[2017] AACR 18

(Secretary of State for Defence v A (AFCS)
[2016] UKUT 500 (AAC))

Judge Knowles QC **CAF/2213/2015**
4 November 2015

Armed Forces Compensation Scheme 2011 – article 11 – meaning of hazardous environment

The claimant, a soldier, sustained injuries after he went to sit on a wall, lost his balance and fell whilst waiting for a bus to take him to a training destination in Israel. His claim for benefit under the Armed Forces Compensation Scheme (AFCS) was rejected, initially on the basis that his injuries had not been caused by service and on review that the exclusion in article 11(3) of the AFCS, for injuries sustained by slipping, tripping and falling applied, and as the activity was not of a hazardous nature or in a hazardous environment the exceptions in article 11(4) were not engaged. The First-tier Tribunal (F-tT) upheld the claimant's appeal holding, amongst other things, that the exceptions in article 11(4) did apply as the claimant had been engaged in a sensitive service activity within Israel which was therefore a hazardous environment, given the nature of the operation. The Secretary of State for Defence appealed against that decision arguing that the F-tT had erred in law in deciding that the whole of Israel was a hazardous environment and also by failing to give reasons for its conclusion that the claimant's injuries were caused by service in accordance with article 8 of the AFCS.

Held, allowing the appeal, that:

1. the underlying purpose and intention of the AFCS as a whole was to establish an entitlement to benefit based on a service cause, as opposed to breach of duty or fault, and the exceptions in article 11(4) to the general exclusion of slipping, tripping and falling accidents were intended to capture "*non-routine*" activities: *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC); [2016] AACR 3 (paragraph 33);

2. the F-tT erred in interpreting article 11(4)(b) so as to conclude that the whole of Israel was a hazardous environment for the claimant. The environment in which the respondent came to be injured could not, on any sensible interpretation of the 2011 AFCS, be classified as "*hazardous*", there being nothing about the activity of a soldier waiting for a bus more likely to lead to a slip, trip or fall than if a civilian had been participating in the same activity in ordinary, or non-service, circumstances (paragraph 34);

3. the F-tT failed to support with adequate reasoning its conclusion that the respondent's injuries were predominantly caused by service. It should have followed the steps set out in *JM* before considering whether the exclusions in article 11(3) and 11(4) applied in this case (paragraph 38);

4. the test under article 8(1) and (2) was not whether the claimant was in service or was on duty at the time of his fall but whether his injury was caused and predominantly caused by service. The claimant failed to satisfy that test because at the time of the accident he was doing something necessary for him to carry out his job but he was not yet doing it. The fact that he was in Israel on a training exercise as a member of the Armed Forces could not be regarded as anything other than the setting for what occurred – not the cause of his injury (paragraph 44 to 45);

5. even if the claimant's injuries had been caused by service, his claim for benefit would still have failed because none of the exclusions in article 11(4) applied: he was not engaged in an activity of a hazardous nature, in a hazardous environment or actually taking part in training (paragraphs 46 to 47).

The judge set aside the decision of the F-tT and re-made it to the effect that the claimant's appeal against the decision of the Secretary of State for Defence was dismissed.

DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the appellant Secretary of State for Defence.

The decision of the First-tier Tribunal on 7 May 2015 under reference AFCS/00554/2014 involved an error on a material point of law and is accordingly set aside.

The Upper Tribunal is in a position to re-make the decision on the appeal by the respondent against the decision of the Secretary of State dated 11 November 2014. The decision that the First-tier Tribunal should have made is as follows and the Upper Tribunal re-makes the decision accordingly.

"The respondent's appeal against the decision of the Secretary of State for Defence is dismissed. The condition of left arm multiple injuries is not attributable to service on or after 6 April 2005."

