**[2025] UKUT 244 (AAC)**
**Appeal No. UA-2024-001158-WP**

**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER**

**Between:**

**C.S.**

**Appellant**

**- v -**

**Secretary of State for Defence**

**Respondent**

**Before: Upper Tribunal Judge Wikeley**

**Hearing date(s):** 7 July 2025

**Representation:**
**Appellant:** Mr Keir Hirst, Solicitor, Wace Morgan Solicitors
**Respondent:** Mr Jack Castle, Counsel instructed by GLD

*On appeal from:*
Tribunal: First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber)
Tribunal Case No.: ASS/00025/2024
Tribunal Venue: Remote hearing
Hearing Date: 4 April 2024
Decision Date: 16 April 2024

**<u>Anonymity:</u> The appellant in this case is anonymised in accordance with the practice of the Upper Tribunal approved in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28.**

## SUMMARY OF DECISION

This was an appeal against the First-tier Tribunal (FTT)'s composite assessment of disablement for the purpose of the war pensions scheme under Article 42 of the Service Pensions Order (SPO). The Upper Tribunal rejected the Appellant's submission that the FTT had erred in law in deciding not to make separate assessments for the two accepted conditions of prolapsed intervertebral disc disease C5/C6 and cervical myelopathy. The appeal was dismissed.

## DECISION

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

## REASONS FOR DECISION

### Introduction

1. This appeal is about the assessment of disablement for the purposes of an award of a war pension to a veteran.

### The Upper Tribunal's decision in summary

2. I refuse the Appellant's appeal to the Upper Tribunal. The decision of the First-tier Tribunal does not involve any material error of law.

### Abbreviations

3. The following abbreviations are used in this decision:

| | |
|---|---|
| AD | Accepted Disablement |
| AFCS | Armed Forces Compensation Scheme |
| AGGR | Aggravated |
| ATTR | Attributed |
| CM | Cervical Myelopathy |
| DCM | Degenerative Cervical Myelopathy |
| FTT | First-tier Tribunal |
| MJOA | Modified Japanese Orthopaedic Association |
| PID | Prolapsed Intervertebral Disc |
| RAF | Royal Air Force |
| SPO | Service Pension Order |

### An outline of the factual background

4. The Appellant served in the RAF from 1984 until 1995. In the early 1990s he suffered an injury when an oil drum fell on his head, after which he had significant neck pain and headaches. In 2005 he was awarded a war pension on an interim basis with an overall assessment of 70%. This composite award was in respect of a prolapsed intervertebral disc (PID) C5/C6 and cervical myelopathy (with a

combined assessment at 50%) and anxiety state with features of depression and bilateral varicose veins (each assessed at 6-14%).

5. On 11 October 2021 the Appellant applied for a review of his war pension award and for two further conditions to be recognised, being lumbar disc disease L5/S1 and bladder dysfunction/nocturia. On 14 March 2023 the Secretary of State made a new war pension award, again on an interim basis, but this time with an overall assessment of 80%. Thereafter the Appellant lodged an appeal with the First-tier Tribunal (FTT).

**The decision of the First-tier Tribunal**

6. On 4 April 2024 the FTT refused the Appellant's appeal against the Secretary of State's decision dated 14 March 2023 to make an award of an interim assessment of 80% with effect from 11 October 2021 in respect of:

| | | |
|---|---|---|
| AD1 prolapsed intervertebral disc C5-C6 (ATTR) | } | 50% |
| AD4 cervical myelopathy (ATTR) | } | |
| AD5 lumbar disc disease (ATTR) | | 6-14% |
| AD3 anxiety state with features of depression (ATTR) | | 6-14% |
| AD2 bilateral varicose veins (AGGR) | | 6-14% |

(Lower urinary tract symptoms accepted as part and parcel of AD1, AD4 and AD5)

7. The FTT's short-form Decision Notice very concisely summarised the panel's reasoning as follows:

> 7. [The Appellant] did not dispute the assessments in respect of AD5 and AD2.
>
> 8. The Tribunal considered that the functional impact of the accepted conditions was more than fully reflected in the award.

