[2017] AACR 27

(Secretary of State for Defence v CM (WP)
[2017] UKUT 8 (AAC))

Judge Rowland **CAF/2584/2015**
6 January 2017 **CAF/3213/2015**
CAF/3234/2015

War pensions – widow's pension – whether constant attendance allowance or unemployability supplement can have been "payable" to the deceased if successful claim not made by him – whether appeal in respect of widow's pension can be treated as a posthumous appeal in respect of constant attendance allowance

War pensions – constant attendance allowance – eligibility when a need for attendance arises both from accepted conditions and from another condition

In all three cases the claimant was the widow of a former member of the Armed Services who had been receiving payments of retired pay or pension under article 6 of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 based upon their having either 90 per cent or 100 per cent disablement. Each of the deceased had claimed constant attendance allowance (CAA) but the claims had been disallowed and they had not appealed. All three claimants applied for a war widow's pension under article 23 of the Order but were unsuccessful. In each case the Secretary of State decided that the deceased's death was not due to service. He also received advice that the deceased would not have satisfied the conditions for entitlement to CAA for at least 26 weeks before his death had he made another claim.

The claimants all appealed to the First-tier Tribunal (F-tT). In the first case, the claimant having referred to allowances that her husband had had, the Secretary of State said that the deceased had had an underlying entitlement to unemployability supplement but submitted that it was not "payable" for the purposes of article 22(4) so as to entitle his widow to a widow's pension because he had had an allowance for lowered standard of occupation. The F-tT awarded a widow's pension on the ground that the deceased had satisfied the conditions for entitlement to CAA for at least 26 weeks before his death because his needs for attendance had arisen not only from lung cancer that was not attributable to service but also from conditions attributable to service. In the other two cases too, the F-tT considered whether the deceased had satisfied the conditions for entitlement to CAA for at least 26 weeks before his death, allowing one appeal on the ground that the deceased had done so and that therefore article 22(3) was satisfied but dismissing the other on the ground that the deceased had not done so.

The Secretary of State appealed to the Upper Tribunal (UT) in the first two cases and the claimant in the other. The UT allowed the claimant's appeal in the third case on the ground that the F-tT had failed to give reasons for not finding that the deceased's death had been due to service but deferred consideration of the question of the scope of the remitted appeal. In all three cases, the Secretary of State submitted that his practice of awarding a pension to a widow whose husband's disablement had been assessed as at least 80 per cent if he would have satisfied the conditions for entitlement to CAA for at least 26 weeks before his death had he made a claim was a concession made under the dispensing instruments and that article 22(3) of the Order had not been satisfied in any of the cases because CAA was not "payable to [the deceased] in respect of a period ending with his death".

Held, allowing the Secretary of State's appeals and giving a further direction in the claimant's appeal, that:

1. the right of appeal in section 1(3) or (3A) of the Pensions Appeal Tribunals Act 1943 against a decision that death was not due to service extended to a decision that death could not be treated as having been due to service (paragraph 13);

2. CAA could not be regarded as "payable" for the purposes of article 22(3) of the 2006 Order unless there had been a successful claim for the allowance (which could be determined posthumously) because article 34 required there to be a claim for CAA before an award could be made (paragraphs 18 to 22);

3. similarly, unemployability supplement was not "payable" to the first claimant's husband for the purposes of articles 15(4) and 22(4) of the 2006 Order because there had been no claim for it, whereas "eligible" in articles 15(5) and 27(1)(b)(ii) meant "entitled but for having made a claim" (paragraphs 33 to 36);

4. an appeal against a rejection of a widow's pension claim could be treated as having been also a posthumous appeal against the rejection of a claim for CAA, provided that the appeal had been made within the

time limit for such a posthumous appeal, and the claimants in the first two cases would be treated as having brought such appeals, the third claimant having been irredeemably out of time for doing so (paragraphs 40 and 48 to 60);

5. there was no right of appeal under section 1(3) or (3A) of the Pensions Appeal Tribunals Act 1943 against a decision not to make a payment under a dispensing instrument, even if the decision was expressed in terms of the deceased's death not being treated as having been due to service (paragraphs 77 and 78);

6. while article 8 of the 2006 Order did not directly address dual causation in relation to CAA, considering whether the "accepted disablement" was the main factor in the overall need for attendance was an approach capable of taking account of the extent to which different disabilities might interact with each other (paragraph 107);

7. in the first case, the F-tT had given inadequate reasons for finding that the deceased had been eligible for CAA before his death because it had not made a finding as to whether the contribution of his disablement due to the accepted conditions was sufficient to have qualified him for at least the part day rate of CAA (paragraph 108).

In the Secretary of State's appeals, the judge set aside the decisions of the F-tT, remitting the first case to the F-tT and directing a further submission in the second case. In the third claimant's appeal, the judge directed that the remitted case be decided in accordance with his reasoning, so that whether her husband had been eligible for CAA in the period before he died was irrelevant to her entitlement to a widow's pension.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The Secretary of State for Defence was represented by Mr Tim Buley of counsel, instructed by the Government Legal Department.

The claimant in the first case was represented by Mr Hugh Lyons, solicitor, of Baker & McKenzie, acting *pro bono* on behalf of the Royal British Legion.

The claimant in the second case was represented by Mr Chris Francis of the Royal Air Forces Association.

The claimant in the third case was represented by Mr Glyn Tucker of the Royal British Legion.

Decisions: In the first case, on file CAF/2584/2015, the Secretary of State's appeal is allowed. The decision of the First-tier Tribunal dated 8 May 2015 is set aside and the case is remitted to a differently-constituted panel of the First-tier Tribunal to be re-decided in accordance with my reasoning below on the basis that the claimant has brought an appeal against the decision dated 21 November 2013 refusing her husband constant attendance allowance as well as an appeal against the decision dated 6 August 2014 refusing her a widow's pension.

In the second case, on file CAF/3213/2015, the Secretary of State's appeal is allowed to the extent that the decision of the First-tier Tribunal dated 21 July 2015 is set aside and I direct the Secretary of State to make a submission within one month as to the final decision that I should make in consequence.

In the third case, on file CAF/3234/2015, I have already allowed the claimant's appeal and remitted the case to the First-tier Tribunal. I therefore merely direct that the remitted case be decided in accordance with my reasoning below.

REASONS FOR DECISIONS

1. In each of these three cases, the claimant is the widow of a former member of the Armed Forces. At the date of his death, each claimant's husband was receiving payments of retired pay or pension under article 6 of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 (SI 2006/606 – "the 2006 Order") based on an assessment of 90 per cent disablement (in the first case) or 100 per cent disablement (in the other two cases) but was not receiving payments of either a constant attendance allowance under article 8 or an unemployability allowance under article 12, although each had made an unsuccessful claim for constant attendance allowance.

2. The widows each claimed a war widow's pension and their cases were referred to medical advisors who refused to certify that death was due to service and also advised that their late husbands did not satisfy the conditions for entitlement to constant attendance allowance for at least 26 weeks before their deaths. Widows' pensions were accordingly refused and the widows appealed. In the first two cases, the First-tier Tribunal allowed their appeals and awarded widows' pensions to the claimants on the ground that their late husbands satisfied the conditions of entitlement to constant attendance allowance for at least 26 weeks before their deaths. In the third case, the First-tier Tribunal dismissed the appeal on the ground that the claimant's late husband would not have satisfied the conditions of entitlement to constant attendance allowance for at least 26 weeks before his death.

3. In the first two cases, the Secretary of State appeals, with the permission of the First-tier Tribunal in one case and the permission of Upper Tribunal Judge Levenson in the other case, on the principal ground that the First-tier Tribunal had no jurisdiction to award a widow's pension on the ground that it did and, in the first case only, on the alternative ground that the First-tier Tribunal gave an improper or inadequate reason for its decision. In the third case, the claimant appealed with my permission and I have already issued a decision notice allowing her appeal and remitting her case to the First-tier Tribunal on the ground that, as the Secretary of State had conceded, the First-tier Tribunal failed to give any reasons for not finding that the claimant's husband's death was due to or substantially hastened by service, but there remains the same question as arises in the other cases as to the scope of the remitted appeal.

4. On the jurisdiction issue, the Secretary of State submits that he does not have any power under the 2006 Order to award a widow's pension on the ground that the assessment of the claimant's late husband's disablement was at least 80 per cent and he would have been awarded a constant attendance allowance for at least 26 weeks before his death had he made a claim and that, to the extent that he has made awards on such a ground in other cases, he has done so on an extra-statutory basis in respect of which there is no right of appeal. The claimants' response to the Secretary of State's grounds is, first, that a widow's pension may be awarded under the 2006 Order if, at the time of his death, the claimant's late husband's disablement was assessed at 80 per cent and he satisfied the conditions for a constant attendance allowance set out in article 8 of the 2006 Order irrespective of whether he had made a claim for such an allowance and, secondly, that there is in any event a right of appeal against a decision not to make an award under a concession made under a dispensing instrument and that the relevant concession was made under such an instrument.

5. If the Secretary of State is successful in his grounds of appeal, there arises a further issue, which is whether the claimants can and should be treated as having brought posthumous appeals

against the decisions refusing their husbands constant attendance allowance. The Secretary of State submits that they cannot be treated as having brought such appeals. The claimants in the first two cases submit that they can and should be treated as having done so and that, if successful in those appeals, they can succeed in their widow's pension appeals.

The Pensions Appeal Tribunals Act 1943

6. The First-tier Tribunal is a creature of statute, having been established by section 3(1) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), and it therefore has only the jurisdiction conferred on it by statute. The only potentially relevant statute directly conferring jurisdiction on the First-tier Tribunal is the Pensions Appeal Tribunals Act 1943 ("the 1943 Act") and the only provisions of that Act that might conceivably be thought to have conferred a right of appeal in these cases are section 1(3A) – not section 1(1) as suggested in the Secretary of State's "Summary for [*sic*] issues for Determination" in each of these cases nor section 1(3) to which I referred when granting permission to appeal in the third case – and section 5A(1). So far as is material, section 1 and 5A provide:

> "**Appeals against rejection of war pension claims made in respect of members of the naval, military or air forces.**
>
> **1. –** (1) Where any claim in respect of the disablement of any person made under any such Royal Warrant, Order in Council or Order of His Majesty as is administered by the Minister or under a scheme made under section 1 of the Polish Resettlement Act 1947 is rejected by the Minister …
>
> (2) …
>
> (3) Where any claim in respect of the death of any person made under any such Royal Warrant, Order in Council, Order of Her Majesty or scheme as aforesaid is rejected by the Minister on the ground that neither of the following conditions is fulfilled, namely –
>
> (a) that the death of that person was due to or hastened by an injury which was attributable to any relevant service;
>
> (b) that the death was due to or hastened by the aggravation by any relevant service of an injury which existed before or arose during any relevant service;
>
> the Minister shall notify the claimant of his decision, specifying that it is made on that ground, and thereupon an appeal shall lie to the appropriate tribunal on the issue whether the claim was rightly rejected on that ground.
>
> (3A) The last foregoing subsection shall not apply to any claim made under any such Royal Warrant, Order in Council, Order of Her Majesty or scheme as aforesaid in respect of the death of a person who dies after the expiration of the period of seven years beginning with the end of any relevant service of that person, but where any such claim is rejected by the Minister on the ground that neither of the following conditions is fulfilled, namely –

(a) that the death of that person was due to or substantially hastened by an injury which was attributable to any relevant service;

(b) that the death was due to or substantially hastened by the aggravation by any relevant service of an injury which existed before or arose during any relevant service;

the Minister shall notify the claimant of his decision, specifying that it is made on that ground, and thereupon an appeal shall lie to the appropriate tribunal on the issue whether the claim was rightly rejected on that ground.

(4) …
…
Appeals in other cases.

5A. – (1) Where, in the case of a claim to which this section applies, the Minister makes a specified decision –

(a) he shall notify the claimant of the decision, specifying the ground on which it is made, and

(b) thereupon an appeal against the decision shall lie to the appropriate tribunal on the issue whether the decision was rightly made on that ground.

(1A) This section applies to –

(a) any such claim as is referred to in section 1, 2 or 3 of this Act;

(b) a claim under a scheme mentioned in section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004 (compensation schemes for armed and reserve forces).

(2) For the purposes of subsection (1), a 'specified decision' is a decision (other than a decision which is capable of being the subject of an appeal under any other provision of this Act) which is of a kind specified by the Minister in regulations."

7. What is particularly important for present purposes is that section 1 provides for appeals only where the Minister has rejected a claim under a royal warrant, order in council, royal order or specified scheme and section 5A provides only for appeals against specified decisions made on such claims. The background to the references in section 1 to "such Royal Warrant, Order in Council or Order of His Majesty as is administered by the Minister" is that the Crown's power to make provision for pensions, including pensions in respect of disablement or death, to former members of the armed forces or their dependants is derived (at least principally) from section 3 of the Naval and Marine Pay and Pensions Act 1865, section 2(1) of the Pensions and Yeomanry Pay Act 1884 and section 2(1) of the Air Force (Constitution) Act 1917, each of which must now be read with section 12 of the Social Security (Miscellaneous Provisions) Act 1977 ("the 1977 Act"). Until the 1977 Act came into force, provision in respect of former members of the Royal Navy and Royal Marines was made by orders in council under the 1865 Act, provision in respect of former soldiers in the Army was made by royal warrants issued under the 1884 Act and

provision in respect of former members of the Royal Air Force was made by royal orders made under the 1917 Act. Since 1977, the powers under all three of those old Acts have, by virtue of the 1977 Act, been exercised by orders in council made by statutory instruments. Such orders in council make provision in respect of former members of all three services, thus avoiding the need to make three almost identical instruments every time there is a change in the provision made for pensions. They are, of course, made on the advice of the Secretary of State.

8. In any event, section 1 and 5A confer rights of appeal only if the decision being challenged was made under a relevant instrument so that, in each of these cases, consideration needs to be given to the statutory basis, if any, on which the Secretary of State's decision was made.