This decision is given under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This appeal considers the meaning of the phrase "*hazardous environment*" contained in article 11(4)(b) of the Armed Forces Compensation Scheme (SI 2011/517) ("AFCS"). Compensation under that Scheme is payable for an injury caused wholly or partly by service on or after 6 April 2005 unless any of the exclusions in articles 11 or 12 apply. Article 11 contains exclusions relating to travel, sport and slipping and tripping. By article 11(3) benefit is not payable by reason of injury caused, either wholly or partly, by a member of the Armed Forces slipping, tripping or falling. However, article 11(4) does provide that benefit for injury caused in such a manner will be payable in certain circumstances where the member of the Armed Forces was participating in certain activities in pursuance of a service obligation. These activities are: activities of a hazardous nature; activities in a hazardous environment; and training to improve or maintain the effectiveness of the forces.

2. I have concluded that a "*hazardous environment*" is one where the risk of slipping, tripping or falling during activity performed in pursuance of a service obligation is likely to be increased. The focus is not solely on whether the environment could in general terms be described as "*hazardous*" but on whether the activity being carried out by the member in pursuance of a service obligation was rendered more hazardous due to the nature of the environment. Though this appeal concerned the construction of article 11(4)(b), my conclusions may have application to the construction of article 11(4)(a), namely activities of a hazardous nature.

3. Given my interpretation of article 11(4)(b), I find that the First-tier Tribunal ("the tribunal") hearing this appeal erred in law by finding that the whole of the territory of Israel was a hazardous environment. In waiting for a bus outside his hotel, I find that the respondent was not in a hazardous environment within the meaning of article 11(4)(b) since there was nothing about the environment which rendered waiting for a bus – the activity in which he was participating in pursuance of a service obligation – more likely to lead to a slip or a trip or a fall than if a civilian had been participating in the same activity in ordinary, non-service circumstances.

4. I set the tribunal's decision aside. I am in a position to re-make the tribunal's decision and do so to confirm the decision of the appellant Secretary of State dated 11 November 2014 that the condition of left arm multiple injuries was not attributable to service on or after 6 April 2005.

Background

5. The factual background pertinent to this appeal is summarised as follows. The appellant before the Upper Tribunal is the Secretary of State for Defence and the respondent is a former member of the Armed Forces. I will refer to the parties as "the appellant" and "the respondent" respectively.

6. The respondent enlisted in the Army on 13 November 2003 and was a serving soldier when his injury occurred on 9 March 2013. He was in Israel on a training course with his regiment. With his colleagues, he was waiting outside his hotel for transport to the training destination. He went to sit on a wall, lost his balance and fell, sustaining multiple fractures and dislocations to his left forearm and wrist.

7. The respondent submitted a claim under the AFCS on 25 April 2013. In a decision dated 13 August 2013, the appellant stated that it was not accepted that his injuries had been caused by service and he was thus not entitled to compensation under the AFCS. It was noted that (a) hospital case notes recorded the respondent had fallen off a wall backwards whilst in Israel; and (b) the respondent's claim form stated he was in Israel with his unit on a course and was waiting for transport to take him to his training destination when the accident occurred.

8. The respondent appealed against the decision on 9 June 2014. He emphasised that he was on duty when the accident occurred and gave further details about the extent of his injuries. The appellant reviewed the original decision but concluded on 11 November 2014 that it was correct. The appellant's review decision noted that the respondent's injuries happened when he tripped and therefore that article 11 of the AFCS applied. Waiting outside the hotel for transport was not considered to be activity of a hazardous nature or an activity in a hazardous environment. Being on duty did not constitute an exception to article 11. Finally the appellant did not accept the injury was caused by service, since waiting for transport outside the hotel was an everyday activity and there was nothing to suggest that service was anything more than the background against which the accident occurred.

The tribunal decision

9. The hearing took place on 7 May 2015 and the respondent gave oral evidence. The tribunal found that the respondent's arm injuries were predominantly caused by service and that article 11(4)(b) of the AFCS was applicable.

