[2025] UKUT 140 (AAC)

Appeal No. UA-2023-001520-AFCS

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

CRP

Appellant

-v-

Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Mitchell
Decided on consideration of the papers

Representation:
Appellant: Peter Collins (Royal British Legion case adviser)
Respondent: Veterans UK in-house advisory team

On appeal from:
Tribunal: First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber)
Tribunal Case No: AFCS/00825/2022
Tribunal Venue: London (Fox Court), remote hearing via video-link
Decision Date: 31 January 2023

SUMMARY OF DECISION

56 war pensions and armed forces compensation
56.1 war pensions – entitlement

Judicial summary

The Upper Tribunal rejects the Secretary of State for Defence's argument that the interpretation of item 2 of Table 9, in Schedule 3 to the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011, given by the Upper Tribunal in *MD v Secretary of State for Defence* (AFCS) [2015] UKUT 0298 (AAC), should not be followed. *MD's* interpretation was not objectionable due to unfairness nor was it liable to lead to absurd consequences. However, the appeal succeeded because the First-tier Tribunal failed to give adequate reasons for its decision. The Tribunal should have explained why it found that osteoarthritis was not a qualifying injury under item 2, as interpreted in *MD*.

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.

(1) The decision of the First-tier Tribunal, taken on 31 January 2023 under case reference AFCS/00825/2022, involved an error on a point of law. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal sets aside the First-tier Tribunal's decision.

(2) Subject to paragraph (3) below, under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal re-makes the First-tier Tribunal's decision as follows:

(a) CRP's appeal against the Secretary of State for Defence's decision of 9 March 2022 succeeds, and the Secretary of State's decision is set aside;

(b) The Secretary of State's decision is replaced by a decision that CRP satisfies item 2B of Table 9, in Schedule 3 to the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011, and is entitled to a Level 9 tariff award in accordance with the terms of that Order.

(3) Paragraph (2) above is disapplied if, within **one month** of the date on which this decision is issued, the Upper Tribunal receives the Secretary of State for Defence's written, reasoned objections to the Upper Tribunal re-making the First-tier Tribunal's decision as set out in paragraph (2).

(4) If the Upper Tribunal receives the Secretary of State's written objections in accordance with paragraph (3) above, this case is to be referred back to Upper Tribunal Judge Mitchell.

REASONS FOR DECISION

Introduction

Terminology

1. These reasons refer to various medical terms that appear in the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011. Article 62(3) of the Order provides that, "where any decision required to be made under this Order is, or includes, a decision involving a medical issue" the decision is to be made "in accordance with generally accepted medical and scientific knowledge prevailing at the time the decision is made". My understanding is that prevailing, generally accepted medical and scientific opinion ascribes the following meanings to the following medical terms:

- *arthrodesis*: "the fusion of bones across a joint space by surgical means, which eliminates movement" (Oxford Concise Medical Dictionary, 8th edition);
- *osteoarthritis*: "osteoarthritis (OA) is a syndrome of joint pain associated with structural deterioration of synovial joints that over time involves the whole joint organ. It is the most common form of arthritis" (Oxford Textbook of Medicine, 6th edition);
- *"osteotomy"*: "a surgical operation to cut a bone in two parts, followed by realignment of the ends to allow healing" (Oxford Concise Medical Dictionary, 8th edition);

- *septic arthritis*: "Septic arthritis (or infective arthritis) is the most serious cause of one or more hot swollen joints. A causative organism can be identified in about 80% of cases, with *Staphylococcus aureus* the most common, followed by Streptococcus and gram-negative organisms." (Oxford Textbook of Medicine, 6th edition).

2. The word "pathology" also features in the 2011 Order. The current Oxford Dictionary of English defines "pathology", as used in medicine, as "pathological features considered collectively; the typical behaviour of a disease", and "pathological", as used in medicine, as "involving or caused by a physical or mental disease".

3. In these reasons:

- "2011 Order" means the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011;
- "CRP" refers to the Appellant.

Factual Background

CRP's claim

4. CRP's claim form described his injury as "left and right hip…Femoroacetabular impingement syndrome…medium level arthritis", "medium level arthritis" in both hips and "Rectus Femoris Tear on left hip". It seems that CRP subsequently withdrew the claim, or appeal, relating to his right hip. The claim form described the incident giving rise to the first described injury as "8 years of infantry training and service" and the second injury as having that cause as well as "injury whilst training in 2014 created long term imbalance in hips".

