IN THE UPPER TRIBUNAL **Appeal No. *UA-2021-000742-AFCS***
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 170 (AAC)**

On appeal from the First-tier Tribunal (WPAFCC)

Between:

N.C. (deceased)

Appellant

by

J.C.

Executrix

- v –

Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Wikeley

Hearing date: 25 April 2024
Decision date: 6 June 2024

Representation:

Appellant: Mr Michael Rawlinson KC and Ms Jasmine Skander of Counsel instructed by Irwin Mitchell LLP
Respondent: Mr Will Hays of Counsel, instructed by the Government Legal Department

DECISION

The decision of the Upper Tribunal is to dismiss the Appellant's appeal. The decision of the First-tier Tribunal issued on 4 January 2021, following the hearing on 21 December 2020 under file number **AFCS/00654/2020**, was not made in error of law (section 11 of the Tribunals, Courts and Enforcement Act 2007).

REASONS FOR DECISION

Introduction

1. There are two principal statutory schemes providing financial compensation for armed forces personnel who suffer injury or death caused by service. The war pensions scheme applies to disablement or death which is due to service before 6 April 2005. The Armed Forces Compensation Scheme (AFCS) covers injury or death due to service on or after 6 April 2005. This appeal concerns the latter scheme.

2. The Appellant, the late Colonel C, brought a claim for compensation under the AFCS (he was still in service, thus precluding a claim under the war pensions scheme). His argument, in essence, was that the condition of malignant melanoma on the left shoulder and right calf, which resulted in a fatal cancer, was predominantly caused by service after 6 April 2005. The Secretary of State for Defence, acting through the agency of Veterans UK, refused that AFCS claim. The First-tier Tribunal (the FTT) in the War Pensions and Armed Forces Compensation Chamber (WPAFCC) dismissed the Appellant's subsequent appeal. For the reasons that follow I dismiss the further appeal to the Upper Tribunal.

3. I held a remote oral hearing of this Upper Tribunal appeal on 25 April 2024. The Appellant was represented by Mr M Rawlinson KC and Ms J Skander of Counsel, instructed by Irwin Mitchell LLP, while the Respondent was represented by Mr W Hays of Counsel, instructed by the Government Legal Department. I am indebted to all three counsel for their various written and oral submissions in the course of these proceedings.

4. Rather late in the day, it has become apparent that the Upper Tribunal office had first registered this appeal under the incorrect file reference UA-2021-000742-WP. This was on the mistaken assumption that the case was brought under the war pensions scheme (hence the 'WP' suffix). The file reference has now been corrected with the change of the appropriate suffix to UA-2021-000742-AFCS. Nothing of any substance turns on this administrative misclassification.

5. For convenience the following abbreviations are used in this decision:

ABBREVIATIONS	
AFCS	Armed Forces Compensation Scheme
AK	Actinic keratosis
BCC	Basal cell carcinoma
CMM	Cutaneous malignant melanoma
FOB	Forward Operating Base
FTT (or F-tT)	First-tier Tribunal
IMEG	Independent Medical Expert Group
JM	*JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC); [2016] AACR 3
MOB	Main Operating Base

MoD	Ministry of Defence
NMSC	Non-melanoma skin cancer
SCC	Squamous cell carcinoma
TFH	Task Force Helmand
UVR	Ultraviolet radiation
WP	War Pensions
WPAFCC	War Pensions and Armed Forces Compensation Chamber

A very brief outline of the factual background to the appeal

6. The Appellant had two periods of service in the armed forces. He first joined the regular army for officer training in 1988, but left in 1997 to pursue a civilian career. He then joined the reserve forces in 2002 and rejoined the regular army again in 2004.

7. The Appellant's army service naturally took him abroad on multiple occasions, sometimes for prolonged periods, during both the pre-April 2005 and post-April 2005 periods. During nearly all these deployments he experienced various degrees of exposure to the sun and suffered sunburn. Before April 2005 he served in Canada (1988 and 1991), Bosnia (1994), the USA (1996) and Afghanistan (2004/05). After April 2005 he was posted to Kenya (2006), Oman (2007/08) and Afghanistan again (2009, 2010 and 2017/18).

8. Colonel C's case before the FTT was that his melanoma had been predominantly caused by exposure to sunlight during his AFCS service, i.e. his service <u>after</u> 6 April 2005. Sadly, he died of the resulting cancer on 8 March 2021.

The Appellant's AFCS claim

9. On 14 February 2019 the Appellant made a claim under the AFCS in respect of melanoma on his left shoulder and right calf, giving the date of onset as June 2018. In the box on the claim form marked 'Extra Information' he made the following points:

> Throughout my service I have regularly served in environments exposed to intense sunlight for prolonged periods… Repeated lengthy exposure to intense sunlight and hot environments throughout my career, including five tours of Afghanistan, have been major causative factors in the disease. I have always taken precautions against sunburn, as advised, but it is the long periods spent in these environments with all of the variables of exposure to sunshine and other factors that have led to this disease. I do not take beach holidays and do not sunbathe, and use sunscreen during summer months – therefore the greatest exposure I have had to UV light and causative factors for malignant melanoma has been whilst I have been on duty.

The Secretary of State's decision on the Appellant's AFCS claim

10. On 9 April 2019 Veterans UK wrote to the Appellant to notify him of their decision that "you are not entitled to compensation under the Scheme as your injury/illness

is not due to Service". The very brief reason for the rejection of the claim, as recorded on the contemporaneous lay certificate, was as follows:

> [Col C] has been diagnosed with melanoma on his upper back and right calf. Although he may have been exposed to increased UV radiation through service, the areas affected would not have been exposed during military service etc. It is noted that he had excessive sun exposure as a child. As such this claim falls for rejection.

11. It is perhaps only right at this stage to note that the FTT subsequently discounted the effects of UVR exposure as a child as a potentially causative factor.

The Appellant's appeal to the First-tier Tribunal

12. On 27 March 2020 the Appellant lodged an appeal, arguing that "in the view of specialists in dermatology …. my service has in fact contributed to my illness. My consultant notes that the fast growing lesion on my shoulder developed over the course of my operational tour in 17/18 when I was exposed to intense sunlight … I therefore appeal this decision on the grounds that medical evidence supports my case that my illness was wholly or partly caused by my service and I restate my claim." The Appellant included, for example, a letter from his consultant dermatologist dated 20 February 2020, which included the following passage:

> He has informed me that that there has been a question as to the role of his military service in the aetiology of his skin cancer. I have explained that it is very well established that ultraviolet light exposure is one of the major risk factors for the development of melanoma. He has been stationed overseas for five tours in Afghanistan and Iraq between 2004 and 2017, all of these postings were between 6-12 months. Although a definitive causal link cannot be proven, in my view it is entirely plausible that this extensive sunlight exposure has contributed to the development of his melanoma.

13. Following the Appellant's appeal, the adverse decision was confirmed on reconsideration in a decision by Veterans UK dated 18 August 2020. In a supplementary comment, following the Appellant's submission of his consultant reports, the Secretary of State noted that "it is not in dispute that [Col C] has not had extensive exposure during his service … what is up for determination is whether his service after April 2005 is the predominant cause of his condition". In that context the Secretary of State noted the following evidence from the Appellant's personal statement:

- BATUS (Canada) 10 weeks in summer 1988 "was over exposed to the sun and did have reddening of my skin, arms, legs and face."
- BATUS (Canada) summer 1991 "again ended up with sun exposure, with reddening to my skin."
- Bosnia 1994 "The temperatures here were known to reach in excess of 30+ degrees and from August to October 1994 the conditions were hot and sunny, and we operated extensively outdoors."
- South Carolina 1996 "We spent an average of 12-14 hours each day in the sun … We lived on the beach during this exercise which lasted about 10 weeks. The temperatures were in excess of 33+ degrees. Many of the unit suffered sunburn whilst on this tour, including myself."

- Afghanistan October 2004-April 2005 "Again during this tour a significant number of soldiers suffered from sunburn, me included."

14. The lay certificate accordingly asked the FTT to decide "if the claimed condition melanoma on left shoulder and right calf is predominantly caused by [AFCS] service in accordance with the rules of the Order".

15. Shortly before the hearing, the Appellant's solicitors filed further evidence in the form of letters from the Appellant's consultant dermatologist and consultant oncologist. Copies of the solicitors' instructing letters requesting these reports were not provided to the FTT, but from the way the solicitors' questions were framed (which were cited in the consultants' replies) it does not appear that the consultants were asked to distinguish between the respective causative effects of service before and after April 2005.

