Neutral Citation Number [2024] UKUT 395 (AAC) **Appeal No. UA-2023-000558-AFCS**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

Secretary of State for Defence

Appellant

- v -

HM

Respondent

Before: Upper Tribunal Judge Church
Hearing date(s): 05 September 2024
Mode of hearing: Remote video hearing by CVP

Representation:
Appellant: Ms Jennifer Seaman of counsel, instructed by the Government Legal Department
Respondent: Mr Thomas Banks of counsel, instructed by Hilary Meredith Solicitors

On appeal from:
Tribunal: First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber)
Tribunal Case No: AFCS/00498/2021
Tribunal Venue: Arnhem House, Leicester (remote hearing by video)
Decision Date: 10 January 2023

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the respondent in these proceedings. This order does not apply to: (a) the respondent; (b) any person to whom the respondent discloses such a matter or who learns of it through publication by the appellant; or (c) any person exercising statutory (including judicial) functions where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

SUMMARY OF DECISION

WAR PENSIONS AND ARMED FORCES COMPENSATION (56)
56.5 Armed Forces Compensation Scheme

This decision considers the proper interpretation of, and approach to, Article 11 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011.
In particular, it considers:

- when Article 11 must be considered by a tribunal, and
- where an injury was sustained or worsened by participation in sporting activity, what is required to fall within the exceptions in Article 11(6) to the exclusion of benefit in Article 11(5).

It decides that the sport of rugby has been "approved" by the Defence Council for the purposes of Article 11(6)(a) but subject to conditions, including that involvement in civilian rugby is at the participant's own risk and must be done in the participant's own time. Therefore, while participation in civilian rugby is not prohibited, the Defence Council's approval of the sport of rugby for the purposes of Article 11(6)(a) of the AFCS Order does not extend to civilian (including civilian charity) rugby.
It decides that the requirement in Article 11(6)(a) that a sporting event and the organisation and training for it be "recognised" by the relevant Service prior to the event requires more than simply an acknowledgement of the awareness by someone in the chain of command that the event will occur and may require training, and that clinical advice on injury management given by a medical officer in the course of medical appointments is incapable of amounting to recognition by the Service for the purposes of Article 11(6)(a).
It decides that while a one-off civilian charity rugby match may provide some benefit in terms of maintaining physical fitness, such a benefit is merely incidental: its purpose is to raise funds for charity and to raise the charity's profile, rather than to meet or maintain physical standards required of members of the forces, and it does not satisfy the requirements for the exception in Article 11(6)(b) to apply.
SM v SSD [2018] AACR 4 followed.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), b(ii) and (4) of the Tribunals, Courts and Enforcement Act 2007, I set the decision aside and remake the decision as follows:

> "The appeal is dismissed. The claimant is not entitled to an award of compensation in relation to his left knee injury. The Secretary of State's disallowance decision of 30 January 2018 is confirmed."

REASONS FOR DECISION

Introduction

1. This appeal is about the scheme established by the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011, SI 2011/517 (the **"AFCS Order"**) to compensate people for illness or injury attributable (wholly or partly) to their service in the armed forces or reserve forces (the **"AFCS"**). The AFCS is administered by Veterans UK on behalf of the Secretary of State.

2. This appeal raises the issue of when Article 11 of the AFCS Order is relevant, and how that Article should be interpreted and applied.

The agreed factual and procedural background

3. The Respondent (to whom I shall refer in this judgment as **"the claimant"**) served with the Royal Navy from 16 September 2011 until 8 February 2018, when he was medically discharged.

4. This appeal is brought by the Secretary of State with the permission of the First-tier Tribunal.

5. The claimant injured his right knee playing rugby for the Royal Navy. He underwent reconstructive surgery in July 2012 and on 12 August 2013 was graded "P2" (see page 243 of the appeal bundle). This signified that the claimant was fit for a return to full duties, but it did not amount to a clinical assessment that he was either injury-free or symptom-free.

6. On or around 24 July 2014 the claimant sought medical advice from Dr Iddles, a medical officer at HMS Nelson, regarding pain in his right knee. He was referred to physical rehabilitation (see page 125 of the appeal bundle).

7. On 27 July 2014 the claimant played in a civilian charity rugby match (the **"Fixture"**).

8. The Fixture was not organised by the Royal Navy (see §30 of the claimant's witness statement at page 53 of the UT bundle), although the claimant was not forbidden to play in it.

