IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

UT Ref: UA-2023-000017-AFCS
[2024] UKUT 124 (AAC)

On appeal from First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber)

Between:

MA

Appellant

- v –

The Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 18 April 2024
Decided after and oral hearing on 6 December 2023

Representation: **Glyn Tucker** of the Royal British Legion for the appellant
Scarlett Milligan and **Chiara Cordone**, both of counsel, instructed by Kara Young of GLD for the respondent

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This is an appeal against the decision of the First-tier Tribunal of 16 September 2022 ("the FTT"). By that decision, the FTT dismissed the appellant's appeal from the specified decision of the Secretary of State for Defence, dated 20 September 2020, that the appellant's neck and back pain was not predominantly caused by service. dated. The FTT decided that the appellant's claim to the respondent was made out of time under article 47 of the Armed Forces and Reserve Forces Compensation Scheme Order 2011 ("the AFCS Order").

Reasons for decision in summary

2. The appeal is dismissed because the appeal is now academic as far as the appellant is concerned and I have been persuaded that the Upper Tribunal should not decide the legal issue on which I gave permission to appeal where the appeal is academic.

The FTT's decision

3. The appeal before the FTT was against the Secretary of State's decision that the appellant's back and neck pain was not caused by service.

4. Although time limits for claiming had not been raised by either party as an issue on the appeal, at the outset of the hearing before it the FTT gave notice to the parties that whether the appellant had made his claim in time was a live issue on the appeal: per section 5B(a) of the Pensions Appeal Tribunals Act 1943. No challenge was or is made to this part of the FTT's decision bringing time limits into issue on the appeal.

5. It was the appellant's case before the FTT that there was no objective evidence of the appellant having a degenerative/spinal condition until about 2015, which meant that the claim he made in respect of this condition on 31 January 2020 was made in time.

6. Having taken evidence from the appellant, the FTT accepted that the appellant had developed cervical disc problems by March 2014. It found that this type of pathology would not be expected in an otherwise healthy 34 year old man and that it was predominantly caused by prolonged or overuse by the appellant of night vision goggles during operational tours flying helicopters.

7. However, the FTT "judged that the 2014 condition would likely have been caused before this date and by prolonged/overuse of the [night vision goggles] from [the appellant's] 2008 to 2011 Chinook tours". The FTT therefore decided under article 47 of the AFCS Order that the claim submitted on 31 January 2020 was made out of time as it was made more than 7 years after the condition/injury was caused.

8. The FTT recorded that no argument was made to it about a different time limit applying under either article 47(3) or article 48 of the AFCS Order. However, in the FTT's view neither provision could assist the appellant "given his diagnosis pertaining to his cervical disc degeneration was apparent by the 24 March 2014 entry that referred to "C8" and the results of the 2015 MRI". No point was taken on this further appeal about either article 47(3) or article 48.

Events after the FTT's decision

9. I gave the appellant permission to appeal against the FTT's decision on the grounds of appeal made on his behalf. In essence, those grounds argued that the FTT had erred in law in applying article 47(1)(a) of the AFCS Order, which fixes the time limit for claiming from the day the injury occurs, when it should, in the alternative, have applied article 47(1)(d), which runs the time for claiming from the day the service member first seeks medical advice in relation to an illness. The grounds of appeal argued that article 47(1)(d) contemplates an 'injury' that develops or occurs over a period of time, even if initially it was caused by, for example, an infection or trauma on a particular date. Were that not so, it was argued, sub-paragraph (d) would be otiose, as an illness must be caused and develop before medical treatment is sought in respect of it. It was said on behalf of the appellant that one purpose of article 47(1)(d) is to fix a date from which time runs in cases where there would otherwise be no identifiable date and it does so on the premise that it will generally be unreasonable to expect a person to make a claim in respect of a physical or mental disorder before that

person realises that he or she is suffering from a problem that justifies seeking medical advice.