The 2006 Order – widows' pensions and constant attendance allowance

9. The 2006 Order, which sets out the current principal scheme of pensions in respect of disablement and death due to service in the armed forces before 6 April 2005, is an order in council made pursuant to section 12(1) of the 1977 Act. Pensions under the 2006 Order are administered by the Secretary of State for Defence, who is the current successor of the former Minister of Pensions. There is therefore no doubt that sections 1 and 5A of the 1943 Act provide for appeals against certain decisions made under the 2006 Order.

10. Provision for awards in respect of death is made in Part III of the 2006 Order. So far as is material, articles 22 and 23 provided at the material time:

> "**General conditions for Part III**
> **22.** – (1) Under this Part, awards may be made in accordance with this Order in respect of the death of a member of the armed forces which is due to service before 6th April 2005.
>
> (2) ….
>
> (3) The death of a member occurring after 22nd November 1916 at a time when an allowance in respect of constant attendance was payable to him in respect of a period ending with his death, or would have been so payable if he had not been in hospital or other institution, shall be treated as due to service for the purposes of this Part.
>
> (4) The death of a member –
>
> (a) whose degree of disablement was assessed at not less than 80 per cent; and
>
> (b) to whom, in respect of the period ending with his death, an allowance under article 12 was payable
>
> shall be treated as due to service for the purposes of this Part.
>
> (5) For the purposes of paragraph (4), a member of the armed forces shall be treated as if he was in receipt of an allowance under article 12 if –
>
> (a) at the time of his death subparagraphs (b), (c) and (f) of article 12(3) applied to him; and
>
> (b) the period of remunerative work had not exceeded a period of 104 weeks.

(6) ….
(7) ….

Pensions to surviving spouses and surviving civil partners
23. – (1) The surviving spouse or surviving civil partner of a member of the armed forces whose death is due to service may be awarded a pension –

(a) at whichever of the rates specified in column (2) of Tables 1, 2 and 3 in Part II of Schedule 2 is appropriate in the case where –

(i) the person has attained the age of 40 years …, or
(ii) …, or
(iii) …, or
(iv) …, or
(v) …;

b) ….

(2) A supplementary pension payable at whichever of the rates specified in column (2) of Tables 6 and 7 in Part II of Schedule 2 as is appropriate in the case per week shall be awarded to a surviving spouse or surviving civil partner of a member of the armed forces where –

(a) the surviving spouse or surviving civil partner is entitled to a pension under paragraph (1) above; and

(b) the service of that member terminated before 31st March 1973."

11. Article 27(1) provides:

"**Temporary Allowances**

27. – (1) Notwithstanding anything in the foregoing provisions of this Order, where a member of the armed forces died or dies on or after 2nd December 1963 and –

(a) *[revoked]*

(b) in respect of any period ending with his death there was payable to him either –

(i) an allowance under article 8 or 12(1)(a), or

(ii) although concurrently eligible for an allowance under article 12(1)(a), an allowance under article 15; or

(c) an allowance under article 8 ceased to be payable within 13 weeks of his death following his entry as an inpatient into a hospital or other institution

> his surviving spouse or surviving civil partner or dependant who lived as his spouse or dependant who lived as a civil partner ('dependant') may be awarded a personal allowance and, in respect of children, additional allowances in accordance with the following provisions of this article."

A temporary allowance is payable for 26 weeks at a rate that is, subject to some exceptions, equivalent to the rate at which the deceased's war pension was paid.

12. Articles 22 and 23 must be read with article 41, paragraph (1) of which provides:

> "**Entitlement where a claim is made in respect of a disablement, or death occurs, more than 7 years after the termination of service**
>
> **41.** – (1) Except where paragraph (2) applies, where, after the expiration of the period of 7 years beginning with the termination of the service of a member of the armed forces, a claim is made … in respect of the death of that member (being a death occurring after the expiration of the said period), such … death, as the case may be, shall be accepted as due to service for the purpose of this Order provided it is certified that –
>
> (a) …; or
>
> (b) the death was due to or substantially hastened by
>
> (i) an injury which was attributable to service, or
>
> (ii) the aggravation by service of an injury which existed before or arose during service."

Section 1(3A) of the 1943 Act clearly provides for a right of appeal against the rejection of a claim for widow's benefit on the ground that death was not "due to or substantially hastened by" a service injury. Section 1(3) applies to cases under article 40 of the 2006 Order (death within seven years of service), where the test is "due to or hastened by" a service injury.

13. In each of these cases it was either accepted by the claimant or was at least implicitly found by the First-tier Tribunal that article 41(1)(b) was not satisfied and so the widow's husband's death could not be accepted as actually having been due to service. There therefore arose the question whether his death could be "treated as due to service" under article 22(3). (In the first case before me, there also arose at one stage the question whether article 22(4) might apply, but I will deal with that issue separately.) It has rightly not been suggested that an appeal does not lie under section 1(3) or (3A) of the 1943 Act, as the case may be, in a case where a claim for widow's benefit is rejected on the ground that her husband's death cannot be "treated as due to service". The implication of treating a death as due to service is that the conditions of article 40(1)(b) or 41(1)(b), as the case may be, are treated as satisfied so that, where there is a refusal to treat a death as due to service, the claimant is to be taken for the purposes of section 1(3) or (3A) as having been rejected on the ground that those conditions are not satisfied.

14. The Secretary of State's submission is that article 22(3) could not apply in any of these cases because constant attendance allowance was not "payable" at the time of the claimants' husbands' deaths simply because there had not been an award in any of the cases. He accepts that,

if there had been an outstanding claim for constant attendance allowance at the time of death and then a posthumous award in respect of that date, that would meet the condition. However, there was no outstanding claim in any of these cases; there had been a claim in each case but it had been rejected and there had been no appeal.

15. In the second of the cases before me, the First-tier Tribunal took the view that article 22(3) applied if the claimant satisfied the conditions of entitlement to constant attendance allowance set out in article 8 even if constant attendance allowance had not been awarded. In the first case before me, the First-tier Tribunal took a similar approach but it did not refer to article 22(3). It may have adopted the argument of the claimant's representative, who it recorded had referred to article 27. Article 27 was not directly in issue because the claimant had received a temporary allowance under article 27(1)(b)(ii) and so did not need to rely on article 27(1)(b)(i). In fact, of course, the claimant was seeking a pension under article 23, which was not mentioned anywhere in the documents in the case (or, indeed, in the documents in either of the other cases) and so, in the light of the opening words of article 23(1), article 22(3) was the provision that made eligibility to constant attendance allowance potentially relevant.

16. Article 8 provides:

> "**Constant attendance allowance**
>
> **8.** – (1) Subject to paragraph (6) and article 71(4), where –
>
> (a) a member of the armed forces is in receipt of retired pay or a pension in respect of disablement the degree of which is not less than 80 per cent; and
>
> (b) it is shown to the satisfaction of the Secretary of State that constant attendance on the member is necessary on account of the disablement
>
> the member shall be awarded an allowance in accordance with the following paragraphs of this article.
>
> (2) Where the necessary attendance consists of frequent or regular attendance for periods during the daytime which total not less than four and not more than eight hours per day, the rate of the allowance shall be the part day rate specified in paragraph 1(a)(i) of Part IV of Schedule 1.
>
> (3) Where the necessary attendance consists of –
>
> (a) frequent or regular attendance for periods during the daytime which total not less than eight and not more than sixteen hours per day; or
>
> (b) frequent or regular attendance for periods during the daytime which total less than eight hours per day and attendance on two or more occasions per night
>
> the rate of the allowance shall be the full day rate specified in paragraph 1(a)(ii) of Part IV of Schedule 1
>
> (4) Where the necessary attendance consists of –

(a) frequent or regular attendance for periods during the daytime which total not less than eight hours per day and attendance on two or more occasions per night; or

(b) frequent or regular attendance for periods at night which total not less than eight hours and during the daytime for periods which total not less than four hours per day

the rate of the allowance shall be the intermediate rate specified in paragraph 1(a)(iii) of Part IV of Schedule 1.

(5) Where the necessary attendance consists of continual attendance throughout the day and night, the rate of the allowance shall be the exceptional rate specified in paragraph 1(a)(iv) of Part IV of Schedule 1.

(6) Where –

(a) a member of the armed forces is in receipt of retired pay or pension in respect of disablement, due to one or more injuries, the degree of which is not less than 80 per cent, and

(b) one of those injuries is a terminal illness,

the member shall be taken to satisfy or likely to satisfy the necessary attendance specified in paragraph (4) for so much of the period for which he is terminally ill as does not fall before the date of claim, and the rate of the allowance shall be the intermediate rate specified in paragraph 1(a)(iii) of Part IV of Schedule 1."

17. The First-tier Tribunal also appears to have taken the view in those two cases that it was under the 2006 Order that the Secretary of State had considered whether the claimants' late husbands would have been entitled to constant attendance allowance for at least 26 weeks before their deaths had they claimed again. However, as Mr Buley pointed out in argument, that cannot be right because there is no basis in the 2006 Order for the 26-week qualification period.

18. In any event, the Secretary of State submits that such a construction of the 2006 Order in those two cases was wrong. He submits that constant attendance allowance cannot be regarded as "payable" for the purposes of article 22(3) unless there has been a successful claim for the allowance or supplement and he refers to article 34(1) and (2), which, so far as is material, provided at the material time:

"**Making of claims**

34. – (1) Subject to paragraphs (2A), (4)**]** and article 35, it shall be a condition precedent to the making of any award of any pension, allowance or supplement mentioned in paragraph (2) (including any such award which follows an earlier award or which follows a period which, had there been an award for that period, would have ended in accordance with article 33(1)) that the person making the claim shall have –

(a) completed and signed a form approved by the Secretary of State for the purpose of claiming that pension, allowance or supplement payable under this Order; and
(b) delivered that form either to an appropriate office of the Secretary of State or to an office of an authorised agent.

(2) The pensions, allowances and supplement to which paragraph (1) applies are –

…
(c) a constant attendance allowance payable under article 8;
…
(e) an unemployability allowance payable under article 12;
…"

19. Mr Lyons, who has shouldered the main burden of arguing the legal points for all three claimants, submits that the word "payable" is deliberately used in article 22(3) so as not to prejudice the widows of those who could have been entitled to constant attendance allowance if they had applied for it. He submits that otherwise there would be something of a lottery, depending on whether the deceased had made a claim for the allowance or supplement and, if there had been a rejected claim, whether the deceased had brought an appeal. He also submits that it is significant that the practice of the Secretary of State of making awards to widows in cases where the deceased had not made a claim for constant attendance allowance is reflected in official forms.

20. I have no doubt that the Secretary of State's argument on this issue must prevail. Despite the language of subsequent provisions, including articles 22(3), 27(1)(b)(i) and 34(2)(c), article 8 does not directly deal with payability but with whether an award should be made; it provides that, where the conditions are satisfied, "the member shall be awarded an allowance". Article 34(1) provides that making a claim "shall be a condition precedent to the making of any award". It thus necessarily qualifies article 8(1) and all the other provisions in Parts II and III of the 2006 Order. In my judgment, "payable" in article 22(3) and all other provisions other than article 34(2) must be construed as "payable under an award". As Mr Buley readily conceded, in article 34(2), the context requires "payable" to be read as "payable if an award is made" or something to like effect, since the clear purpose of article 34(1) is that a pension, allowance or supplement will not be payable if there has been no claim.

21. There is, of course, a close relationship between an award and payability. An award generally confers entitlement to a payment so that, unless payment is withheld under some other provision of the 2006 Order, a benefit that has been awarded is payable and, indeed, a claimant would be entitled to sue for the payments if they were not made. Article 53 is one provision under which payments may be withheld. It has the effect that constant attendance allowance that has been awarded under article 8 may cease to be payable if a claimant is in a hospital or other institution. A claimant is often said to have an "underlying entitlement" in such a case, since the award remains in place but the benefit is not payable. Specific provision is made in article 22(3) for such cases. However, although there may therefore be cases where there is an award but the allowance is not payable, I do not consider it possible for there to be payability without an award and article 34 requires there to be a claim for constant attendance allowance before there can be an award. Moreover, it is implicit that, if a claim is rejected and the rejection is not successfully challenged by way of an appeal or application for review, a further claim is required before an award can be made.

22. I do not accept that this construction of the 2006 Order gives rise to any unfairness, although there may be some hard cases. Article 34(1) clearly anticipates that there will be a difference in the treatment of those who have claimed constant attendance allowance and those who have not and, to the extent that that may occasionally produce hard cases, that is the necessary result of a provision that presumably is considered justified in the interests of good administration. Moreover, use may be made of the dispensing instruments, which I will consider below, if it is thought that there will otherwise be serious injustice. As the Secretary of State accepts, if a claim is outstanding at the date of death, it will still fall to be determined and an award made on a claimant's claim after the date of his death can clearly have the effect that an allowance is "payable to him in respect of a period ending with his death" for the purposes of article 22(3). Appeals and rights of appeal also survive the death of the claimant and I will consider below the possibility of posthumous appeals in these cases.

23. I also do not accept that the forms used by the Secretary of State support Mr Lyons' argument. Mr Lyons drew attention to the claim form for a war widow's or war widower's pension, which states that the form can be used if "your husband, wife or civil partner was getting or *could have got* War Pensioner's Constant Attendance Allowance" (his emphasis). He also referred to the form to be completed by a medical advisor, which requires the medical advisor to consider certifying whether death was due to, hastened by or substantially hastened by an accepted condition and then contains the following instruction:

> "Deceased assessed at 80 per cent or more – not in receipt of CAA. In the event of a rejection please advise whether the deceased pensioner would have been entitled to CAA for at least 26 weeks before their death."

24. However, while those forms are consistent with there having been an established practice, they do not suggest that the Secretary of State has ever believed that the practice was required by the 2006 Order. Indeed, as will be seen below, there is clear evidence that he has never believed such a thing or intended that to be the Order's effect. Moreover, the decisions refusing pensions in all three of these cases were expressed in standard terms that reflect only the provisions of article 41 which is consistent with the Secretary of State's submission to the Upper Tribunal that there was no question of entitlement under section 22(3) in these cases because, at the time the decisions were made, none of the claimants had claimed that her husband had been awarded constant attendance allowance in respect of the date on which he died. In each case, it was said only that:

> "Our Medical Advisers have confirmed that your husband's death was not due to
>
> - An injury caused by their service,
> - The worsening of an injury caused by their service,
> - The worsening, because of their service, of an injury which was there before or happened during their service."