9. In the course of the Fixture, the claimant injured his left knee. He had reconstructive surgery on his left knee in February 2015.

10. On or around 23 May 2015 the claimant twisted his left knee going down the stairs at his service accommodation at HMS Drake.

11. On or around 8 December 2017 the claimant made a claim under the AFCS for compensation in respect of his left knee injury.

12. On 30 January 2018 the Secretary of State disallowed the claimant's claim for compensation in respect of his left knee injury. In the disallowance decision, which was addressed to the claimant, it was explained that the Secretary of State:

> "does not accept that your left knee injury is wholly or predominantly caused by service. The evidence shows that you sustained an injury to your left knee whilst playing charity/civilian rugby in 2014. You were not carrying out a service obligation at the time of your injury and you had not presented with your left knee prior to this incident."

13. The claimant applied for reconsideration of the disallowance decision. When this was unsuccessful, he appealed to the First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber) on the basis that his previous service-related injury to his right knee was a partial cause of the injury to his left knee, and therefore his left knee injury was partly caused by service.

Factual issues in dispute

14. There is some dispute in relation to the process cause of the claimant's left knee injury as well as whether that injury was predominantly caused by service. However, because of what I have decided in relation to Article 11, I do not need to decide these matters in this appeal.

15. What the claimant was told by Service physiotherapists and by Dr Iddles at appointments regarding his left knee injury in the days leading up to the Fixture is disputed. For the purposes of this appeal, I have taken the claimant's evidence at face value, and proceeded on the basis that he was "given the green light" by Dr Iddles to play rugby (as the three-member panel of the First-tier Tribunal which heard his appeal on 9 January 2023 (the **"Tribunal"**) found to be the case).

16. There is also a factual dispute as to whether the Defence Council has "approved" the sport of rugby generally for the purposes of Article 11(6)(a) of the AFCS Order and whether Dr Iddles or the Service physiotherapists who treated the claimant had authority to "recognise" the Fixture, or the organisation and training for it, on behalf of the Royal Navy, and whether they in fact did so.

17. I discuss these matters below in the context of my analysis of Article 11 and its proper application.

Legal framework

18. Section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004 (the **"2004 Act"**) permitted the Secretary of State by Order to "establish schemes which provide for benefits to be payable to or in respect of a person by reason of his illness or injury (whether physical or mental), or his death, which is attributable (wholly or partly) to his service in the armed forces or the reserve forces". The Secretary of State established the AFCS pursuant to the 2004 Act by way of the AFCS Order.

19. The articles of the AFCS Order that are most relevant for the purposes of this appeal are Articles 8 and 11. They provide (so far as applicable):

> "Article 8 – Injury caused by service:
>
> "(1) Subject to articles 11 and 12, benefit is payable to or in respect of a member of former member by reason of any 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."
>
> Article 11 – Injury and death – exclusions relating to travel, sport and slipping and tripping

"… (5) Except where paragraph (6) or (9) apply, benefit is not payable to or in respect of a person by reason of an injury sustained by a member, the worsening of an injury, or death which is caused (wholly or partly) by participation in sporting activity, as –

(a) a player;

(b) a referee;

(c) an organiser or a representative of a particular sport or sporting organisation."

"(6) This paragraph applies where –

(a) the Defence Council have approved the sport or sporting activity as being a sport which enhances the fitness, initiative and endurance of members of the forces, and prior to the event, the relevant Service has recognised the particular sporting event and the organisation and training for it; or

(b) the sporting activity is approved by the Defence Council which is undertaken for the purpose of meeting and maintaining the physical standards required of members of the armed forces.

(7) For the purposes of paragraph 6(a), the Defence Council may approve a single sport or sporting activity or a class of such activities and may approve such activities unconditionally or subject to any specified condition.

…

(10) In this article –

…

(c) "sporting activity" includes an adventurous course or an adventurous expedition approved by the Defence Council."

The First-tier Tribunal's decision

20. The Tribunal allowed the claimant's appeal on the basis that his left knee injury was predominantly caused by service within the meaning of Article 8 of the AFCS (the **"FtT Decision"**). The FtT Decision is set out in the decision notice signed on 10 January (the **"FtT Decision Notice"**), as supplemented by the full written reasons issued on 22 February 2023 (**"Full Reasons"**).