10. The FTT had rejected these arguments and refused permission to appeal. In holding the grounds to be unarguable, the FTT said that even if the appellant's condition could properly be classified as an illness, the grounds failed to appreciate that the sub-paragraphs in article 47(1) had to be considered together because article 47(1) expressly provides that the 7 year time limit begins "with whichever is the earlier" of the events identified in sub-paragraphs (a) to (d). Article 47(1)(d) was not therefore a separate and stand-alone provision that could apply even if article 47(1)(a) applied and showed an earlier start date for the time for claiming beginning to run. The FTT's reading of article 47 was further supported, it said, by article 2 of the AFCS Order's provision that "'injury' includes illness except in relation to determining eligibility for a fast payment in article 27(1)(a) ".

11. In response to this, and in his grounds of appeal made to the Upper Tribunal, the appellant relied on the reasoning in a decision of another First-tier Tribunal. That reasoning, largely set out here in summary, was as follows. (I have placed in bold what seems to me to be the key part of that tribunal's analysis for this appeal.) Logically the first question is whether the condition claimed for is an "illness". Although article 2 of the AFCS Order makes clear that "illness" is a smaller category than "injury", neither of those terms is exhaustively defined within article 2, and it is therefore necessary to look elsewhere in the AFCS Order for other aids to interpretation. A better indication of the difference between "illness" and "injury" is to be found in article 47(1) of the AFCS Order. **Subparagraphs (a), (b) and (d) of that article are intended to be mutually exclusive**. Whereas subparagraph (a) and (b) contemplate an injury or a worsening of an injury that "occurs" on a particular day (even if it is not always possible precisely to identify that day), paragraph (d) contemplates an injury that develops or occurs over a period of time. Were that not so, subparagraph (d) would be otiose, since an illness must be caused and develop before medical treatment is sought for it.

12. In giving permission to appeal, I said (inter alia):

> "1. I give permission to appeal because it is arguable with a realistic prospect of success that the First-tier Tribunal erred materially in law in coming to its decision of 16 September 2022, for the reasons set out in the ground of appeal. In addition, the correct legal construction of article 47(1) of the 2011 Order merits further consideration by the Upper Tribunal, and a definitive ruling by the Upper Tribunal on its construction might be welcomed.
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> 2. If the ground of appeal relying on the construction of article 47(1) adopted by the [other] First-tier Tribunal…is correct, it would appear from [the FTT's] view when refusing permission to appeal that the [FTT in this appeal] may have directed itself incorrectly that article 47(1)(a) and (d) were not mutually exclusive. As a result, [and] in any event, it is arguable the First-tier Tribunal failed to consider whether on the evidence before it [the appellant's] neck and back pain was (instead) an 'illness' under article 47(1)."

13. In his first response to the appeal the Secretary of State argued that the appeal was academic and should be withdrawn as he had "remade the decision and awarded compensation". The Upper Tribunal was invited to direct the appellant to withdraw his

appeal, "failing which it should be struck out/dismissed". The Secretary of State's response added that for the avoidance of any doubt, he reserved his position in respect of the substantive issue on the appeal. The response revealed that on 3 April 2023 the Secretary of State had reconsidered the appellant's case afresh and decided it would be appropriate to make an award of compensation to him for his claimed condition of 'back and neck' pain. This was made at Table 9, Item 25, Level 13 of the tariff descriptors in Schedule 3 to the AFCS Order. The response then went on to set out argument for why the legal issue on which I had given permission to appeal need not be determined because the appeal was academic.

14. The appellant did not withdraw the appeal and he opposed the Secretary of State's argument that the legal issue for which permission had been given did not need to be decided.