10. The tribunal set out the evidence given by the respondent in paragraphs 9–13 of its Reasons. He was in Israel on an intense special training exercise lasting six days. The participants on that exercise were issued with special military clothing which bore no insignia. They travelled on a civilian British Airways flight and were told not to mention to security at Tel Aviv airport that they were British Army personnel. The respondent stated that he was singled out for questioning at the airport on the basis, he believed, of his Arab name and his appearance. There was heightened security in relation to the training because of its secret nature, its importance and because the respondent had been told not to tell anyone he was in the British Army. The respondent was a moderate drinker who did not smoke and who had been out with friends the evening before the accident. He was in a position where he had to enforce discipline and set an example by his behaviour.

11. The tribunal found that no particular instructions were issued to the soldiers at the hotel during their stay and they were not made aware of any particular security procedures. It also

found that the respondent was travelling to the training activity at the time of the accident. It held that article 11(4)(b) applied in that the respondent was participating in an activity in pursuit of a service obligation and that the activity was in a hazardous environment. The tribunal observed that the term "*hazardous environment*" was not defined in the AFCS.

12. In reaching that conclusion, the tribunal attached weight to (a) the credible and persuasive evidence given by the respondent and (b) the fact that the training exercise was of a sensitive and classified nature which required the respondent to sign security papers and to observe heightened security measures to ensure the safety and secrecy of the exercise. The tribunal found that the whole of the territory of Israel was a hazardous environment for British Army personnel when engaged in a sensitive operation and was particularly hazardous for someone of the respondent's ethnicity and physical appearance. His name and physical appearance would have created a real risk of hostility to him whilst in Israel including a real risk of violence. The tribunal noted that the hazardous nature of the environment played no part in causing or contributing to the respondent's injury but this was not required in order to bring article 11(4)(b) into play.

The appeal to the Upper Tribunal

13. The appellant applied for permission to appeal and this was granted by Judge Wikeley, Temporary Chamber President, on 14 July 2015. Two grounds were advanced, namely that the tribunal erred in law by:

> a) failing to give reasons for its implied finding that the appellant was wrong to conclude that the respondent's injuries were not wholly or predominantly caused by service; and
>
> b) holding that the whole of the territory of Israel was a "hazardous environment" so that the exclusion in article 11(3) of the AFCS for injuries sustained by slipping, tripping and falling did not apply.

Judge Wikeley observed that it would be helpful to have the guidance of the Upper Tribunal on the interpretation of article 11(4)(b).

14. I held an oral hearing of this appeal on 28 September 2016. The listing of this hearing was delayed in order that the respondent might be properly represented given that I intended to give the guidance for which Judge Wikeley had asked. At the hearing the appellant was represented by Miss Galina Ward of counsel. The respondent did not attend, his presence having been excused, and Mr Tucker from the Royal British Legion appeared on his behalf. I am very grateful to both representatives for their very helpful written and oral submissions.

15. I will consider the grounds of appeal in reverse order as it makes sense to do so in this particular case.

The relevant legal framework

16. The AFCS came into force on 9 May 2011, replacing an earlier version of the Scheme. Article 8 of the AFCS provides that, subject to articles 11 and 12, benefit is payable to or in respect of a member or former member of the Armed Forces by reason of an injury which occurred on or after 6 April 2005 and which is caused wholly or partly by service. Article 8(2) provides that, if the injury is caused partly by service, benefit is only payable if service is the predominant cause.

17. Article 11 is headed "**Injury and death – exclusions relating to travel, sport, and slipping and tripping**". In that context article 11(3) states that:

> "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."

Article 11(9) relates to terrorism and emergencies and is not relevant to this appeal. However, article 11(4) states:

> "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."

18. The Upper Tribunal in *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC); [2016] AACR 3 acknowledged that the First-tier Tribunal would often have to make difficult value judgments and findings in relation to provisions in the AFCS Orders whose language contains words of degree and which will apply to a wide range of circumstances ([64]). Further, courts and tribunals are repeatedly warned against the dangers of taking an inherently imprecise word and, by redefining it, thrusting on it a degree of spurious precision. The correct approach is to construe the words by reference to their ordinary meaning, their statutory context and purpose ([56]). In construing and applying the relevant test, its underlying purpose is an important and often determinative factor to be taken into account in deciding whether, on the facts of a given case, it is satisfied ([58]).