16. The consultant dermatologist's letter (dated 27 October 2020) included the following responses:

> It is my opinion that, on the balance of probabilities, the sun exposure that Col C received whilst in the military was responsible for the development of his melanoma … Having read Col C's witness statement it seems to me that the extent of sun exposure that he sustained whilst a child was insignificant compared to the prolonged episodes of intense sun exposure with burning that occurred whilst in military service. In view of this it is my opinion that, on the balance of probabilities, the sun exposure whilst in the military is the predominant cause of the melanoma from which he now suffers,

17. The consultant oncologist's letter (dated 28 October 2020) was in similar terms:

> Reading the account of your client's history, suggesting multiple episodes of sun burn while on deployment, then my view would be that on balance of probabilities it is likely that the episodes of sun burn represented the UV exposure that led to his subsequently developing melanoma … Reading the account of your client's history of sun exposure in childhood, compared with the multiple episodes of sun burn he experienced whilst on deployment, then my view is that on a balance of probabilities it is the periodic episodes of high intensity sun exposure and subsequent sunburn in adult life that was the predominant cause of his condition.

18. It bears repeating that neither of the consultants' reports drew a distinction between service before and after April 2005.

19. In terms of medical evidence the Secretary of State relied (in part at least) on the December 2017 report of the Independent Medical Expert Group (IMEG). Topic 7 of that report dealt with UV light and skin cancers and made the following 'key points':

> 1. For a disorder to be a Recognised Disease in the AFCS, we look for evidence that service is consistently associated with an increase in its frequency and whether there are circumstances where the frequency is more than doubled, making it more likely than not in the individual case that the disease was attributable to a cause in service.
>
> 2. Skin cancers, the most common cancers in white skinned populations are usually divided into nonmelanoma skin cancers (NMSC) and cutaneous

malignant melanoma (CMM). The most important types of NMSC are basal cell carcinoma (BCC) and squamous cell carcinoma (SCC).

NMSC Basal cell carcinoma (BCC) is commonly called rodent ulcer. The mortality rate is low and they rarely metastasize but they may invade surrounding tissues including cartilage and bone causing significant destruction. Squamous cell carcinomas (SCC) may arise in scar tissue but the majority arise on sun damaged exposed skin, and most commonly in actinic keratosis (AK).

Cutaneous malignant melanoma. Cutaneous malignant melanoma (CMM) accounts for less than 5% total skin cancers, although the incidence is rising in all parts of the world for which data are available and it leads to 75% of all deaths from skin cancers.

3. By April 2005 public health education on the dangers of sun exposure were well developed including in the UK amongst the military medical services, the chain of command and Service personnel. The avoidance of direct UVR exposure and sunburn, use of suitable protective clothing, sunglasses, and sunscreens, were standard practice.

4. While total cumulative lifetime sun exposure is casually associated with AK and SCC, the evidence is that BCCs are more related to short intermittent burning episodes. Sun exposure plays a primary role and supporting role in most cases of CMM with the pattern of exposure in the sub-types varying. The risk for CMM in older people, developing over many years and of generally lower mortality is as for SCC, i.e. chronic long term excess UV exposure. Superficial spreading melanomas, the most common type in working age adults are related to short sharp episodes of burning exposure especially in youth and adolescence.

5. We conclude that in general none of these circumstances is likely to be met at this date due to AFCS service and so most cases of NMSC and CMM claimed under AFCS will be for rejection. However each case should be considered on its facts.

20. I recognise, as Mr Rawlinson submitted, that the findings of the IMEG report are based on an overall epidemiological assessment and are subject to the important proviso that, as the final 'key point' stipulates at paragraph (5), "each case should be considered on its facts".

The decision of the First-tier Tribunal

21. The First-tier Tribunal held an initial hearing of the appeal on 18 November 2020. That hearing had to be adjourned for reasons which need not now concern us. It was followed by a further hearing on 21 December 2020. The Appellant's solicitors helpfully prepared a full printed transcript of the latter hearing based on the digital record of proceedings. Although technically an unofficial transcript – it has not been approved by the FTT panel and contains some gaps where comments were not audible – there is no suggestion that it is other than the 'best available evidence' of what took place.

22. The hearing on 21 December 2020 was not just a hearing of the Appellant's substantive appeal. Rather, it was also a hearing of the Appellant's application that the FTT recuse itself, or more particularly that the FTT Judge recuse herself,

in the light of certain exchanges that had taken place at the initial hearing on 18 November 2020. The FTT dismissed the recusal application in a detailed oral ruling delivered by the FTT Judge on 21 December 2020. The FTT further expanded on these detailed reasons in a statement of reasons for the decision not to recuse that was signed off on 29 September 2021 and issued on 7 October 2021. In the meantime, on 4 January 2021, the FTT promulgated its unanimous decision dismissing the Appellant's substantive appeal. This was followed by a full statement of reasons on 4 March 2021.

23. At this stage it may be helpful to sketch out the structure of the FTT's statement of reasons. The first three paragraphs outlined the background. Paragraphs 4 to 9 summarised the AFCS legislative framework and (in some detail) the decision of the three-judge panel of the Upper Tribunal in *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC); [2016] AACR 3. Paragraphs 10, 11 and 12 dealt with (a) the IMEG report of December 2017, (b) the Secretary of State's Synopses of Causation (which were essentially the MoD's literature-review based summaries of the present state of medical knowledge for various conditions) and (c) the issue of heat exposure versus sun exposure respectively.

24. The FTT then addressed the evidence relating to the Appellant's sun exposure both before and after 2005 in some detail in paragraphs 13 and 14:

> **13 The evidence relating to the Appellant's sun exposure**
>
> Pre 2005
>
> 13.1 Whilst a child, Mr C's parents were posted by the RAF to Melbourne, Australia for 2 years. During that time Mr C was at boarding school in England and travelled to Australia for school holidays. He has very clear memories of the recognised need to use copious sun protection from the dangerous Australian sun.
>
> 13.2 In 1988 Mr C joined the regular Army for Officer training, and on commissioning, served in the Life Guards. In 1988, as an officer cadet aged 20, he deployed to BATUS in Canada on a 10 week training exercise. His statement (P 58 of the Response) records that the temperatures were over 30 deg, he was outside a lot of the time and got 'over exposed to the sun and did have reddening of my skin, arms, legs and face'. In his oral evidence, he diluted this statement to some extent, explaining that he spent a lot of the time inside armoured vehicles so sun exposure was episodic. Nevertheless there is a clear history of sunburn and as a very junior officer, he would have had little control over his role.
>
> 13.3 Again, after commissioning and as a Lt. he returned to BATUS in the summer of 1991 as part of a similar exercise and in similar conditions. He again recalls sunburn.
>
> 13.4 In 1994 Mr C was deployed to Bosnia for 7 months, again in high temperatures (although reducing from November onwards), in sunny weather. Although operating extensively outdoors, he told us that again he spent a lot of the time in armoured vehicles.
>
> 13.5 In 1996 Mr C deployed to South Carolina USA on exercise with the US military for 10 weeks. He states, at Para 15 of his statement that he spent on average 12-14 hours a day in the sun, on the beach and the sea, and

suffered sunburn. In his oral evidence he explained that they were living tactically outside most of the time and recalled being sunburned.

13.6 In October 1997 Mr C left the regular army, rejoining in November 2003. In the intervening period he pursued a career in publishing. He took holidays in the UK, particularly hill walking and cycling, and joined the Army Reserve in 2002. He confirmed that even when outside in the UK, he used sunscreen and carried spare bottles with him.

13.6 On re-joining the regular Army in August 2004 as a captain aged 36, he deployed to Afghanistan from October 2004 to April 2005 in a role supporting civil aid work. Although much of the time was over the Afghan winter, he was also exposed to the sun and suffered sunburn: in his statement, he explains 'Again during this tour a significant number of soldiers suffered from sunburn, me included'.

14. Post April 2005

14.1 In February 2006 he took part in Exercise GRAND PRIX in one of the usual training areas in Kenya, for 10 weeks. This consists mainly of open grassland peppered with small trees, and Mr C explained that they spent a lot of the time out on the ground in a light infantry role, but lay down in the shade during the midday sun.

14.2 From October 2007 to January 2008 Mr C was posted to Oman as the Army Liaison Officer with the RAF. His primary role was flying with the aircraft to co-ordinate communication with troops on the ground which took up 2-3 days a week. The remainder of the time he was generally helping out around the base as required. He recalls suffering from sunburn from working outside and we accept that in this non-operational theatre he would have had the flexibility to wear service issued shorts and T-shirts or long sleeved shirts rolled up to the elbow. However, there would have been no imperative to work outside during the heat of the day, and there was ample available shelter from the sun.