25. For all these reasons, I am satisfied that, absent a successful posthumous appeal in respect of her husband's entitlement to constant attendance allowance, none of these claimants could secure entitlement to a widow's pension through article 22(3).

The 2006 Order – widows' pensions and unemployability allowance

26. Although the Secretary of State's decision refusing a widow's pension in each case conspicuously failed to mention the fact that the claimant's husband was not entitled to constant attendance allowance or unemployability allowance at the time of his death as part of his reasoning, the claimants may have had further information about widows' pensions and, in particular, he had provided the claimant in the first case before me with more information when she made an enquiry about an award in respect of funeral expenses. He said, in a letter dated 6 May 2014:

> "When an ex-member of the Armed Forces dies, War Widow's Pension and a grant towards the cost of a basic funeral may be made if:
>
> - It is medically confirmed that the death was caused or substantially hastened by conditions related to their military service or
> - They were assessed at 80 per cent or more and were in receipt of War Pensions Unemployability Supplement or War Pensions Constant Attendance Allowance (not Attendance Allowance paid by DWP) with their War Pension at the time of death."

In her appeal in respect of both the widow's pension and the grant for funeral expenses, the claimant pointed out that the assessment of her late husband's assessment had been 90 per cent and she enclosed a copy of that letter and also a copy of a letter her husband had received a year earlier, confirming "that you are currently in receipt of a 90 per cent War Pension *and Allowances*" (emphasis supplied). It appears that she was not aware what allowances he had been receiving.

27. The Secretary of State responded by way of a "comment" in the bundle of papers supplied for the hearing before the First-tier Tribunal, in which he said:

> "1. The Secretary of State has noted the comments made by [the claimant] in her letter of appeal received on 14.08.14.
>
> 2. [The claimant's husband] had been in receipt of a 90 per cent War disablement Pension (WDP) and Allowance for Lower Standard of Occupation (ALSO). He had underlying entitlement to Unemployability Supplement (UNSUPP). This gave the [claimant] entitlement to Temporary Allowance for Widows (TAW). [The claimant] has indicated that she believes that she meets the automatic entitlement criteria.
>
> 3. [The claimant's husband] had claimed Constant Attendance Allowance but his claim was unsuccessful. The appeal is therefore on the basis of his underlying entitlement to UNSUPP and that his death was neither due to or substantially hastened by service. The Medical Advisor's reasons dated 01.08.14 address the medical issue.
>
> 4. The criteria for an award of TAW and War Widows pension (WWP) are different; the Temporary Allowances includes (at article 27(1)(b)(ii)) provision specifically stating that there is entitlement where a pensioner was in receipt of ALSO but had entitlement to UNSUPP.

5. The criteria for an automatic award of WWP, set out in article 22(4)(b), state that in respect of the period ending with his death, an allowance under article 12 was payable. There is no provision equivalent to that in the Temporary Allowances article.

6. In addition we must consider the ALSO article 15. At (4) the article provides that an allowance shall not be payable to a member for any period in respect of which an allowance under article 12(1)(a) or article 17 is payable to him.

7. Article 12(1) refers to unemployability allowances

> ***12.****—(1) Subject to the provisions of this article, where a member of the armed forces is in receipt of retired pay or a pension in respect of disablement so serious as to make him unemployable, he shall be awarded unemployability allowances, being—*
> *(a) a personal unemployability allowance at the appropriate rate specified in paragraph 5(a) of Part IV of Schedule 1; and*
> *(b) additional unemployability allowances for dependants in accordance with such of the provisions of paragraph (6) as may be appropriate in his case.*

8. [The claimant's husband] had underlying entitlement to UNSUPP (article 12) but it was not payable to him because ALSO was in payment. Therefore there is no automatic entitlement to WWP following his death.

9. The Secretary of State would point out that on 09.06.10 the then SPVA sent [the claimant's husband] a letter explaining the criteria of automatic awards of WWP therefore he was aware of this.

10. For these reasons and the Medical Reasons dated 01.08.14 the Secretary of State is satisfied that the decision in [the claimant's] case is appropriate."

28. The Secretary of State provided with the comment extracts from the 2006 Order, setting out articles 15, 22 and 27 but not article 23. In so far as is material, article 15 provides:

> "**Allowance for lowered standard of occupation**
> **15.** – (1) Subject to paragraph (2), where a member of the armed forces is –
>
> (a) in receipt of retired pay or a pension in respect of disablement the degree of which is less than 100 per cent; and
>
> (b) the disablement is such as to render him incapable, and likely to remain permanently incapable, of following his regular occupation and incapable of following any other occupation with equivalent gross income which is suitable in his case taking into account his education, training and experience
>
> he shall, subject to paragraph (3), be awarded an allowance for lowered standard of occupation at a rate not exceeding the appropriate rate specified in paragraph 8 of Part IV of Schedule 1.

(2) …

(3) The aggregate rate of the member's retired pay or pension together with the allowance under this article shall not exceed the rate of retired pay or pension which would have been appropriate in his case if the degree of his disablement had been 100 per cent.

(4) Subject to the provisions of paragraph (5), an allowance under this article shall not be payable to a member for any period in respect of which an allowance under article 12(1)(a) or article 17 is payable to him.

(5) Where a member is in receipt of an allowance under this article he may continue to receive such allowance if he becomes eligible subsequently for an allowance under article 12(1)(a).

(6) …"

29. The point that the Secretary of State was trying to make in paragraphs 4 and 5 of the comment was that the claimant had qualified for a temporary allowance under article 27(1)(b)(ii) but that it did not follow that article 22(4) was satisfied so that she could qualify for a pension under article 23. However, because none of the documents provided to the First-tier Tribunal so much as mentioned article 23 and because the version of article 27 provided by the Secretary of State failed to take account of the very important amendment made by the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions (Amendment) Order 2008 SI/2008/679), which revoked article 27(1)(a) and so removed the requirement that the deceased's death have been due to service (restoring the position to what it had been some years earlier), and because neither party explained the real relevance of the argument about constant attendance allowance, the First-tier Tribunal appears to have overlooked the information that the claimant had already received a temporary allowance and may have believed that the issue before it was whether the claimant qualified for a temporary allowance under article 27(1)(b)(i). Consequently, it did not consider it necessary to refer to the argument advanced by the Secretary of State in his comment.

30. In my judgment the Secretary of State's conclusion in respect of article 22(4) was sound but his reasoning was completely misconceived and, indeed, is inconsistent with the submission he has made to the Upper Tribunal in respect of article 22(3).

31. Plainly many people who are unemployable and satisfy the conditions for unemployability allowance set out in article 12 also satisfy the conditions for an allowance for lowered standard of occupation set out in article 15, but article 15(4) has the effect that both allowances cannot be payable at the same time. (For reasons that I will explain below, article 15(5) appears to be a dead letter.) Unemployability allowance is paid at a rate that is greater than the maximum rate of an allowance for lowered standard of occupation and so, other things being equal, one might expect a person to claim the former rather than the latter. However, an unemployablity allowance "overlaps" with non-means-tested benefits in the civilian social security scheme, such as incapacity benefit, contributory employment and support allowance and retirement pensions, so that the latter are reduced by the amount of the former (see regulation 6 of, and Schedule 1 to, the Social Security (Overlapping Benefits) Regulations 1979 (SI 1979/597)), whereas an allowance for lowered standard of occupation under article 15 does not.

32. The consequence, as explained to the claimant's husband in the letter of 9 June 2010 mentioned in paragraph 9 of the Secretary of State's comment, is that a person may be better off claiming an allowance for lowered standard of occupation together with a civilian benefit than he or she would be claiming unemployability allowance. The letter to the claimant's husband pointed out that, while the amount of unemployability allowance was less than the amount of allowance for lowered standard of occupation plus incapacity benefit, there were other implications. I think the letter may have been written partly as a result of the 2008 amendment to article 27(1), although it was also clearly triggered by the substitution of article 32 in the following year. In any event, it included the following information, in different parts of the letter:

> "If your disablement is assessed at 80 per cent or more and you are being paid Unemployability Supplement at the time of your death, your widow/widower will automatically qualify for a War Widow's/Widower's Pension."
>
> "Your wife/husband may still qualify for a War Widow's/Widower's Pension in any case if you die of your accepted disablement."

The implication, albeit not spelled out, was that, if the claimant's husband's death was not due to any of his accepted conditions, his widow might not qualify for a widow's pension if he did not elect to claim unemployability supplement. Whether or not he appreciated that implication, he did not in fact make a claim for unemployability supplement following receipt of the letter.

33. It seems to me to be misleading to say, as the Secretary of State did in his comment, that the claimant's husband in this case had an "underlying entitlement" to unemployability supplement. As he now submits, there can only be entitlement if there has been a claim and therefore, as I have indicated above, the non-statutory term "underlying entitlement" is best confined to cases where there has been a claim and an award but payment has been withheld because, for instance the claimant has been in hospital. Here, there was no claim for unemployability supplement. The claimant had been entitled to a temporary award under article 27 because the word used in article 27(1)(b)(ii) is "eligible", a term that appeared in article 33(1)(a)(ii) of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983 (SI 1983/883) and pre-dates the introduction of the forerunner of article 34. The drafting of article 27(1)(b)(ii) is a little odd – particularly the use of the word "although" – but in its context the phrase "eligible for an allowance under article 12(1)(a)" clearly means satisfying the conditions for entitlement to unemployability supplement set out in article 12. It does not require satisfaction of the additional condition imposed by article 34 of having made a claim.

34. Moreover, paragraph 8 of the comment was inconsistent with paragraph 6. Article 15(4) has the effect that an allowance for lowered standard of occupation is not payable where an unemployability allowance is payable – not *vice versa*. It was therefore not correct to say that an unemployability allowance was not payable because an allowance for lowered standard of occupation was payable. The legal reason that an unemployability allowance was not payable was simply that there had been no claim for it. That the claimant's husband had preferred to claim an allowance for lowered standard of occupation was merely the explanation for his not having made the necessary claim.

35. It initially appeared to me that article 15(5) had the effect that the Secretary of State was permitted to pay both an allowance for lowered standard of occupation and an unemployability allowance at the same time and so at first I read the reference to an underlying entitlement to

imply that the claimant's husband had in fact made a claim for unemployability supplement. However, it is now clear that there was no such claim – or, if there had been in the past, the claim had been withdrawn to allow an allowance for lowered standard of occupation to be paid – and Mr Buley has persuaded me that my initial reading of article 15(5) was not correct. I accept that "eligible" in that provision should be given the same meaning as it clearly has in article 27(1)(b)(ii) and so it becomes clear that the purpose of article 15(5) (which was previously article 21(4) of the 1983 Order) is to make it explicit that the mere fact that a person satisfies the conditions of article 12 does not bring article 15(4) into play if no claim for unemployability allowance has been made. As Mr Buley was, I think, inclined to concede, article 15(5) is now a wholly unnecessary provision because, in the light of article 34, the effect is achieved through the use of the word "payable" where it appears or the second time in article 15(4). Article 15(5) therefore tends to confuse, rather than to clarify, the position.

36. In any event, the reason that article 22(4) does not help the claimant in the first case before me is much the same as the reason that, absent a posthumous appeal, article 22(3) does not. Her husband had not been awarded unemployability supplement and there was no undetermined claim for it.

Specified decisions under the 2006 Order

37. In the third case before me, the First-tier Tribunal made no reference to article 22(3) of the 2006 Order or to any other statutory provision other than article 41 of that Order. However, it said:

> "The question whether CAA was merited for his accepted disablement in the 26 week period before his death is essentially a specified decision to be decided on the balance of probabilities."

38. It presumably had in the back of its mind section 5A of 1943 Act, which was brought fully into force in 2001 (see section 57(1) of the Child Support, Pensions and Social Security Act 2000) and the Pensions Appeal Tribunals (Additional Rights of Appeal) Regulations 2001 (SI 2001/1031) ("the 2001 Additional Rights of Appeal Regulations"), as amended, which is made under section 5A of the 1943 Act and regulation 3A(1) of which provides:

> "**3A.** – (1) Each decision –
>
> (a) which is made in exercise of any provision of the 2006 Service Pensions Order listed in Schedule 1A; and
>
> (b) which –
> (i) refuses or discontinues an award;
>
> (ii) establishes or varies the amount of an award; or
>
> (iii) establishes or varies the date from which an award has effect,
>
> shall be a specified decision."

39. Articles 8 and 12 of the 2006 Order are listed in Schedule 1A to those Regulations so that decisions in respect of constant attendance allowance and unemployability allowance that fall within the scope of regulation 3A(1)(b) are specified decisions in respect of which there is a right of appeal under section 5A of the 1943 Act. So, too, is article 23(2) but article 23(1) is not, presumably because it is unnecessary in the light of section 1(3) and (3A) of the 1943 Act. Thus, the 2001 Additional Rights of Appeal Regulations do not make appealable any decisions as to the payability of constant attendance allowance or unemployability allowance for the purposes of a claim for widow's pension. A supplementary pension cannot be awarded under article 23(2) unless a basic pension has been awarded under article 23(1).

40. What, on the other hand, a widow may be able do is bring a posthumous appeal against a decision to refuse her husband constant attendance allowance or, as the case may be, unemployability allowance. However, in the third case before me, the decision on the claimant's husband's claim for constant attendance allowance had been made more than two years before he died. So, by the time the claimant made her claim for a widow's pension, a posthumous appeal against the constant attendance allowance decision would have been irredeemably out of time. The First-tier Tribunal's understanding that there was a specified decision before it was therefore entirely misconceived.