15. As a result of this turn of events, I gave further directions on the appeal and for there to be an oral hearing on the appeal. Insofar as is material, those directions stated:

> "2. The Secretary of State's submission does not address the legal issue about the correct construction of article 47(1) of the 2011 Order. He argues, instead, that the appeal should be withdrawn, struck out or dismissed as it has become academic. The appeal is said to be academic because the Secretary of State has, subsequent to the First-tier Tribunal's decision, made an award to [the appellant] under the 2011 Order for the claimed condition of back and neck pain. It is argued, therefore, that any success [the appellant] may have on this appeal could not lead to any more beneficial result for him and so, in that sense, the appeal is academic. It is also pointed out that the latest quinquennial review has recommended that all time limits (such as in article 47(1)) should be removed. It appears to be suggested by the Secretary of State that it is by this means that any future issues of principle concerning time limits should be addressed.
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> 3. The appellant does not consent to his appeal being withdrawn. Only he can do so: see rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules"). (Nor is it apparent on what basis this appeal could be struck out under rule 8 of the UT Rules.) The appellant argues that the appeal is not academic because the Upper Tribunal can still give a binding decision on the correct construction of rule 47(1). Moreover, that binding decision is likely to affect other current cases more readily than any future response to the quinquennial review's recommendations. He also seeks an oral hearing of the appeal.
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> 4. At present I incline more to the appellant's case on this issue than that of the Secretary of State, and at least sufficiently to direct an oral of the appeal to hear argument both on the 'academic' nature of this appeal and on the correct construction of article 47(1) of the 2011 Order.
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> 5. It is trite law that not all academic appeals should be dismissed: see *R v Secretary of State for the Home Department ex parte Salem* [1991] AC 491 (HL), and paragraph [20] of *VS and RS v Hampshire CC* [2021] UKUT 187 (AAC), and see further paragraphs [8]-[16] of *DD v Sussex Partnership NHS Foundation Trust and Secretary of State for Justice, MIND intervening* [2022] UKUT 166 (AAC). I am inclined at present to the view that the Upper Tribunal ruling on the correct construction of article 47(1), on which the specialist First-tier Tribunal Chamber has disagreed, and in a context where no other case is

yet at Upper Tribunal appellate level on this issue and where both parties are represented, is an appropriate use of the Upper Tribunal's jurisdiction even where the point in issue may no longer have any practical effect for [the appellant]

6. On this very last point, however, I feel I should indicate my concern as to the proper lawful basis for the Secretary of State making an award under the 2011 Order to [the appellant] for the claimed condition of back pain in circumstances where, at present and as between the parties, the First-tier Tribunal's decision is very arguably to the effect that there was no in-time (and thus lawful) claim by [the appellant] for that condition. What as a matter of law allows the Secretary of State to ignore or reconsider the First-tier Tribunal's decision in [the appellant's case]? In other benefit schemes in the UK the law provides (limited) grounds on which a First-tier Tribunal's decision may be altered by the Secretary of State even though he is a party to the independent tribunal's decision and otherwise bound by it: see for example sections 10 and 17 of the Social Security Act 1998 and the regulations on 'supersession' made under that Act. What are the provisions in play in this case that allowed the Secretary of State to make the award under the 2011 Order to [the appellant] for the claimed condition of back and neck pain notwithstanding the First-tier Tribunal's decision that [the appellant] had not made a lawful (i.e. in-time) claim under the 2011 Order for that condition? These considerations may be relevant to whether the appeal is academic.

7. I therefore grant the appellant's request for an oral hearing of this appeal."

16. In his skeleton argument for the hearing of the appeal, the Secretary of State made three central points, as well as setting out further argument for why the appeal was academic.

17. First, there had been no appeal by the appellant against the awarding decision of 3 April 2023.

18. Second, that awarding decision had been made by the Secretary of State reviewing his decision of 20 September 2020 under article 59 of the AFCS Order.

19. Third, and as to article 47(1) of the AFCS Order, he argued as follows:

> "36. The Upper Tribunal has identified that the correct construction of Article 47(1) of the 2011 Order is a point on law which could be determined as a result of the appeal being heard, notwithstanding its academic nature. However, in the Secretary of State's submission, the question which the Upper Tribunal is considering answering in the abstract is necessarily fact-dependent and specific, and is incapable of reduction to a simple legal definition or test. In those circumstances, this case does not fit the criteria set out in cases such as ***Salem***.
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> 37. Moreover, the Upper Tribunal is encouraged to proceed with caution in circumstances where attempting to provide further guidance and direction on this question may, in fact, only serve to confuse or misstate the law in the absence of fully argued reasoning by reference to the high number of factual permutations which could arise on any consideration of the 2011 Order.