Ground two: hazardous environment in article 11(4)(b)

19. As an aid to construction, it is helpful to understand the background to the exclusion for slipping, tripping and falling cases in the AFCS. This exclusion was introduced into the 2011 AFCS having not been present in the previous version of the Scheme in force from 2005.

20. In 2009 the then Secretary of State for Defence, Bob Ainsworth, asked Admiral the Lord Boyce to conduct a review of the 2005 AFCS and in February 2010 Lord Boyce's report was published. His recommendations in large part formed the basis for the revision of the 2005 AFCS found in the present version of the AFCS in force from 9 May 2011.

21. Lord Boyce did not consider the issue of slipping, tripping and falling since specific provision for such accidents was not contained in the 2005 AFCS. When considering a similar exclusion for home to duty travel, now contained in article 11(1) of the 2011 AFCS, the report stated that:

> "The Scheme contains certain exclusions, in Article 10, on where normal home to duty travel of personnel is not covered by the Scheme. A number of contributors to the Review have suggested that greater clarity, in either the rules or the associated guidance notes,

> should be provided in certain circumstances, such as when posted overseas, when involved in incidents on MOD property, and for Reservists travelling to training. The Review recommends that such clarity is provided either in the Scheme rules or in appropriate guidance material, which should be widely available to personnel." (paragraph 2.201)

22. With those recommendations in mind, the slipping and tripping provisions in the 2011 AFCS introduced greater clarity as to when such accidents qualified for an award of compensation. The current provisions of the AFCS are aimed at identifying those trips, slips and falls that are likely to have been caused (or at least predominantly caused) by service, because a service obligation has increased the risk of slipping, tripping or falling to the extent that it can be regarded as the predominant cause of the accident.

23. Miss Ward told me that, on consultation prior to the implementation of the 2011 AFCS, the Pay Colonels of all three services were asked to identify what hazardous environments their members were likely to encounter that would make slipping, tripping or falling more likely. The only example forthcoming – from the Royal Navy – was that of being on board ship. This is reflected in the published guidance on Ministry of Defence Compensation Schemes JSP 765 which provides at paragraph 2.29 under the heading "**Hazardous Environments**" as follows:

> "Being on board ship is considered to be a hazardous environment due to the presence of hatchways, ladders and doors with sills for sealing etc. Subject to meeting the balance of probabilities test, slips and trips which occur on board ship are more likely to be considered to be predominantly due to service relative to other circumstances. All other claims will be considered on the facts of the case."

24. I turn now to the arguments of the parties in this case. The appellant Secretary of State submitted that a hazardous environment would be one in which the risk of slipping, tripping or falling during activity performed in pursuance of a service obligation was likely to be increased. Whilst the tribunal was correct to state that the hazardous nature of the environment did not have to be shown to have caused or contributed to the injury in order for article 11(4)(b) to apply, the legislative purpose behind article 11(3) and (4) was to ensure that, although slipping, tripping and falling accidents were generally excluded from payment of benefit even if caused by service, there were circumstances in which it was recognised such an exclusion would be unfair. Such circumstances were those where the risk of slipping, tripping and falling was likely to be increased due to the non-routine nature of the activities, even though those activities could not necessarily be shown to be directly causally related to the accident in question.

25. The appellant submitted that the environment in which the respondent was waiting for a bus outside a hotel could not, on any reasonable interpretation, be classed as "*hazardous*". The tribunal had interpreted article 11(4)(b) too widely in holding that the whole of Israel could be classed as a hazardous environment.

