it was expected that the trainees would attend. A minibus was laid on to take them to the gig. There was a bar but, being under the age of 18, the claimant was not allowed to drink alcohol. Last orders were called at 23.00. Because he was under the age of 18, the claimant was required to be in bed by 23.59.

4. There was before the First-tier Tribunal a witness statement (doc 130-132) taken by the police from a fellow trainee who was also aged 17. He said that he had consumed two cans of Foster's Lager during the evening and had seen the claimant drinking, although he only saw him drink one can. He said that, at about 23.00, he had asked the claimant if he wanted to go with him to McDonald's (which was on the same side of the road as the Sports Pavilion) and the claimant had said he wanted to finish his drink first. They went outside for a cigarette but the claimant had still not finished his drink after they had smoked their cigarettes and so they agreed to meet at McDonald's and the other trainee went on ahead, leaving the claimant at the pavilion.

5. At about 23.20, the claimant was hit by a car while crossing the road between the Sports Pavilion and the main gate. He suffered a catastrophic head injury, as a result of which he still requires 24-hour care and is confined to a wheelchair during the day. He does not remember what happened. The car's driver told a police officer at the scene that the claimant had run into the road. His wife, who had been a passenger in his car, made a more detailed witness statement to the police but to the same general effect. She said that the car had just passed a Pelican crossing when the claimant darted out in front of the car from the nearside. That would have been consistent with him coming from the exit from the Sports Pavilion or from near that point. No other witness to the accident itself has been identified. It was thought at one time by some of the other trainees (doc 53 reverse) that "Rating J" might have been with the claimant when the accident happened but that appears not to have been so (see doc 112)).

6. On 26 April 2011, the claimant's mother signed a claim form for benefit under the Armed Forces Compensation Scheme, which was received by the Service Personnel and Veterans Agency Veterans Welfare Centre in Gosport on the following

day. The 2011 Order came into force on 9 May 2011 and, as no decision had yet been made, the claim fell to be determined under the provisions of that Order rather than its predecessor (see article 85(2)(a)). On 3 August 2011, the Agency wrote to the claimant to state that he was not entitled to compensation under the Scheme because his injury was not due to service. The reason given was that "the road traffic accident was caused by a third party". Reference was made to article 8 but not to article 11 or 12.

7. The claimant appealed, his father signing the appeal form as the claimant's "official appointee" and nominating Mr Coyle of the Royal British Legion as his representative. On 23 January 2013, the Agency wrote to inform the claimant that the Secretary of State had reconsidered his decision under article 53(5) of the Order but had not altered it. This time, it was mentioned that article 8 was subject to articles 11 and 12 and the reasons at least addressed article 11(8) as well as article 8 even if the particular paragraph was not expressly mentioned.

> "You were travelling back from a gig to your barracks when the accident that resulted in your claimed injury occurred. You were not under any service obligation to attend the gig and did so in your own free time, the provision of transportation or not is immaterial, it was not compulsory to attend by order and as such an exception under article 11 does not apply.
>
> The predominant cause of the road traffic accident that resulted in your claimed injury was the actions of a third party i.e. the driver of the car that hit you. That you were a minor under a curfew to return to your bunk by 23.55 is merely a background factor and does not constitute service causation of the accident."

However, the Decision Lay Certificate that was dated 21 January 2013 and presumably represents the actual decision that was notified two days later referred not just to articles 8 and 11(8) but also article 11(1) and (2). It was said –

> "[The claimant] was travelling back from a gig to his barracks when the accident that resulted in his claimed injury occurred and as such an exception under article 11(2), 11(6) or 11(9) do not apply."

On 21 August 2013, the claimant was discharged from the Royal Navy.

8. His appeal was dismissed by the First-tier Tribunal on 1 October 2013. He had produced at the hearing a large number of documents recently obtained from the Royal Navy, relating to the Ship's Learning Account, or internal investigation, into the service circumstances leading up to the accident on 2 December 2009. Both parties had requested an adjournment, the Secretary of State so that he could consider the documents and the claimant so that he could obtain witness statements from some of those mentioned in the documents, but the First-tier Tribunal had refused those requests. The claimant appealed and, on 30 April 2014, I set aside the First-tier Tribunal's decision (*JG v Secretary of State for Defence (AFCS)* [2014] UKUT 194 (AAC)) and remitted the case to the First-tier Tribunal.