38. An objective reading of the terms “injury”, “illness” and “disorder” as used in the 2011 Order shows that the terms were not intended to be used in a mutually exclusive way. Such an approach is contraindicated by: (i) the very definition of the terms within the 2011 Order, (ii) the preceding text in Article 47(1), namely “*whichever is the earlier of the following days*”, and (iii) the tariff tables within Schedule 3 of the 2011 Order in this case, which refer varyingly to “disorder”, “injury”, and “syndrome” even within tables which are labelled as pertaining to a “disorder”.

39. Further, such a highly technical approach to the legislation would undermine the attempts to make the AFCS simple and accessible for all members without legal representation, and indeed for the lay administrators of AFCS. A finding that these terms were mutually exclusive would require, on every case, a medical expert to opine on whether the symptoms amounted to an injury or illness. That position would be further complicated where an injury may have led to an illness, or vice versa.

40. The plain and objective meaning of those terms, combined with the purpose of the 2011 Order, should also inform the Upper Tribunal’s consideration of Article 47(1). As set out above, in providing for four different formulae for when time may start to run for the purposes of bringing an AFCS claim, Article 47 – much like the relevant provisions of the Limitation Act 1980, albeit simplified – ensures that provision is made in order to “*remedy the injustice of a claimant’s claim being time-barred before they knew, or could reasonably be expected to know, that they had a claim*”.

41. The function of Article 47(1)(d) is best illuminated by reference to facts. By way of two brief examples only, a claimant under the AFCS could:

> a. sustain a minor impact injury to their abdomen in a collision for which they do not intend to make a claim, but in two years’ time seek medical attention for painful abdominal symptoms, only to learn that the traumatic impact has given rise to a form of organ disease or failure;
>
> b. injure a limb while deployed abroad, necessitating the lower half of the limb to be amputated. At some later date, the claimant could seek medical attention for painful symptoms, only to be told that infection has taken root and that the remainder of the limb will need to be amputated. Alternatively, the claimant could develop a psychiatric condition as a result of the difficulties experienced in adjusting to life without a limb.

42. Those are but two examples of a number of factual permutations in which Article 47(1)(d) has real purpose and relevance. The examples are necessarily complicated when considering the relevance of pre-existing injuries and illnesses, and the question of whether or not predominant causation, or a worsening, is made out.

43. To summarise, the fact that injuries and illness may overlap (whether in a singular condition or across multiple conditions) does not, of itself, render Article 47(1)(d) otiose. However, the application of Article 47(1)(d) as compared to the other sub-paragraphs of that Article will necessarily turn on the facts and medicine of each case, including whether or not on the facts of the case there is an illness as distinct from an injury, and whether or not

> it is appropriate to treat time as running from the injury or the subsequent illness. The sheer number of factual permutations and the interactions between medical conditions make this a question that cannot be resolved by high level guidance, beyond the need to consider the application of Article 47(1) on the particular facts of each case."

20. The appellant did not make any written response to these arguments. At the hearing of the appeal he maintained the argument that the correct construction of article 47(1) was properly before the Upper Tribunal on this appeal and should be addressed.