8. Later, the FTT issued a full statement of reasons for its decision. This statement systematically set out the FTT's approach. The FTT summarised the background (paragraphs [1]-[3]), the nature of the appeal (paragraphs [4]-[8]) and the FTT's decision (paragraphs [9]-[10]). In doing so, the FTT neatly summarised the parties' competing core submissions as follows:

> 6. [The Appellant] informed the Tribunal at the hearing that he did not dispute the assessments in respect of lumbar disc disease L5/S1 and bilateral varicose veins. [The Appellant]'s position was that the remaining assessments did not reflect the deterioration in his conditions and that there

should have been separate assessments for the prolapsed intervertebral disc disease C5/C6 and cervical myelopathy.

7. [The Appellant]'s view was that he was entitled to an award of 40% for the prolapsed intervertebral disc disease C5/C6, at least 20% for the cervical myelopathy and 20% for anxiety state with features of depression, which amounted to an assessment of 100%, including the undisputed assessments for lumbar disc disease L5/S1 and bilateral varicose veins.

8. Veterans UK maintained that the degree of disablement had been correctly assessed. Veterans UK submitted that the impact of the prolapsed disc disease C5/C6 and the cervical myelopathy could not be separated as the conditions were in the same area of the body.

9. The FTT then referred briefly to the relevant statutory provisions and the associated case law (paragraphs [11]-[15]), before turning to deal with its findings of fact in the appeal. The FTT first addressed the Appellant's medical conditions:

**Medical conditions**

16. [The Appellant] suffered an injury whilst in service when an oil drum fell on his head in the early 1990's after which he had significant neck pain and headaches. He was subsequently diagnosed with a C4/C5 disc prolapse. [The Appellant] underwent surgery in 1994 to fuse the bones in his neck (page 101). His surgeon wrote on 26/02/1997 that the surgery left him with a permanent restriction to his range of movement and persisting root symptoms in his arms (page 101). More recently, his neurosurgical specialist stated on 24/05/2022 that the operation was an uncomplicated procedure without any evidence of spinal cord injury (page 68).

17. In the early 2000s, [the Appellant] started to suffer symptoms compatible with cervical myelopathy (page 68). [The Appellant] had progressively worsening symptoms. He complained of symptoms impacting his neck, all four limbs, balance and bladder. He was then diagnosed with degenerative cervical myelopathy in 2005 (page 52).

18. In 2020, a cervical MRI did not reveal any feature consistent with degenerative cervical myelopathy. As no cause was found for the ongoing symptoms, [the Appellant] was referred for further investigations, including a brain/whole spine MRI and neurophysiology (page 68).

19. An MRI was undertaken on 29/01/2022 showed that "The entire spine looks remarkably pristine for his age. At C5-6 the vertebral bodies have fused. There is no evidence of neural compromise, and the discs appear healthy" (page 52). The MRI of the cervical spine in 2020 and the MRI of the whole spine in 2022 did not show any deterioration. [The Appellant]'s specialist noted that the latest scan showed that the spine was in "good condition". The specialist nevertheless commented that [the Appellant] was severely affected by the cervical myelopathy.

20. [The Appellant] did not provide the Tribunal with the medical evidence regarding outcome of the neurophysiology investigations. He told the Tribunal in his oral evidence that the results were 'not helpful', which the Tribunal inferred meant that the tests had also not found the cause of the ongoing symptoms.

21. [The Appellant] provided evidence from the BMJ (page 84A) that patients with degenerative cervical myelopathy report neurological symptoms such as pain and numbness in limbs, poor coordination, imbalance and bladder problems. The article refers to the condition as involving spinal cord dysfunction from compression in the neck. No such neural compromise was found on [the Appellant]'s scans. [The Appellant] attributed his bladder symptoms to the cervical myelopathy, although there was no spinal cord compression.

22. [The Appellant] is also being treated for an enlarged prostate, a common condition in a man of his age. He is prescribed mirabegron 50mg once a day and tamsulosin 400mcg once a day (page 66), which are for an overactive bladder and the enlarged prostate.