5. CRP's claim form stated that he was awaiting treatment, described as "for left hip arthroscopy, labral repair/debridement, and femoral neck osteoplasty".

6. The Secretary of State initially refused to make any award on CRP's claim. On 9 March 2022, however, Veterans UK informed CRP that he was entitled to a lump sum payment of £6,180 because he satisfied the descriptor in item 27, Table 9 in Schedule 3 to the 2011 Order ("hip…strain, sprain or overuse injury, which has required, or is expected to require, operative treatment").

Medical and other evidence

7. The medical evidence within the First-tier Tribunal bundle included:

(a) *20 September 2021*, MRI imaging report: "CONCLUSION / RECOMMENDATION: 1. On the left there are early OA [osteoarthritis] changes secondary to a CAM type of femoral acetublar impingement";

(b) *23 September 2021*, orthopaedic registrar letter: “an image guided steroid injection into the left hip to confirm this is the source of his pain prior to an arthroscopy with osteoplasty would be a good starting point”;

(c) *8 October 2021*, consultant orthopaedic surgeon letter: “radiographically he certainly does have evidence of osteoarthritis with rather significant osteophyte formation in the left hip. I have explained the significance of the diagnosis in a man of his age in his career”;

(d) *13 October 2021*, consultant orthopaedic surgeon letter: “Management plan: 1. For left hip arthroscopy, labral repair/debridement, and femoral neck osteoplasty…it is reasonable to consider arthroscopic hip surgery…the goals of surgery would be assessment and repair/debridement of the labrum, assessment and management of any unstable chondral injuries and reshaping of the femoral head/neck junction to improve the cam morphology…surgery is primarily performed to try to improve his symptoms now rather than to prevent future degenerate change in the hip…[CRP] feels he cannot carry on how he is and is keen to try anything to avoid having a hip replacement at the moment”;

(e) *9 December 2021*, post-operative note: “Findings. Significant acetabular chondral injury with extensive delamination with exposed bone zone 1 and 2 – one third to two thirds distance from acetabular rim to cotyloid fossa. Unstable labrum zone 1. Massive cam and osteophyte postero-lateral, lateral and anterolateral femoral head neck junction”;

(f) *28 March 2022*, entry in medical notes: “Has had consult with surgeon – concerning comments like expecting ‘lifelong problems’ and ‘shouldn’t run / TAB for a year post op’”;

(g) *5 April 2022*, consultant orthopaedic surgeon letter: “discussion about the longer term picture for his hip and he does understand he is at a significantly increased risk of needing a hip replacement at some point. I did explain that it might take as long as 6 months to a year after keyhole surgery to really see how much recovery the hip is going to have and what it is going to allow him to do”

(h) *9 May 2022*, entry in medical notes: “Hip arthroscopy on 09.12.21…: Rim exposed. Prominent rim section recessed with high speed burr. Two Speedlock anchors to stabilise labrum. Chondroplasty to most unstable parts of cartilage. T capsulotomy to expose femoral neck…Has had minimal recent rehab due to stopping exercises whilst on a career course (sedentary). Worse with this rest. Currently desk bound…Struggles with driving, baby changing and other ADLs – shoes and socks etc. Pain and restless

legs affecting sleep. Takes codeine ON PRN but not seen MO regarding any other analgesia";

(i) *22 July 2022*, consultant orthopaedic surgeon letter: "long discussion today about his hip and his options moving forward. He is awaiting an intra-articular injection at DMRC which I think is an entirely appropriate next step. Hopefully this will allow him to engage further with his rehabilitation exercises…We did also talk about arthroplasty today. He does understand that both radiologically and intraoperatively he had significant chondral injury, and that this may well be the cause of his ongoing symptoms";

(j) *24 September 2022*, Army doctor's letter: "now listed for a total hip replacement";

(k) *26 September 2022*, radiology report: "*Left hip*: Marked femoroacetabular cartilage damage which is full-thickness superolaterally and anteriorly with associated superior and anterior subchondral oedema and cystic change. There is left CAM morphology with subcortical oedema and cystic change and acetabular over coverage, suggestive of femoroacetabular impingement. The femoral head contour and subchondral bone is otherwise preserved. The anterior and anterosuperior labrum is degenerate with chondrolabral separation and a further radial tear within the body of the labrum. There is adjacent encysted fluid with septations measuring up to 3.8 cm, more in keeping with an intra-articular paralabral cyst rather than joint effusion. The posterior labrum is also mildly degenerate. Mild iliopsoas tendinopathy with fluid distension of the iliopsoas bursa suggestive of bursitis".