14.3 From March to November 2009 Mr C deployed to Afghanistan as a Major working in the Planning Cell at Task Force Helmand (TFH) in Lashkar Gah. This role in planning future operations requires considerable co-ordination with other co-located disciplines including Intelligence, Personnel, current operations, Logistics communications, etc to pull the plan together. His role was based in the Main Operating Base (MOB), a large community with a mix of former Afghan buildings, rigid tents and shipping containers housing TFH personnel, a large canteen, small gym, chapel and shop, together with a helicopter landing site, all surrounded by a perimeter wall.

14.4 We accept Mr C's evidence that as part of his role, he would travel out to the Forward Operating Bases (a smaller and more rudimentary replica of the MOB) in order to liaise with the troops on regular patrol, to better understand the situation on the ground. We also accept that on occasions, he would go out on patrol with the troops, sometimes from Patrol Bases, an even more rudimentary replica of a FOB. However, what we do not accept is, as his Counsel encouraged us to find, that he was out in the heat and

sun for 10-12 hours a day during his entire tour and that during this time he was wearing mainly shorts and T-shirts.

14.5 This was an exceptionally kinetic time for UK troops in Helmand with considerable casualties and deaths. It attracted significant media attention with many reports in the press and documentaries from the front line from reporters embedded with units. From our collective knowledge from such media exposure, descriptions from other appellants deployed to Afghanistan, and relevant personal experience we know that the threat was so great that troops on patrol did so in full combat dress, with body armour, and with legs and arms fully covered. We also accept that in periods of 'downtime' soldiers would wear their issued shorts and t-shirts, but had the flexibility to shelter in the shade and only exercise in the cooler/less sunny times of the day which would also protect from the dangers of heat exhaustion.

14.6 Mr C returned to Afghanistan from May to August 2010 in a role with Joint Force Logistics with a similar pattern of work as in the previous year. As a senior Major, he would not ordinarily be expected to routinely patrol on the ground.

14.7 His final tour of Afghanistan was from October 2017 to May 2018 based in Kabul and in the rank of Lieutenant Colonel. This winter deployment was primarily office based indoors.

25. Paragraph 15 considered in some detail the Appellant's own medical history (which was not in dispute) while paragraph 16 reviewed the state of medical opinion on the aetiology of melanoma, including summaries of both "what we don't know" (paragraph 16.5) and "what we do know" (paragraph 16.6). These were itemised as a series of bullet points under the respective headings:

16.5 <u>What we don't know</u>

- What degree of sunburn is required (e.g. from slightly pink to severe peeling/blisters) to be implicated
- How protective is a 'gentle tan' as in careful exposure during a Mediterranean beach holiday.
- Is only one exposure enough to cause a danger
- What is the timeline between exposure and onset; the latency period. BCC's are said to emerge in older age (see Para 4.7 of the UVR Synopsis), but CMM describe the 'working age population'. We note Para 4.11 above of the UVR Synopsis which states that 'childhood sunburns …have been linked to melanoma in later life' implying a long latency period.
- What were the degrees of Mr C's sunburn, what areas of his body, and how often he 're-burned' during his tours.

16.6 <u>What we do know</u>

- Exposure as a child/young adult is a potent risk factor
- Intermittent or short sharp episodes of burning is a significant risk factor.

- Mr C's age profile is consistent with a 'peak incidence in the fifth decade'.

26. In paragraph 17 the FTT asked whether the services were responsible for providing sunscreen (and I return to this issue later). Finally, paragraph 18 set out the FTT's key findings while paragraph 19 provided the FTT's core reasoning under the heading "applying the law". These final two sections of the decision read as follows (with emphasis as in the original):

> **18 Our findings**
>
> 18.1 Mr C suffered multiple episodes of sun exposure of short duration and unknown intensity from early adulthood until around 2017. All of this was in a military, not civilian setting.
>
> 18.2 When out on patrol in Afghanistan, Mr C would be substantially covered up and protected against the sun. Sun exposure during his other post 2005 tours would have been of shorter duration and intensity.
>
> 18.3 It was his responsibility to equip with and use sunscreen when necessary.
>
> 18.4 Mr C has had possibly 3 moles, the first being discovered in 2013 on his inner thigh. A further mole appears on his left back the following year and which he describes as having had 'for years'. He also had a mole on his right calf.
>
> 18.5 We accept that CMM may arise on areas of skin not previously exposed to the sun.
>
> 18.6 None of his treating consultants have sought to differentiate a causal link between pre and post 2005 sun exposure. They have all used cautious language which does not meet the burden and standard of proof.
>
> 18.7 Nor do the Synopses or the IMEG report try to define a latency period which would identify which episodes of sunburn relate to the onset of <u>any</u> skin cancers other than vague 'in older age' for BCC's and 'in the working age population' in the case of CMM. This is unsurprising given the current level of medical thinking.
>
> **19. Applying the Law**
>
> We have largely followed the guidelines helpfully set out in *JM vs SoS* and quoted at Para 9 above but with the fundamental distinction that this is not only a question of whether service was the predominant cause, but whether service <u>after 6th April 2005</u> was the predominant cause.
>
> We have first considered whether, without a 'service cause' the injury would have occurred at all. We conclude that sun exposure post April 2005 <u>might</u> have led to some form of melanoma, but not for many more years. The first mole was noticed by Mr C in 2013, only 8 years post the start of AFCS service, and there is no evidence at all that such a short latency period (even up to malignancy in 2018) would be causative. This is presumably why the IMEG report concludes at Para 14 that *in general, none of these circumstances is likely to be met due to service after 6 April 2005 and so most cases of NMSC and CMM claimed under AFCS will be liable to rejection. However, each case will be considered on its facts.* (NMSC stands

for non-melanoma skin cancers). Clearly as time goes on, this conclusion will carry less weight as the period between exposure and onset becomes more stretched.

The second question is (applying the test in *JM* above) whether without the 'service cause' the injury would have been less than half as serious. In our view, the basic injurious process started pre 2005. It would be wholly speculative, unsupported by the medical evidence and certainly not meet the standard of proof or the predominancy test for us to conclude that the onset of Mr C's CMM would have been less than half as serious if he had not had post 2005 sun exposure. In the specific case of CMM it is difficult to envisage what 'half as serious' might look like, and the Medical Opinions to which we have referred above do not even discuss such a concept. *JM* was a case about mental health conditions where it is somewhat easier to tease out the effects of service and non-service factors.

We have also noted the IMEG conclusion that each case should be considered on its facts. Had there been no pre 2005 sun exposure <u>at all</u> (not only in service), and Mr C were very much younger then there might be an argument for a service cause but bearing in mind the medical evidence that UVR is not the <u>only</u> factor. On the evidence in this appeal, this is not such a special case.

27. The Appellant sought permission to appeal from the FTT to the Upper Tribunal in respect of both the FTT's decision not to recuse itself and its decision on the substantive appeal. On 29 November 2021 Judge Monk, the WPAFCC Chamber President, refused permission to appeal in respect of both matters.

The Upper Tribunal appeal

28. On 10 December 2021 the Appellant renewed the application for permission to appeal direct to the Upper Tribunal. The application comprised three grounds of appeal. Ground 1, in summary, was that the FTT had erred in law by utilising impermissible methods to find facts. Ground 2 was that the FTT had misdirected itself in law by failing to recuse itself. Ground 3 was that the FTT had misdirected itself in law by failing to have regard to the fact that the AFCS is a no-fault scheme and by its erroneous application of the legal test for causation.

29. On 5 June 2023 Upper Tribunal Judge Hemingway held an oral hearing of the application for permission to appeal. In a ruling dated 18 July 2023 (but not issued until 30 August 2023) Judge Hemingway gave limited permission to appeal, granting permission on Grounds 1 and 3 but refusing leave in respect of Ground 2. I therefore need say no more about the recusal ground of appeal. Conduct of the appeal was subsequently transferred to myself on the retirement of Judge Hemingway.

The AFCS legislative framework

30. The relevant legislative framework is established by the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517; 'the 2011 Order).

31. Article 2(1) of the 2011 Order defines "injury" for all relevant purposes as including "illness", which in turn is defined as meaning "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". There is accordingly no dispute but that Colonel C's melanoma constituted an "injury". Article 2(1) also, and unsurprisingly in both respects, defines "service" as meaning "service as a member of the forces" and defines "forces" as meaning "the armed forces and the reserve forces".

