IN THE UPPER TRIBUNAL **Case No.** CAF/1913/2015
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 24 September 2014 is set aside and the case is remitted to a differently-constituted panel of the First-tier Tribunal to be re-decided.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 24 September 2014 whereby it dismissed the claimant's appeal against a decision of the Secretary of State, dated 18 October 2012 and notified to the claimant on the next day, to the effect that the claimant was not entitled to a payment under the Armed Forces Compensation Scheme because the injury to his left shoulder in respect of which he had claimed was not caused wholly or predominantly by service.

2. The injury had occurred in April 2010 while the claimant, who had only recently enlisted in the Royal Marines, was climbing a rope in a gym. In essence, the First-tier Tribunal agreed with the Secretary of State, finding that "there was a pre-existing weakness to the Appellant's left shoulder and that it was this pre-existing weakness that was the predominant cause of his subsequent dislocation".

3. The claimant sought leave to appeal on the ground that the service member of the First-tier Tribunal had questioned him in an unjust way. His representative from the Royal British Legion also described the questioning as "hostile" and "presented in an accusatory manner". The First-tier Tribunal refused permission to appeal on the ground that, even if the questioning was improper, it had not resulted in any disadvantage to the claimant because the First-tier Tribunal did not make any adverse findings as regards his oral evidence.

4. When the claimant renewed his application to the Upper Tribunal, I granted permission on a different ground, saying –

> "I doubt that the allegation as to the manner of the questioning by a member of the First-tier Tribunal demonstrates an error of law. Even if the manner of the questioning can be criticised, it does not currently seem to me that the evidence is sufficient to show bias or other unfairness such as might undermine the First-tier Tribunal's finding that the claimant had been suffering from a relevant pre-existing condition in the form of an atraumatic structural instability of the left shoulder joint.
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> However, it is strongly arguable that the First-tier Tribunal erred in law in failing adequately to explain why it considered that the claimant had not suffered an injury that was predominantly caused by service. Its finding that he had a pre-existing condition is arguably not a sufficient explanation, given that the First-tier Tribunal appears to have accepted that he suffered a specific injury, a dislocation of the shoulder, while in service. The approach to the "predominant cause" test in cases

> where there is a pre-existing condition was recently considered, admittedly as *obiter dicta*, in *JM v Secretary of State for Defence* (AFCS) [2015] UKUT 332 (AAC) at [127] to [138]. Correctly identifying the injury actually caused most immediately by service may be important. Thus, it is arguable that, if a person has a pre-existing shoulder joint instability, he or she might not be eligible for a payment based on, say, item 17 or 59 of Table 8 in Schedule 3 to the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) but, even if that is so, it does not follow that he or she might not be eligible for an award in respect of a dislocation or subluxation or other injury of the shoulder that arises out of the instability but is more immediately caused by strain suffered on, say, a military exercise and that falls within the scope of, say, item 41 of Table 8 or perhaps an item in Table 9. Moreover, there might be a question whether there had been worsening of the pre-existing condition within the scope of article 9. Thus, in this case, the First-tier Tribunal arguably should have asked itself whether the claimant had suffered any disablement from which he would not have suffered but for a service cause and, if so, whether that disablement was attributable to an injury, or the worsening of an injury, described in Schedule 3."

5. The Secretary of State broadly agrees that the appeal should be allowed on the ground that I identified, although his representative quite rightly points out that, as the claimant is still a serving member of the Armed Forces, no question of a payment under article 9 of the Scheme in respect of worsening arises. (The injury also occurred within six months of his enlistment, which is another reason why an argument under article 9 could not get off the ground.) The claimant is content for the case to be decided on that basis.

6. In *JM*, the three-judge panel considered the old case of *Marshall v Minister of Pensions* [1948] 1 KB 106, in which under the claimant sustained a hernia, the immediate cause of which was coughing resulting from the conditions in which he had served. It was held that the claimant was entitled to a war disablement pension under the scheme then in existence notwithstanding that an underlying weakness in the claimant's abdominal wall might have been the predominant cause of the hernia. The three-judge panel considered that the Armed Forces Compensation Scheme required a different approach to predominancy, saying –

> "133. We acknowledge that, in exercising the judgment between process causes that have been categorised into service and non-service causes of the injury, a literal approach to the language of the test in the 2005 and 2011 Orders could, in an equivalent case to *Marshall*, found the view expressed by Denning J with the result that the claimant would not get an award because the predominant cause of the injury was the constitutional weakness and the cough was a lesser cause.
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> 134. But in our view the width of the language permits a more sophisticated approach to deciding whether, as the Secretary of State put it, conceptually the service cause contributes more than one half of the causative stimulus for the injury claimed, and thus whether service is the predominant cause in a case where (after the categorisation process) the only competing causes are service and constitutional or other pre-existing weaknesses. In such a case the decision maker generally should firstly consider whether, without the 'service cause', the injury would:
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> have occurred at all, or

have been less than half as serious.

135. If the answer to the first question is that the injury would not have occurred at all in the absence of the service cause, we consider that this can and generally should found a conclusion that the service cause is the predominant cause of the relevant injury. It seems likely that a claimant in Mr Marshall's position would succeed on this basis.

136. If however that is not the answer to the first question, the second question will generally found the answer to whether the service cause is the predominant cause of the relevant injury. Thus the second question is likely to be determinative in the present case if it is found that the claimant's depression was caused both by service and by pre-existing domestic factors.

137. We consider that this approach fits with and promotes the underlying intention of the AFCS to pay compensation for an injury that has more than one process cause that under the categorisation exercise we have described fall to be taken into account as respectively service and non-service causes.

138. We repeat that this is not intended to be prescriptive guidance and that it may need to be modified or abandoned in some cases. For example, we acknowledge that timing issues could cause complications that warrant a departure from it."

7. I consider that that the Secretary of State is right to concede that the First-tier Tribunal has not recorded adequate reasoning for its finding that the claimant had not suffered an injury the predominant cause of which was service. However, it is understandable that the First-tier Tribunal should have erred, both because its decision was made before that of the three-judge panel and because the claimant's case had been largely directed at arguing that he did not have any relevant pre-existing condition. The result was that the First-tier Tribunal concentrated on giving reasons for finding that there was a relevant pre-existing condition and then did not adequately address the question which of the pre-existing condition and service had predominantly caused the condition in respect of which the claimant had made his claim, which required some analysis of both the nature of that injury and its immediate cause. In any event, the First-tier Tribunal's decision is erroneous in point of law.

8. Accordingly, I allow the claimant's appeal and remit the case to the First-tier Tribunal, as both parties have suggested that I should. All issues will be at large again before the First-tier Tribunal. The First-tier Tribunal may wish to direct the Secretary of State to make a further written submission to it in the light of *JM* and my observations above.

Mark Rowland
22 February 2016