21. The Tribunal's route to the FtT Decision was somewhat involved. It made the following findings:

a. the injury to the claimant's right knee in 2011 (some years before the charity Fixture) was a "service cause", but while the right knee injury was a "substantial" cause of the left ACL injury it was not the "predominant" cause;

b. the medical advice given to the claimant on or around 24 July 2014 was "given by service medical officers" and was a service cause (see §10.2 of the FtT Decision Notice);

c. the medical advice given to the claimant on or around 24 July 2014 led the claimant to believe that he was "given the green light to play the game", and the claimant would not have returned to playing rugby in the Fixture had he been advised not to play by the medical team (see §11.2 of the FtT Decision Notice);

d. the claimant's decision to play in the Fixture was a non-service cause (see §10.2 of the FtT Decision Notice);

e. the playing of the Fixture (during which the left ACL injury was sustained) was a non-service cause (see §10.3 of the FtT Decision Notice); and

f. the claimant sustained the left ACL injury "when side stepping in the course of the game" and was "not caused by any collision, hard tackle or other trauma" (see §11.2 of the FtT Decision Notice).

22. The Tribunal said it "could not usefully distinguish the causal weight of the decision to play the charity match from that of actually playing the game, since they amount to the same thing" and so it proceeded to make a "composite assessment" of both. It decided that "deciding to play and playing the game" was a "major factor" contributing to the left knee ACL injury on 27 July 2014 about half of which was due to the medical advice ([Service Cause]) and half was due to [the claimant] wanting to play ([Non-Service Cause])" (see §11.2 of the FtT Decision Notice).

23. Ultimately, the Tribunal decided that "it was more likely than not that the contribution to causation of the previous right knee injury and the medical advice, taken together, was more than 50% of the cause of the left knee injury", so service causes preponderated and the claimant's appeal should be allowed (see §11.3 of the FtT Decision Notice).

24. In its Full Reasons the Tribunal referred to Article 11 of the AFCS and said:

> "… we thought it likely the [Secretary of State for Defence] was right not to rely on it. It was within the knowledge and experience of the Tribunal that rugby had been approved by the Defence Council as being a sport which enhances the fitness, initiative and endurance of members of the forces. Further, as explained above, the Service physiotherapists had sanctioned [the claimant]'s return to rugby training and the service medical officer had been consulted on 24 July 2014 about the charitable rugby match on 27 July 2014. Accordingly, the Tribunal thought it likely the exception under Article 11(6) would have applied to any exclusion that might have been advanced by the [Secretary of State for Defence] under Article 11(5)."

The grounds of appeal and the parties' submissions

25. Permission to appeal was granted by Judge Siddique of the First-tier Tribunal. I later gave the Secretary of State permission to rely on amended grounds of appeal. The amended grounds are summarised below.

26. Ground 1: the First-tier Tribunal misapplied Article 11 of the AFCS because it mistakenly decided that the facts of this case brought the claimant within Article 11(6). It should instead have decided that the circumstances of this case did not fall within Article 11(6) of the AFCS because:

    a. the Defence Council had not approved charitable rugby games as a sporting activity "which enhances the fitness, initiative and endurance of members of the forces" and the Royal Navy did not, prior to the event, recognise the Fixture or the organisation and training for it;

    b. only the UK Armed Forces Sports Board, Single Service Sports Boards or unit commanders (and not service physiotherapists or service medical officers) have authority to recognise a sporting event and the organisation and training for it, and they did not do so in respect of the Fixture;

    c. the sporting activities approved by the Defence Council which are undertaken for the purpose of meeting and maintaining the physical standards required of members of the forces are running, cycling, circuit training, weight training and other fitness activities, which are a separate category to sporting events, and do not include charity/civilian rugby matches.

d. due to the operation of Article 11(5), therefore, the claimant was not entitled to compensation for his injuries.

27. Ground 2: the First-tier Tribunal erred in law by failing to take into account relevant material facts, and consequently made an irrational finding that service was the predominant cause of his left knee injury.

28. The Secretary of State asks that the FtT Decision be set aside and asks me to remake the decision confirming the Secretary of State's disallowance of the claim in respect of the claimant's left knee injury.