23. The prolapsed intervertebral disc disease C5/C6, cervical myelopathy and lumbar disc disease may possibly have some contribution to the bladder problems, although nothing has been indicated from the scans and investigations to suggest any link.

24. [The Appellant] is prescribed tramadol (50mg one or two to be taken up to four times per day when required) for pain (page 66). He also takes ibuprofen for his lower back. He has not been under pain management services for many years. He told the Tribunal that he does some gentle physiotherapy exercises daily that were shown to him many years ago when he was in Headley Court. He last saw a physiotherapist in 2022 following a referral for the cervical myelopathy affecting his arms and leg strength and grip. The physiotherapist noted that his engagement with the exercises was good, and he was discharged on 02/08/2022 (page 115).

25. As regards the mental health condition, [the Appellant]'s condition was treated in the past by an anti-depressant, duloxetine 30mg once a day (page 66), which did not help. On 28/05/2020, [the Appellant] consulted his GP for the first time about binge drinking and self-harm (page 44/reverse), but there has been no onward referral to specialist mental health services. Instead, [the Appellant] has been provided with counselling at the GP practice.

26. [The Appellant] last self-referred himself to OpCourage (Veterans Mental Health Transition, Intervention and Liaison Service, TILS) who carried out an assessment on 08/11/2021. Other than the assessment, OpCourage wrote on 09/02/2022 that there was no further role for TILS (page 67). On 25/01/2023, [the Appellant]'s GP completed a factual report regarding the conditions (page 96). The GP stated that the mental health

condition was ‘stable’ (page 58), but at [the Appellant]'s request, this was later changed to ‘unstable’ (page 92).

27. In his claim for a further review, [the Appellant] claimed that his mental health was also attributable to traumas during his service, including abuse and an assault (page 27/reverse and page 30). After the date of the decision under appeal, [the Appellant]'s counsellor wrote on 17/08/2023 (see page 96) that he was receiving support for symptoms related to PTSD, anxiety and depression. The Tribunal informed [the Appellant] at the hearing that the new mental health condition PTSD was not within the remit of the appeal. If [the Appellant] wishes to pursue this, a further condition claim would have to be made for the mental health conditions claimed to be attributable to the trauma experienced in service.

10. The FTT went on to record its findings on the functional impact of these medical conditions on the Appellant’s day-to-day life:

**Functional impact of the conditions**

28. [The Appellant] is a single person whose was last relationship was in 1999. He lives alone in a two-storey semi-detached house with one flight of stairs. The bathroom/toilet are on the first floor. [The Appellant] uses a urine bottle downstairs as he struggles to use the stairs. He can, however, manage the stairs by going carefully using the handrail. His sleep is mainly impacted by the problem of urinary frequency/urgency.

29. [The Appellant] has a cleaner who visits every 3 to 4 weeks and he can keep up with the housekeeping in the intervening periods. He told the Tribunal that there is not too much housework as he lives alone and does not have pets. He has a garden and employs a gardener. He has arranged works to his garden through a local garden centre and their workmen planted flowers in raised beds. He enjoys sitting in the garden and feeding the birds. His other hobby is listening to audiobooks. He has been unable to pursue golf since leaving service due to the medical conditions.

30. [The Appellant]'s home has some adaptations, and he uses some aids (pages 118-120). He uses grab rails in the bathroom/wc and a walk-in shower with a seat installed following an occupational therapist assessment (page 55). He uses a long-handed shoe-horn for shoes, but he can manage to put on socks unaided. He benefits from the adaptations and aids, which enable him to manage the activities of daily living independently. He relies on convenience foods for meals as he has difficulty lifting heavy pans, but he can manage to lift a kettle filled by a third.

31. [The Appellant] drives an automatic car, and he makes regular visits to his mother once or twice a week. He has a good relationship with his family. He also visits his sister who lives 2 miles away. He does not have any friends who live locally but an old friend from the RAF keeps in contact by

telephone. [The Appellant] can drive up to 30 minutes. He uses public transport, for example, taking the train by himself to Leeds for dental appointments, and buses on rare occasions. He manages the step on to the train by holding the handrail and using his walking stick.