26. The respondent disputed the appellant's contention that the actual wording of article 11(4)(b) should be construed so that it applied to activities carried out in circumstances where the physical environment rendered it more likely that the activity would give rise to a risk of slipping, tripping or falling than if it were to be performed in an ordinary environment. He argued that the words did not carry that meaning any more than the tribunal needed to find – which it did not – that the hazardous nature of the environment played a part in causing or contributing to the injury. If he was wrong about this, the respondent submitted that the tribunal had not necessarily erred in applying article 11(4)(b) in the way that it had. The respondent had a

stressful time in Israel and would have been more prone to lapses of concentration that could have resulted in him slipping, tripping or falling.

27. I am mindful about falling into the trap identified in *JM* of thrusting spurious precision onto an inherently imprecise phrase but I nevertheless prefer the submissions made by the appellant on this question of construction. In order to trigger the exclusion to the general rule that payment for injuries caused by slips, trips and falls was not authorised by the 2011 AFCS, article 11(4) requires the service member, in pursuance of a service obligation, to have been participating "*in one of the following activities*" namely, activity of a hazardous nature, activity in a hazardous environment, or training to improve or maintain the effectiveness of the forces. All that article 11(4) does – when read alongside article 3 – is clarify that the risk of slips, trips and falls is increased in certain circumstances. Thus, activities carried out in circumstances where the physical environment itself increases the risk of slips, trips and falls will come within the meaning of article 11(4)(b) – the ship with hatchways and ladders into thoroughfares and raised sills into entrances and exits, to take the Royal Navy's example in the Guidance referred to in [23] above.

28. Likewise, though not directly in issue in this appeal, activities which by their very nature increase the risk of slips, trips and falls will come within article 11(4)(a). Actually participating in training to improve the effectiveness of the forces will come within article 11(4)(c) because it is known that such activity increases the risk of slipping, tripping and falling accidents taking place. My interpretation of article 11(4)(c) is consistent with the decision given by Upper Tribunal Judge Lloyd-Davies in CAF/2260/2014 (see paragraph 5 of that decision).

29. Other risks to safety such as those arising from a general danger of hostility or violence directed at service personnel are catered for by article 11(9)(a) which specifies risks arising from terrorism or other warlike activities directed towards the person as a member of the forces as such. Thus, the tribunal's finding that the whole of the territory of Israel was a hazardous environment for British Army personnel engaged in a sensitive operation wholly misinterpreted article 11(4)(b). It failed to have regard to what it was about the objective physical environment that increased the risk of slipping, tripping and falling in Israel, instead relying on irrelevant matters such as the sensitive and classified nature of the training exercise undertaken by the respondent and his colleagues. There was nothing about waiting for a bus outside a hotel in Israel which increased the risk of slips, trips and falls for service personnel in comparison to civilians.

30. The tribunal's approach to article 11 overall was confused and led it into error. In paragraph 14 of its Reasons, it found that the respondent was travelling to the training activity at the time of the accident. It went onto say that it had considered the provisions of article 11 including the exclusions relating to travel, sport, slipping and tripping and that benefit under that article was not payable by reason of an injury sustained when the injury is caused wholly or partly by travel from home to a place of work or during travel back again unless one of the specific exclusions apply. The Reasons then abruptly stated in paragraph 15 that the tribunal found that paragraph (4)(b) applied as the respondent was participating in an activity in pursuance of a service obligation and that the activity was in a hazardous environment. The tribunal's reference to travel from home to a place of work would – as article 11(1) provides – engage the exclusions set out in article 11(2) and 11(9), neither of which were applicable to the respondent's circumstances. Though the tribunal did not make specific reference to article 11(9), I suspect it may have had this in mind – along with its finding that the respondent was travelling to work – when it came to define what constituted a hazardous environment in article 11(4)(b). Its definition was muddled by considerations such as the secrecy of the training mission and

heightened security measures which just might conceivably have had some passing relevance were the tribunal considering the application of article 11(9)(a) to travel from home to work but which were of no relevance at all to article 11(4)(b).