Posthumous appeals

41. Provision for posthumous appeals is made by the Pensions Appeal Tribunals (Posthumous Appeals) Order 1980 (SI 1980/1082, as amended by SI 2001/408, SI 2001/3506, SI 2005/245 and SI 2008/2683) (the 1980 Order"), which is made under section 16(1) and (2) of the Social Security Act 1980. Of particular relevance to the present cases is article 3(2), which provides for appeals to be brought after a claimant's death against entitlement decisions and specified decisions notified to the claimant before his or her death. Article 3 provides:

> "**Posthumous notification of, and appeals to the appropriate tribunal against, decisions of Secretary of State**
>
> **3.** – (1) Subject to paragraph (5), where the decision by the Secretary of State on a claim for an award under an instrument mentioned in section 1, 2, 3 or 5A of the Act (appeals to the appropriate tribunal on entitlement questions and specified decisions) has not been notified to the claimant before his death –
>
> (a) the Secretary of State shall, on becoming aware of that death and the existence and identity of the designated person, notify that person of the decision; and
>
> (b) the designated person may, subject to the following provisions of this Order, bring an appeal under section 1, 2, 3 or as the case may be, 5A of the Act against that decision within 6 months of the date of notification.
>
> (2) Subject to paragraphs (3) to (5), where the decision by the Secretary of State on such a claim has been notified to the claimant in his life time but the claimant has not appealed against that decision before his death, the designated person may, subject to the following provisions of this Order, bring an appeal under the said section 1, 2, 3 or, as the case may be, 5A as though brought on behalf of the appellant and, without prejudice to the

application of article 68(5) of the Pensions Order [now article 68(3) of the 2006 Order] … (no award in respect of any period following date of claimant's death), as though the claimant had not died.

(3) An appeal referred to in paragraph (2) shall be made within 6 months from the date of notification to the claimant.

(4) ….

(5) Where a designated person satisfies the Secretary of State that –

(a) he would have brought an appeal on a date ('the earlier date') earlier than that ('the actual date') on which he actually did so but for the fact that he was incapable of so doing or instructing someone to act on his behalf by reason of –

(i) the death or serious illness of the designated person or a spouse or dependant of that person;

(ii) the disruption of normal postal services;

(ii) failure on the part of the Secretary of State to notify the claimant or the designated person of the decision; or

(iv) exceptional circumstances applying to the designated person which rendered it impracticable for him to bring the appeal or to instruct another person to bring it; and

(b) the appeal was in any event made or brought as soon as was reasonably practicable in the circumstances of the case,

the reference in paragraph (3) to 6 months from the date of notification shall be treated as a reference to not later than 12 months after the expiry of the time limit provided for in that paragraph.

(6) For appeals to the First-tier Tribunal, Tribunal Procedure Rules apply in respect of the time limits and extension to those time limits by the Secretary of State."

42. By virtue of article 1(2) of the 1980 Order, read with article 68(5) of the 2006 Order, any surviving spouse or civil partner of the claimant is "the designated person" for the purposes of the 1980 Order.

43. Article 3(6) is not perhaps as clearly drafted as it might have been but I have no doubt that its effect is to confine the operation of the time limits in article 3(1)(b) and (3) of the 1980 Order to appeals to Pensions Appeal Tribunals in Scotland and Northern Ireland. The functions of Pensions Appeal Tribunals in England and Wales were transferred to the First-tier Tribunal in 2008 and Tribunal Procedure Rules now make provision for time limits for appealing. Since 2011, rule 21(1) to (4) of the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (SI 2008/2686) ("the 2008 Tribunal Procedure Rules") has provided:

"**21.** – (1) An appellant must start proceedings by sending or delivering a notice of appeal to the decision maker so that it is received within 12 months after the date on which written notice of the decision being challenged was sent to the appellant.

(2) If the appellant provides the notice of appeal to the decision maker later than the time required by paragraph (1) the notice of appeal must include the reason why the notice of appeal was not provided in time.

(3) Subject to paragraph (4), where an appeal is not made within the time specified in paragraph (1), it will be treated as having been made in time if the decision maker does not object.

(4) No appeal may be made more than 12 months after the end of the 12-month period provided for in paragraph (1).

…
(7) Notwithstanding rule 5(3)(a) (case management powers) and rule 7(2) (failure to comply with rules etc.), the Tribunal must not extend the time limit in paragraph (4)."

Paragraph (1) must be read as being subject to rule 5(3)(a), which provides that the First-tier Tribunal may "extend or shorten the time for complying with any rule" but, as is emphasised by rule 21(7), rule 5(3)(a) must in turn be read as being subject to rule 21(4).

44. Thus, article 3(6) of the 1980 Order has the effect that the basic time limit for bringing posthumous appeals is twelve months in England and Wales whereas it is six months in Scotland and Northern Ireland. The legislative history shows how this has come about.

45. There were no time limits at all in the 1980 Order until 2001, reliance being placed solely on the general time limit for entitlement appeals in section 8 of the 1943 Act, which was twelve months but extendable by a Pensions Appeal Tribunal if there was a reasonable excuse for the delay. In 2001, the time was reduced to six months and applied also to appeals under the newly inserted section 5A. At the same time, the circumstances in which time might be extended were tightened up, through a further amendment to section 8 and through the Pensions Appeal Tribunals (Late Appeals) Regulations 2001 (SI 2001/1032) ("the 2001 Late Appeals Regulations"). It was also at that time that a six-month time limit was added to article 3(1)(b) of the 1980 Order and that paragraphs (3) to (5) were also added. The reason for doing that is apparent when one compares article 3(5) of the 1980 Order with regulations 3 and 4 of the 2001 Late Appeals Regulations. They have the same broad effect but regulation 4 of the 2001 Late Appeals Regulations is directed to the circumstances of the claimant, whereas article 3(5) of the 1980 Order is largely directed to the circumstances of the designated person. The basic six-month time limit for appeals against entitlement decisions and specified decisions and the twelve-month limit on extending it were common both to claimants' appeals and to appeals brought by designated persons.

46. This continued to be the case until 2011, notwithstanding the transfer of functions from the Pensions Appeal Tribunal in England and Wales to the First-tier Tribunal in 2008, although the restricted grounds on which the time limit might be extended then ceased to apply in England and Wales. This is because amendments made to section 8 of the 1943 Act in 2008 had the effect

of confining the time limits in it and the operation of the 2001 Late Appeals Regulations to appeals to Pensions Appeals Tribunals in Scotland and Northern Ireland. Time limits for appeals to the First-tier Tribunal in England and Wales and the powers to extend them were thereafter to be found in the 2008 Tribunal Procedure Rules, rule 21(1) of which prescribed time limits that were the same as those in section 8. Article 3(6) of the 1980 Order was inserted at the same time and was clearly intended similarly to have the effect that the time limits for posthumous appeals and the powers to extend them in England and Wales should be found in the 2008 Tribunal Procedure Rules rather than in the 1980 Order itself, a reversion to the position that had obtained until 2001. (I observe, though, that in the case of a posthumous appeal under article 3(2) of the 1980 Order, "appellant" in the second place where it appears in rule 21(1) of the 2008 Tribunal Procedure Rules must be read as referring to the deceased claimant.) Initially, the only practical difference this made was in relation to the disapplication of article 3(5) in England and Wales, just as the 2001 Late Appeals Regulations had ceased to have effect in England and Wales.

47. However, in 2011, the time limits in section 8 of the 1943 Act and in rule 21(1) of the 2008 Tribunal Procedure Rules were increased to twelve months. The time limits in article 3(1)(b) and (3) of the 1980 Order were not similarly extended. I suspect that they were overlooked but, in any event, they continue to have the effect that the time limit for bringing posthumous appeals in Scotland and Northern Ireland is only six months and so article 3(6) now creates more of a practical difference between the position in England and Wales and that in Scotland and Northern Ireland than it did before.

48. The question that arises before me is whether the claimants in the present cases could have been treated by the First-tier Tribunal as having made posthumous appeals under article 3(2) of the 1980 Order against the decisions refusing their late husbands constant attendance allowance. The Secretary of State accepts that, if the claimants had brought posthumous appeals against the refusal of constant attendance allowance and the First-tier Tribunal had awarded constant attendance allowance up to the date of his death, the First-tier Tribunal could then properly have allowed the claimants' widows' pension appeals on the ground that article 22(3) of the 2006 Order was satisfied. However, he submits that, on the facts of these cases, the claimants had not brought such posthumous appeals and cannot now do so or be treated as having done so.

49. This is a live issue only in the first two cases before me because, as I have already mentioned, the third claimant could never have brought such a posthumous appeal as the decision refusing her husband constant attendance allowance had been made more than two years before he died. In the first case, however, the decision refusing the claimant's husband constant attendance allowance was made on 21 November 2013, he died on 30 April 2014, the claimant's claim for widow's pension was made, or treated as made, on 2 May 2014, that claim was rejected on 6 August 2014 and her appeal against the rejection was received by the Secretary of State on 14 August 2014 and therefore within 12 months of the constant attendance allowance decision. The appeal was heard on 8 May 2015, within the period of a further 12 months within which a late appeal against the constant attendance allowance decision might, and would unless the Secretary of State objected, be admitted. In the second case, the decision refusing the claimant's husband constant attendance allowance was made on 12 December 2013, he died on 4 November 2014, the claim for widow's pension was treated as made on 11 November 2014 and the claimant's appeal against the decision of 22 December 2014 refusing her widow's pension was received by the Secretary of State on 9 January 2015 and heard on 21 July 2015, both of the latter dates being between 12 months and 24 months after the constant attendance allowance decision.

50. The Secretary of State points out that rule 21(5)(d) of the 2008 Tribunal Procedure Rules requires a notice of appeal to include "details (including the full reference) of the decision being appealed" and he correctly submits that the wording of the appeals submitted in the first two cases (or, for that matter, the third) cannot be construed as referring in any way to the constant attendance allowance decision. Although rule 7 permits breaches of the requirements of the Rules to be waived, he submits that that is not appropriate on a matter that goes to jurisdiction. The fact is, he argues, that neither of the claimants showed any intention of appealing against the constant attendance allowance decision in their original letters of appeal and, even if the First-tier Tribunal could have invited late posthumous appeals against those decisions at the hearings, it did not do so and it is far too late to do anything about it now.

51. Mr Lyons, however, submits that, in order to avoid injustice, any appeal to the First-tier Tribunal in this sort of case should be construed as an appeal against any possibly relevant decision on any possible ground. He draws attention to the way in which these appeals unfolded before the First-tier Tribunal and to the background against which they were brought.

52. I accept the Secretary of State's submission that it is implicit that some defects of procedure cannot be waived under rule 7, a failure to comply with the absolute time limit in rule 21(4) having been one of them even before rule 21(7) was added (see *LS v London Borough of Lambeth (HB)* [2010] UKUT 461 (AAC); [2011] AACR 27 at [130]). I also accept that, for there to be an appeal, the claimant must have taken some action that is capable of being construed as an appeal. However, I do not consider that rule 21(5)(d) is any more fundamental than rule 21(5)(e), which requires a claimant to include in any notice of appeal "the grounds on which the appellant relies", and it is well established that, although section 5B(a) of the 1943 Act provides that the First-tier Tribunal "need not consider any issue that is not raised by the appellant or the Minister in relation to the appeal", it is a necessary implication of that provision that it is quite proper for it to consider any issue it considers relevant provided that the parties are given an opportunity to address it. In an area of the law where, generally, neither party is represented by lawyers, there are bound to be cases where the First-tier Tribunal spots a point that has not been identified by the parties. The issues are not defined by the notice of appeal and the response in the way that the pleadings in a civil action in the courts define the terms of the proceedings and there is therefore no requirement for grounds of appeal formally to be amended if a new point is taken and a new point may be taken after the time for appealing has expired. The appeal is effectively construed as though the grounds had always included the new point. There are many instances where, in a similar manner, the law treats something as having been done earlier than it was actually done, particularly in order to avoid injustice in relation to procedural matters that would otherwise be caused by the passage of time. In a situation not very far removed from the present, it was held in R(SB) 8/88 that an appeal brought in respect of a claim for a social security benefit made by a person who had since died and which would otherwise have been a nullity could retrospectively be validated by a grant of letters of administration or by an appointment by the Secretary of State and reference was made in that case to the long-established doctrine of relation back under which a similar approach is taken.

53. Had the claimants in the first two cases before me been advised by a lawyer, with a correct understanding of the law, that the payability of constant attendance allowance was the key issue in determining their entitlement to a widow's pensions, they would without doubt have brought posthumous appeals against the constant attendance allowance decisions at the same time as bringing their widow's pension appeals. In these circumstances, where bringing such a posthumous appeal may be considered as a preliminary step necessary for success in their

widow's pension appeals, I do not see any reason why the appeals brought should not have been taken by the First-tier Tribunal as having encompassed such posthumous appeals, provided that they would have been within time. This would not have been materially distinguishable from the First-tier Tribunal merely taking a new point in the proceedings. There was no procedural disadvantage to the Secretary of State. In particular, the evidence that had led him to reject the claims for constant attendance allowance was before the First-tier Tribunal in all of these cases and the presenting officers were ready to address the issue. The Secretary of State would, of course, have been at risk of paying out arrears of constant attendance allowance as well as widow's pension but, if the First-tier Tribunal was right on the facts and did not make any material error of law, that was no more than the claimant was entitled to.

54. Even if I am wrong about that and the scope of an appeal cannot be related back for the purpose of compliance with time limits, the First-tier Tribunal is certainly entitled to invite a further appeal at a hearing if the absolute time limit has not expired and is equally entitled to waive formalities, although it would be wise, when the claimant is present so that it is practical, to ask for a written document signed by the claimant, saying that she wished to appeal against the decision refusing constant attendance allowance to her husband. These are public law proceedings conducted before tribunals in which the parties are not expected to have legal representation and, more importantly, they are not adversarial (see *Kerr v Department of Social Development* [2004] UKHL 23; [2004] 1 WLR 1372 (also reported as R1/04(SF)) at [61]) because the Secretary of State has an investigatory and adjudicatory function and as much of a duty to pay out benefits to which the claimant is entitled as he has to withhold benefits to which the claimant is not entitled. In such proceedings, the First-tier Tribunal is entitled to help a claimant to avoid obstacles that are merely procedural and, indeed, one might expect the Secretary of State to do so too.