32. [The Appellant] drives into the local town for a change of scene. He will sit by the river or go for an iced latte once a week. He considers his walking ability as limited to 50 metres. [The Appellant] uses the same walking aid that he purchased himself several years ago following a recommendation made by a physiotherapist. He has not been assessed as requiring any other aid to mobilise, such as a walking frame or motorised wheelchair/mobility scooter. [The Appellant] mainly shops online. He can use a computer and he has been on Facebook in the past. He also shops at a small M&S food hall in his local town, using the shopping trolley to walk around the shop.

33. [The Appellant] last worked in 2006. This was part-time employment as a telephonist. The employment was terminated on medical grounds as [the Appellant] had difficulties with sitting and repetitive neck movements (page 101).

34. [The Appellant] was awarded the enhanced rate of the daily living component of personal independence payments from 21/07/2021 on an indefinite basis (page 116). The DWP assessed that he needed aids to cook, take nutrition, wash/bathe, manage his toilet needs, dress/undress and prompting to engage with other people face to face. [The Appellant] was not considered to need the assistance of another person to manage his personal care, but that he could do so independently with the use of aids. The DWP assessed that [the Appellant] could mobilise more than 20 metres but not more than 50 metres, i.e., the standard rate of the mobility component, rather than the enhanced rate (20ms or less). [The Appellant] was not entitled to the mobility component as he is receiving a war pensions mobility supplement.

35. [The Appellant] takes holidays both abroad and in the UK by himself. For example, he went on holiday to Morocco for 3 days in January 2023 (having arranged wheelchair assistance at the airport) and he makes trips by train to Edinburgh where he stays overnight.

## Conclusions

36. [The Appellant]'s physical limitations relate to neck movements, balance, walking, shoulder pain, arm strength and grip. He can walk up to 50 metres, drive an automatic car up to 30 minutes, shop in a small supermarket and use public transport. He uses aids to carry out the daily living activities. [The Appellant] is under specialist care and prescribed strong pain relief.

> 37. In respect of the mental health condition, [the Appellant] is motivated to self-care, do light housework, oversee caring for his garden and adhere to physiotherapy. He can travel on holiday alone to destinations within the UK and abroad, make regular trips to see family members and he has stayed in contact with an old friend. [The Appellant]'s mental state is impacted by sleep disturbance due to the nocturia, but it was not clear as to the extent to which the bladder problem was affected by the accepted conditions as [the Appellant] has been diagnosed with an enlarged prostate. The mental health condition has not warranted a referral to specialist services.

11. Finally, the FTT set out its reasons for refusing the appeal against the latest Veterans UK interim assessment:

> **REASONS**
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> 38. Having made the above findings of fact, the Tribunal then applied the comparison test as required by Article 42(2)(a), i.e., the "comparison with 'the condition of a normal healthy person of the same age and sex". The Tribunal then converted the findings of disablement into a percentage or percentages for the purposes of the SPO award.
>
> 39. [The Appellant] was 61 years old as at the date of Veterans UK's decision. The Tribunal considered that a normal healthy 61 year old male would enjoy a personal and social life, be employed and enjoy hobbies, but they are likely to have some degenerative issues due to their age and likely to have prostate issues. A normal healthy 61 year old male would experience some limits to their functional abilities and sleep.
>
> 40. The Tribunal decided that the two neck conditions (prolapsed intervertebral disc C5/C6 and cervical myelopathy) could not be separated as they relate to the same part of the body. Cervical myelopathy clearly overlaps with the intervertebral disc disease C5/C6 as both they both cause pain and/or stiffness in the neck. It was, therefore, appropriate to consider the conditions together for the purposes of assessment. The 50% band remained appropriate as the medical evidence did not suggest any or any significant deterioration and still represented a severe degree of disablement in keeping with the comparison with a normal healthy 61 year old man.
>
> 41. As regards the mental health condition, the Tribunal considered that the 6-14% band more than fully reflected the degree of disablement given [the Appellant]'s activities and the low level of medical input. Although [the Appellant] did not wish to challenge the assessment in respect of the bladder dysfunction, the Tribunal noted that the problem caused sleep disturbance, which was a feature of the mental health issues and, therefore, the Tribunal had to consider the effects of the enlarged prostate that was not service-related. The issue with alcohol was excluded as part of the

assessment as the disablement for the mental health condition was not 50% or more (as per paragraph 32 of Schedule 6 of the SPO).