31. Application of article 11(4)(b) furthermore requires a construction which is fair to all service personnel. The tribunal found that the respondent's ethnicity and physical appearance rendered the whole of the state of Israel a particularly hazardous environment for him thereby permitting payment of benefit for a fall outside his hotel whilst he was waiting for a bus. Leaving aside the tribunal's sweeping and erroneous finding that Israel was a hazardous environment for the respondent and all of his colleagues, the tribunal's logic came close to suggesting that a soldier not visibly of Arab ethnicity would not have been in a hazardous environment and would not have been able to claim any compensation if s/he had suffered similar injuries in the same circumstances as the respondent did. I accept the appellant's argument that his interpretation of article 11(4)(b) avoids any potential unfairness by focussing on an objective risk of slipping, tripping or falling created by the physical environment in which the service activity is being carried out.

32. The respondent sought to argue that the stress experienced by him whilst in Israel would have rendered him more prone to lapses of concentration and thus at greater risk of slipping, tripping and falling. I do not find that submission persuasive. First, there is no medical evidence to support the contention that the respondent was experiencing unusual stress whilst in Israel. Second, whilst his time at Tel Aviv airport might have been unpleasant and whilst the training exercise in which he was participating was surrounded by a degree of secrecy, the respondent's own evidence was that there were no particular instructions issued to him and his colleagues whilst they were at the hotel and they were not aware of any particular procedures relating to their own security. His own evidence did not suggest he was experiencing unusual stress during his trip to Israel. The respondent's submission was not supported by the evidence before the tribunal and indeed came close to creating the type of unfairness discussed in [31] above.

33. My interpretation of article 11(4)(b) is also consistent with previous Upper Tribunal case law. *JM* accepted that the underlying purpose and intention of the AFCS as a whole was to establish an entitlement to benefit based on a service cause as opposed to breach of duty or fault ([86]). Further, the exceptions in article 11(4) to the general exclusion of slipping, tripping and falling accidents were intended to capture "*non-routine*" activities (see paragraph 5 of CAF/2260/2014).

34. I conclude that the tribunal materially erred in law by interpreting article 11(4)(b) so as to conclude that the whole of Israel was a hazardous environment for the respondent. The environment in which the respondent came to be injured could not, on any sensible interpretation of the 2011 AFCS, be classified as "*hazardous*". There was nothing about the activity of a soldier waiting for a bus outside a hotel more likely to lead to a slip, trip or fall than if a civilian had been participating in the same activity in ordinary - that is non-service - circumstances.

Ground one: failure to give reasons

35. The appellant Secretary of State argued that the tribunal had failed to give reasons for its conclusion that the respondent's injury was caused by service. Article 11 of the 2011 AFCS excludes the payment of benefit that would otherwise be payable for injuries occurring in certain circumstances. If benefit would not be payable under article 8, then the fact that payment would not be excluded by article 11 does not change that position. The original decision and the review

decision put in issue whether the respondent's injury was caused by service and this should have been addressed by the tribunal. In support of his case, the appellant relied on the decision of the Upper Tribunal in *EW v Secretary of State for Defence (AFCS)* [2011] UKUT 186 (AAC); [2012] AACR 3 which held that not everything which happens to a member of the Armed Forces doing his/her service job is caused by service (see [26] of *EW*). The line between service being merely part of the circumstances or being a cause of the injury can be a very fine one (see [31] of *EW*).

36. Given those circumstances, the appellant argued that the tribunal's conclusion that the respondent's injuries were predominantly caused by service was wholly unsupported by any reasoning. It made no attempt to explain the link between its findings of fact and that conclusion and failed to set out its approach to the application of the relevant test. Its decision was thus materially erroneous in law.