9. When issuing case management directions in the Upper Tribunal, I had raised a number of questions as to the meaning of article 11 of the 2011 Order. The Secretary of State did not answer them but conceded that the appeal should be

allowed. Against that background, I explained why I gave the following explanation for remitting the case rather than deciding it –

> "5. The Secretary of State concedes that the refusal to adjourn was irrational and does not seek to defend it. He wishes the case to be remitted to the First-tier Tribunal because he still wishes to seek advice on the meaning of article 11 and to investigate the facts. It is submitted that "[s]uch investigations could have the potential to effect the negating of the appeal." Mr Coyle agrees that the case should be remitted.
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> 6. I am satisfied that the expressed ground for refusing the adjournment was irrational and that the final decision was therefore wrong in law. I am also prepared to remit the case without giving any further consideration to the meaning of article 11, but only because such consideration would best take place against the background of clear findings of fact and I accept the parties' contention that it is at least possible that some of the material in the new documents merits further investigation, the consequence of which might conceivably be the Secretary of State reviewing his decision under article 59 of the 2011 Order."

10. There was a hearing in connection with the remitted appeal before the First-tier Tribunal on 29 January 2015 when the First-tier Tribunal issued a number of case management directions, which included a direction requiring the Royal British Legion to file and serve witness statements but did not require the Secretary of State to make a submission as to the application of article 11. Uncharacteristically, the Royal British Legion failed to respond to those directions or to subsequent contact by the First-tier Tribunal. Eventually, it became apparent that the Royal British Legion had not been able to make contact with the relevant witnesses and, after further case management directions had been issued, the case was heard by the First-tier Tribunal on 25 August 2016. Despite what he had said to me, the Secretary of State did not make any written submission as to the law and, in particular, as to the meaning of article 11 and its relevance to this case.

11. Surprisingly, the Secretary of State was not represented at the hearing on 25 August 2016. The claimant was represented by Mr Nixon of the Royal British Legion. The First-tier Tribunal allowed the appeal. First, it decided that neither of paragraphs (2) or (6) of article 11 applied. Secondly, it decided that it was more likely than not that the claimant's awareness of the danger of fast moving traffic would have been reduced by his exposure over a sustained period to traffic conditions within naval training establishments, so that it was more likely than not that he was at greater risk than any ordinary member of the public. Thirdly, it decided that the claimant's attendance at the gig had been "required by an order" for the purpose of paragraph (8)(a) of article 11, so that he was not excluded from entitlement to benefit by virtue of paragraph (8). Fourthly, it considered article 8 and decided that service was the predominant cause of the accident.

12. The Secretary of State now appeals against the First-tier Tribunal's decision. He accepts that payment of compensation is not excluded by article 11 but he submits that the First-tier Tribunal failed to give adequate reasons for finding that the claimant's injury was caused by service and in any event failed to apply the correct test. The claimant submits that the First-tier Tribunal did not err on either of those grounds.

13. Although article 11 is not now in issue, it may be helpful if I first explain why that is so, because neither the Secretary of State's decision-maker on the reconsideration decision nor the First-tier Tribunal correctly analysed the legislation. In *SM v Secretary of State for Defence (AFCS)* [2017] UKUT 286 (AAC); [2018] AACR 4, I considered the relationship between articles 8 and 11 and said –