42. The composite assessment, including all the accepted conditions, amounted to 80%, which represents a severe degree of disablement, particularly when considering the list of prescribed disablements in Part V of Schedule 1 of the SPO. In *AM v Secretary of State for Defence (WP)* Upper Tribunal Judge Rowland said that referring to Part V enabled a Tribunal to carry out a "quick reality check of an assessment by asking themselves whether, taken in the round, the claimant in any particular cases is more disabled or less disabled that a person suffering from one of the injuries in respect of which an assessment of the same percentage is prescribed". The Tribunal noted that the 80% included a disablement arising from an amputation below the shoulder, amputation of both feet and amputation below the hip.

43. Whilst the Tribunal was methodical in its approach, the Tribunal recognised, as Upper Tribunal Judge Jacobs explained in *CT v SSD* [2009] UKUT 167 (AAC), that:

> "33. It is impossible to explain percentage assessments with precision. They involve, as I have said, a degree of impression. But it will usually be possible to give some explanation, albeit in general terms. In some cases, the facts will speak for themselves, and it will not be necessary as a matter of law to say more..."

44. Finally, the Tribunal considered whether the assessment should be interim or final. The SPO provides that the default position is that an assessment is interim "unless the member's condition permits a final assessment of the extent, if any, of that disablement" (Art.46(2)(d)). As the Tribunal could not say that "the member's condition permits a final assessment", the Tribunal agreed with Veterans UK that the award should be an interim award.

45. Given the above, the Tribunal refused the appeal.

12. The FTT subsequently refused an application for permission to appeal to the Upper Tribunal.

**The grounds of appeal to the Upper Tribunal**

13. The Appellant advanced six grounds of appeal against the FTT's decision, which he developed under points (a)-(f) inclusive (omitting paragraph and page references):

> "(a). The Tribunal failed to resolve the conflict between opinion and fact whether cervical myelopathy (now DCM) is a separate condition with its own distinct entity.

> (b). The Tribunal failed to ensure that I was able to participate fully on the issues mentioned below, re Rule 2(2)(c) of the England and Wales Procedure Rules 2008.
>
> (c). The Tribunal failed to give adequate/sufficient reasons to verify that prolapsed intervertebral disc C5-6 and cervical myelopathy actually overlap.
>
> (d). The Tribunal has failed to refer to material matters from 2005 and acknowledge the diagnosed 'spinal cord damage' instead they have used 'no cord compression and scans' to play down my damaged spinal cord symptoms especially my bladder symptoms due to cervical myelopathy and giving too much weight to an enlarged prostrate, in other words, the Tribunal did not attempt to carry out a sufficient systematic assessment of my degenerative myelopathy disablement and MJOA score in accordance with article 42(2)(a) of the SPO 2006.
>
> (e). The Tribunal failed to give adequate reasons to justify not to 'sense checking' and/or reassess my condition 'anxiety with features of depression'.
>
> (f). The Tribunal have failed to take into account or acknowledge the total evidence and/or material fact when failing to consider 'Nocturia' as a separate condition nor even assess it as part of DCM and its impact on QoL and mental state."