55. Mr Buley submitted that the First-tier Tribunal cannot be found to have erred in law for not treating the claimants as having appealed against the constant attendance allowance decisions or for not having invited appeals, because a tribunal is obliged to take a point not advanced by a party only where it is "*Robinson* obvious" (see *R v Secretary of State for the Home Department, ex parte Robinson* [1998] QB 929). Since section 5B(a) of the 1943 Act makes specific provision limiting the First-tier Tribunal's obligation to consider points not raised by the parties, perhaps the more relevant authorities – because provisions equivalent to section 5B(a) of the 1943 Act were in play – are *Mongan v Department for Social Development* [2005] NICA 16 (reported as R3/05(DLA)) and *Secretary of State for Work and Pensions v Hooper* [2007] EWCA Civ 495 (reported as R(IB) 4/07), but the principle is the same and I readily accept that section 5B(a) of the 1943 Act requires a less expansive approach to the scope of an appeal than that suggested by Mr Lyons.

56. However, the crucial points in each of the first two cases before me are, first, that the fundamental error of law made by the First-tier Tribunal was in misconstruing the 2006 Order in a way that meant that a posthumous appeal against the constant attendance allowance decisions was unnecessary and, secondly, that it implicitly found that the claimant's husband had been "eligible" (in the sense in which that word is used in the 2006 Order) for constant attendance allowance even though it erred in finding that constant attendance allowance had been "payable". Had the First-tier Tribunal not made that error of law, its finding that the claimant's husband had been eligible for constant attendance allowance would, in my judgment, have made it obvious that it needed at least to consider whether to treat the claimant as having appealed against the constant attendance allowance decision. Once the Upper Tribunal sets aside the First-tier Tribunal's decision in the light of that error, it may, in exercising its power under section 12(2)(b)(ii) of the

2007 Act to " re-make the decision", exercise any power that the First-tier Tribunal had irrespective of whether, in the decision that has been set aside, the First-tier Tribunal considered exercising that power or was obliged to do so.

57. Moreover, even if the First-tier Tribunal had the power only to invite another appeal, I consider that the Upper Tribunal, in setting aside the First-tier Tribunal's decision in the first two cases before me, could treat it as having invited an appeal and treat the claimant as having lodged such an appeal at the hearing, as she would doubtless have done. Any other approach would lead to the Secretary of State gaining an unwarranted advantage as a result of the First-tier Tribunal's error of law and I do not consider that section 12 of the 2007 Act is to be construed to that effect. In my judgment, where a decision is set aside and the Upper Tribunal exercises its power to re-make the decision, the power to re-make the decision includes a power to give the decision that the First-tier Tribunal should have given in the first place in the circumstances before it, although I do not doubt that it also includes a power to make the decision afresh, taking into account new evidence as the First-tier Tribunal would if the case were remitted. Section 12 should be construed as far as possible so as to enable the Upper Tribunal to put the parties in the position in which they would have been had the First-tier Tribunal not erred in law. As I have said, it is to avoid unfairness due to the mere passage of time that the law sometimes allows a person to be treated as having done something in the past that was not actually done then.

58. Accordingly, I am satisfied that, given the history of each of the first two cases before me, the claimant should now be treated as having brought a posthumous appeal against the decision to refuse her husband constant attendance allowance when she submitted her widow's pension appeal, although in the second case there will be a question whether it should be admitted since it was brought outside the basic 12 months' time limit. If that appeal is admitted, I will not need to consider whether, since a notice of appeal must currently be sent to the Secretary of State rather than direct to the First-tier Tribunal, the claims for widows' pensions sent to the Secretary of State could also have been treated as posthumous appeals against the constant attendance allowance decisions.

59. I will consider below the implications for each of those two cases of treating the claimant as having made a posthumous appeal against the relevant constant attendance allowance decision.

60. However, one provision that needs to be remembered in any posthumous appeal is section 5B(b) of the 1943 Act, which precludes the First-tier Tribunal from taking into account any circumstances not obtaining at the time when the decision appealed against was made. For the purposes of these claimants' constant attendance allowance appeals, that has the effect that no account can be taken of any deterioration in the claimant's husband's health leading to an increase in his need for attendance after the date on which he was refused constant attendance allowance, so that making findings as to the position in the last 26 weeks of his life, as the First-tier Tribunal did in each of these cases, may not be sufficient if the decision was made more than 26 weeks before he died.

The dispensing instruments

61. Although the 2006 Order provides for the principal scheme of pensions in respect of disablement and death due to service before 6 April 2005, the three dispensing instruments remain in force. These are the Order in Council of 19 December 1881 in respect of former members of the Royal Navy and Royal Marines, the Royal Warrant of 27 October 1884 in respect of former

soldiers in the Army and the Order of His Majesty dated 14 January 1922 in respect of former members of the Royal Air Force. The Royal Warrant states:

> "OUR WILL AND PLEASURE is that it shall be competent for Our Secretary of State, with the concurrence of the Lords Commissioners of Our Treasury, to grant, in exceptional cases, Pay, Non-Effective Pay, and other Emoluments or Allowances, at rates, or to persons, other than those mentioned, or under conditions other than those laid down in any of Our Warrants or Regulations;
>
> PROVIDED ALWAYS that a list of the grants thus approved as the Lords Commissioners of Our Treasury may direct, and a statement of the grounds on which they have been made, shall be annually laid before Parliament".

The Order in Council and Order of His Majesty are to similar effect, although the drafting is more elaborate. Each confers a power to make payments "in exceptional cases".

62. I do not know how much recent use, if any, has been made of the dispensing instruments, but the evidence in these cases is that they were widely used in the 1970s to make awards in individual hard cases and they were also used sometimes as authority for the making of awards in a class of case. However, generally, the expectation was that a suitable amendment to legislation would be made at a convenient moment, rather than there being prolonged reliance on the dispensing instruments for a class of case, unless the incidence of such cases was expected to be very rare. Thus, they acted as precursors to article 26 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517), which makes provision for what are called "temporary awards" under the Armed Forces Compensation Scheme.

63. The relevance of the dispensing instruments to these appeals is that, during the course of the proceedings, I suggested that it could be argued that, if there were an established concession under a dispensing instrument that a widow's pension would be paid in any case where the claimant's late husband's disablement was assessed at 80 per cent and he satisfied the conditions set out in article 8 of the 2006 Order for payment of a constant attendance allowance for 26 weeks before his death but had not made a claim for it, an appeal lay under section 1(3) or (3A) of the 1943 Act against the rejection of a claim under the instrument. In other words, it could be argued that there was an appeal on the issue of fact as to whether the claimant fell within the scope of the concession. The claimants were happy to adopt the point, possibly out of politeness rather than any real belief in it.

64. I have set out in the annex to this decision a number of letters that provide evidence of the concession relevant to this case.

65. At the first hearing before me, the only evidence of the terms of the concession and the basis on which it was made consisted of the letters of 20 March 1973 and 6 January 1976 from the Treasury to the Department of Health and Social Security. The Secretary of State resisted the notion that there might be a right of appeal on the grounds (a) that the concession in this case was not made under a dispensing instrument at all, (b) that, if it were, the claim would be under the concession rather than under the royal warrant, order in council or royal order, (c) that the concession merely permitted the making of an award rather than requiring it and (d) that rejection of a claim under the concession would not be on the grounds that the claimant's husband's death

was not due to or substantially hastened by service but on the ground that the terms of the concession were not satisfied.

66. The counter arguments were (a) that the letter of 20 March 1973 was ambiguous but it would be improper to make the concession otherwise than under dispensing instruments, (b) that a decision made under a concession made under a relevant instrument should be treated as made under the instrument, in the same way that a decision made under regulations made under an Act is treated as made under the Act, (c) that there may be a public law duty to make an award under a policy that is expressed in permissive terms and (d) that the concession should be read as deeming the deceased's death as having been due to or substantially hastened by service in the same way that article 22(3) and (4) of the 2006 Order does, it not having been suggested that an appeal does not lie under section 1(3A) of the 1943 Act in a case arising under those paragraphs of that article.

67. It became clear during the hearing that it would be helpful to have further evidence as to the precise terms of the concession and the basis upon which it was made and so the Secretary of State undertook to ferret out such of the surrounding correspondence as he could and make it available. This he has done and the further documents now included in the annex to this decision have led him to shift his position and, in particular, to accept that the concession is made under the dispensing instruments.

68. It should be noted that the article 25(3) mentioned in the correspondence was article 25(3) of the Royal Warrant of 19 September 1964 (Cmnd 2467 – the principal instrument setting out the main scheme then current in respect of former soldiers in the Army), as amended, and was a forerunner of article 22(3) of the 2006 Order (save that then it applied only if the rate of constant attendance allowance payable was "not less than the normal maximum rate for the time being"). It had been introduced with effect from 20 September 1971 by the Royal Warrant of 16 July 1971 (Cmnd 4742). It is also important to note that the Royal Warrant of 19 September 1964 did not include any provision in respect of claims and, in particular, did not expressly make a claim a condition precedent to the making of an award or require a claim to be in writing or in any particular form. There was no equivalent of article 34 of the 2006 Scheme until 1996 (see article 3 of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Amendment (No. 3) Order 1996 (SI 1996/2882)). There was also no appeal against decisions in respect of constant attendance allowance until section 5A was inserted into the 1943 Act in 2001.

69. The Secretary of State originally suggested that the third of the categories mentioned in the letter of 20 March 1973 was the one potentially relevant to these cases but, having discovered the letter of 15 February 1973 to which the later letter was the reply, he now submits that it is the first of the categories that is most arguably potentially relevant and that the third of the categories may have become completely unnecessary.

70. Put crudely, the first of the categories identified in the correspondence is where it is considered that a widow's pension should be paid in the light of fresh medical evidence as to the widow's husband's need for attendance provided since his death, the second is where it is considered that a widow's pension should be paid on reconsideration of evidence provided before her husband's death and previously taken into account on a claim by him for constant attendance allowance and the third is where it is considered that a widow's pension should be paid on consideration of evidence provided before her husband's death but not taken into account on a claim by him for constant attendance allowance. I agree that in the present cases the third

category appears irrelevant but I am not sure that that category has become unnecessary in all cases.

71. As the Secretary of State submits, the third category was concerned with cases where there was, or it could be implied that there was, a claim for constant attendance allowance outstanding at the date of death. It appears that there was some doubt as to whether in such a case death occurred "at a time when an allowance in respect of constant attendance allowance was payable to him". As I have already indicated, it is rightly accepted by the Secretary of State that under the present legislation an outstanding claim could be determined posthumously and an award made having the effect that constant attendance allowance was payable at the time of death. It is unnecessary to consider whether that would also have been the true position in 1973.

72. I agree with the Secretary of State that it is unnecessary to rely on any concession in cases where there was an outstanding claim for constant attendance allowance at the date of death. However, article 34(1) of the 2006 Order does not appear to permit *implied* claims for constant attendance allowance; a claimant must complete and sign a form and cannot be treated as having made a claim merely because he has produced evidence that is sufficient to prove that the other conditions of entitlement are satisfied. Thus, there is a question whether the third category should now be read as though it had been rewritten so as to apply in cases where evidence was provided before the claimant's husband's death but there was no effective claim for constant attendance allowance or whether it should be regarded as having lapsed upon the introduction of the forerunner of article 34.

73. Questions also arise as to whether "medical evidence" has a meaning that does not extend to testimony from claimants and whether "fresh medical evidence" means only medical evidence that could not reasonably have been provided in support of a claim for constant attendance allowance before the claimant's husband's death. The first of those questions is raised by Mr Buley on behalf of the Secretary of State, who contends that a narrow approach should be taken. I need merely observe that, while the evidence of doctors is clearly important on matters of causation and can be important on issues of loss of function, the principal evidence as to a person's need for attention or supervision usually comes from that person or those providing the attention and supervision and, in any event, the practice of the Secretary of State seems to be to refer all cases to a medical advisor and the medical advisor's assessment of the claimant's evidence is arguably medical evidence even on a narrow construction.

74. Indeed, it seems that in practice the Secretary of State (who until documents were unearthed for the purpose of this case appears to have forgotten some of the details of the concession and the fact that it was made under the dispensing instruments) takes a very non-technical approach to all three categories mentioned in the correspondence, and acts on the basis that their combined effect is that a widow's pension is awarded in any case where her husband's disablement was assessed at at least 80 per cent and a medical advisor advises him that he would have satisfied the conditions for entitlement to constant attendance allowance for at least 26 weeks before his death had he made a claim. This appears from the wording of the front of the claim form and the wording of the form used by medical advisors to which I have referred above and also from a submission made by the Secretary of State to the First-tier Tribunal in the third of the cases before me after the claimant had raised the question of "a backdated attendance allowance" in her reply to the Secretary of State's response to her appeal. The Secretary of State submitted:

> "…
>
> [The claimant] also requests 'backdated attendance allowance'. If [the claimant] means War Pension Constant Attendance Allowance (CAA), the Secretary of State would draw attention to the reasons for decision dated 30.05.14 [*ie*, the medical advisor's reasons].
>
> As with all claims for War Widows Pension, where War Disablement Pension was assessed at 80 per cent or more at the time of death, the Medical Advisor considers whether CAA would have been appropriate for the 26 weeks prior to death, had it been claimed.
>
> This ensures that the widows of pensioners with a high percentage assessment, and who are not in receipt of CAA at death, are not precluded from the automatic entitlement provisions or disadvantaged by virtue of the fact that they did not claim CAA prior to their death.
>
> The reasons dated 30.05.14 give the reason why CAA would not have been appropriate for the 26 weeks prior to [the claimant's husband's] death."

This leads me to think that the three categories identified by the Department of Health and Social Security were merely the result of an analysis of the types of case that fell within the broad class of cases where people had not been receiving constant attendance allowance at the requisite rate but had satisfied the criteria for an award at that rate and that the Department considered that awards under the dispensing instruments were merited in all those cases.

75. The Secretary of State now submits that the letter of 20 March 1973 did not include a general concession in respect of the first two categories but merely indicated that the Secretary of State might seek approval to use the dispensing instruments in those cases. I agree, and I also agree that it appears to have been considered at that time that it was unnecessary to rely on the dispensing warrants in the third category. The Secretary of State further submits that paragraph 5 of the letter of 6 January 1976 is to be construed as referring to the first two categories and that the 26-week qualifying period was now to apply to them as well. Insofar as it might be necessary to rely on a dispensing instrument in relation to the third category for the reasons I have given above, I would be inclined to read that letter as referring also to the third category. I also incline to the view that it did not extend the 26-week qualifying period to the first two categories because that period already applied to them. That is not obvious if the letter of 20 March 1973 is read in isolation but it becomes apparent when the letter of 15 February 1973 is read because it can then be seen that all three categories were concerned with treating the conditions of article 25(3) of the Royal Warrant of 19 September 1964 as having been satisfied when they were not.