29. The claimant resists the appeal. It was argued by Mr Banks on his behalf that Article 11 wasn't in issue in the appeal before the Tribunal, and what the Tribunal said about Article 11 was therefore *obiter* only. He argued that the appeal before the Upper Tribunal should be determined solely in relation to the Tribunal's decision making in relation to Article 8 of the AFCS Order, on which the FtT Decision was based.

30. He argued further that even if Article 11 was relevant to the appeal, the claimant's circumstances fell within the exceptions in both Article 11(6)(a) and Article 11(6)(b).

31. Mr Banks also argued that the Tribunal's findings of fact were open to it on the evidence as it assessed it, and there was nothing irrational about them.

32. The claimant maintains that the FtT Decision involved no material error of law, and should be confirmed.

Analysis

Was Article 11 of the AFCS Order in issue in the appeal before the Tribunal?

33. It appears that the arguments and evidence at the hearing before the Tribunal focused on the issue of whether the claimant's left knee injury was predominantly caused by service.

34. The relationship between Articles 8 and 11 of the AFCS Order was considered by the Upper Tribunal in *SM v SSD* [2018] AACR 4. At §17 Judge Rowland said:

> "At first sight, there is no connection at all between articles 8 and 11 of the [AFCS Order], but article 11 in fact addresses a number of issues that have caused difficulty when considering the scope of both the civilian industrial injuries scheme and the war pensions scheme (which

> preceded the Armed Forces Compensation Scheme and where the issues was whether disablement is "attributable to service") and might otherwise cause difficulty when considering whether an injury was caused by service for the purposes of article 8. The object of article 11 therefore appears to be to introduce an element of clarity in those areas."

35. Judge Rowland expressed some doubt as to how successful this venture had been, and noted that there was an "untidy overlap" between the questions arising under articles 8 and 11. He went on (at §18) to say:

> "Nonetheless, it will usually be unprofitable to consider whether injuries caused by travel, sport or slipping, tripping or falling might have been caused by service without considering at the same time whether the circumstances fall within an exclusion under article 11; if they do, that will be the end of the case. On the other hand, the fact that a claimant's case falls within one of the exceptions to the exclusions in article 11 is likely considerably to assist the claimant in showing that the relevant injury was caused by service…"

36. In *SM v SSD* Judge Rowland went on to say (at §18) that "some cases will effectively be determined under article 11, whereas others will effectively be determined under article 8".

37. In *Stoddart v SSD* UA-2020-000010-CAF Judge Hemingway said that the AFCS Order sets out a "structured approach" that a decision-maker, including a First-tier Tribunal, must follow. He said the first step was to consider whether the relevant injury has been caused wholly by service and on or after 6 April 2005. If the answer to that is "no" it must then consider whether service was the "predominant cause" of the injury. If the answer to that second question is also "no", that is "the end of the analytical process" (at §7). If, however, the answer to either of those questions is "yes" it is then necessary to consider whether an exclusion applies which would prevent benefit being payable. A finding that the injury had a cause that fell within one of the categories in article 11 (such as participation in sport) requires the decision maker to go on to consider whether one of the exceptions applies. He referred to *SM v SSD*, which he described as offering "what might be, at least in some cases, a helpful shortcut" (see §7).

38. The Tribunal explained in §21-24 of its Full Reasons why it didn't fully investigate matters relevant to Article 11. It acknowledged Judge Hemingway's statement in *Stoddart v SSD* that a tribunal which found an injury had been caused predominantly by service was obliged to go on to consider whether an exclusion, which would prevent benefit from being payable, applies. However, it inferred from what Judge Hemingway said in *Stoddart v SSD* that this applied only in an

appeal in which the Secretary of State had advanced a case that Article 11 excluded the payment of benefit.

39. It "noted" that the Secretary of State had "not raised an issue under Article 11 in this appeal" (see §23 of its Full Reasons) and said that "[t]o the extent that the Tribunal considered Article 11, we thought it likely the [Secretary of State] was right not to rely on it" (§24 of its Full Reasons).

40. I find these statements puzzling because the Secretary of State made specific reference to Article 11 in his response to the claimant's appeal (see page 3 of the appeal bundle). He said:

> "Article 8 provides that 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.
>
> The Secretary of State notes the comments made by the Consultant Surgeon. However, the Secretary of State does not accept that your left knee injury is wholly or predominantly caused by service. The evidence shows that you sustained an injury to your left knee whilst playing charity/civilian rugby in 2014. You were not carrying out a service obligation at the time of your injury and you had not presented with your left knee prior to this incident."