37. Mr Tucker argued by contrast that, having found that the respondent fell whilst participating in an activity in pursuit of a service obligation, it was open to the tribunal to determine that the requirement of article 8 for a "*service cause*" for the injury had been met (see [79]–[83] of *JM* for the differentiation between a service cause and a process cause). He relied on the Service Member's Record of Proceedings which stated as follows:

> "Considered met (?) of Art 11(4)(b) because of Israel being a country which is a hazardous environment and this was especially relevant to [X's] ethnicity. We further consider the predominance is met by his being on exercise under special orders and instructions (?) in hotel."

38. Even taking a generous view of the Service Member's Record of Proceedings, the plain fact is that the tribunal simply failed to support with adequate reasoning its conclusion that the respondent's injuries were predominantly caused by service. I accept the appellant's arguments on this ground. The tribunal should have followed the steps set out in [118] of *JM* before considering whether the exclusions in article 11(3) and 11(4) applied in this case. By failing to do so, it materially erred in law.

39. In the light of the two material errors of law in the tribunal's decision, it follows that I allow the appellant's appeal and set aside the tribunal's decision.

Re-making the decision

40. At the hearing the appellant Secretary of State invited me to re-make the decision and dismiss the respondent's appeal against the Secretary of State's original and review decision. The respondent invited me to remit the matter to the First-tier Tribunal for re-hearing on the question of whether his injuries were caused by service.

41. After careful thought I have come to the conclusion that the facts are sufficiently clear for me to be able to re-make this decision. Where necessary, I have relied on the respondent's oral evidence at the tribunal hearing.

42. The respondent's injuries were caused by him losing his balance when going to sit on a wall outside his hotel and he fell. He was outside his hotel awaiting transport to take him and his colleagues to a training destination when he fell. His injuries were not caused by any process other than the fall.

43. I must then categorise the fall by deciding whether the circumstances in which the fall occurred were either service or non-service causes and, if service causes compete with other causes, service causes need to predominate. In so doing I bear in mind the approach endorsed by Upper Tribunal Judge Mesher in *EW* that the test is not whether the respondent was in service or was on duty at the time of his fall but whether his injury was caused and predominantly caused by service (a formulation also approved in [121] of *JW*). Judge Mesher held that "*the line between service being merely part of the circumstances or being a cause of the injury can be a very fine one and ultimately a matter of impression*" ([31]).

44. In the circumstances of this case, I make the following findings. The respondent could not be regarded as doing his job as a member of the Armed Forces whilst waiting for a bus to take him to a training destination on 9 March 2013. He was doing something necessary for him to carry out that job but he was not yet doing it. My conclusion on this issue is unaffected by the facts that (a) he was under a duty to wait for transport to travel to the training area in order to do his job; (b) he was wearing some sort of uniform; and (c) he was subject to military discipline. The fact that the respondent was in Israel on a training exercise as a member of the Armed Forces cannot be regarded as anything other than the setting for what occurred – it was not the cause let alone the predominant cause of the respondent's injury.

45. In the light of those findings, I conclude that the respondent has failed to satisfy article 8(1) and (2) of the 2011 AFCS and so his claim for benefit must fail.

46. Even if I had held that the respondent's injuries had been caused wholly or partly by service (where service was the predominant cause of his injuries), I find that the claim for benefit would fail because of the effect of article 11(3) and article 11(4).

47. The respondent's injuries were wholly caused by his fall when going to sit on a wall. None of the exclusions in article 11(4) applied. Going to sit on a wall outside a hotel was not an activity of a hazardous nature in that it did not of itself increase the risk of a fall occurring. Equally it was not an activity in a hazardous environment because there was nothing about the physical environment outside the hotel which made it more likely that the respondent – or indeed any other person present outside the hotel – would fall. Finally, the respondent was not actually taking part in training to improve or maintain the effectiveness of the Armed Force but was waiting to be taken to a training destination.

Conclusion

48. For the reasons explained above, I allow the appellant Secretary of State's appeal against the tribunal's decision and I set that decision aside. For the reasons I have given, I re-make the decision and dismiss the respondent's appeal. His multiple left arm injuries were not attributable to service and thus no benefit is payable to him under the 2011 AFCS.