8. On 21 September 2022, CRP emailed Veterans UK as follows:

> "Since my last correspondence 2 surgeons…have agreed that my previous surgery was not hugely successful and that the next step is a full hip replacement of my left hip. The exact date of which is being organised".

9. According to the First-tier Tribunal's reasons for its decision, CRP had a total left hip replacement in December 2022.

First-tier Tribunal's decision

10. By notice of appeal dated 17 March 2022, CRP appealed to the First-tier Tribunal against the Secretary of State's decision. CRP's notice of appeal mainly described the professional and financial consequences of his injury and associated treatment, but also wrote that a diagnosis of arthritis for a person in his circumstances was "extremely abnormal and life changing". CRP's appeal was really about the classification of his injury under the tariff in Schedule 3 to the 2011 Order.

11. The First-tier Tribunal:

(a) rejected CRP's argument that the descriptor in item 2 of Table 8 applied. That descriptor required fracture or dislocation of a hip, but the Tribunal found that CRP suffered no (or no relevant) fracture or dislocation (paragraph 4 of the Tribunal's reasons);

(b) instructed itself that, under Upper Tribunal authority, the term "other pathology" in item 2 of Table 9, was "defined as "an infection or disease akin to septic arthritis"" (paragraph 5);

(c) recorded CRP's representative's concession that he did not have an infection or disease akin to septic arthritis;

(d) allowed CRP's appeal to the extent that the correct tariff entry was that in Table 9, item 16D, level 12, which refers to "Hip…strain, sprain or overuse injury with confirmed significant osteochondral defect, and which has required or is expected to require operative treatment". The tariff amount for a level 12 injury is £10,300.

Legal framework

Armed Forces and Reserve Forces (Compensation Scheme) Order 2011

12. Article 2(1) of the 2011 Order defines "tariff" as "the tables of injuries and amounts set out in Part 1 of Schedule 3", and "tariff level" as "the level of the tariff specified in column (a) of Tables 1 to 10 of Part 1 of Schedule 3". Article 2(1) defines a "descriptor" as "a description of injury in column (b) of Tables 1 to 9 of the tariff. Article 16(2) provides that "the descriptors give rise to entitlement at the corresponding tariff level".

13. Article 5 of the 2011 Order contains rules for the interpretation of the descriptors in Schedule 3 to the Order:

> **"5 Descriptor, further interpretative provisions**
>
> (1)…a descriptor is to be construed as encompassing the expected effects of the primary injury and its appropriate clinical management, short of a discrete diagnosable disorder, including, but not limited to—
>
> (a) pain and suffering due to the primary injury;
>
> (b) the effect of operative intervention, including pain, discomfort and scarring;
>
> (c) the effect of therapeutic drug treatment;
>
> (d) the use of appropriate aids and appliances;
>
> (e) associated psychological effects short of a discrete diagnosable disorder.
>
> […]

> (8) The term "operative treatment" means surgical intervention intended to investigate or treat but excludes insertion of sutures under local anaesthetic, acupuncture, facet or other joint injection or minor dental procedure."

14. The benefits payable for injury, set out in article 15(1) of the 2011 Order, include "a lump sum". Schedule 3 has effect for the purposes of determining "the descriptor", "the tariff level" and "the amount of a lump sum" (article 15(2)l).

15. Article 60(1) of the 2011 Order provides that, subject to the following provisions of that article, "the burden of proving any issue is on the claimant". The exception to this general rule concerns cases where a contemporary official record relating to a material fact is missing.

16. Article 62(3) of the 2011 Order provides as follows:

> "(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."