14. I gave the Appellant permission to appeal following an oral hearing of the application on 14 November 2024. In doing so, I doubted whether there was (as I put it) "much mileage in the proposed grounds (e) and (f)", although I did not in terms formally limit the grant of permission to appeal. However, I regarded the first four inter-related grounds of appeal as being arguable:

> 11. … Suffice it to say I consider it arguable that there is some merit in grounds (a)-(d) inclusive, which involve the inter-relationship between AD1 and AD4. As I understood his submissions, the Applicant's principal argument was that the FTT erred by failing to focus on the individual assessments for each condition – thus, he contended the two elements could not properly be combined without prior apportionment (relying on Judge Rowland's observations in *AM v Secretary of State for Defence* [2013] UKUT 97 (AAC)). In summary, the FTT needed to do more, he says, to show its arithmetic. In addition, he contended, the FTT had overlooked disabling consequences to his hands, legs and bladder which had been recognised in the MJOA assessment and were not related to the C5-C6 disc problem. The Applicant further argued that the finding that there was substantial overlap was undermined by the fact that he had not been claiming that AD4 caused neck pain (see 27R).

> 12. Despite the care taken by the FTT, it may still be arguable that the assessment is not adequately explained. Leaving to one side the issue of any overlap between AD1 and AD4, has the FTT done enough to explain why the AD1/AD4 assessment has remained the same as in 2005? At that earlier date the Applicant argued that his DCM symptoms were in their infancy. Notably, his walking ability had deteriorated from 800m in 2005 (107) to 20m-50m in the PIP assessment in 2023 (117). The Upper Tribunal has recognised the importance of making an informed comparison with earlier assessments (see e.g. *GM v Secretary of State for Defence (WP)* [2024[ UKUT 45 (AAC)).

15. At this juncture it is important to bear in mind the principles governing the role of appellate review in this specialised jurisdiction.

**The role of appellate review in the case of a specialist jurisdiction**

16. I discussed the principles governing the role of appellate review in my decision in *NC (dec'd) by JC v Secretary of State for Defence (AFCS)* [2024] UKUT 170 (AAC) at paragraphs 36-39. Those comments were made in the context of a claim and appeal made under the AFCS rather than the legacy war pensions scheme, but that distinction is immaterial for present purposes:

> 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.
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> 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 mis-directions 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 (which are uncontroversial) 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.'

17. I now turn to focus on the specific legislative provisions which are material to this appeal.

## The statutory framework for the assessment of disablement

18. Entitlement to a war pension is governed by the Naval, Military and Air Forces etc. (Disablement and Death) Service Pensions Order 2006 (SI 2006/606), known colloquially as 'the SPO'. In particular, and in terms of determining the degree of disablement involved, Article 42 of the SPO provides as follows (omitting paragraphs which are not relevant to the instant appeal):

> **Determination of degree of disablement**
>
> **42.**—(1) The following provisions of this article shall apply for the purposes of the assessment of the degree of the disablement of a member of the armed forces due to service before 6th April 2005.
>
> (2) Subject to the following provisions of this article—
>
> (a) the degree of the disablement due to service of a member of the armed forces shall be assessed by making a comparison between the condition of the member as so disabled and the condition of a normal healthy person of the same age and sex, without taking into account the earning capacity of the member in his disabled condition in his own or any other specific trade or occupation, and without taking into account the effect of any individual factors or extraneous circumstances;
>
> (b) for the purpose of assessing the degree of disablement due to an injury which existed before or arose during service and has been and remains aggravated thereby—
>
> (i) in assessing the degree of disablement existing at the date of the termination of the service of the member, account shall be taken of the total disablement due to that injury and existing at that date, and
>
> (ii) in assessing the degree of disablement existing at any date subsequent to the date of the termination of his service, any increase in the degree of disablement which has occurred since the said date of termination shall only be taken into account in so far as that increase is due to the aggravation by service of that injury;

> (c) where such disablement is due to more than one injury, a composite assessment of the degree of disablement shall be made by reference to the combined effect of all such injuries;
>
> (d) the degree of disablement shall be assessed on an interim basis unless the member's condition permits a final assessment of the extent, if any, of that disablement.
>
> …
>
> (5) The degree of disablement assessed under the foregoing provisions of this article shall be certified by way of a percentage, total disablement being represented by 100 per cent (which shall be the maximum assessment) and a lesser degree being represented by such percentage as bears to 100 per cent the same proportion as the lesser degree of disablement bears to total disablement, so however that a degree of disablement of 20 per cent or more shall be certified at a percentage which is a multiple of 10, and a degree of disablement which is less than 20 per cent shall, except in a case to which Table 1 of Part III of Schedule 1 applies, be certified in a manner suitable for the purposes of Table 2 of Part III of that Schedule.
>
> …
>
> (14) The degree of disablement certified under this article shall be the degree of disablement for the purposes of any award made under this Order.