41. I find that this response put Article 11 in issue in the appeal.

42. The Tribunal's comment on non-reliance suggests that a concession was made by the Secretary of State at the hearing, but this too would be puzzling, given the way that the AFCS Order is structured.

43. It doesn't matter whether one starts, as Judge Hemingway suggests, with the Article 8 questions, and then proceeds to the Article 11 questions if the answer to at least one of the Article 8 questions is answered in the affirmative, or whether one takes Judge Rowland's "short cut" of considering whether an exception within Article 11 applies from the start.

44. A case will only "effectively be determined" under Article 8 (without considering whether Article 11 applied) if it is decided that no benefit is payable under Article 8 because the injury is not wholly or predominantly attributable to service. Any decision that benefit is payable under Article 8 requires a second stage of consideration of Article 11 and its exceptions.

45. I don't see how the Tribunal can have considered Article 11 not to be relevant to the appeal, and not to be an issue that it needed to determine, given that it found that the injury to the claimant's knee was predominantly attributable to service. Article 8 is subject to Article 11, so a decision to award benefit under Article 8 cannot properly be made without considering the applicability of Article 11. As such, the Tribunal fell into error of law in deciding the appeal under Article 8 without making findings in relation to those matters identified in Article 11.

Was the Tribunal mistaken in its analysis of Article 11?

46. Although the Tribunal said it decided the appeal only on Article 8, it did provide a brief explanation of its thinking on Article 11, indicating that had the applicability of that provision been in issue it would still have allowed the claimant's appeal.

47. To decide whether the error of law I have identified was material it is therefore necessary for me to consider the Tribunal's analysis of Article 11. This is what it said (in §24 of its Full Reasons):

> "It was within the knowledge and experience of the Tribunal that rugby has been approved by the Defence Council as being a sport which enhances the fitness, initiative and endurance of members of the forces. Further, as explained above, the Service physiotherapists had sanctioned the [claimant's] return to rugby training and the service medical officer had been consulted on 24 July 2014 about the charitable rugby match on 27 July 2014. Accordingly, the Tribunal thought it likely the exception under Article 11(6) would have applied to any exclusion that might have been advanced by the [Secretary of State] under Article 11(5)."

48. The Tribunal was an expert tribunal, and it was entitled to draw upon the expertise and experience of its members. However, its explanation doesn't address the fact that the Fixture was in relation to a civilian charity match, rather than a fixture organised by the Royal Navy or another service. Further, while the Tribunal made a finding (presumably based on the claimant's oral evidence at the hearing, which it found compelling) that the service physiotherapists had "sanctioned" his return to rugby training and the service medical officer had been consulted about the Fixture, it didn't explain how it decided based on those findings that the conditions in either Article 11(6)(a) or (b) were satisfied. In particular, it did not explain how it was satisfied that the "sanctioning" of a return to rugby training by the service physiotherapists and the consultation with the medical officer together amounted to "recognition" by the relevant Service of the Fixture and the organisation and training for it. As such, it is not adequately clear from the Tribunal's reasons that

its error of law in failing to determine the issues outlined above in relation to Article 11 was not material.

How should the Tribunal have approached Article 11 and what did it need to say about it?

49. Rather than simply saying that the Tribunal didn't explain its decision making in relation to the Article 11 issues with adequate clarity, I think it appropriate to set out my analysis of Article 11 and how the Tribunal should have interpreted and applied it, and to give guidance on what a tribunal needs to say about it in its reasons for its reasons clear the hurdle of 'adequacy'.

50. Statutory interpretation requires the reader to identify the meaning of the words of the statute in their context. Part of that context is the legislative scheme of which the provision in question is a part, and an important part of understanding a provision's context is to understand the legislative purpose of the scheme as a whole. See *R (PACCAR Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28, 1 WLR 2594 at [40]-[41] per Lord Sales JSC).

51. The same principles apply to the interpretation of secondary legislation such as the AFCS Order, with the added consideration that delegated legislation must be interpreted in the light of the enabling Act (in this case the 2004 Act), the legislative purpose of delegated legislation being assumed to be the purpose of the primary legislation from which it derives (see 'Bennion, Bailey and Norbury on Statutory Interpretation', 8th edition, at §3.17 and *Virgin Media v NTL Pension Trustees II Ltd and ors* [2024] EWCA Civ 843 at §63-68).