> "17. … At first sight, there is no connection at all between articles 8 and 11 of the 2011 Order, but article 11 in fact addresses a number of issues that have caused difficulty when considering the scope of both the civilian industrial injuries scheme and the war pensions scheme (which preceded the Armed Forces Compensation Scheme and where the issue is whether disablement is "attributable to service") and might otherwise cause difficulty when considering whether an injury was caused by service for the purposes of article 8. The object of article 11 therefore appears to be to introduce an element of clarity in those areas, although whether it does so to the extent that it could have done may be debateable, even though some of the difficulties arising from the terms of articles 7 and 10 of the 2005 Order have been removed. In particular, it might have been conceptually neater if article 11 had been drafted so as to make provision for circumstances in which injuries would not be regarded as caused by service, rather than merely making provision for circumstances in which benefit would not be payable. As it is, there is an untidy overlap between the questions arising under article 8 and those arising under article 11.
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> 18. Nonetheless, it will usually be unprofitable to consider whether injuries caused by travel, sport or slipping, tripping or falling might have been caused by service without considering at the same time whether the circumstances fall within an exclusion under article 11; if they do, that will be an end of the case. On the other hand, the fact that a claimant's case falls within one of the exceptions to the exclusions in article 11 is likely considerably to assist the claimant in showing that the relevant injury was caused by service, particularly when, as is the case with article 11(4), the exception applies only where the claimant is carrying out a relevant activity "in pursuance of a service obligation". As Ms Ward submitted, some cases will effectively be determined under article 11, whereas others will effectively be determined under article 8. …"

14. The structure of article 11 is relatively straightforward even if its interpretation is not. Paragraphs (1), (3), (5) and (8) provide that benefit is not payable in four, largely unrelated, circumstances. Paragraphs (2), (4), (6) and (9) provide for exceptions to those exclusions from benefit, paragraphs (2), (4) and (6) each only providing exceptions to the exclusion imposed by the immediately preceding paragraph and paragraph (9) providing for exceptions to all of the exclusions. Paragraphs (7) and (10) are merely supplementary.

15. In his initial decision in the present case, the Secretary of State relied on paragraphs (1) and (8), saying in relation to paragraph (1) that none of the exceptions in paragraphs (2), (6) or (9) applied even though the exceptions in paragraph (6) are not relevant to paragraph (1) save insofar as there is a reference to them in paragraph (2)(a). On reconsideration, he appears to have relied only on paragraph (8), although he did not refer to any particular paragraph by number in his decision letter. In the comment he submitted by way of a response to the appeal, he made it clear that he was still relying only on paragraph (8). However, he did not expressly state that he was no longer relying on paragraph (1) and the First-tier

Tribunal may have thought that he was because his reconsideration letter mentioned travel. It said that the claimant was "travelling back from a gig to your barracks when the accident that resulted in your claimed injury occurred".

16. In any event, the First-tier Tribunal said –

> 11. The Tribunal came to the view that Article 11 subparagraph (2) which deals with travel to and from a place of work did not apply to the particular facts of this case. The Appellant was both living and working on base for the whole of his Part II training. The fact that the base unit was in fact bisected by one single lane public road was immaterial. Subparagraph (2) appeared to cater for the situation where service personnel were living off base in either private or service accommodation and were on their way to or from their place of work. Furthermore, subparagraph (6) did not apply as the Appellant was not travelling to a Defence approved organised sporting event nor was he changing a place of work."

As the Secretary of State points out, the logic of the First-tier Tribunal's reasoning should have led it to finding that paragraph (1) did not apply and that therefore the exceptions in paragraph (2) were not relevant, rather than merely that the exceptions in paragraphs (2) and (6) did not apply, because that in theory left open the question whether the exclusion in paragraph (1) applied. However, as I have said, the Secretary of State now accepts that paragraph (1) does not apply. The definition of "place of work" in paragraph (10)(b) supports the First-tier Tribunal's view that paragraph (1) was not brought into play in the circumstances of this case and I accept that that is so. (That definition also makes the purpose of paragraph (2)(a) unclear because a journey "from the member's home or place of work to the place where an activity referred to in paragraph (6) is happening" is not a journey "from home to place of work or … back again" so as to be within the scope of paragraph (1), unless the activity is taking place at the person's home or place of work as defined in paragraph (10) and he or she is travelling from or to the other of those places, which I doubt was the scenario envisaged by the draftsman.)

17. The exclusions in paragraphs (3) and (5) clearly did not apply on the facts of this case and the contrary has never been suggested.