32. Article 8 of the 2011 Order provides as follows:

> **Injury caused by service**
>
> **8.**—(1) Subject to articles 11 and 12, benefit is payable to or in respect of a member or former member by reason of an injury which is caused (wholly or partly) by service where the cause of the injury occurred on or after 6th April 2005.
>
> (2) Where injury is partly caused by service, benefit is only payable if service is the predominant cause of the injury.

33. Reverting for a moment to Article 2(1), this further provides that "predominant" means "more than 50%".

34. Article 60 of the 2011 Order further provides that the default position and so the general rule – subject to an exception which does not arise in the present case – is that "the burden of proving any issue is on the claimant". This stands in stark contrast to the position under the war pensions scheme, with its more complex but more claimant-friendly provisions on the burden of proof. Moreover, under the AFCS, as stipulated by Article 61 of the 2011 Order, "The standard of proof applicable in any decision which is required to be made under this Order is the balance of probabilities." More generally, so far as evidence in AFCS cases is concerned, Article 62 provides as follows:

> **Evidence**
>
> **62.**—(1) For the purposes of determining any issue under this Order, the Secretary of State is to produce such medical or other records of a member or a former member (whether living or deceased), as are held by the Secretary of State for Defence or the Defence Council and are relevant to the issues to be decided.
>
> (2) The Secretary of State is to consider any evidence which appears to be relevant to the issues which are to be decided and is to determine those issues on that evidence.
>
> (3) Where any decision required to be made under this Order is, or includes, a decision involving a medical issue, that decision is to be made in accordance with generally accepted medical and scientific knowledge prevailing at the time the decision is made.

35. Mr Rawlinson, for the Appellant, did not take issue with the FTT's own exposition of these material statutory provisions. Indeed, he described the relevant passage in the FTT's statement of reasons, which set out the key provisions of the 2011 Order, as "an impeccable statement of the law". Rather he submitted that it was in the application of the law to the facts and in its handling of the facts that the FTT had fallen into error. He further acknowledged that he had to show an error of law in the FTT's approach and not simply a different view as to the facts. In

this context it is important not to lose sight of the role of appellate review in deciding appeals from a specialist first instance jurisdiction.

The role of appellate review in appeals from a specialist first instance jurisdiction

36. The jurisprudence on the standard of appellate review exercisable in an error of law jurisdiction demonstrates that any challenge which turns on a specialist tribunal's treatment of the facts needs to be approached with a degree of circumspection. Three interlocking themes or principles are evident in this jurisprudence. The first is that appropriate recognition must be accorded to the first instance tribunal as the primary fact-finder. The second is that due note should be taken of the expertise of a specialist tribunal. The third is that the tribunal's reasons for its fact-finding need to be at least adequate, but not necessarily optimal.

37. The significance of the first of this trilogy of principles is captured in the following passage from the judgment of Carr LJ (as she then was) in *Clin v Walter Lilly & Co Ltd* [2021] EWCA Civ 136, dealing with grounds of appeal that amounted to challenges to the trial judge's findings of fact and/or evaluative findings:

> 83. Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:
>
> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;
>
> ii) The trial is not a dress rehearsal. It is the first and last night of the show;
>
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;
>
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);
>
> vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.
>
> …
>
> 85. In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:
>
> i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support;

> ii) Where the finding is infected by some identifiable error, such as a material error of law;
>
> iii) Where the finding lies outside the bounds within which reasonable disagreement is possible.
>
> 86. An evaluation of the facts is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the trial judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.
>
> 87. The degree to which appellate restraint should be exercised in an individual case may be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case, or from first-hand experience of the testing of the evidence, or because of particular relevant specialist expertise.

38. The second principled theme, picking up on that final observation, is exemplified by Lady Hale's judgment in *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49. Giving guidance in the context of specialist tribunals (that was an asylum case, but the same principle applies here too in an appeal from the WPAFCC), Lady Hale held as follows:

> This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.

39. The third theme concerns the standard required for the adequacy of reasons. The relevant authorities were reviewed recently by a three-judge panel of this Chamber, of which I was a member, in *Information Commissioner v Experian Ltd* [2024] UKUT 105 (AAC):

> 63. There are many appellate authorities on the adequacy of reasons in a judicial decision. In this chamber of the Upper Tribunal, the principles were summarised in, for example, *Oxford Phoenix Innovation Ltd v Information Commissioner & Medicines and Healthcare Regulatory Agency* [2018] UKUT 192 (AAC) at [50-54]. At its most succinct, the duty to give reasons

was encapsulated at [22] in *Re F (Children)* [2016] EWCA Civ 546 (one of the authorities cited there), as follows:

> 'Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable.'

64. As is well-known, the authorities counsel judicial "restraint" when the reasons that a tribunal gives for its decision are being examined. In *R (Jones) v FTT (Social Entitlement Chamber)* [2013] UKSC 19 at [25] Lord Hope observed that the appellate court should not assume too readily that the tribunal below misdirected itself just because it had not fully set out every step in its reasoning. Similarly, "the concern of the court ought to be substance not semantics": per Sir James Munby P in *Re F (Children)* at [23]. Lord Hope said this of an industrial tribunal's reasoning in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 at [59]:

> ' … It has also been recognised that a generous interpretation ought to be given to a tribunal's reasoning. It is to be expected, of course, that the decision will set out the facts. That is the raw material on which any review of its decision must be based. But the quality which is to be expected of its reasoning is not that to be expected of a High Court judge. Its reasoning ought to be explained, but the circumstances in which a tribunal works should be respected. The reasoning ought not to be subjected to an unduly critical analysis.'

65. The reasons of the tribunal below must be considered as a whole. Furthermore, the appellate court should not limit itself to what is explicitly shown on the face of the decision; it should also have regard to that which is implicit in the decision. *R v Immigration Appeal Tribunal, ex parte Khan* [1983] QB 790 (per Lord Lane CJ at page 794) was cited by Floyd LJ in *UT (Sri Lanka) v SSHD* [2019] EWCA Civ 1095 at [27] as explaining that the issues which a tribunal decides and the basis on which the tribunal reaches its decision may be set out directly or by inference.

66. The following was said in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 (a classic authority on the adequacy of reasons), on the question of the context in which apparently inadequate reasons of a trial judge are to be read:

> '26. Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. … If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial.
>
> ….

> 118. ... There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision.'

40. The Appellant's two extant grounds of appeal in the present case need to be viewed through the prism of those three principles.

Ground 1

Introduction

41. Ground 1 amounts to a composite assertion that the FTT erred in law through finding facts without the evidence enabling it to do so; through finding facts on the basis of extraneous information; and through wrongly and contrary to the principles of natural justice relying on its own knowledge for certain of its findings.

42. Judge Hemingway had this to say in respect of Ground 1 when granting permission to appeal:

> There are some elements of that ground, as set out in the written grounds prepared by Ms Skander, which I find unpersuasive. But the threshold for the giving of permission is not a high one and upon hearing oral argument I do think the F-tT might have erred through, at least, not giving a sufficiently clear signal as to the nature of the findings it was contemplating making on the basis of its own knowledge (see paragraph 14.5 of the written reasons issued on 4 March 2021) though it did send something of a signal (see page 50 of the transcript of the hearing of 21 December 2021); or through failing to adequately explain the basis for or the detail of the "collective knowledge" it applied to the fact-finding process. Although I have said there are aspects of what is argued in support of ground 1 which I find unpersuasive (even in the context of what is arguable) it would be a difficult and probably unhelpful exercise to sever parts of the ground. So, ground 1 may be argued in full. I would add, though, that whilst the written grounds criticised the F-tT for attaching weight to a document referred to as the "IMEG report", Mr Rawlinson accepted it was perfectly proper for the F-tT to have regard to it. I agree. So, I would not anticipate there will be any complaint about the F-tT having regard to that report in the appeal to the Upper Tribunal which will now follow.

43. Given that clear judicial steer, it was understandable that at the oral hearing of the appeal Mr Rawlinson primarily focussed his forensic fire on what he submitted was the FTT's erroneous approach to making findings on the basis of its own knowledge and the use of its "collective knowledge" as applied to the fact-finding process. Mr Rawlinson highlighted several passages in the transcript of the FTT hearing in an attempt to make good this aspect of the first ground of appeal. In the next section I discuss the most significant of these passages.