52. The legislative purpose of the 2004 Act and the AFCS is to provide state compensation to members of the armed (and reserved) forces where members suffer an injury of which service was the predominant cause. However, Article 8 is expressly stated to be subject to Articles 11 and 12 (see Article 8(1), as set out in §19 above).

53. Certain injuries are expressly excluded if they are not deemed to be attributable to service, such as injuries caused by, or occurring during, social events (Article 11(8)), or slipping or tripping (Article 11(3)), or home to duty travel (Article 11(1)), unless the injuries occur in specified circumstances linking them to service. Injuries caused by smoking, alcohol, drugs or sexual activity, events before service, certain hereditary illnesses or self-inflicted injuries are also excluded (Article 12(1)).

54. Article 11(5) is of particular relevance to this appeal. Under Article 11(5) benefit is not payable in respect of an injury sustained, or worsened, wholly or partly by participation in sporting activity (whether as a player, referee or as an organiser or representative of a sport or sporting organisation). A clear finding as to whether the claimant's injury was sustained or worsened wholly or partly by participation in sporting activity in any of the relevant capacities is therefore required. In this case it was common ground that the left knee injury was sustained or worsened wholly or partly by the claimant's participation in the Fixture as a player.

55. Article 11(5) is itself subject to the exceptions in Article 11(6), and (not relevant to this appeal) Article 11(9)).

56. Article 11(6)(a) excepts from the Article 11(5) exclusion of entitlement, injuries sustained or worsened by participation in sport or sporting activities where (i) those sports or sporting activities have been "approved by the Defence Council as being a sport which enhances the fitness, initiative, and endurance of members of the forces" and (ii) the relevant Service has, prior to the event, "recognised the particular sporting event and the organisation and training for it".

57. Article 11(6)(b) provides a further exception where the injury is sustained in the course of sporting activities "approved by the Defence Council and undertaken for the purpose of meeting and maintaining the physical standards required of members of the forces".

58. So, in order to determine the applicability of Article 11(6)(a) to the claimant's situation, the Tribunal was required to answer the following questions:

    a. was the sport of rugby union "approved" by the Defence Council as being a sport which "enhances the fitness, initiative and endurance of members of the forces"?

    b. had the relevant Service "recognised" the Fixture and the organisation and training for it?

Has civilian/charity rugby been "approved" by the Defence Council?

59. The Tribunal said that it was "within the knowledge and experience of the Tribunal that rugby has been approved by the Defence Council as being a sport which enhances the fitness, initiative and endurance of members of the forces" (see §24 of the Tribunal's detailed written reasons). However, it didn't explain the evidential basis for that position. It should have done.

60. The AFCS Order doesn't specify how sports or sporting activity may be approved by the Defence Council. Miss Bara, a senior executive in the 'Defence People, Armed Forces People Support Compensation and Insurance team', provided a witness statement which sought to shed light on this. In it she referred to two policy documents published by the Ministry of Defence: document JSP 765, entitled 'Armed Forces Compensation Scheme Statement of Policy' (**"JSP 765"**), and document JSP 660 entitled 'Sport in the UK Armed Services' (**"JSP 660"**). She pointed the Upper Tribunal to §2.32 of JSP 765, which states that JSP 660 "sets out the types of sporting activities that are **approved on behalf of the Defence Council** by the UK Armed Forces Sports Board, Single Services Sports Boards or unit commanders" (emphasis added).

61. JSP 765 and JSP 660 are simply policy documents. They are not legislation. The operation of the AFCS is governed by the AFCS Order, not by policy documents. Nothing said in the policy documents can change how the AFCS operates, but these documents are helpful because they show how the Secretary of State seeks to implement the AFCS Order.

62. While JSP 660 refers to "approval" in the context of the approval by the Sports Council of national governing bodies (§11 a. of Chapter 1 of Pt 1), the approval of the constitution and articles of association of UKAF sports associations and amendments to them (§5 a. (3) and (4) and 6 a. of Annex A to Chapter 1 of Pt 1 of JSP 660), as well as approving grants and other funding to sports associations (see §11 of Annex A to Chapter 1 of Pt 1), it does not use the language of "approval" in relation to sports or sporting activities themselves as the AFCS Order does.