18. As to paragraph (8), the Secretary of State does not challenge the First-tier Tribunal's finding that the claimant's attendance at the gig was "required by an order" so as to fall within the exception within paragraph (8)(a). Standing Orders said that events, including sporting and musical events, would be arranged by staff and physical training instructors and that information about them would be on Daily Orders. Some such events would be compulsory. The First-tier Tribunal considered it likely that the gig attended by the claimant would have been published in Daily Orders, that it had all the characteristics of a compulsory event described in the Standing Orders and that the claimant "would have quite properly taken this as an order to attend". However, the Secretary of State's primary position is that paragraph (8) did not apply simply because the claimant was no longer at the social event at the time of the accident, but had left and was on his way back to the main part of the establishment. This suggests a narrow reading of the exclusion, since, on a broader view, attendance at a social event can make it necessary to travel home and so can be a cause of an accident occurring on such journey.

19. That broader view seems to have been the approach adopted by the First-tier Tribunal because when, having decided that payment was not excluded by article 11, it turned to article 8, it said –

> "15. Was the accident caused (in whole or in part) by service under Article 8 and if caused in part by service was service the predominant cause? The Tribunal takes the view that the Appellant attended the event as required to do by an order. He was then required to return to his accommodation by another order (the curfew) the only reason he was crossing the road was following compliance with one order and in the process of complying with another order."

20. The Secretary of State submits that that shows an impermissible approach to article 8 because the fact that a person would not have been in the place where the accident occurred but for service is not determinative of the question whether the accident was caused by service. The claimant, on the other hand, submits that regard must be had to the First-tier Tribunal's finding that the claimant's awareness of the danger of fast moving traffic would have been reduced by his exposure over a sustained period to traffic conditions within HMS Collingwood. The Secretary of State concedes that that finding might be relevant but submits that it was based on inadequate reasoning.

21. The First-tier Tribunal said –

> "12. The Tribunal also considered whether the Appellant was at any greater risk than any member of the public in crossing the road between the two parts of the base. The Tribunal took into account that the Appellant would have spent the great majority of the previous seven months living and working inside naval training establishments. From its own expertise, the Tribunal was aware that traffic is very limited within these establishments. It is generally restricted to vehicles arriving, departing and making their way to allocated parking areas. Trainees in these establishments have right of way over vehicles and traffic speed is limited to 20 mph. The Tribunal took the view that it is more likely than not that the Appellant's awareness of the danger of fast moving traffic would have been reduced by this exposure over a sustained period, and therefore it is more likely than not that he was at greater risk than any ordinary member of the public."

The First-tier Tribunal did not explain the relevance of that finding to the legislation but I accept that it was potentially relevant to the question posed by article 8 as to whether service was the predominant cause of the injury suffered by the claimant.

22. I agree with the Secretary of State that the First-tier Tribunal erred in its approach to article 8 but not for quite the reason suggested by him.

23. It is common ground that, where there is only one process cause of an injury, in this case the road traffic accident, the question whether that is a service cause is essentially one of attribution (see *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC); [2016] AACR 3). It is also common ground that neither the question whether the claimant was on or off duty nor the question whether he or she was only where the accident took place due to service commitments is determinative. However, it does not follow that those factors are irrelevant and in my view both are potentially relevant.

24. Insofar as the Secretary of State's approach implies that an accident befalling a serviceman when travelling from one place where he is under a duty to be to another place where he is under a duty to be can never be caused by service for the purposes of article 8, I do not agree. Indeed, an accident while travelling from home to a place where he is under a duty to be or vice versa may in some circumstances be caused by service and payment will not be excluded by article 11(1) if the latter place is not a "place of work" as defined in article 11(10)(b). However, that is not necessarily so. One significant factor in "travelling" cases in the civilian industrial injuries scheme is whether an employee is travelling in his employer's time (see R(I) 1/91) and, although the service context is obviously different, what seems to me to be important in the present case is that the accident occurred during a period that was free time for the claimant. That he had earlier had to attend the gig and that ultimately he had to return on time to barracks did not in my view have the effect that the accident was caused by service, because the claimant was, at the material time, "on his own business" (see *Gaffney v Minister of Pensions* (1952) 5 WPA 97, considered in *JM* at paragraph 98(v), although I accept in that case the claimant had not had a service reason for being away from his barracks in the first place). In the absence of any other consideration, I would accept that the First-tier Tribunal erred in paragraph 15 of its decision.