76. The position therefore appears to be that the Secretary of State and his predecessors have had for forty years a practice, sanctioned by the Treasury, of treating as "exceptional" all cases where a widow's late husband's disablement was assessed at 80 per cent or more at the time of death and a medical advisor has advised that he would have been entitled to constant attendance allowance for the 26 weeks prior to death had it been claimed and, accordingly, of paying widows' pensions in such cases on the basis that death is to be treated as due to service. How and why the practice has survived for so long, becoming entrenched in practice and openly acknowledged but not being incorporated into the legislation, I am not sure but have not enquired.

77. Does an appeal lie under section 1(3) or (3A) of the 1943 Act against the rejection of a claim under that practice? I have come to the conclusion that it does not. I accept the Secretary of State's submission that the Treasury's authority still leaves the Secretary of State to determine whether any individual case is exceptional so as to fall within the scope of the power to make a payment under the relevant dispensing instrument. Ordinarily, it would be impossible to argue that the 1943 Act made provision for an appeal against a decision under a dispensing instrument to the effect that a case was not "exceptional". I do not consider that the facts that the practice has become general and that it has been explained as involving treating death as due to service can make any difference and make the decision one in respect of which an appeal may be brought under section 1(3) or (3A) of the 1943 Act. There clearly cannot be a right of appeal as to the scope of the Treasury's concession, on the ground that, say, the death of an ex-serviceman who would have satisfied the conditions of entitlement to constant attendance allowance for only 13 weeks had he claimed should be treated as due to service, and I am not persuaded that any appeal lies against the Secretary of State's assessment of the facts in any particular case either.

78. I recognise that a Tribunal of Pensions Appeal Commissioners in Northern Ireland has held there to be a limited right of appeal against a refusal to make a temporary award under the Armed Forces Compensation Scheme in arguably analogous circumstances (*Secretary of State for Defence v FA (AFCS)* [2015] NICom 17; [2016] AACR 27), but that decision turned on the wording of the relevant legislation providing for rights of appeal against decisions under the Scheme and I do not consider it right to extend the approach here. Although, as the Secretary of State appears to accept, section 1(3) and (3A) of the 1943 Act must be construed as having, since 1971, conferred a right of appeal against a decision not to treat a death as due to service under article 22(3) of the 2006 Order and its predecessors, I do not consider that it can be stretched to include a right of appeal against a decision made under a dispensing instrument because the dispensing instruments do not themselves provide for treating a death as due to service. The dispensing instruments confer a discretionary power to make payments in exceptional cases and the Secretary of State's view that a death should be treated as though it were due to service where the deceased was eligible for, but did not claim, constant attendance allowance for 26 weeks before his or her death is no more than a reason for exercising the power. That death should be treated as due to service is not a condition that needs to be fulfilled before such a payment can be made. Indeed, it would be surprising if there were a right of appeal in respect of the application of a practice when the practice itself could be withdrawn or modified at any time through executive action.

79. On the other hand, it may well be that the existence of a clear policy as to the type of cases that might be regarded as exceptional opens the way to challenges by way of judicial review if there is an apparent failure to apply the policy without there being a good reason, but such proceedings would have to be brought initially in the High Court or, in Scotland, the Court of Session and there are no such proceedings before me.

Responses to appeals to the First-tier Tribunal

80. Before I turn to the facts of the individual cases, there is one further general matter to which I wish to draw attention. It will be apparent from what I have said above that in none of these cases did the First-tier Tribunal identify article 34 of the 2006 Order as a relevant provision and in only one of them did it expressly identify article 22(3) as being important. Moreover in all three cases, the First-tier Tribunal understood it to be necessary to consider whether the

claimants' husbands had been eligible for constant attendance for 26 weeks before their deaths, despite there being no reference to a 26-week qualifying period anywhere in the legislation. The Secretary of State may be entitled to expect the First-tier Tribunal to be familiar with the law but in my view he must take some responsibility for the errors of the First-tier Tribunal in these cases and for a general culture in which the law is scarcely acknowledged. It should not be forgotten that tribunal proceedings are legal proceedings before a judicial body.

81. Rule 23 of the 2008 Tribunal Procedure Rules provides:

> "**23.** – (1) When a decision maker receives the notice of appeal or a copy of it, the decision maker must send or deliver a response to the Tribunal as soon as reasonably practicable after the decision maker received the notice of appeal.
>
> (2) The response must state –
>
> (a) …;
> (b) …;
> (c) …;
> (d) …;
>
> (e) whether the decision maker opposes the appellant's case and, if so, the grounds for such opposition; and
>
> (f) any further information or documents required by a practice direction or direction.
>
> (3) The response may include a submission as to whether it would be appropriate for the case to be dealt with without a hearing.
>
> (4) The decision maker must provide with the response –
>
> (a) a copy of any written record of the decision under challenge, and any statement of reasons for that decision;
>
> (b) copies of all documents relevant to the case in the decision maker's possession, unless a practice direction or direction states otherwise; and
>
> (c) a copy of the notice of appeal, any documents provided by the appellant with the notice of appeal and, unless stated in the notice of appeal, the name and address of the appellant's representative (if any)."

82. Rule 23(2)(e) is of the utmost importance and it is clear from the structure of the rule (albeit that the clarity is undermined by rule 23(2)(f)) that what is required from the Secretary of State is a document setting out the Secretary of State's case *in addition to* the documents required by rule 23(4). The standard document that was included at the front of the bundle of documents in each of these cases, recording a "Summary for [*sic*] issues for Determination" and "Terms of Reference", does not comply with rule 23(2)(e). It is not good enough for the Secretary of State to do what he did in each of these cases, which was to provide the First-tier

Tribunal with a bundle of documents and leave the claimant and the First-tier Tribunal to work out from them whether, and if so why, the appeal was opposed.

83. The Secretary of State argues that there was not actually a breach of the Rules because the First-tier Tribunal, if well-versed in the law as it should be, could have worked out what the issues were. However, in my judgment, that is beside the point. The current approach of the Secretary of State, which seems to have been the approach regarded as acceptable before the Pensions Appeal Tribunal in England and Wales and which may still reflect the procedural rules in force in Scotland and Northern Ireland, is not helpful and is capable of being positively unfair to unrepresented claimants who are not made aware of the issues that could be raised in their cases. Thus, in the present cases, where the Secretary of State's reasons for refusing a widow's pension made no reference to the fact that constant attendance allowance and unemployability allowance were not payable to the claimant's husband, how could the claimant be expected to realise that if one of those allowances had been payable she could raise that as an issue on the appeal unless sections 22 and 23 were set out or the claimant happened to be represented by a competent representative or had otherwise acquired the relevant knowledge? The law should not be set out in a response in a way that makes things unduly complicated for a claimant, but it should be set out to the extent necessary to inform the claimant of his or her rights (and, indeed, what the Secretary of State regards as the limits of those rights).

84. I recognise that the extent to which the Secretary of State can comply with rule 23(2)(e) depends partly on the extent to which the claimant has complied with rule 21(5)(e), which requires a claimant to include in his or her notice of appeal "the grounds on which the appellant relies" and compliance with which in turn will depend partly on the amount of information that the claimant has obtained about the benefit in question and also on the extent to which the Secretary of State has given reasons for his decision. At the time the appeals were brought in these cases, there seems to have been no standard form for appealing to the First-tier Tribunal to encourage claimants to provide grounds of appeal. But even where the claimant provides no clear grounds, a response ought at least to provide a legal justification for the decision that has been given in terms that allow a claimant to see what arguments he or she might advance. The assistance given by the Secretary of State to the First-tier Tribunal and the claimants in these cases was derisory.

85. The "Summary for [*sic*] issues for Determination" does not in fact identify the issues in the case in question. It appears to be a standard document that refers to sections 1(1), 5b [*sic*] and 6(4) of the 1943 Act, ignoring the fact that section 1(1) applies only in disablement cases and that the second provision that he has in mind is section 5B, rather than section 5b (which does not exist).

86. Unless a claimant raises particular issues in his or her grounds of appeal or subsequently, the Secretary of State appears to rely on the First-tier Tribunal and the claimant identifying the issues from the, usually laconic, reasons given to the claimant for the decision or, more often, the reasons given by the medical advisor for issuing, or refusing to issue, a certificate, supplemented by medical appendices and extracts from the legislation, often called legal appendices and the relevance of which is seldom explained. If particular issues are raised by a claimant, a further comment or submission, of the type seen in the first and third of these cases, is also added.

87. In each of these three cases, the medical advisor gave cogent reasons for refusing a certificate, but those reasons were associated with the reasons for advising that the claimant's husband would not have qualified for constant attendance allowance for the 26 weeks before his

death. Nowhere was the limited purpose of that advice explained. Moreover, in none of these cases was there any reference anywhere to article 23 of the 2006 Order, under which the claims for widows' pensions were made, or, except in the first case, to article 22. In the other two cases, the only legal appendix submitted by the Secretary of State was that in respect of article 41 of the 2006 Order, which also set out the text of article 43(b). Even in the third case, where there was a submission purportedly addressing the claimant's request for a back-dated constant attendance allowance, the Secretary of State failed to explain that the medical advisor's advice about entitlement to constant attendance allowance was not related to a matter arising on the claimant's appeal and failed to refer to articles 8, 22, 23 or 34 or explain that it was too late for a posthumous appeal. In these circumstances, it is perhaps little wonder that the First-tier Tribunal went astray in each case in the way that it did.

88. I do not wish to be prescriptive as to the contents of a response – the views of the Chamber President of the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal would be more relevant than mine – but I would suggest that cutting and pasting relevant legislative provisions into a document that explains what the case is about by reference to the documents in the bundle would be helpful. Most cases, of course, turn on issues of fact or medical opinion, but a response to an appeal should explain briefly the legal framework in which those issues arise.

89. Such a document would provide a proper background for consideration of a case at a hearing and submissions by the parties. In the present cases, there seems to have been no detailed discussion at the hearings as to the statutory basis of the Secretary of State's decisions. The nearest there was to such a discussion was in the first of the cases before me, to which I now turn.

The first case – facts and conclusion

90. The claimant's husband in the first case served in the 1960s in the Royal Northumberland Fusiliers and, upon amalgamation, the Royal Regiment of Fusiliers, being medically discharged as a result of back problems arising out of injuries accepted as being due to service. He had been a smoker and died of lung cancer on 30 April 2014, the disease having first been diagnosed in 2011. At the time of his death, he had a composite assessment of disablement of 90 per cent in respect of nine identified conditions. Most materially, they included spondylolisthesis (20 per cent), cervical spondylosis (6–14 per cent) and "internal derangement of the left knee" (40 per cent) and the Secretary of State appears also to have accepted that falls in 1993 and 1999 due to those injuries had caused further injuries, including two fractured ribs, that were therefore accepted as attributable to service.

91. In March 2013, the claimant's husband had both applied for a review of the assessment of disablement and claimed constant attendance allowance on the ground that his spine was deteriorating but, on the application for review, he also said that "I now have cancer of the lung which I feel could be linked to the cordite from firing live rounds whilst in the Army on active service" (see document 62). A medical examination took place at his home on 31 May 2013, as a result of which the examining doctor completed two report forms, one in respect of the assessment of disablement and the new claimed condition of lung cancer (document 94–101) and one in respect of constant attendance allowance (document 332–334). In the latter report, he advised that the claimant's husband's neck, back, knee, shoulder and rib problems were all long-standing and were unlikely to change but that the lung cancer was of relatively recent onset and incurable. As to his need for attendance, it was said that he needed help with dressing his lower

half, help over the bath side and occasional help out of bed but was largely self-caring, needing less than one hour of attendance per day and not requiring any attendance at night. It was also advised that his need for attendance at that time was entirely due to the disablement caused by the accepted conditions but that it was likely to increase as the lung cancer progressed.

92. On 21 November 2013, the claimant's husband was sent a standard letter informing him that he was not eligible for constant attendance allowance.

93. On 12 December 2013, a medical advisor refused to certify that lung cancer was attributable to service on the ground that he or she had been unable to find any reference to cordite exposure being a cause of lung cancer, whereas smoking was the principal cause of lung cancer but was generally excluded from consideration as a service cause (document 72). Whether a decision refusing to review the assessment of disablement, or reviewing but maintaining it, was issued in the light of that advice I do not know and is not now material.

94. In her claim for widow's pension, the claimant contended that the injuries due to her husband's service in the Army "contributed to his overall health and ultimately contributed to his death" (document 107). The medical advisor said (document 4):

> "Although [the claimant's] comments are noted, his accepted conditions would not cause adenocarcinoma of the lung.
>
> He had a 90 per cent assessment for the accepted conditions, however, hospital case notes dated 17/12/2013 indicated that he was self-caring. He would not therefore have met the criteria for CAA in the 26 weeks prior to his death."

95. As explained above, the claimant appealed against the consequent decision on the ground that her husband's disablement had been assessed at 90 per cent and he had been in receipt of relevant allowances, without apparently knowing what the allowances were. At the hearing, her representative conceded that her husband's death had not in fact been due to, or substantially hastened by, service. The case was argued on the basis of the claimant's husband's eligibility for constant attendance allowance. His claim for constant attendance allowance, the relevant report of the examining doctor and the decision of the Secretary of State refusing the claim, none of which was in the original bundle of documents supplied by the Secretary of State, were all produced to the First-tier Tribunal at the hearing by the Secretary of State's representative, apparently in response to questions asked by the First-tier Tribunal. Although there had been no reference to the terms of article 8 of the 2006 Order in the documents before the First-tier Tribunal, there were experienced, albeit non-lawyer, representatives for both the Secretary of State and the claimant and in those circumstances the First-tier Tribunal proceeded, after a short adjournment, to consider whether the claimant satisfied the conditions for eligibility to constant attendance allowance under article 8, without any protest from either representative, although the Secretary of State's representative's said that he thought that the basis on which the Secretary of State considered whether a widow's late husband would have been awarded a constant attendance allowance for at least 26 weeks before his death had he made a claim was a "convention" rather than a specific article within the 2006 Order. He appears not to have added that the issue was therefore outside the First-tier Tribunal's jurisdiction, perhaps confident that the First-tier Tribunal would not think it was unless it was persuaded by the claimant's representative that the issue fell to be considered under the 2006 Order.