63. Neither does JSP 660 refer in terms to "enhancing the fitness, initiative and endurance" of members of the forces (as contemplated by Article 11(6)(a) of the AFCS Order). It does, however, refer to various benefits of service personnel engaging in sport such as contributing "to both mental and physical fitness, teamwork, leadership, self-discipline, determination, co-ordination, courage, competitive spirit, individual and collective resilience, and consequently military ethos" and it says that competitive sport plays a key role in operational capability, making "a significant contribution to operational effectiveness, fighting spirit and personal and collective development".

64. JSP 660 also sets out categorisations of sports by reference to their eligibility for public funding (§11 et seq. of Chapter 1 of Pt 1). In Annexe E to Chapter 1 of Pt 1 of JSP 660 the sport of rugby (both union and league) is listed as a "Cat 1" sport

for all services, and indeed Ms Seaman's submissions at the hearing proceeded on the basis that service rugby was approved, but that the approval did not extend to charity or civilian rugby.

65. Pt 2 of JSP 660 provides "practical guidance" for the organisation, administration and conduct of sporting activity in the UK armed forces. While the focus of that document is principally on participation in sports playing for UK armed forces teams in UK armed forces fixtures, it also deals with the circumstances in which service personnel may participate in civilian sport (see §10 of Chapter 1 of Pt 2) and charity sporting events (see §17 of Chapter 1 of Pt 2) as well as participation in international and elite events (see §22 of Chapter 1 of Pt 2).

66. Article 11(7) permits the Defence Council to approve sports subject to conditions, and §10 of Chapter 1 of Pt 2 of JSP 660 states:

> "Service personnel participating in civilian sport at all levels, including national representation, have no duty status and do so at their own risk and in their own time. The MOD accepts no liability either for personal or third party accident. It is therefore essential that Service personnel involved in civilian sport take out the necessary insurance cover. At national level, athletes should make insurance arrangements with their appropriate [National Governing Body]."

67. Considering the matter in the round, I find that the sport of rugby has been approved by the Defence Council, but its approval is subject to conditions, including that involvement in civilian rugby is at the participant's own risk and must be done in the participant's own time. Therefore, while participation in civilian rugby is not prohibited, the Defence Council's approval of the sport of rugby for the purposes of Article 11(6)(a) of the AFCS Order does not extend to civilian (including civilian charity) rugby.

Was the Fixture, and the organisation and training for it, "recognised" by the relevant Service?

68. Even if I am wrong about the "approval" of the sport of rugby not extending to civilian rugby for the purposes of Article 11(6)(a), for the exception to apply the sporting event (i.e. the Fixture), and the organisation and training for it, must have been "recognised" by "the relevant Service" (which I'll call the **"recognition requirement"**). It is not in dispute that the "relevant Service" in this case is the Royal Navy.

69. The claimant's evidence was that he was seen by Service physiotherapists who "sanctioned" his return to rugby training, and he sought medical advice from Dr Iddles, a medical officer at HMS Nelson, who gave him "the green light" to play rugby in a few days' time (see §8 of the claimant's witness statement at page 45 of the appeal bundle).

70. The Tribunal accepted this evidence and, as I have explained above, I have taken this evidence at face value for the purposes of analysing the application of Article 11 to this appeal. The Tribunal said that it "thought it likely the exception under Article 11(6) would have applied to any exclusion that might have been advanced" under Article 11(5) (see §66 of the Tribunal's written reasons).

71. The recognition requirement in the second limb of Article 11(6)(a) gives rise to two issues:

    a. what does "recognise" mean?

    b. who may "recognise" an event, and the organisation and training for it, and how?

72. "Recognise" is not defined in the AFCS Order. Mr Banks, for the claimant, argued that because there was no requirement that the relevant Service permits, authorises or approves an event, the recognition requirement can be "no more than acknowledgement that the sporting event is happening (and where necessary that it may require training and organisation not done by the Navy)" (see §17(b)(ii) of Mr Banks's Skeleton Argument). Ms Seaman, for the Secretary of State, argued that a more formal process was required.

73. Reading the AFCS Order as a whole, and in the context of its legislative purpose, it is apparent that the requirement must be for more than a mere indication that the relevant Service is aware that the event is taking place. The word "recognise" is capable of bearing several different meanings. It is difficult to see why a requirement for "recognition" would be included if the word were to bear the meaning proposed by Mr Banks. The much more apposite meaning of "recognise" in the context in which it appears in the AFCS Order is the bestowing on the event of a formal status in the nature of an approval or sanction. The reason for such a requirement is the underlying policy that participation in civilian sporting events over which the Service has no control is at the risk of the individual and not of the Service/the AFCS.