25. However, if service was nonetheless a cause of the claimant being at a greater risk than a civilian, the accident could still have been caused by service for the purposes of article 8 (see *Giles v Minister of Pensions and National Insurance* (1955) 5 WPA 445, considered in *JM* at paragraph 98(vi)) and I therefore agree with the parties that the First-tier Tribunal's finding at paragraph 12 of its decision was potentially relevant.

26. The Secretary of State criticises that finding because, it is submitted, it does not follow from the fact that a person has limited traffic awareness that he or she would be likely to run out in front of the only car in the vicinity in the way described by the driver's wife and, if her evidence was not accepted, the First-tier Tribunal did not say so and has not explained why. I doubt that the First-tier Tribunal did reject her evidence in any material respect. Even if the car was going faster than she said, it is difficult to see how the accident could have occurred if the claimant had not walked or run out in front of it in circumstances where a careful pedestrian would have stopped and seen it in good time. The road was lit (although it was drizzling and there is some evidence that the lighting was not particularly effective in the area from which the claimant emerged) and anyway the car presumably had its headlights on. I imagine that the First-tier Tribunal simply reasoned that the claimant must have failed to look and that the reason for that was probably a lack of recent experience of roads due to service. That was not an argument that had been advanced on the claimant's behalf. The First-tier Tribunal was unable to put that argument to the Secretary of State because he was not represented. I am told that that was due to a lack of resources although I am surprised that this case was not prioritised given the amount that may have been at stake and that no request was made for a postponement if representation on that day really could not be arranged.

27. I do not entirely accept the Secretary of State's argument because it seems to me that the First-tier Tribunal did not reason that a lack of road awareness was likely to make people run in front of cars but only that, where a person had run in front of a

car, the probable cause was a lack of road awareness and that the probable cause of a lack of road awareness was living and working in a naval establishment. However, if generally accepted, its reasoning would have the effect that there was a presumption that any road traffic accident due to a naval trainee walking or running in front of a car was due to service, wherever the accident occurred. It seems to me that the First-tier Tribunal failed to have regard to the possibility that there might have been other causes of the accident apart from a lack of road awareness induced by service in naval training establishments. For instance, any pre-service lack of experience of roads might have been at least as relevant but, in any case, not all carelessness on roads is due to a lack of experience of them. Moreover, in the present case, the First-tier Tribunal ought to have considered whether the consumption of alcohol might have been at least as important a factor.

28. There is clear evidence that the claimant had consumed some alcohol at the Sports Pavilion notwithstanding that he was not allowed to do so. I have already referred to a statement by a fellow trainee that was given to the police. The Ship's Learning Account was not concerned with establishing exactly what had happened on the evening of 2 December 2009 but it was concerned with drawing lessons from what might have happened and a considerable number of its recommendations were in relation to the supervision of trainees under the age of 18, particularly at events in the Sports Pavilion where alcohol was available, although it also recommended carrying out a risk assessment of the pedestrian route from the main establishment to the Sports Pavilion and raising the question of signage with the local authority.

29. No doubt because of its focus, most of the other trainees were interviewed together by an officer, with another officer and two senior ratings present, rather than individually, and they do not appear to have been closely questioned about what the claimant had drunk and exactly how he had obtained the drink. But the record of the interview (doc 52, reverse) stated that the trainees said –

> "6. … it was apparent that by the end of the evening he was under the influence of alcohol, although at no time was he considered unfit to carry out a duty that he may be reasonably expected to perform.
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> 7. At approximately 2315 [the claimant] stated that he had to return to his accommodation (as he was required to be in bed no later than 2359 because he was Under 18 years of age).
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> 8. He was seen walking down the steps at the Sports pavilion with his hands in his pockets, he negotiated the steps with ease and at no time did he appear unsteady on his feet or in an unfit state to make his way back to his accommodation."