19. Thus, Article 42(5) of the SPO provides that disablement of 20% or more must be assessed in 10% bands up to a maximum of 100%. Any disablement assessed at less than 20% – which, in isolation, results in payment of a gratuity rather than a weekly pension – is generally assessed using the percentage bands for gratuities, namely 1%-5%, 6%-14% and 15%-19%.

**The case law guidance on the assessment of disablement**

20. So far as the case law is concerned, the two most relevant decisions were both referenced by the FTT in its decision. As to the first, Upper Tribunal Judge Jacobs gave the following helpful guidance on the assessment of disablement under the war pensions scheme in *CT v Secretary of State for Defence (WP)* [2009] UKUT 167 (AAC):

> 19. The tribunal must assess the claimant's disablement, not the condition or the injury.
>
> 20. If there is more than one injury, it must make a composite assessment (article 42(2)(c)). In doing so, it may find it useful, even perhaps necessary, to make individual assessments of different disablements as part of the process of determining the claimant's overall disablement. That will depend in part on the nature of the disablement. For example: if all the claimant's injuries affect his mobility, it would be pointless to try to identify the

contribution of each injury. But if the claimant has a variety of disablements affecting various aspects of physical and mental functioning, it may be helpful to consider them separately before making a composite assessment. The way in which the tribunal has approached the assessment will affect the reasons that it is able to give.

21. Disablement can only be identified by comparison with 'the condition of a normal healthy person of the same age and sex' (article 42(2)(a)). The tribunal must make findings of fact on the claimant's disablement that are sufficient to allow it to apply that test. It must identify the different types of disablement and make findings on their nature, severity and extent. If there is variation, it must make findings on frequency and range of the variation. If there is medication or other treatment, the tribunal must find what effect that has. Treatment may be relevant in three ways. It may alleviate the disablement. It may produce side-effects. And it may itself be a disablement. For example: the need to rely on regular medication may have a mental effect.

22. Having made its findings its findings on disablement and undertaken the comparison, the tribunal has to translate the comparison into a percentage. Article 42(5) provides that 100% represents total disablement. However, that does not mean that 100% is the assessment only for a claimant who is wholly unable to function in any respect whatsoever. The assessments in Schedule 5 show that that is not correct. An assessment of 100% is appropriate for someone who may have a considerable degree of function. The result is that the assessment is based on a conventional scale that can only be fixed by reference in general terms to the assessments given in the Schedule. They give an indication of the level of disablement appropriate for different percentages.

23. It may also be helpful, at least as a check on the assessment that is made, to have regard to particular assessments in Schedule 1. In this case, the claimant has complained of a remark by the tribunal judge about 40% being for an amputation. I do not have a transcript of what was said, but I am sure that the judge was attempting to make such a comparison.

24. The making of an assessment cannot be done with precision and does not have to be. For assessments over 20%, it is only necessary to assess within 10% bands (article 42(5)). Even choosing between those bands involves deciding in relatively broad terms. And the assessment may involve an element of impression. However, the tribunal must avoid the temptation to decide solely on its impression without appropriate findings of fact and analysis of all relevant aspects of the claimant's disablement. It must approach its task methodically and in a structured way. If it does not, the presiding judge will not be able to provide adequate reasons to explain how and why the tribunal made its decision.