17. Table 8 in Schedule 3 to the 2011 Order is headed "Fractures and dislocations", and includes the following entry:

Item	*Column (a)* *Level*	*Column (b)* *Description of injury and its effects ("descriptor")*
2	9 [the Level 9 tariff amount is currently £41,200]	Fracture or dislocation of one hip…which has required, or is expected to require, osteotomy or total joint replacement

18. Table 9 in Schedule 3 to the 2011 Order is headed "Musculoskeletal disorders", and includes the following entries:

Item	*Column (a)* *Level*	*Column (b)* *Description of injury and its effects ("descriptor")*

2	9 [the Level 9 tariff amount is currently £41,200]	Septic arthritis or other pathology requiring arthrodesis, osteotomy or partial or total joint replacement.
2B	9	Septic, rheumatoid or post traumatic arthritis requiring arthrodesis, osteotomy or total joint replacement. [“post traumatic arthritis” is defined as “arthritis which is secondary to a significant traumatic injury which was documented in the medical records at the time it occurred”]
16D	12 [the Level 12 tariff amount is currently £10,300]	Hip…strain or overuse injury with confirmed significant osteochondral defect, and which has required or is expected to require operative treatment.
25	13 [the Level 13 tariff amount is currently £6,180]	Radiologically confirmed osteoarthritis of hip…(caused by repetitive or attrition injury) causing permanent significant

		functional limitation or restriction.
27	13	Hip…strain, sprain or overuse injury, which has required, or is expected to require, operative treatment.

Pensions Appeal Tribunals Act 1943

19. Section 5B of the Pensions Appeal Tribunals Act 1943 provides as follows:

> "In deciding any appeal under any provision of this Act, the appropriate tribunal—
>
> …(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.**"**

MD v Secretary of State for Defence (AFCS) [2015] UKUT 0298 (AAC)

20. There were two Appellants in *MD*, both with back injuries. One Appellant sustained lower back injuries in two separate IED explosions while serving in Afghanistan, which required spinal fusion surgery. The other suffered a disc prolapse while serving in Iraq, and also required spinal fusion surgery.

21. *MD* was decided by Upper Tribunal Judge Wikeley following a hearing at which all parties were represented, in the Secretary of State's case by counsel. The legal issue was the correct interpretation of the descriptor in item 2 of Table 9. Judge Wikeley:

(a) recorded counsel's concession that item 2 was "unhappily worded in that it lacked clarity and precision, especially as regards the use of the word 'pathology'" (paragraph 13 of the judge's reasons);

(b) said that the definition of pathology in Black's Medical Dictionary – "the science which deals with the causes of, and changes produced in the body by, disease" – was "indeed the primary meaning of the word" but it could not bear that meaning in item 2. A 'science of knowledge' cannot itself require joint replacement (paragraph 13);

(c) the secondary meaning of ‘pathology’, referred to by counsel, denotes “the process or pathways of a given disease”. Again, this made “no real sense” if applied to item 2 (paragraph 13);

(d) found that item 2 must use ‘pathology’ in its third sense “as a deviation from an otherwise healthy or normal condition, and so meaning (putting it neutrally) some abnormality” (paragraph 13);

(e) described the issue as whether, in item 2, ‘other pathology’ bore a broad or narrow meaning (paragraph 14). The broader meaning, advanced by the Appellants, was that item 2 should be construed to mean ‘septic arthritis or *any* other pathology requiring arthrodesis [etc]’. The Secretary of State argued that item 2 should be construed as if it read ‘septic arthritis or any similar or related pathology requiring arthrodesis [etc]’;

(f) found that the language used to describe item 2 was “undoubtedly ambiguous” and “on a literal reading it could be read either way”. Hence, it was necessary to have regard “both to the context and the purpose of the statutory drafting” (paragraph 17);

(g) considered that the context involved particular and general aspects. A particular consideration was that “or other pathology” immediately follows “septic arthritis” and “so take their colour from and are qualified by that medical condition”. The purpose of ‘other’ “is to make the link between septic arthritis and what follows”. The Appellants’ construction was objectionable because it effectively involved ignoring the word ‘other’ (paragraph 18);

(h) found that the general context “requires consideration of the Tariff as a whole”. It is a very detailed code which makes specific provision elsewhere for traumatic back injuries (paragraph 19). A further relevant general consideration was the “underlying purpose of the Scheme”:

> “20…The complex matrix of Tables, Items and related levels in Schedule 3 is intended to ensure that the most serious injuries receive the higher levels of compensation. The descriptors are said to represent a ‘Description of injury and its effects’. If “or other pathology” is read to mean “or any pathology”, whether or not it is related to or similar to septic arthritis, then the reference to septic arthritis itself loses any real purchase. The descriptor for Item 2 of Table 9 might just as well say simply “Any pathology requiring arthrodesis, osteotomy or total

> joint replacement." On that basis "septic arthritis" is mere surplusage. In that event, the nature of the underlying condition becomes irrelevant, and the sole focus is on the nature of the treatment required, which in turn may be a very poor guide as to the severity of the effects of the condition in question. As [counsel for the Secretary of State] argued, that cannot be consistent with the purpose of the Scheme."

22. In conclusion, the Upper Tribunal accepted the Secretary of State's submissions as to the construction of item 2. That is, item 2 was to be construed as if it referred to 'septic arthritis or any similar or related pathology requiring arthrodesis [etc]'.

Grounds of appeal and the parties' submissions

Grounds of appeal

23. The Upper Tribunal granted CRP permission to appeal against the First-tier Tribunal's decision on the following grounds:

(1) arguably the Tribunal misdirected itself in law because it thought that the interpretation of item 2 in Table 9 was addressed by the Upper Tribunal in *TH v Secretary of State for Defence* (AFCS) [2017] UKUT 309 (AAC). However, *TH* concerned a claim brought by a service member who contracted meningitis while based at the Catterick Garrison, and had nothing to do with item 2;

(2) the Upper Tribunal's decision in *MD v Secretary of State for Defence* (AFCS) [2015] UKUT 0298 (AAC), which the Tribunal had probably meant to cite, and which did concern item 2, was arguably ambiguous. Iin paragraph 3 of the Upper Tribunal's reasons it said, for reasons that would follow, it agreed with the Secretary of State's argument that item 2 was to be construed as "some other infection or disease such as septic arthritis". However, in paragraph 21 the Upper Tribunal again agreed with the Secretary of State, but, here, the argument was described as being that item 2 should be construed as "septic arthritis or any other similar or related pathology";

(3) arguably *MD* could be distinguished because it involved Appellants whose injury was a traumatic back/spinal injury rather than any form of arthritis;

(4) arguably, the purposes of the 2011 Order might not be served by a construction of item 2 that applies to one type of service-related arthritis (septic arthritis) leading to

joint replacement but excludes another type (osteoarthritis) when both conditions will, of necessity, be related to service and have exactly the same effect on the service member namely partial or total joint replacement;

(5) despite CRP having been professionally represented before the Tribunal, arguably the Tribunal's acceptance of CRP's representative's concession in relation to item 2 involved legal misdirection. This point was described as follows in the Upper Tribunal's permission determination:

> "I was initially minded to refuse [CRP] permission to appeal because he was represented before the First-tier Tribunal by a representative who, quite clearly, accepted that Table 9, item 2 did not apply to the Appellant. Normally, a party must accept the consequences of a concession made by his legal representative and the question whether the concession was well-advised or ill-advised is immaterial…it is just possible that [CRP's] representative was misled by the Tribunal's incorrect case reference so that it was unfair to rely on the resultant concession, but I reject that possibility. I shall take the First-tier Tribunal's reasons at face value and proceed on the basis that it asked [CRP's] representative whether his case was that [CRP] had an infection or disease akin to septic arthritis. Arguably, this was a more restrictive formulation than either of those approved by the Upper Tribunal in *MD*. On that basis, arguably the First-tier Tribunal misdirected itself in law which led it to ask [CRP's] representative the wrong question and thereby elicit a flawed concession. I grant permission to appeal on that ground."

(6) the First-tier Tribunal judge who refused the Appellant permission to appeal to the Upper Tribunal recorded that the First-tier Tribunal found that osteoarthritis was not a pathology similar to septic arthritis. Arguably, the First-tier Tribunal gave inadequate reasons for its decision because it failed to explain why osteoarthritis was not a pathology similar to septic arthritis.

Secretary of State for Defence's submissions

24. The Secretary of State supports this appeal. His representative argues that the *ratio* (dispositive finding of law) of *MD* is unclear, and "would also suggest that there is a further need for clarity on this issue in light of legislative amendments having altered the statutory context in which the descriptor is to be interpreted since the decision in *MD*".