The First-tier Tribunal's approach to making findings on the basis of its own knowledge

44. Mr Rawlinson's core submission, in effect, was that the FTT had put its own experience ahead of the Appellant's evidence in circumstances where the Appellant's evidence about conditions in Afghanistan properly outweighed the panel's experience and knowledge, some of which was based on what had been seen on TV. This approach involved an error of law, he argued, as like was not being fairly compared with like – the evidential basis for the experience of the FTT panel, and in particular of the Judge, who had also served in Afghanistan, was not the same as the evidential basis for the Appellant's experience. In this respect particular objection was taken to the following exchange, as recorded in the FTT hearing transcript (at p.49), which dealt with the type of clothing worn by service personnel in Afghanistan and their ability to seek shelter from the intense sunlight:

> JUDGE: Just a few questions from me Colonel C. I think it is fair to let you know that I was deployed to Afghanistan in August 2009 for a six month tour and I spent two months in Lashkar Gah and the rest of the time in Kandahar. Obviously I was not as active out on the ground as you were but did helicopter submitting so out to some of the FOBs and to Kabul and in fact spent a week in **[inaudible]**. So probably was issued with very much the same kit as you were. Certainly I was issued with two pairs of shorts, I never wore them. They have only been worn when I have been gardening here at home. And in fact everywhere I never saw anyone else wearing shorts. Certain not in Lashkar Gah when soldiers were having their downtime. So I will just make that comment. Also I went to all the daily briefings where I saw lots of photographs of what was happening out in the FOBs and the PD. So absolutely understand what you are talking about. So a few comments from me is that a lot of people were being moved around in helicopters when there were any available and vehicles such as and so forth. As you said Helmand is a green zone and a green zone for a reason although I appreciate that a lot of the FOBs would be sort of out in the desert area, places like **[inaudible]** and Kabul and Kajaki. But when we did go out on patrol obviously they were wearing full kit. Your statement in one place said that you didn't have any long sleeved shirts issued to you but I am sure that is not correct. I am looking at paragraph 42, we didn't have these in place **[inaudible]**. So you would be wearing full kit, long trousers, long sleeves, body armour, helmets and so forth. So very much when you were out on patrol the only part of you that was exposed was your face. Entirely accept having seen all the photos of soldiers firing water and things at handles and sorts and so I accept all that. So I accept all that. Just another comment that whilst I was out there night vision goggles had come in and quite a lot of soldiers went out at night not only because it was cooler but because there was not the opportunity …
>
> APPELLANT: If I may interrupt ma'am I mean all I would say is that many of us, thousands of us served in Helmand and passed through it. My experience and yours have much in common and also much in diversions with each other. And you know we served at the same time in many of the same places but I recognise what you are describing but all I would say that is not necessarily my experience.
>
> JUDGE: OK well just to comment on the FOBs that I did go to as you say they were compounds and they threw the hospo barriers around them and created a FOB and helicopter landing strips and all the rest of it. But my recollection is that they did actually have buildings there in the FOBs, I don't know about TB.
>
> APPELLANT: Of course there were buildings there. You know I have sort of made that clear and we used cover wherever possible. My point is that we conducted significant mobile operations over large periods of time operating with things like

> the brigade, reconnaissance, force and others and lived tactically in the desert in order to avoid contact with the enemy. That was part of a reconnaissance process.

45. In the course of his oral submissions Mr Rawlinson acknowledged that it was perfectly proper for the Judge to set out her own experience when posted to Afghanistan and to invite the Appellant's comments. However, he submitted that the FTT had both failed to analyse the partly overlapping but still substantially differing experiences of the Judge and the Appellant on their respective tours of duty and had also failed to give the Appellant a proper opportunity to comment on other matters on which the panel had relied in making its findings (e.g. social media and TV coverage). This submission is unpersuasive for two main reasons, both of which were identified by Mr Hays.

46. The first reason, and the starting point, is that a specialist tribunal such as the FTT in the WPAFCC is entitled to take into account its own experience in reaching findings of fact. There are, however, safeguards, as recognised by the Lands Tribunal in *Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2007] RVR 39 at [23]:

> … It is entirely appropriate that, as an expert tribunal, an LVT should use its knowledge and experience to test, and if necessary to reject, evidence that is before it. But there are three inescapable requirements. Firstly, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision.

47. Those requirements were set out in the context of the leasehold valuation tribunal, but they apply across the board to specialist tribunals and indeed are echoed in the war pensions case law. Thus, it follows that what the tribunal cannot do is to rely on its own specialist knowledge without putting the point to the affected party (*Butterfield and Creasy v Secretary of State for Defence* [2002] EWHC 2247 (Admin)). Likewise, the FTT cannot undertake its own research about an issue that is material to the outcome of the appeal without giving the parties the opportunity to comment (see *Busmer v Secretary of State for Defence* [2004] EWHC 29 (Admin)). The FTT in the present case was plainly alive to the importance of this principle, as illustrated by the following comment made by the Judge in the course of the FTT hearing (transcript at p.50):

> JUDGE: Right Miss Skander the position is this when the panel retires we consider the matter, they will bring their expertise as we are required to do because that is why this panel has been constituted with a service member, a medical member and a legal member. And if because of my own experience and expertise I know that certain facts exist then it would be entirely wrong for me to use that knowledge, expertise and experience in discussion with my panel members without giving Colonel C the opportunity to comment on it. So it would be even worse if in our discussions as a panel I said to my colleague that I know for certain X, Y and Z because that is what my experiences are. If I haven't explained that to Colonel C that would be an even greater transgression.

48. The second reason is that it is important to distinguish between (a) what took place at the FTT hearing (in terms of the panel testing the evidence) and (b) what subsequently appeared in the FTT's reasoned decision (in terms of the panel's fact-finding). As Mr Hays submitted, it is only the latter that ultimately matters,

whereas Mr Rawlinson's submissions were principally directed towards the former. It can only be said that the FTT erred in law if its reasoned decision demonstrates that it improperly relied, in making its findings of fact, on its own undisclosed specialist experience and knowledge rather than on the evidence before it. The reality, however, was that the FTT broadly accepted the Appellant's own evidence as to both service clothing and the ability to seek shelter in Afghanistan:

> 14.4 We accept Mr C's evidence that as part of his role, he would travel out to the Forward Operating Bases (a smaller and more rudimentary replica of the MOB) in order to liaise with the troops on regular patrol, to better understand the situation on the ground. We also accept that on occasions, he would go out on patrol with the troops, sometimes from Patrol Bases, an even more rudimentary replica of a FOB. However, what we do not accept is, as his Counsel encouraged us to find, that he was out in the heat and sun for 10-12 hours a day during his entire tour and that during this time he was wearing mainly shorts and T-shirts.
>
> 14.5 This was an exceptionally kinetic time for UK troops in Helmand with considerable casualties and deaths. It attracted significant media attention with many reports in the press and documentaries from the front line from reporters embedded with units. From our collective knowledge from such media exposure, descriptions from other appellants deployed to Afghanistan, and relevant personal experience we know that the threat was so great that troops on patrol did so in full combat dress, with body armour, and with legs and arms fully covered. We also accept that in periods of 'downtime' soldiers would wear their issued shorts and t-shirts, but had the flexibility to shelter in the shade and only exercise in the cooler/less sunny times of the day which would also protect from the dangers of heat exhaustion.

49. The fact of the matter is that these findings by the FTT broadly reflected the Appellant's own evidence. For example, the Appellant agreed with the service member's observation that "you wouldn't be wearing [shorts] when you went out on the recces with the patrols". Likewise, the Appellant himself acknowledged that "I would emphasise nobody would be foolish enough to go on patrol wearing shorts" (hearing transcript p.39). Thus, the FTT's finding that "From our collective knowledge from such media exposure, descriptions from other appellants deployed to Afghanistan, and relevant personal experience we know that the threat was so great that troops on patrol did so in full combat dress" was in accord with the Appellant's own evidence, so resort to the FTT's wider knowledge cannot properly be characterised as unfair in any material way. Furthermore, the FTT's acceptance that shorts were sometimes worn off-duty (contrary to the Judge's comment that she had herself never seen anyone in shorts during her tour) fundamentally undermines the argument that the Judge (and by extension the panel) rejected the Appellant's evidence on the basis of her own experience.

<u>The Appellant's other main written submissions in the context of Ground 1</u>

50. As originally drafted, Ground 1 alleged that the FTT fell into error by utilising impermissible methods to find facts. This proposition was supported by three discrete sub-grounds, namely that the FTT made findings (i) on the basis of no evidence ('the nil evidence issue'), (ii) on the basis of material that was not part

of the case ('the immaterial matters issue'), and (iii) on the basis of the Judge's misunderstanding of her role ('the controversial recollections issue').