96. As also mentioned above, the First-tier Tribunal, who had been referred to article 27 of the 2006 Order but not to article 23, may have accepted the claimant's representative's argument that the question whether constant attendance allowance had been payable to the claimant's husband under article 8 arose before it under article 27. In any event, it said in its statement of reasons:

> "12. The issue before the Tribunal is whether the Tribunal can stand in the shoes of the Secretary of State in relation to Article 8 and make a decision that [the claimant's husband] could have been awarded CAA if it was satisfied that constant attendance on him was necessary on account of disablement. There is no issue between the parties that the Tribunal has the power to make this decision. …"

97. The Temporary Chamber President of the First-tier Tribunal refused permission to appeal on the ground that that passage appeared to him to record a concession by the Secretary of State as to the First-tier Tribunal's jurisdiction. The presenting officer denies making any such concession. I accept that he did not, particularly as such a concession would have been inconsistent with his submission, recorded by the members of the First-tier Tribunal in their notes of the proceedings, that consideration of eligibility for constant attendance allowance had been outside the 2006 Order.

98. However, I consider this to be unimportant, for two reasons. First, the wording of the second sentence of paragraph 12 of the statement of reasons may merely reflect the presenting officer not having explicitly made the point that the First-tier Tribunal would not have jurisdiction if the issue of eligibility for constant attendance allowance arose outside the scope of the 2006 Order and with him apparently being content for the First-tier Tribunal to consider the factual dispute without there being an adjournment if the issue arose within the scope of the 2006 Order. Reading the statement of reasons as a whole, it seems to me that the First-tier Tribunal was persuaded that the question of the claimant's husband's eligibility for constant attendance allowance did arise under the 2006 Order and therefore that it rejected the presenting officer's submission that consideration of the claimant's husband's eligibility for constant attendance allowance had been a matter of concession. Thus, on its view, no issue about jurisdiction arose because it could not be, and clearly was not, disputed that it had jurisdiction to determine questions arising under the 2006 Order and should do so standing in the Secretary of State's shoes. Secondly and in any event, it is trite law that parties to proceedings cannot confer on a tribunal a jurisdiction that it does not have (see *Essex Incorporated Congregational Church Union v Essex County Council* [1963] AC 808) and there can be no question of the matter being *res judicata* in this case because this is an appeal from the very decision of the First-tier Tribunal in which the matter was determined. Therefore what was or was not conceded before the First-tier Tribunal in relation to its jurisdiction is now irrelevant.

99. For the reasons I have given above, I am satisfied that the First-tier Tribunal erred in law in its approach to the 2006 Order and that the claimant could not qualify for a widow's pension in this case unless she was first successful in a posthumous appeal against the decision refusing her husband constant attendance allowance. However, I am also satisfied that, because she submitted her widow's pension appeal on 14 August 2014 which was within the time for appealing against the decision dated 21 November 2013 refusing constant attendance allowance to her husband, her appeal could have been treated by the First-tier Tribunal as being also an appeal against the constant attendance allowance decision and should now be treated as such.

100. The question then arises whether I should remit this case to the First-tier Tribunal or whether the First-tier Tribunal made sufficient findings to enable me to give the decision that it should have given in the light of those findings.

101. The First-tier Tribunal found that the claimant's husband:

> "would have been entitled to Constant Attendance Allowance for at least 26 weeks before his death, ie from 30/10/13 to 30/04/14. The Tribunal finds that the necessary attendance consisted of frequent or regular attendance for periods during the daytime which totalled less than eight hours per day and attendance on two or more occasions per night. The Tribunal finds that the constant attendance was necessary on account of the conditions for which [he] had an award of 90 per cent."

That amounts to a finding that he would have been entitled to an award of constant attendance during that period at the full day rate under article 8(3)(b) of the 2006 Order.

102. However, the Secretary of State submits that the First-tier Tribunal either wrongly took into account disablement arising out of the lung cancer or else reached a conclusion that was not supported by any evidence. He relies on the definition of "injury" in paragraph 1 of Part II of Schedule 6 to the 2006 Order, which excludes any injury due to "the use or effects of tobacco". He also points out that the medical advisor had relied on entries dated 17 December 2013 in hospital case notes, made when the claimant's husband was admitted to hospital suffering from pneumonia and indicating that he was self-caring, and that there was no evidence of subsequent deterioration in his condition for any reason other than the lung cancer. On the other hand, Mr Lyons submits that the First-tier Tribunal reached a conclusion it was entitled to reach and gave adequate reasons for doing so.

103. There is certainly force in Mr Lyons' submission that the Secretary of State overlooks the First-tier Tribunal's reasoning. It is clear that the First-tier Tribunal did not accept that the claimant's husband was entirely self-caring in December 2013, as submitted by the Secretary of State. It preferred the claimant's oral evidence to what had been recorded in the medical notes and it expressly rejected the presenting officer's submission that her husband's needs would have reduced when he had adaptations to his house in December 2013. In the light of the claimant's evidence, it found that her husband's condition had deteriorated considerably between the date when he made his claim for constant attendance allowance in March 2013 and October 2013 and that by the latter date he required the attention identified in its statement of reasons:

> "21. … He required necessary attendance to get in and out of the bath and in and out of the shower when provided, to wash his lower body, to put on his E45 cream, to dress, to take his medication, to help him clean himself after using the toilet, to go to the bathroom 2 or 3 times a night and to get him in and out of bed safely. He was drowsy from his opiate medication in the evenings and could not be trusted with hot water to make a drink."

It plainly did not regard subsequent deterioration in his condition to be relevant to its decision.

104. The First-tier Tribunal also clearly accepted that it was material that some of the claimant's husband's attendance needs arose out of his lung cancer, which was not an accepted condition, because it said in its statement of reasons:

> "25. The Tribunal found that [the claimant's husband] had necessary attendance needs arising from both the attributable conditions, and from lung cancer which was a rejected condition. The Tribunal considered that it was the totality of his conditions which led to his frailty and not just his lung cancer. [He] had an award of 20 per cent for Spondylolisthesis, L5 vertebrae and cervical Spondylosis 6-14 per cent. There is no doubt that these conditions would have contributed to walking difficulties and instability."

105. However, the Secretary of State's argument of principle may be applied to the deterioration in the claimant's husband's condition between March and October 2013, rather to the period from December 2013 to April 2014. The First-tier Tribunal did not make any finding as to whether the cause of the deterioration was due to a worsening in his accepted conditions or to the lung cancer. If the former, it would have been necessary to explain why it disagreed with the prognosis of the examining doctor. If the latter, it would have been necessary for it to explain why it nonetheless considered that the claimant's need for attendance arose from disablement due to the accepted conditions for the purposes of article 8(1) of the 2006 Order.

106. The First-tier Tribunal may have thought it was unnecessary to record such a finding and reasoning because the implication of what it said in paragraph 25 of its statement of reasons and its detailed findings of fact in paragraph 21 is that it considered that the claimant's husband required attention due to the combined effects of his accepted conditions and the lung cancer. However, I do not consider that to be enough.

107. Article 8 of the 2006 Order does not directly address dual causation. The Secretary of State's approach was formerly set out at paragraph 70355 of the *WP Medical Advisers Instructions and Procedures*:

> "If the Accepted Disablement is the main factor in the overall need for attendance, CAA can be awarded at the rate appropriate to the overall need. If the AD is not the main factor in the overall need, CAA can be awarded at a lower rate if the AD is the main factor at that lower rate."

Paragraph 297 of the Veterans Agency Medical Handbook was to the same effect. I am not aware of any change to that approach which, if applied with a due regard to the purpose of the legislation, is capable of taking account of the extent to which different disabilities may interact with each other and so may sometimes produce a need for attendance that might be greater than the sum of the needs that would arise from each of them taken separately. It does not necessarily provide a simple answer to any particular case and other approaches may be permissible if explained, but it provides a practical framework for deciding complex cases.

108. The claimant's difficulties in the present case are that, on the examining doctor's assessment of 31 May 2013, her husband's need for attendance at that time was less than a quarter of that required even for the part day rate of constant attendance allowance under article 8(2) and that, even if the disablement due to his accepted conditions contributed to his greater need for attendance by the end of October 2013 or by the date of the Secretary of State's decision on 21 November 2013, it does not necessarily follow that he was entitled to constant attendance allowance at the full day rate or even at the part day rate. On the other hand, the First-tier Tribunal was not necessarily bound to accept the examining doctor's assessment and prognosis and, whether or not it did, it might have judged the contribution of the disablement due to the

accepted conditions to the claimant's husband's need for attendance in October or November 2013 to be sufficient to have qualified him for at least the part day rate.

109. These are issues on which the expertise of the medically-qualified member of a panel of the First-tier Tribunal would obviously be useful and, since I am satisfied that the First-tier Tribunal's findings are not supported by adequate reasoning, I therefore remit the case to be re-decided by a differently-constituted panel of the First-tier Tribunal. I do so on the basis that the remitted appeal is to be taken to include a posthumous appeal against the constant attendance allowance decision of 21 November 2013, which will obviously have to be determined before the First-tier Tribunal decides whether the claimant is entitled to a widow's pension.

The second case – facts and further direction

110. In the second case before me, the claimant's husband had been a warrant officer pilot in the Royal Air Force during the Second World War, flying gliders, and he suffered serious injuries in an accident as a result of which he was medically discharged. He continued to suffer from the effects of those injuries for the rest of his life. The cause of his death on 14 November 2014 was certified as old age.

111. He had claimed constant attendance allowance in 2013 and was visited at home by a doctor on 17 September 2013 who made a report as a result of which the claim was rejected on 12 December 2013, which was just over a year before the claimant lodged her appeal against the rejection of her claim for a widow's pension. On her appeal, the First-tier Tribunal heard evidence from the claimant and her son and recorded detailed findings before concluding:

> "10. The Tribunal was satisfied that [the claimant's husband] was a very proud man who would have given the appearance of coping which the Appellant allowed him to do by helping him discreetly and that he did tell the doctor who assessed him in 2013 that he could do things even though that was not the case. It was satisfied that on account of his spinal and leg conditions his mobility was severely restricted and he was at risk of falling so he needed help with all aspects of his self care, moving and doing his exercises which would have amounted to at least eight hours a day as well as help going to the toilet frequently through the night.
>
> 11. It therefore found that although not paid, constant attendance allowance was payable to [the claimant's husband] for about two years prior to his death and therefore that his death should be treated as due to service. Accordingly, it allowed the appeal."

The First-tier Tribunal appears to have been on familiar territory considering article 8 because its findings seem to be sufficient to enable it to be seen at what rate it considered that constant attendance allowance should have been paid – the intermediate rate under article 8(4)(a).

112. For the reasons I have given above, I am satisfied that the First-tier Tribunal erred in law in allowing the claimant's appeal without first treating her as having appealed against the refusal of her husband's claim for constant attendance allowance but, given the history of the case, I am also satisfied that the claimant's appeal to the First-tier Tribunal should now be treated as having included a late appeal against the constant attendance allowance decision.

113. In my Directions dated 2 August 2016, I said at paragraph 2(e):

> "In the absence of a 'reasons' challenge in [the claimant's] case, treating her as having made a posthumous appeal against the refusal of constant attendance allowance would, it appears, lead to an award of constant attendance allowance on the basis of the First-tier Tribunal's findings recorded at paragraphs 10 and 11 of its statement of reasons. It would therefore arguably be appropriate for the Upper Tribunal to make an award of constant attendance allowance at the intermediate rate from 18 September 2012 (the date of her husband's claim, which is only just over two years before the date of his death on 4 November 2014) until his death and, in the light of that award, to confirm the First-tier Tribunal's award of widow's pension, albeit on different grounds. Does the Secretary of State have any objection to the Upper Tribunal giving a decision to that effect?"

114. The Secretary of State wished to challenge the power of the First-tier Tribunal or the Upper Tribunal to treat the claimant as having appealed against the constant attendance allowance decision and reserved his position on the particular issues relating to the disposal of the claimant's case in the event of the challenge failing. The challenge has now failed. Accordingly, the Secretary of State must now make a submission as to the decision I should give.

115. The first issue is whether the late appeal against the constant attendance allowance appeal should be admitted. Given the history of this case, this is a matter that I currently consider should now be decided by the Upper Tribunal. Material circumstances include the fact that the claimant's widow's pension appeal was submitted a little under one month after the expiry of the basic 12-month time limit for bringing a posthumous appeal against the constant attendance allowance decision. Her husband had still been within time for appealing when he died. She herself had acted very promptly both in claiming a widow's pension only a week after her husband's death and in appealing just over two weeks after the decision rejecting her claim, notwithstanding the intervention of Christmas and the New Year. In her letter of appeal, she referred to the difficulties her husband had had and how much of an advantage it had been that she herself had been a trained nurse, which arguably suggests that, had she realised it was both possible and necessary if she were to receive a widow's pension, she would at the same time have expressly brought a posthumous appeal against the constant attendance allowance decision. As far as I am aware, the possibility of bringing posthumous appeals is not widely advertised.

116. If the late appeal is admitted, there will then be the questions raised in my direction of 2 August 2016 as to the period of the award to be made and as to the rate. It would be possible to remit this part of the case but, while the findings may not be as precise as would be ideal, because the First-tier Tribunal did not have a posthumous appeal in mind, I am currently of the view that it would be more proportionate for the Upper Tribunal to re-make the decision in the light of the First-tier Tribunal's findings and reasoning – not necessarily in the way I suggested in my Directions – because absolute precision is probably not achievable in this sort of case. However, since the possibility of the claimant being treated as having brought a posthumous appeal against the constant attendance allowance decision was clearly not in the Secretary of State's mind when he appealed to the Upper Tribunal, I do not preclude him from arguing for remittal if he considers it arguable that the First-tier Tribunal's did not give adequate reasons for its findings and that a further oral hearing is really necessary, but I would require some persuasion on the point and I do not encourage any such challenge.