25. In an apparent departure from the case advanced in *MD*, the Secretary of State now argues that 'other pathology', in item 2 of Table 9, should be "widely interpreted, without importing any requirement for infection, and the focus when determining the

most appropriate descriptor should be on the consequences of the claimed injury (i.e. whether it has required arthrodesis, osteotomy, partial or total joint replacement)".

26. In 2019, item 2B was added to Table 9 and, like item 2, also attracts a Level 9 award, but, according to the Secretary of State's representative, "unfortunately, the addition of Item 2B compounded the lack of clarity highlighted in *MD v SSD* surrounding the Table 9 descriptors by creating inconsistencies between descriptors that attract the same level of award. For example, one descriptor equates partial and total joint replacement [item 2], whereas another at the same level [item 2B] excludes partial joint replacement."

27. The Secretary of State also agrees with the provisional observation made in the Upper Tribunal's permission determination that "it is not immediately obvious…why one type of service-related arthritis (septic arthritis) leading to joint replacement should satisfy the tariff entry, but another (osteoarthritis) should not. Both conditions are caused by service and have exactly the same consequence for the service member namely partial or total joint replacement."

28. The Secretary of State's proposed solution to the apparent exclusion of osteoarthritis as a qualifying item 2 injury is to "adopt a purposive approach to the interpretation of these descriptors to find that the correct construction of the Item 2 descriptor is the one which produces the fairest outcomes, even if this requires deviation from the analysis and decision in *MD*". This is consistent with the presumption that Parliament does not intend to legislate for absurdity (*Edison First Power Ltd v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209). It also accords with "the scheme's underlying principles, the first of which is fairness" and so, in order to achieve a fair outcome, the term 'pathology' should be widely interpreted, without importing any requirement for infection, and the focus should be on the consequences of the injury. This approach would also be consistent with the interpretative rules in article 5 of the 2011 Order.

29. The Secretary of State invites the Upper Tribunal to allow this appeal, set aside the First-tier Tribunal's decision and replace it with a decision that "the most appropriate tariff descriptor for the appellant's condition is Table 9, Item 2, level 9".

Appellant's submissions

30. In reply to the Secretary of State's written submissions, CRP's representative informs the Upper Tribunal that "we have nothing to add to the Secretary of State's position".

Hearing

31. Neither party requests a hearing of this appeal, and I am satisfied that I am able fairly to decide the appeal on the parties' written submissions.

Analysis

What was decided by *MD*?

32. I shall first identify the *ratio* (dispositive finding of law) of the Upper Tribunal's decision in *MD*. At paragraph 3 of the judge's reasons, he said that he agreed with the Secretary of State's interpretation of item 2 of Table 9, which had just been described in paragraph 2 as construing 'other pathology', in item 2, as if it read "some other infection or disease such as septic arthritis". That initial agreement was given "for the reasons that follow". The reasons that followed were in paragraphs 18 to 20 in a section headed 'The Upper Tribunal's conclusions'. Here, the Secretary of State's argument was said, in paragraph 17, to be that, in item 2, the words "septic arthritis or other pathology requiring arthrodesis [etc]" were to be read as "septic arthritis or *any* other *similar or related* pathology requiring arthrodesis [etc]". In paragraphs 18 to 20, the judge explained why he preferred the Secretary of State's argument to that of the Appellants.

33. Since reasoning provides the foundation for the *ratio* of a judicial decision, the Upper Tribunal's ratio in *MD* must be that which emerged from the analysis in paragraphs 18 to 20 of the judge's reasons. While paragraph 3 of the reasons was not styled as a summary, that was its effective purpose. It was not itself the *ratio* for the judge's decision. To the extent that the summary was inconsistent with the *ratio* (or the reasoning from which the *ratio* emerged), it is ineffective as a proposition of law. The *ratio* of *MD* was that item 2 in Table 9 is to be read as 'septic arthritis or any similar or related pathology requiring arthrodesis [etc]". The *ratio* was not that, in item 2, 'other pathology' is to be read as 'some other infection or disease such as septic arthritis'

Interpretation of item 2

34. Column (b) of Table 9, in Schedule 3 to the 2011 Order, is headed "description of injury and its effects ("descriptor")". In other words, a descriptor is a combination of two things – a specified injury (or injuries) and the injury's specified effects. In the case of item 2, the specified injuries are "septic arthritis or other pathology". The specified effects are "requiring arthrodesis, osteotomy or partial or total joint replacement".