51. As to the first of these, the exemplar for the nil evidence issue appears to be the following passage at paragraph 14.3 of the FTT's decision:

> His role was based in the Main Operating Base (MOB), a large community with a mix of former Afghan buildings, rigid tents and shipping containers housing TFH [Task Force Helmand] personnel, a large canteen, small gym, chapel and shop, together with a helicopter landing site, all surrounded by a perimeter wall.

52. Objection was taken to this passage on the basis that "there is no evidence to support any of the above" (grounds of appeal at §34). This submission goes nowhere. This extract simply contains a description of the conditions at the main base, doubtless informed by the panel's own knowledge. There is no suggestion it is in any way inaccurate or misleading. Moreover, it was not material to the way in which the case was actually decided. In the final analysis, as we shall see in relation to Ground 3, the FTT was not persuaded that the Appellant's melanoma was caused by sun exposure after April 2005 – and the description of the MOB environment was not instrumental to that conclusion.

53. Secondly, the immaterial matters issue concerns a challenge to paragraph 14.5 of the FTT's decision and in particular the reference to "our collective knowledge from such media exposure". This objection has already been addressed in the preceding section of this judgment. The short answer is that the FTT was responding to an ambitious submission by counsel that the Appellant "was out in the heat and sun for 10-12 hours a day during his entire tour and that during this time he was wearing mainly shorts and T-shirts" (paragraph 14.4). The FTT's finding that he would have been wearing full combat dress when out on patrol was, as we have seen, entirely consistent with the Appellant's own evidence.

54. Thirdly, the controversial recollections issue turned on the Judge's comment that while posted to Afghanistan she had not seen army personnel in shorts. This point is also subsumed in the discussion above and has no merit.

<u>The Appellant's other main oral submissions in the context of Ground 1</u>

55. Finally, as regards Ground 1, Mr Rawlinson contended at the oral hearing that there were several contradictory findings in the FTT's decision which amounted to errors of law. The following two examples will suffice to show why this submission lacked traction. First, the FTT found that the Appellant experienced sunburn during his 2004/05 tour of Afghanistan, despite much of the period being in the Afghan winter (paragraph 13.6). It was suggested that the panel took a contradictory approach in paragraph 14.7 dealing with his last 2017/18 tour. On any fair reading there is no inconsistency in terms of the effect of winter sun exposure; rather, the panel was pointing to the very different nature of the Appellant's roles during these two respective periods. Secondly, Mr Rawlinson argued there was a contradiction between the fourth bullet point under 'What we do not know', relating to latency (paragraph 16.5), taken with the panel's finding about latency at paragraph 18.7, and the positive finding of latency in paragraph 19. This critique is akin to counting the number of angels on the head of a pin and is addressed more fully below in the context of Ground 3.

56. Mr Rawlinson's remaining submissions on Ground 1 in large part comprised a commentary on specific passages in the FTT hearing transcript. On closer analysis these observations typically amounted to a thinly disguised invitation to the Upper Tribunal to take a different view of the factual evidence and in particular to accord different weight to particular items of evidence as compared with the FTT's approach. However, to do so would involve the Upper Tribunal impermissibly trespassing on the fact-finding function of the specialist first instance tribunal.

Ground 3

Introduction

57. Ground 3 involves two discrete submissions. The first is the contention that the FTT misdirected itself in law in respect of the non-fault based nature of the AFCS. The second, in summary, is the argument that the FTT erred in law through misapplying *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC); [2016] AACR 3 in the light of the circumstances obtaining in this case.

58. Judge Hemingway had this to say in respect of Ground 3 when granting permission to appeal (emphasis as in the original):

> Having reminded myself of the relatively low threshold applicable when considering a permission application, I do give permission on this ground. It may be the case that the F-tT, whilst correctly identifying the relevance of what had been said in *JM*, did not then apply it correctly.

59. I do not read Judge Hemingway's grant of permission to appeal as limiting Ground 3 to the *JM* point and so proceed accordingly.

The non-fault based nature of the AFCS

60. The argument that the FTT overlooked the non-fault based nature of the AFCS represented a challenge to paragraph 17 of the FTT's decision:

> **17. Were the Services responsible for providing sunscreen**
>
> As noted above, Mr C was well aware from his holidays in Australia of the dangers of sun exposure and the need for sunscreen. He put this knowledge into practice when engaging in activities in his private life, (hill walking and cycling) outdoors. He described his family as being particularly fair skinned (he considered himself to be a Type 3 skin type; i.e. tans fairly easily) and therefore particularly careful in the sun.
>
> In these circumstances we find it extraordinary that he failed to pack sunscreen when posted to a known hot and sunny location, especially after he had learned lessons about sunburn from previous postings. We do not accept his assertion that this would make his baggage 'too heavy'; a bottle of sunscreen would be insignificant in relation to the considerable other 'kit' he would be taking, and, during his longer tours, supplies could be replenished during mid-tour breaks back home, or in local shops where appropriate.
>
> We accept that service is primarily responsible for providing protection against specific risks in operational areas and malaria is the most common example with medication, nets and appropriate clothing being routinely supplied. However, we find that sunshine is a global phenomenon and

> individuals would be expected to source their own, depending on preferred brands, SPF factor etc. for use both on and off duty. We note that sunburn to the extent that it prevents a service person from carrying out their duties is a disciplinary offence in the military.
>
> We therefore consider that sunscreen should be viewed in the same light as personal toiletries such as shampoo/soap/toothpaste and there is no 'factor of service' in the non-standard provision of sunscreen.
>
> Notwithstanding the above it is clear that there is no consensus about whether sunscreen is effective, with protective clothing and avoidance of exposure either side of midday also being important.

61. Counsel for the Appellant also drew attention to paragraph 18.3 of the FTT's decision, namely the finding that "It was his responsibility to equip with and use sunscreen when necessary". As such, so it was argued, the FTT was identifying an alleged failure on the part of the Appellant as being causative, and this finding was in complete disregard of the non-fault based nature of the AFCS.

62. This submission is unpersuasive for three reasons.

63. First, the FTT was entitled to consider who bore the responsibility for the provision of sunscreen, not least because the issue had been raised at the hearing. This was ultimately an issue of fact, not law. If armed forces personnel bear that responsibility, then to the extent that injury was caused by lack of sunscreen it is hard to see how such injury could be said to have been caused by service. As Mr Hays observed in his skeleton argument (at §29), nobody could seriously suggest that rotten teeth caused by a soldier's failure to use toothpaste would be an injury caused by service.

64. Secondly, and crucially in any event, it so happened that the issue of the responsibility for providing sunscreen turned out not to be determinative in any significant respect. It is not as though the FTT found that post-2005 sun exposure was causative but then ruled out that factor as a service cause on the basis that the Appellant had neglected to apply sunscreen. As the FTT had noted at paragraph 16.3, "Para 4.16 [of the UVR Synopsis] states that studies into the relationship between sunscreen and melanoma are inconsistent. The consensus is that properly applied they help to reduce solar damage but protection against melanoma is less certain." This led to the FTT's observation in paragraph 17 that "it is clear that there is no consensus about whether sunscreen is effective". In short, the FTT's conclusion was that it was not satisfied that post-2005 sun exposure was the cause of the melanoma, whether or not the extent of exposure might have been alleviated by sunscreen.

65. Thirdly, it is axiomatic that tribunals need not refer to well-known principles of law – they are assumed to know them unless their reasons demonstrate otherwise. As Burnett LJ (as he then was) remarked in *EJA v Secretary of State for the Home Department* [2017] EWCA Civ 10 (at [27]) "some principles are so firmly embedded in judicial thinking that they do not need to be recited". By the same token, a principle as elementary as the no-fault basis of the AFCS (and indeed of its predecessor war pensions scheme) is part of the daily currency of a FTT sitting in the WPAFCC. One would need compelling evidence before making a finding that a tribunal had failed to observe such a fundamental tenet of the statutory scheme. No such warrant applies in the present case.

The causation test and *JM v Secretary of State for Defence*

Introduction

66. Mr Rawlinson and Ms Skander, in their oral and written submissions respectively, placed rather more emphasis on the second aspect of Ground 3, namely their critique of the way in which the FTT had interpreted *JM v SSD* and thereafter applied the causation test.