117. I direct the Secretary of State to make a submission as to the final decision the Upper Tribunal should make within one month of the date on which this decision is sent to his representative.

The third case – facts and conclusion

118. In the third case before me, the claimant's husband had been an officer in the Royal Signals during the Second World War. He was wounded and captured in Greece in 1941 and remained a prisoner of war in Germany until 1945. He was released from service at the end of 1946. I do not know the full history of his claim for war pension, but at the time of his death on 6 February 2013 and presumably for many years before then, the assessment of his disablement was 100 per cent – 80 per cent in respect of bilateral noise-induced sensorineural hearing loss, due apparently to blast damage to his ears, and 20 per cent in respect of anxiety disorder. Although he required care towards the end of his life, when he was suffering from senile dementia, it was not accepted by the Secretary of State that that was due to the accepted conditions. A claim for constant attendance allowance was rejected on 9 June 2010. There was no appeal against that decision and no further claim.

119. The death certificate identified chronic obstructive pulmonary disease as having led to acute lower respiratory infection which was the direct cause of the claimant's husband's death, but senile dementia was certified as a significant condition contributing to the death. The Secretary of State did not accept that the claimant's husband's death was actually due to or substantially hastened by service and he accordingly refused her claim for widow's pension. The claimant appealed. At the hearing, where the claimant was represented by her son, the judge indicated at the outset the First-tier Tribunal's preliminary view that the claimant could not show that her husband's death had been caused by the accepted conditions and no further consideration was given to that issue either at the hearing or in the statement of reasons for the First-tier Tribunal's decision. The First-tier Tribunal proceeded to consider whether the claimant's husband had been eligible for constant attendance allowance during the 26 weeks preceding his death and decided that he had not. On that basis, it dismissed the claimant's appeal.

120. The claimant appealed to the Upper Tribunal. I have already allowed the appeal, on the ground that the First-tier Tribunal failed to give any reasons for finding that the claimant's husband's death was not actually due to or substantially hastened by service, which had not been conceded by the claimant and in respect of which it might have been material that the First-tier Tribunal found that his service-related anxiety disorder had been subsumed in the diagnosis of senile dementia, and I have remitted the case to the First-tier Tribunal. It is therefore unnecessary for me to say any more other than that the remitted case must be decided in accordance with my reasoning above, so that it is irrelevant whether or not the claimant's husband was eligible for constant attendance allowance before he died because it was not payable to him and, by the time of his death, it was too late for the claimant to bring a posthumous appeal against the decision rejecting his claim for it.

ANNEX

Selected correspondence between the Department of Health and Social Security and the Treasury concerning the application of the Dispensing Instruments in relation to claims for war widow's pension

From Mr E James (DHSS) to Mr J W Cruikshank (Treasury) – 11 December 1972

I am writing about a number of cases which have arisen since 20 September 1971, in which war widows pension has been awarded according to the provisions of Article 25(3) of the Royal Warrant and the equivalent sections of the associated war pension instruments although in each case the husband was not in receipt of constant attendance allowance at the normal maximum rate or above when he died, nor would he have received it had he not been hospital at the time of death. These pensions were awarded on the grounds that the man's attendance needs in respect of his accepted disablement were such that for at least the last 8 weeks of his life he had merited an award of CAA at or above the qualifying level.

When the first of these cases arose it was considered in WP Division that the wording of the relevant article was sufficiently flexible to allow these awards to be made without the use of the Dispensing Warrant. (The article refers to the allowance being "payable"). To date all the awards have been in cases where CAA had been in payment but at less than the qualifying rate. Recently however a number of cases arose where we were asked to consider an award even though no CAA had been in payment at all, and in this context we sought the advice of our Legal Branch. Legal advice was to the effect that whether or not CAA had been in payment at the time of death, if there was no payment at the qualifying rate and an award at such a rate was not under consideration at the time of death then the provisions of Article 25(3) could not apply.

It is apparent therefore, that if we wish to cover future cases we must seek your approval to use the Dispensing Warrant. For the present however there remain possibly 20 cases (on our Blackpool Office's estimate) where an award has been made, regrettably without the full legal authority. We have a record of only 3 of these. May we, therefore, have your authority to pay these pensions as if they had been covered under the terms of Article 25(3) of the Royal Warrant from 20 September 1971 or from such later date as the award was made, no further awards being made in this type of case except as authorised under the Dispensing Warrant.

It appears that Mr James wrote a second letter to Mr Cruikshank on 11 December 1972 in relation to an individual case and that Mr Cruikshank replied to both letters on 22 December 1972. Regrettably, it seems that, of Mr Cruikshank's replies, only the letter concerning the individual case has been preserved. It is not reproduced here.

From Mr E James (DHSS) to Mr J W Cruikshank (Treasury) – 15 February 1973

Following your letter of 22 December concerning the award of war widow's pension in accordance with the provisions of Article 25(3) of the Royal Warrant in cases where the husband had not been receiving Constant Attendance Allowance at the full day rate or above at the time of death, although he appears to have merited such an award, we have reconsidered our practice in the light of your suggestions.

These cases seem to fall into 3 categories:-

1. Where fresh medical evidence has come to light after the pensioner's death, indicating that his attendance needs had merited an award at the qualifying rate.
2. Where the medical evidence upon which an award of CAA had been made at below the qualifying rate during the man's lifetime (or upon which it had been decided not to award the allowance) is reconsidered after his death, and the Department's doctors now advise

that an award at the qualifying rate would have been appropriate (the case of Mrs Olga S… to which your letter of 9 January refers falls in this category).

3. Where medical evidence available to the Department at the time of death (e.g. in support of a claim for CAA) but which had not yet been taken into account for an award of the allowance has since been found to indicate that an award of CAA at the full day rate or above would have been appropriate.

As regards the first two categories our legal advice is that as the law stands at the moment the only manner in which an award of war widow's pension could be made under the Dispensing Warrant. In the third category of case however we would request your authority to award war widow's pension as if the conditions of Article 25(3) had been satisfied in full on the grounds that a claim for the allowance (explicit or implied) was outstanding at the time of death and had been accepted posthumously. No liability for arrears of CAA would of course be implied in accepting the widow for pension.

This would be an extension of the practice which we already follow with your authority in relation to the award of Temporary Allowance for Widows (TAW) under Article 33, by which TAW can be paid on the posthumous acceptance of a claim or implied claim for CAA made before the husband's death (WPM vol VIII, CH 19 para 3923(3)).

Provision for implied claims is essential, as a large proportion of CAA awards are made without a formal claim on the basis of evidence which comes to the notice of the Department, e.g. following a visit by one of our welfare officers. There is an earlier precedent for the posthumous acceptance of a claim made during the man's lifetime for the purpose of awarding war widow's pension, in the practice which was followed with your authority in relation to the "threshold condition" in Article 5 which was removed in October 1972.

As to the length of time for which attendance needs at the qualifying level should have been present prior to the husband's death to merit an award of war widow's pension in this type of case the figure of 8 weeks was chosen as this is the duration over which attendance needs to be indicated for an award of CAA to be made to a living pensioner. There is no minimum duration for CAA to have been in payment to qualify the widow for pension under Article 25(3). To single out posthumous "claims" to CAA for a prolonged qualifying period would not seem equitable, and it would be impracticable to insist on firm medical evidence dating back very far before the man's death. However, we are prepared to look into this point should you consider a longer qualifying period appropriate. As to the incidence of such cases, it is now estimated that about 15 awards have been made in accordance with Article 25(3) where CAA had not been in payment at the appropriate rate when the husband died.

These were awards for which you gave your authority in your letter of 22 December. All but four of these awards relate to deaths which happened before October 1971, and are part of the backlog of cases (a total of 410 reaching back to 1916) taken on when the new provisions were introduced. The remaining 4 awards relate to deaths since the new provision came into effect, 16 months ago, out of a total of 186 awards under Article 25(3), of these 4 cases, 3 fall in category 1 described above (fresh evidence) and 1 in category 2 (departmental error). It would seem therefore that these cases are sufficiently exceptional for the use of the Dispensing Warrant to be appropriate rather than to seek an amendment to the terms of the Warrant.

There are 2 further cases which we are holding over pending clarification of this issue.

From Mr J W Cruikshank (Treasury) to Mr E James (DHSS) – 20 March 1973

Thank you for your letter of 15 February concerning the award of war widow's pension in accordance with the provisions of Article 25(3) of the Royal Warrant in cases where the husband had not been receiving Constant Attendance Allowance at the full day rate or above at the time of death, although he appears to have merited such an award.

I am still not entirely convinced that what you propose is in some respect not going beyond the original intention of the relaxation agreed by Ministers in 1971. There is some doubt in my mind too about the seeming acceptance in some cases of a new interpretation by a medical officer, after the death of a pensioner, of medical conditions found by a Board while the pensioner was alive. However I accept that it would be wrong for widows to suffer loss of pension in, for example, the "departmental error" type of case and I realise the difficulty of drawing a line through these cases.

In the circumstances, whilst I cannot agree that you should have delegated authority to make such awards, I agree that you may seek our approval to use the Dispensing Warrant in future cases of the categories 1 and 2 set out in your letter.

You may have authority in the third category of case to award war widow's pension as if the conditions of Article 25(3) had been satisfied in full providing that the medical evidence available at the time of death in support of the claim for CAA (explicit or implicit) had not previously been taken into account for an award (or non-award) of the allowance at any time. Such cases where evidence had previously been taken into account would of course be for consideration under category 2.

As to the duration of the CAA at the qualifying level, I appreciate that there is no minimum duration under Article 25(3) and also that it would be impracticable to insist on firm medical evidence dating very far before the man's death. I am not so sure, however that the duration over which attendance needs have to be indicated for an award of CAA to be made to a living pensioner is the right corollary for an award of widow's pension in these particular cases. I suggest that a period of 26 weeks would not be unreasonable or inappropriate.

I am copying this letter to Heard in Finance Division.

From Mr E James (DHSS) to Mr J W Cruikshank (Treasury) – 3 April 1973

Thank you for your letter of 20 March 1973.

We will be pleased to follow the procedures you set out, including the test of 26 weeks duration of attendance needs at the qualifying level prior to the date of death which you suggest at the end of your letter.

From Mr T J Burr (Treasury) to Mr D A Bury (DHSS) – 6 January 1976

EXTRA-STATUTORY AUTHORITY FOR PAYMENT OF NATIONAL INSURANCE BENEFITS

I have outstanding four letters from yourself [concerned with National Insurance contributory pensions for widows]. I also have similar letters from Miss Power [about a case concerning incorrect advice about eligibility for invalidity benefit after retirement age] and from Mr Todd (in your A division) dated 25 November (addressed to Mr Robins whom I have replaced) about the case of Mrs C… (award of war widow's pension based on Constant Attendance Allowance the qualifying rate being merited in respect of a period of at least 26 weeks ending with the husband's death).

2. In my short experience here, therefore, it seems that we are getting one of these letters every week, on average. The amounts of money involved seem to be trivial and in some cases non-existent; and rarely, if ever, do we seem to refuse our authority. These considerations have prompted the thought here that we are devoting a disproportionate amount of time to these cases (and causing you unnecessary work and delay arising from the need to write to us frequently about them), and should make an effort to get a proper regime of delegated authority established which will reduce to a minimum the need for future correspondence of this kind.

3. You do, of course, already have a £500 delegation for cases of official misdirection; but this limit has become out of date, and any higher limit which we might agree will soon also need revision. I suggest therefore, that we adopt a different approach, and give unlimited delegated authority subject to the following constraints:-

a. as with delegated authorities generally, cases of a novel or contentious nature are excluded;

b. the expenditure consequences of the case, whether direct or indirect, can be accommodated within existing PESC and Estimates allocations and within any other control ceiling which may have been agreed with the Treasury (eg cash limits);

c. no policy changes or modifications are involved, in the sense that the case either follows an existing precedent or does not establish any significant new precedent;

d. expenditure control arrangements with the CSD are in no way affected.

4. In addition, of course, we would be ready to consider any other cases where you felt that there was a special need for Treasury guidance. Such cases might include, for example, any in which, although criterion b. above was met, an exceptionally large amount of money was involved. (This might render the case 'novel' anyway). But we are prepared to leave this to your judgement.

5. We are also prepared to extend delegation in these terms to awards of war widow's pension under the provisions of the Dispensing Warrant, for the categories agreed by Cruikshank (Treasury) in his reply of 20 March 1973 to James' (DHSS) letter of 15 February 1973. Criterion c. above, however, means, for example, that we would need to be consulted over any widening of the categories or any proposal to shorten the 26 week qualifying period of entitlement to Constant Attendance Allowance.

6. As regards considerations of accounting and financial propriety, you may need to consider whether the kind of payments in question can always be correctly classified as 'extra-statutory'. This classification implies that the payments are within the broad intention of the statute (see M42

of 'Government Accounting'). Your greater familiarity with the statutes in question will enable you to judge better than I whether this criterion is met in any particular case. Where it is not met the Appropriation Account should be noted in respect of ex gratia rather than extra statutory payments.

7. Both ex gratia and extra statutory payments rest on the authority of the annual Appropriation Act, which should not be used as the sole basis for continuing programmes of expenditure. If therefore it becomes clear that a particular category of payment is of a frequently recurring nature you should consult with us as to whether amending legislation or regulations (or an amendment to the Royal Warrant in the case of war widows' pensions) is required to properly legitimise the service in question.

8. Finally, I can give you the authority which you seek in the cases listed in my first paragraph, and would be grateful if Miss Power and Mr Todd would take their copies of this letter as constituting Treasury approval to the proposals in their letters mentioned in that paragraph. Perhaps you and they would let me know if you have comments on this letter so that we can notify the Exchequer and Audit Department of agreed delegations – hopefully in time to avoid Treasury consideration of any further cases falling within the scope of my suggested delegations. If you are aware of any other parts of your Department (on the social security side) who are likely to originate similar requests for extra statutory authority, perhaps you would be good enough to see that they are aware of this letter.

9. I am also copying this letter to Messrs Culpin, Burton and Miss Mann (TOA) here.