74. The next issue is who may recognise a sporting event and the organisation and training for it, and how. Mr Banks argued that anyone in a position of authority in the naval chain of command was capable of satisfying the recognition requirement by acknowledging the existence of the Fixture, and that Dr Iddles, as a medical officer with responsibility for decisions affecting what the claimant could do in the course of his employment, had authority to provide recognition on behalf of the Service for these purposes.

75. Relying on the evidence of Miss Bara, Ms Seaman argued that it was not open to the Tribunal to find that the Fixture and the organisation and training for it was recognised by the Service physiotherapists or Dr Iddles, because only Armed Forces Sports Boards, Single Service Sports Boards or unit commanders were capable of providing such recognition. Miss Bara noted there was no record of any of those entities having recognised the Fixture or the organisation and training for it (see §5-6 of Miss Bara's witness statement) at page 22 of the appeal bundle, and the claimant didn't rely on anything other than the conversations with the physiotherapists and Dr Iddles.

76. As Mr Banks pointed out, Miss Bara used the words "authorise" and "approve" rather than "recognise" when discussing sporting events, and neither "authorisation" nor "approval" is required by Article 11(6)(a) (only "recognition"). However, given what I have said about the proper meaning of "recognition" in this context, that inconsistency is not material.

77. Returning to the circumstances of this appeal, taking the claimant's evidence as to what he was told at his appointments with the Service physiotherapists and Dr Iddles at face value, what is described amounts to clinical advice about the management of the claimant's injury and, at its highest, the giving of permission to train for and play in, the Fixture. It does not amount to "recognition" (properly understood) by the Service of the Fixture itself, or of the organisation and training for it. As such, it was incapable of satisfying the requirements of Article 11(6)(a).

Article 11(6)(b)

78. Mr Banks argued that even if the exception in Article 11(6)(a) wasn't satisfied, the exception in Article 11(6)(b) was made out because "sporting activity" includes rugby union, and rugby union is approved by the Defence Council, and Article 11(6)(b) does not require the sporting event to be "recognised".

79. While "sporting activity" is defined in the AFCS Order, rather unhelpfully it is given an inclusive, rather than an exclusive, definition: it states that it "includes an adventurous course or an adventurous expedition approved by the Defence Council", but it doesn't say what is excluded.

80. While Article 11(6)(a) refers to "sport or sporting activity", it is clear from the words that follow ("as being a sport which enhances the fitness, initiative and endurance of members of the forces…") that something being a "sporting activity" does not necessarily exclude it from being "sport".

81. However, for Article 11(6)(b) to apply, the sporting activity must be "undertaken for the purpose of meeting and maintaining the physical standards required of members of the forces".

82. While a one-off civilian charity rugby match may provide some benefit in terms of maintaining physical fitness, such a benefit is merely incidental: its purpose is to raise funds for charity and to raise the charity's profile, rather than to meet or maintain physical standards required of members of the forces.

83. For all these reasons I am satisfied that the Tribunal erred materially in law in its approach to, and interpretation of, Article 11(6) of the AFCS Order.

84. On its proper interpretation, the exclusion in Article 11(5) applies to the claimant's circumstances and neither exception in Article 11(6) applies. This is, therefore, a case in which consideration of Article 11 is "the end of the case", as Judge Rowland put it in *SM v SSD*.

85. It is not necessary for me to decide the matters raised by Ground 2 of the Secretary of State's grounds of appeal.

Disposal

86. While the making of findings about the process of the injury to the claimant's left knee and whether it was predominantly caused by service are matters that would tend to engage the expertise of the specialist members on the panel and would make a remittal appropriate, because I have decided that Article 11, properly applied, is "the end of the case" as far as eligibility for compensation under the AFCS is concerned, there is no need for such findings, and it is therefore appropriate for me to exercise my discretion in favour of remaking the FtT Decision myself.

Conclusion

87. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), b(ii) and (4) of the Tribunals, Courts and Enforcement Act 2007, I set the decision aside and remake the decision as set out at the beginning of this judgment.

Thomas Church
Judge of the Upper Tribunal

Authorised by the Judge for issue on 3 December 2024