Key points from the three-judge panel's decision in JM v Secretary of State for Defence

67. The appellant in *JM* was a soldier who made a claim under the AFCS for depression, allegedly caused by bullying while in service. The Secretary of State rejected the claim. A tribunal dismissed the soldier's appeal, holding that his depression was caused by multiple factors including personal, domestic and marital problems. His further appeal to the Upper Tribunal was allowed by a strong three-judge panel (Charles J, UTJ Rowland and UTJ (Shelley) Lane and the case remitted for rehearing by a fresh FTT.

68. At paragraph 118 of its judgment in *JM* the Upper Tribunal set out the following four-staged process as the correct approach to issues of causation and predominant cause under the AFCS:

> **The steps to be taken in the application of the AFCS test**
>
> 118. The analysis we have set out founds the conclusion that the correct approach to the issues of cause and predominant cause under the AFCS is:
>
> i) First identify the potential process cause or causes (i.e. the events or processes operating on the body or mind that have caused the injury);
>
> ii) Secondly, discount potential process causes that are too remote or uncertain to be regarded as a relevant process cause;
>
> iii) Thirdly, categorise the relevant process cause or causes by deciding whether the circumstances in which each process cause operated were service or non-service causes. It is at this stage that a consideration of those circumstances comes into play and the old cases on the identification of a service cause applying the old attributability test provide guidance.
>
> iv) Fourthly, if all of the relevant process causes are not categorised as service causes, apply the predominancy test.

69. The Upper Tribunal in *JM* then provided further analysis of what was meant by the notion of a predominant cause before giving the following more 'high level' guidance (the reference to Mr Marshall is to *Marshall v Minister of Pensions* [1948] 1 KB 106):

> 134. But in our view the width of the language permits a more sophisticated approach to deciding whether, as the Secretary of State put it, conceptually the service cause contributes more than one half of the causative stimulus for the injury claimed, and thus whether service is the predominant cause in

> a case where (after the categorisation process) the only competing causes are service and constitutional or other pre-existing weaknesses. In such a case the decision-maker generally should firstly consider whether, without the "service cause", the injury would:
>
> (a) have occurred at all, or
>
> (b) have been less than half as serious.
>
> 135. If the answer to the first question is that the injury would not have occurred at all in the absence of the service cause, we consider that this can and generally should found a conclusion that the service cause is the predominant cause of the relevant injury. It seems likely that a claimant in Mr Marshall's position would succeed on this basis.
>
> 136. If however that is not the answer to the first question, the second question will generally found the answer to whether the service cause is the predominant cause of the relevant injury. Thus the second question is likely to be determinative in the present case if it is found that the claimant's depression was caused both by service and by pre-existing domestic factors.
>
> 137. We consider that this approach fits with and promotes the underlying intention of the AFCS to pay compensation for an injury that has more than one process cause that under the categorisation exercise we have described fall to be taken into account as respectively service and non-service causes.
>
> 138. We repeat that this is not intended to be prescriptive guidance and that it may need to be modified or abandoned in some cases. For example, we acknowledge that timing issues could cause complications that warrant a departure from it.

70. For the avoidance of doubt I start from the premise that *JM* was correctly decided as to the application of the predominancy test in the context of the assessment of causation under the AFCS. Indeed, as *JM* is a decision of a three-judge panel it is binding on me as a single judge of this Chamber (*Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC)) just as it is binding on the FTT.

The First-tier Tribunal's approach to the decision in JM v SSD

71. The FTT cited paragraphs 134-136 of *JM* at paragraph 9 of its own decision as well as setting out paragraph 145 (which is in the form of a direction to the remitted tribunal, effectively in identical terms to paragraph 118 of the three-judge panel's judgment). It therefore cannot seriously be suggested that it misdirected itself as to the law, and Mr Rawlinson did not suggest as much – rather, his submission was that the FTT had erred in the application of the relevant legal tests to the facts. The FTT then sought to apply that template to the circumstances of the present case in the final paragraph 19 of its own decision, which I replicate here for convenience:

> **19. Applying the Law**
>
> We have largely followed the guidelines helpfully set out in *JM vs SoS* and quoted at Para 9 above but with the fundamental distinction that this is not

only a question of whether service was the predominant cause, but whether service after 6th April 2005 was the predominant cause.

We have first considered whether, without a 'service cause' the injury would have occurred at all. We conclude that sun exposure post April 2005 might have led to some form of melanoma, but not for many more years. The first mole was noticed by Mr C in 2013, only 8 years post the start of AFCS service, and there is no evidence at all that such a short latency period (even up to malignancy in 2018) would be causative. This is presumably why the IMEG report concludes at Para 14 that *in general, none of these circumstances is likely to be met due to service after 6 April 2005 and so most cases of NMSC and CMM claimed under AFCS will be liable to rejection. However, each case will be considered on its facts.* (NMSC stands for non-melanoma skin cancers). Clearly as time goes on, this conclusion will carry less weight as the period between exposure and onset becomes more stretched.

The second question is (applying the test in *JM* above) whether without the 'service cause' the injury would have been less than half as serious. In our view, the basic injurious process started pre 2005. It would be wholly speculative, unsupported by the medical evidence and certainly not meet the standard of proof or the predominancy test for us to conclude that the onset of Mr C's CMM would have been less than half as serious if he had not had post 2005 sun exposure. In the specific case of CMM it is difficult to envisage what 'half as serious' might look like, and the Medical Opinions to which we have referred above do not even discuss such a concept. *JM* was a case about mental health conditions where it is somewhat easier to tease out the effects of service and non-service factors.

We have also noted the IMEG conclusion that each case should be considered on its facts. Had there been no pre 2005 sun exposure at all (not only in service), and Mr C were very much younger then there might be an argument for a service cause but bearing in mind the medical evidence that UVR is not the only factor. On the evidence in this appeal, this is not such a special case.

The Appellant's challenge to the FTT's approach to the decision in JM v SSD

72. It has to be said at the outset that the basis on which this third ground of appeal has been advanced by counsel on behalf of the Appellant has shifted somewhat over time.

73. First, the Appellant's original grounds of appeal accepted that the approach to causation as set out in *JM* was correct, but sought to argue that the FTT had misdirected itself in the application of that test to the facts of the case. For example, it was argued that there was an inherent contradiction between the FTT's finding that the IMEG report did not try to define a latency period (paragraph 18.7) and its conclusion a few sentences later that "sun exposure post April 2005 might have led to some form of melanoma, but not for many more years" (paragraph 19).

74. Secondly, however, the Appellant's skeleton argument then raised the possibility (at §16) that *JM* had no application in the case of a 'long-tail' condition ("It is difficult to conceive of how the application of a predominancy test would apply to

an 'all or nothing' (and hence indivisible) condition"). On this basis, the Appellant's "primary case" was then put rather differently – namely "if *JM* is found not to be applicable". By analogy with *Holmes v Poeton Holdings Ltd* [2023] EWCA Civ 1377; [2024] 2 WLR 1029, it was argued that the AFCS causation test should be whether service has made a "material contribution in fact" to the outcome. Failing that, and as it was put, "even if" *JM* remained good law, the Appellant's case in the alternative was that his appeal should have succeeded by reference to factors such as genetic susceptibility and current medical knowledge.

75. Thirdly, and finally, Mr Rawlinson's oral submissions at the Upper Tribunal hearing involved a further change of tack. He reverted to the position that the approach to causation as set out in *JM* was correct and accordingly eschewed any suggestion that the common law test of a "material contribution in fact" was sufficient to meet the predominancy test. In concluding, he argued that the application of the four-fold staged process in paragraph 118 of *JM* only admitted of two possible outcomes. The first was to accept that there was nothing to do but throw one's hands in the air as a long-tail cancer case would never satisfy the predominancy test. The second was to acknowledge that the predominancy test was satisfied in this case by reliance on the majority of periods of intense sun exposure having taken place in the post-2005 period. Mr Rawlinson averred that the latter was both the correct and the just approach.

76. As I understood them, Mr Rawlinson's submissions necessarily proceeded on the following basis. As to the first element of the four-stage test in paragraph 118(i), both pre-2005 UVR exposure in service and post-2005 UVR exposure in service were potential process causes. As to paragraph 118(ii), there were no other possible process causes in play as intense exposure to the sun during service (at whatever date) was the only operative process cause (childhood exposure having by now been discounted). As to paragraph 118(iii), this likewise posed no problem as there was no relevant non-service cause. As to paragraph 118(iv), Mr Rawlinson submitted that here the FTT had misapplied the predominancy test. Thus, as it had been framed in the grounds of appeal, it was argued that "the evidence demonstrated that the overwhelming balance of the exposure post-dated 2005" (at §69). This comes perilously close to a perversity challenge.