The officer who had been Officer of the Day on 2 December 2009 recalled that one of those trainees was "particularly upset and commented that he had bought [the claimant] one or two beers that evening" (doc 86, reverse). A physical training instructor who had been at the gig and said that he had seen the claimant with a non-alcoholic drink but not an alcoholic one, later saw the claimant outside shortly before the accident and "was under the impression that [the claimant] had been drinking" (doc 107). The trainees and bar staff disagreed as to whether bar staff checked ID cards (on which there should have been a sticker identifying those under 18, although it was not unknown for such stickers to come adrift) but there was evidence

that it was possible for those over 18 to buy drinks for those under that age and that the ratings tasked with clearing glasses were phase 2 trainees at the start of their course who were too junior themselves to enforce in practice the regulations against under-age drinking.

30. That evidence required consideration. It seems fairly clear that no-one who saw the claimant shortly before the accident thought that he was drunk as that term was defined in Standing Orders – "he is unfit to be entrusted with his duty or with any other duty he is likely to be called upon to perform, or acts in a disorderly manner or manner likely to bring discredit on Her Majesty's Service" (doc 82) – or so as to need escorting back to his accommodation, but, quite apart from the possibility of them having underestimated the extent to which he had been affected, the evidence at least raises the question whether his judgment might have been impaired as a result of the consumption of alcohol.

31. In any event, the First-tier Tribunal either failed to consider other possible reasons why the claimant might have been involved in the accident or, as the Secretary of State submits, it failed to give adequate reasons for its decision. In either event, it erred in law and its decision must be set aside.

32. The Secretary of State has invited me to substitute my own decision rather than remitting the case to the First-tier Tribunal and Mr Tucker for the claimant did not object to me doing so if, contrary to his submission, I found the First-tier Tribunal to have erred in law. This seems appropriate, since it does not appear that any more evidence would be elicited at another hearing.

33. I have already explained that the facts that the claimant had been required to attend the gig and had to cross the road in order to return to his accommodation where he was required to be by midnight do not by themselves lead to the conclusion that the claimant's injury was caused by service because he was on a public road in his free time.

34. As to the question whether service placed him at any particular risk, I accept the First-tier Tribunal's finding that there is little traffic within naval training establishments but I do not accept that any consequent lack of recent experience of traffic is a sufficient explanation for the claimant making a misjudgement of the enormity that it seems likely that he made in this case so that the accident can properly be attributed to service even though it took place on a public road in the claimant's free time. There is no evidence that a lack of traffic in HMS Collingwood actually had the effect of making the claimant careless on roads. Frankly, I consider it more likely that alcohol played a part and, if it did not, it is simply unclear why the claimant walked or ran in front of the car as he appears to have done. One can speculate as to the mistake he made but it would be no more than speculation. In these circumstances, I cannot find that the claimant's injury was caused by service

35. It has rightly not been argued on behalf of the claimant that, if the claimant's judgment was impaired by alcohol, his injury was caused by service given the finding that he was obliged to attend the gig and what might be said to be deficiencies in the supervision of those under the age of 18. Setting on one side article 12(b) – because it is arguable, given the other paragraphs of article 12, that article 12(b) applies only

where alcohol consumption directly causes physical or mental illness and not where it merely leads to a lack of judgment that leads to an accident – it seems to me that it cannot be said that drinking alcohol was caused by service when the claimant was under express orders not to drink. Service was merely the setting. See *Monaghan v Minister of Pensions* (1947) 1 WPA 971, considered in *JM* at paragraph 98(iv), where a serviceman on active service died as a result of inhaling his own vomit after drinking, with other servicemen, raw spirit abandoned by the enemy. Denning J held that, although war service gave the opportunity for the drinking, the real cause of the death was entirely the personal action of the serviceman. I do not consider that it matters that the claimant in the present case was under 18. He was subject to naval discipline. It was his personal choice not to obey orders and even if, which I do not decide, the supervision was inadequate and it is not particularly surprising that he drank while at a gig he was required to attend with fellow trainees who were allowed to drink, the consumption of alcohol to the extent that his judgement was impaired was not a service obligation or part of a service obligation and therefore an injury caused by the impairment could not be said to be caused by service.

36. One cannot but have sympathy for the claimant and his parents. However, not all injuries lead to payments of compensation and, for the reasons I have given, I am satisfied that the terms of the Armed Forces Compensation Scheme, as set out in the 2011 Order, are not satisfied in this case.

Mark Rowland
21 January 2019