35. Osteoarthritis is the most common form of arthritis (see the medical definition in paragraph 1 of these reasons). And I do not think one needs to be a doctor to say with confidence that a significant part of the UK's population suffers from

osteoarthritis. Septic arthritis, by contrast, is rare with a reported incidence of between four to twenty-nine cases per 100,000 patient years (McBride S, Mowbray J, Caughey W, et al. Epidemiology, management, and outcomes of large and small native joint septic arthritis in adults. *Clin Infect Dis.* 2020; 70(2):271-279). Why, then, did the legislator decide, when framing item 2 in Table 9, to refer to only one type of arthritis, being one that is rarely encountered and normally associated with a causative organism? It was either a conscious legislative decision or a mistake. Given the prevalence of forms of arthritis, in particular osteoarthritis, other than septic arthritis, I do not think it could have been a mistake.

36. The *ejusdem generis* principle of statutory interpretation is described as follows, at p.1231 of the fifth edition of Bennion on Statutory Interpretation:

> "The Latin words *ejusdem generis* (of the same kind or nature), have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a list or string of genus-describing words followed by wider residuary or sweeping-up words."

37. According to Bennion, at p.1238, "a rule that two or more genus-describing words are always required would be too rigid. The question is invariably one of the intention conveyed by the entirety of the passage…the ejusdem principle should be applied in the one-word case in recognition of the fact that the drafter must have specified the word for some purpose". For instance, in *Parkes v Secretary of State for the Environment* [1978] 1 WLR 1308, the Court of Appeal held that, in the phrase 'building or other operations' in the Town and Country Planning Act 1971, the other operations must be read as akin to building.

38. In my judgment, the legislator enacted the words "septic arthritis or other pathology" with the intent of limiting the category of other qualifying pathologies by reference to septic arthritis' particular characteristics. I see no other logical reason for beginning the description of the relevant injury with a reference to a form of arthritis that is rarely encountered. The legislator could have described the relevant injury by reference to the very common form of arthritis, osteoarthritis, instead of septic arthritis but chose not to do so. To use Bennion's words, the choice made by the legislator shows that it intended to limit the scope of 'other pathology' by reference to 'matters of the same limited character'. In other words, I agree with Upper Tribunal Judge Wikeley's construction of item 2 in *MD*.

39. The Secretary of State now invites the Upper Tribunal, by reference to 'fairness', to ignore the choice made by the legislator when framing item 2, depart from *MD*, and interpret item 2 in Table 9 by focussing on 'the consequences of the injury" (i.e. whether the service member requires arthrodesis etc). That stretches the statutory wording beyond the range of reasonable interpretations that they are capable of bearing notwithstanding the overall aims and purpose of the compensation scheme provided for by the 2011 Order. The Secretary of State's interpretation effectively ignores Table 9's definition of a descriptor (a specified injury with specified effects). Under this interpretation, if a service member requires arthrodesis etc. for a service-related reason, it is to be assumed, in the interests of fairness (as that concept is understood by the Secretary of State), that the member has a qualifying injury and therefore satisfies item 2. This is a back-to-front way of dealing with what is really a policy issue. Statutory interpretation seeks to identify the legislator's intention and, if that intention is clear, there is no room for recourse to some general conception of fairness. If, as a matter of policy, the Secretary of State considers that the 2011 Order, construed according to established principles of statutory interpretation, produces an outcome considered unfair, the answer is not to ask the Upper Tribunal to ignore those principles but to bring forward an amendment to the 2011 Order in order to cure the perceived unfairness.

40. The Secretary of State also argues that Judge Wikeley's interpretation in *MD* gives rise to an absurdity. It is unusual for a Government Department to argue that legislation promoted by itself is absurd, but it is nevertheless open to the Secretary of State to make the argument which, in the present context, is an argument that it is absurd for a compensation scheme to treat service members differently according to the reason why they require arthrodesis etc. In *Edison First Power Ltd*, Lord Millet, at [117] said:

> "The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it…".