77. In support of the proposition that the overwhelming balance of the Appellant's UVR exposure post-dated 2005, Mr Rawlinson provided (at the Upper Tribunal oral hearing) a document entitled 'Tables of Exposure'. This sought to tabulate the respective periods of sun exposure during the Appellant's first and second periods of service. It purported to show 14 months of UVR exposure in the 1988-1997 period and 32 months of sun exposure in the second period of service (namely after 2004). Quite properly Mr Rawlinson acknowledged that this was not a document that had been agreed by Mr Hays, but, in any event, he argued that it was simply collating the evidence as it was before the FTT and presenting it in a compendious manner. For present purposes I leave to one side the facts that (i) no formal application was made to admit this document in the Upper Tribunal; (ii) the Respondent has not agreed it (and so Mr Hays has not made submissions on it); and (iii) self-evidently it was not put before the FTT, at least in the present form.

    A superficial reading of the 'Tables of Exposure' document might indeed appear to support the argument that "the overwhelming balance of the exposure post-

dated 2005". On the face of it at least, 32 months of exposure far outweighs 14 months.

TABLES OF EXPOSURE

First Period in the army from 1988 to 1997

Year(s)	Location	Evidence	Total exposure	Grand total
1988	Canada	UT 122	2 months	
1991	Canada	UT 122	2 months	
Summer 1994	Bosnia	UT 122	2 months	
1996	South Carolina	UT 122	8 months	
				14 months

Second Period in the army

Month/Years(s) From:	Location	Evidence	Total Exposure	Grand total
October 2004 to April 2015	Afghanistan	UT 124	6 months	
February 2006	Kenya (grand prix)	FTT 73R UT 125	2.5 months	
October 2007	Oman	UT 124	2.5 months	
16 March 2009 to November 2009	Afghanistan	UT 126 FTT 91-92	8 months	
26 October to 15 May 2010	Afghanistan	FTT 95	3 months	
September 2017 to June 2018	Afghanistan	UT128	10 months	
				32 months

78. The reality, however, is that on closer scrutiny the document does not prove what it seeks to assert. In particular, the second period of the Appellant's service is not congruent with post-2005 service, as the first entry for the second period (6 months in Afghanistan, October 2004-April 2005) properly counts as pre-AFCS service. Furthermore, the last entry for the second period of service (10 months in Afghanistan, September 2017-June 2018) cannot realistically be included as relevant causative sun exposure, given both (a) the FTT's factual finding about this period ("This winter deployment was primarily office based indoors": paragraph 14.7) and (b) what is known about latency (an issue to which I also return below). It follows that providing an aggregate duration of sun exposure of 14 months (for the first period of service) and 32 months (covering the second period of service) is of no relevance and is potentially misleading. The self-same data can be more accurately recategorized respectively as 20 months' exposure (being the original 14 months + 6 months from 2004/05) for pre-April 2005 service and 16 months' exposure (32 – 16 (6 + 10)) for post-April 2005 AFCS service. Looked at in this more nuanced way, the evidential case for post-April 2005 exposure as being predominant in comparison to the pre-April 2005 exposure is not at all obvious.

79. Be all that as it may, it is not the Upper Tribunal's role to review and redecide the facts where the right of appeal is confined to an error of law jurisdiction. As rehearsed above, the FTT here made detailed findings of fact as to the Appellant's UVR exposure both before and after April 2005 in the section of its decision headed 'The evidence relating to the Appellant's sun exposure' (which actually contains a combination of a narrative of some of the key evidence together with the FTT's factual findings) – see paragraph 24 above. Those findings amply supported the FTT's overarching and determinative findings of fact as neatly summarised at paragraphs 18.1 and 18.2 of its decision:

> 18.1 Mr C suffered multiple episodes of sun exposure of short duration and unknown intensity from early adulthood until around 2017. All of this was in a military, not civilian setting.
>
> 18.2 When out on patrol in Afghanistan, Mr C would be substantially covered up and protected against the sun. Sun exposure during his other post 2005 tours would have been of shorter duration and intensity.

80. All this notwithstanding, the outcome of the application of the causation test cannot be determined by a somewhat arid arithmetical exercise of counting the respective numbers of years and months of UVR exposure both pre- and post-April 2005 (and even putting to one side the obvious point that the intensity of exposure at any given time and at any given location will vary according to both geographic and climatological factors). Instead, the assessment of causation is a complex multi-factorial exercise, taking into account 'What we do know' (paragraph 16.6) and bearing in mind 'What we don't know' (paragraph 16.5). The question of latency is part of this wider process of multi-factorial assessment. In this context two principal submissions were made on behalf of the Appellant as regards the FTT's approach to latency.

81. The first, as outlined above, was the submission that there was a contradiction between the FTT's finding that the medical evidence did not "define a latency period" (paragraph 18.7) and its conclusion just several sentences later that sun

exposure in the Appellant's AFCS service "might have led to some form of melanoma, but not for many more years" (paragraph 19). This argument goes nowhere. In stating that the medical evidence did not "define a latency period", the FTT was simply observing that the medical evidence did not specify a set number of years (or a range of years) for latency. Rather, the UVR Synopsis stated in more guarded terms that "'childhood sunburns … have been linked to melanoma in later life' implying a long latency period" (paragraph 16.5, 4th bullet point). This understanding was reinforced by the acknowledgement that exposure as a child or young adult "is a potent risk factor" ('What we do know', paragraph 16.6, 1st bullet point). In short, the FTT was recognising that a trigger event may occur in youth or early adulthood but not manifest itself until much later in life and indeed it noted that "Mr C's age profile is consistent with a 'peak incidence in the fifth decade'" ('What we do know', paragraph 16.6, 3rd bullet point). It follows that there is no inconsistency between the FTT finding there is no defined (in the sense of definitively specified) latency period and its conclusion that e.g. the mole first identified in 2013 was unlikely to be attributable to (relatively recent) exposure to UVR after April 2005.

82. The second main submission on latency was that the FTT had failed to define what it meant by the "basic injurious process" (paragraph 16) and failed to distinguish between what Mr Rawlinson referred to as latency type 1 and latency type 2. By latency type 1, he meant the time lag after the exposure to the harmful agent and the period during which no changes to the body took place. By latency type 2 he referred to the later period that elapsed after the affected cells begin to mutate and the cancer spreads. There are at least two reasons why this submission is unpersuasive. The first is that this was not how the case was run before the FTT, so the tribunal can hardly be properly criticised for failing to make this distinction. The second is that on any fair reading of the FTT's decision as a whole it is perfectly clear what it meant by the "basic injurious process". It was referring to the entirety of the period from the time of the relevant causative exposure to the time that the melanoma manifested itself, namely, as the FTT put it, "the timeline between exposure and onset" (paragraph 16.5, 3rd bullet point), in other words the latency period as that term is commonly understood.

83. I therefore conclude that the FTT did not err in law in its approach either to the issue of latency nor to the application of the *JM* predominancy test.

Pulling the threads together

84. I agree with Mr Hays's submission that the final paragraph of the FTT's decision is telling:

> We have also noted the IMEG conclusion that each case should be considered on its facts. Had there been no pre 2005 sun exposure at all (not only in service), and Mr C were very much younger then there might be an argument for a service cause but bearing in mind the medical evidence that UVR is not the only factor. On the evidence in this appeal, this is not such a special case.

85. In summary, the FTT was postulating that even if there had been no pre-2005 sun exposure then the Appellant would not necessarily have succeeded in an AFCS claim. This passage, and a fair reading of the decision as a whole, confirms that the FTT was influenced in reaching its conclusion as to causation by three

factors in particular. The first was that the Appellant's age was important – in particular, the exposure during AFCS service took place when he was in his late 30s (or older) and not when he was a young adult. The second was the significance of latency, with diagnosis in the fifth decade of life being the period of peak incidence. The third was that UVR is by no means the only factor in causing melanoma. Strictly speaking, and given the finding that post-2005 exposure was not causative, the FTT did not need to delve into the predominancy test – the Appellant's case (and, of course, the burden of proof was on him) fell at the first hurdle in paragraph 118 of the decision in *JM*.

Conclusion

86. For all the reasons above, I dismiss this appeal as neither of the two grounds of appeal on which permission was granted is made out.

Nicholas Wikeley
Judge of the Upper Tribunal

Approved for issue on 6 June 2024