<u>Relevant law</u>

21. Article 2(1) of the AFCS Order is a provision which sets out how terms in the Order are to be interpreted. It includes:

> ""illness" means a physical or mental disorder included either in the International Statistical Classification of Diseases and Related Health Problems or in the Diagnostic and Statistical Manual of Mental Disorders ;
>
> "injury" includes illness except in relation to determining eligibility for a fast payment in article 27(1)(a);

22. Article 47 of the AFCS Order provides, insofar as relevant, as follows:

> "**47.**—(1) Subject to articles 48 and 49, the time specified for making a claim for injury benefit is 7 years beginning with whichever is the earlier of the following days—
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> (a) the day on which the injury occurs;
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> (b) the day an injury which is not caused by service is made worse by service;
>
> (c) the day on which the member's service ends;
>
> (d) the day a member first seeks medical advice in relation to an illness.
>
> (2) Paragraph (1)(d) applies only if the claim is in respect of an illness.
>
> (3) The time for making a claim for injury benefit is extended by 3 years from the date of diagnosis where—
>
> (a) an illness first presents within the period specified in paragraph (1); but
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> (b) the diagnosis of the illness is not made until less than 1 year before the end of that period…."

23. Article 48 of the same Order sets out that:

> "**48.**—(1) Article 47 does not apply where—
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> (a) a claim for injury benefit is made by a former member for a late onset illness and the illness has been diagnosed by an accredited medical specialist;
>
> (b) the death of a former member—
>
> (i) is caused by a late onset illness; or
>
> (ii) occurs in circumstances specified in article 10(3)(c)(ii).
>
> (2) Where paragraph (1) applies, the time specified for making a claim is 3 years beginning with the day the late onset illness was first diagnosed, or the date of death, as the case may be."

24. What is termed “adjudication” is dealt with in Part 7 of the AFCS Order. By article 51 it is for the Secretary of State to determine any claim for benefit and any question arising out of the claim, and that article also provides that reasons must be given for such a decision and claimants informed, inter alia, of the right of appeal conferred by section 5A(1) of the Pensions Appeal Tribunals Act 1943.

25. Article 54 of the AFCS Order deals with the finality of decisions. It sets out:

> “**Finality of decisions**
>
> **54.**—(1) Where the Secretary of State has made a final decision awarding benefit, there is to be no review of that decision except in the circumstances specified in articles 55, 56, 57, 58 and 59.
>
> (2) Where the Secretary of State has made a final decision which makes no award of benefit, there is to be no review of that decision except in the circumstances specified in article 59.
>
> (3) In this article, and subject to paragraph (4), a final decision is—
>
> (a) a decision under article 51;
>
> (b) a decision making a final award under article 52;
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> (c) a decision revised by the Secretary of State under article 55, 56, 57, 58 or 59;
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> (d) a decision made under article 55, 56, 57 or 59 which maintains the decision under review;
>
> (e) a decision revised by the Secretary of State following a reconsideration under article 53; or
>
> (f) a new decision which maintains the original decision following a reconsideration under article 53.
>
> (4) The decisions referred to in sub-paragraphs (a) to (d) are final decisions where there has been no application for reconsideration under article 53, or the time for such an application has expired.”

26. Article 59 of the AFCS Order is in the following terms:

> “**Review - ignorance or mistake**
>
> **59.**—(1) Subject to paragraph (2), any decision of the Secretary of State may be reviewed at any time (including on the application of the claimant) if the Secretary of State is satisfied that the decision was given in ignorance of, or was based on, a mistake as to a material fact or of a mistake as to the law.
>
> (2) This article only applies—
>
> (a) if the material fact was knowable at the time the decision was made and was disclosed to the Secretary of State at that time;
>
> (b) if the ignorance or mistake was the ignorance or mistake of the Secretary of State;
>
> (c) where the ignorance or mistake relates to the diagnosis of an injury, where the correct diagnosis was knowable given the state of medical knowledge existing at the time the diagnosis was made.

(3) On a review under this article, the Secretary of State may—

(a) make a new decision which maintains the decision under review ("the original decision"); or

(b) revise that decision by—

(i) awarding benefit where no award of benefit was made in the original decision;

(ii) changing the descriptor awarded so as to maintain, increase or decrease the amount awarded in the original decision;

(iii) increasing or decreasing the amount awarded in the original decision or so as to cancel an award of benefit;

(iv) changing the date on which an award of benefit becomes payable.