41. A legislator is entitled to enact absurd legislation but, when an enactment falls to be construed, it is to be assumed to be unlikely that the legislator intended to enact an absurdity. So, does *MD's* construction of item 2, in Table 9, give rise to absurd consequences? It is a construction that restricts the ambit of item 2 by linking it with a rare form of arthritis. That might possibly be considered harsh by the general public, and almost certainly would be by a service member who has a joint replacement but

not an injury that qualifies under item 2, but that is not the same as absurdity. By framing the item 2 descriptor by reference to a rare, and possibly unusual, type of injury/condition, the legislator may have prioritised the public purse over an expansive set of beneficiaries. That is not absurd. It is a common feature of government policy making. I do not accept that Judge Wikeley's construction of item 2 in *MD* gives rise to absurd consequences.

42. For the above reasons, those grounds of appeal that argue that the Upper Tribunal should depart from *MD's* construction of item 2 are not made out.

Why the First-tier Tribunal erred in law

43. In my judgment, the First-tier Tribunal's reasons for its decision were inadequate. On my reading of the Tribunal's reasons, it found that osteoarthritis could not be an 'other pathology', as that term was construed in *MD*. This conclusion did not speak for itself and the requirement to give adequate reasons for a decision called for some explanation as to why osteoarthritis was not considered to be a similar or related pathology to septic arthritis. The Tribunal's decision involved an error on a point of law, and it is set aside.

The Secretary of State's suggested disposal of this appeal

44. The Secretary of State's suggested disposal of this appeal invites me to hold that osteoarthritis constitutes a relevant injury for the purposes of item 2. I have already explained why I cannot take this course by reference to some general conception of fairness or to avoid a supposed absurdity.

45. The Secretary of State's suggested disposal would not necessarily be inconsistent with *MD*'s ruling that, in item 2, 'other pathology' means 'septic arthritis or any similar or related pathology requiring arthrodesis [etc]'. The Appellants in *MD* did not suffer from osteoarthritis so there was obviously no need for Judge Wikeley to consider whether osteoarthritis fell within his construction of 'other pathology'. However, I do not consider myself competent, on the evidence before me, to answer the question whether osteoarthritis is a condition with a similar or related pathology to septic arthritis. My impression is that osteoarthritis is probably not a similar or related pathology to septic arthritis, given the very different aetiology, but it would be wrong for me to rule on the point without expert medical evidence which I do not have.

What about item 2B?

46. This is a case in which both the Appellant and Secretary of State agree that the Appellant is entitled to a Level 9 tariff award. I have explained why I cannot give effect

to that agreement with reference to item 2 in Table 9. But there is also item 2B, which also carries with it a Level 9 award.

47. Item 2B has none of the arthritic uncertainty arguably attached to item 2. It specifies three kinds of arthritis including “post traumatic arthritis”. The specified ‘effects’ differ from those in item 2 in that item 2B requires total joint replacement as opposed to item 2’s partial or total joint replacement. However, that should not disadvantage CRP on his left hip claim because it seems that he has undergone a procedure for total replacement of the left hip.

48. CRP did not have septic or rheumatoid arthritis, but the medical evidence disclosed a clear diagnosis of osteoarthritis. The Secretary of State obviously accepts that CRP’s osteoarthritis is related to his service and there is reference in the First-tier Tribunal’s papers to CRP suffering training injuries. I have therefore provisionally decided to re-make the First-tier Tribunal’s decision by allowing CRP’s decision against the Secretary of State’s decision and replacing it with a decision that CRP satisfies the descriptor in item 2B of Table 9 on the basis that he has post traumatic arthritis (in the form of osteoarthritis) requiring a total replacement of the left hip joint. I recognise that the Secretary of State has not had the opportunity to make submissions on the applicability of item 2B and therefore direct that my decision comes into effect one month after it is issued unless, within that period, the Upper Tribunal receives the Secretary of State’s written, reasoned objection to a decision that CRP satisfies item 2B in Table 9. This is reflected in the formal decision set out before these reasons begin.

Conclusion

49. This appeal succeeds. Unless the Secretary of State objects, proceedings will be disposed of by the Upper Tribunal re-making the First-tier Tribunal’s decision, rather than remitting to that tribunal, and deciding that CRP satisfies item 2B of Table 9, in Schedule 3 to the 2011 Order.

Upper Tribunal Judge Mitchell

Authorised for issue on 24 April 2025