(4) The decision of the Secretary of State on a review under this article and the reasons for the decision must—

(a) be in writing;

(b) be given or sent to the claimant; and

(c) inform the applicant of any right the claimant may have—

(i) to a reconsideration of the decision under article 53; and

(ii) to appeal to the appropriate tribunal under section 5A(1) of the Pensions Appeal Tribunals Act 1943."

27. Two observations may be apposite in relation to this statutory scheme.

28. First, it would appear that the original decision of the Secretary of State not to make an award to the appellant for his 'back and neck pain', dated 20 September 2020, could only be reviewed under article 59: see article 54(2).

29. Second, and perhaps more importantly, there would appear to be no provision in either the AFCS Order or the Pensions Appeal Tribunals Act 1943 which deals with (a) the status of First-tier Tribunal decisions in terms of how they affect the Secretary of State's decision under appeal and, (b) relatedly, review of First-tier Tribunal decisions. Therefore case law from social security adjudication which holds that the First-tier Tribunal's decision replaces the Secretary of State's decision under appeal, such as *VW v London Borough of Hackney* (HB) [2014] UKUT 277 (AAC) (at paragraphs [23]-[25]), may have no application in the field of armed forces compensation adjudication and appeals from decisions made under the AFCS Order. (In war pensions cases, specific provision is made for reviewing a First-tier Tribunal decision: see article 44(3) of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006.)

Discussion and conclusion

30. There is no doubt that this appeal is academic. By reason of the Secretary of State's decision of 3 April 2023 and the fact the appellant has not appealed against that decision, the appellant has now obtained all he could have obtained had the FTT's

decision on his claim being out of time been set aside as being wrong in law on this appeal and the appeal then redecided on the basis that his claim was made in time and his 'back and neck' pain had been caused by service.

31. In the circumstances where there is no appeal against the review decision of 3 April 2023, that decision is not before the Upper Tribunal and it is a final decision by virtue of article 54(1) of the AFCS Order. As that decision is not before me and neither party is challenging that awarding decision, and the effect of that awarding decision is to render this appeal academic, I need not address the potentially interesting point, prefaced in the second observation in paragraph 29 above, about the lawfulness of the Secretary of State's ability to review either the First-tier Tribunal's decision or his earlier decision of 20 September 2020 (assuming it survives the FTT's decision). The Secretary of State's position before me was that his decision of 20 September 2020 remained a legally valid and extant decision notwithstanding the FTT's decision, and it was the 20 September 2020 decision (at least) which he reviewed under article 59 of the AFCS Order on 3 April 2023.

32. It was further submitted on the Secretary of State's behalf at the oral hearing before me that it was "sufficient for [the Upper Tribunal] to be satisfied that the Secretary of State was lawfully entitled to review his earlier decision, after the 'out of time' decision of the FTT, and decide on the basis of article 59 that both decisions were mistaken and that the claim was made in time and that the 'neck and back pain' injury was caused by service." I am not at all clear that the Secretary of State was legally empowered to review the FTT's decision for ignorance or mistake of material fact. However, as I have already said, the 3 April 2023 decision is not before me, and I am prepared to assume that the Secretary of State was empowered under article 59 of the AFCS Order to review his earlier decision of 20 September 2020. If he was not, because the FTT's decision had replaced that decision, that would leave a deficit in the statutory scheme as the AFCS Order's review powers would seem to contain no power to review a First-tier Tribunal decision.

33. As for the correct construction of article 47(1) of the AFCS Order, I decline for the reasons the Secretary of State gives, to decide that issue on this academic appeal. I recognise that this may be an unfortunate consequence in one sense given both parties were represented on this appeal and able to address the competing arguments about the construction of article 47(1). However, this decision may highlight those arguments and, in my judgement, they are better addressed in a case where the resolution of those arguments would make a material difference to whether the claim was made in time or not. I may add that a difficulty with the other First-tier Tribunal's construction of article 47(1) may be how the 'mutually exclusive' construction sits with the "whichever is the earlier of the following days" wording in article 47(1), which would appear to cover all of sub-paragraphs (a) to (d) in that article.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 18 April 2024