21. Secondly, the particular issue of interacting or overlapping disablements was considered by Upper Tribunal Judge Rowland in *AM v Secretary of State for Defence (WP)* [2013] UKUT 97 (AAC):

> 15. As far as the 2006 Order goes, the First-tier Tribunal was right in saying that it is not necessary to apportion a composite assessment of disablement between the relevant conditions. However, it may be important to make assessments in respect of individual elements of a composite assessment in order adequately to explain the composite assessment. Quite a lot can be implied from the apportionment in any particular case and, by the same token, the exercise of apportioning the overall disablement between the relevant conditions can help to focus the medical officer's or tribunal's mind on the proper relationship between the conditions and the correctness of its overall assessment.
>
> 16. In assessing disablement, it is important to remember that 100% represents the degree of disablement necessary for receipt of the maximum amount of disablement pension, described in article 42(5) of the 2006 Order as "total disablement" but actually less than that because Part V of Schedule 1 to the Order makes it clear that very severe, but less than total, disablement attracts an assessment of 100%.
>
> 17. It is also important to remember that disabilities may interact or overlap with each other so that a composite assessment may be either greater than, or less than, the sum of the assessments that would be made in respect of the individual conditions were they to be assessed separately, as is recognised in Part V of Schedule 1. Thus, for instance, the loss of two eyes is obviously more than twice as disabling as the loss of one eye. On the other hand, the additional effect of a condition that affects a part of the body that has already been affected by another condition may be less than the effect of the first condition alone would be. Moreover, individual assessments of 20% or more must be certified as a percentage which is a multiple of 10 (article 42(5)) which may involve an element of rounding up and assessments of less than 20% are usually expressed as assessments of 1-5%, 6-14% or 15-19% and this practice is generally applied to the assessments of individual conditions in respect of which a composite assessment is made. Adding together assessments that might more precisely have been expressed at the lower end of the range covered by figures for the individual assessments may well produce a total assessment of less than the total of the figures for the individual assessments.
>
> 18. It is not compulsory to make an assessment in respect of disablement that is not due to service, but doing so may again help to explain a decision, because it will show what proportion of a claimant's disablement has been accepted as due to service. Moreover, it is important to remember that, because a 100% assessment does not in fact represent total disablement, the fact that a claimant is suffering from a disabling condition that is not due

> to service does not necessarily have the effect that the assessment of disablement due to service must be less than 100%.
>
> 19. Part V of Schedule 1 also provides useful comparators, enabling medical officers and the First-tier Tribunal to carry out a quick reality check of an assessment by asking themselves whether, taken in the round, the claimant in any particular cases is more disabled or less disabled that a person suffering from one of the injuries in respect of which an assessment of the same percentage is prescribed.

22. Against that background, I now turn to consider the individual grounds of appeal in this case. In doing so, however, it should be borne in mind that there is a degree of overlap within grounds (a) to (d) inclusive. It follows that some observations may be relevant to more than one ground of appeal in that quartet. By the same token, I have taken into account all the helpful written and oral submissions by Mr Hirst and Mr Castle respectively, even if they are not fully rehearsed in the discussion that follows.

**Ground (a)**

23. Ground (a) is that the FTT is said to have failed to resolve the conflict between opinion and fact, namely whether cervical myelopathy (now DCM) is a separate condition with its own distinct entity.

24. In his submissions on behalf of the Appellant, Mr Hirst emphasised that AD1 (prolapsed intervertebral disc C5-C6) and AD4 (cervical myelopathy) are discrete medical conditions – the former is a cartilage issue whereas the latter is a neurological condition. The fact that they originate from the same part of the body (the neck) does not mean that they cannot be separated with independent functional effects. He argued that the FTT's failure to carry out individualised assessments for each condition meant that thereafter the two conditions could not properly be combined. Prior apportionment was thus an essential prerequisite in the proper process of assessment.

25. In his submissions on behalf of the Secretary of State, Mr Castle stressed that it was the FTT's task, where several conditions were in play, to arrive at "a composite assessment of the degree of disablement … by reference to the combined effect of all such injuries" (SPO, Article 42(2)(c)). It was not the FTT's role to assess whether CM or PID were responsible for every individual symptom. In any event, the medical evidence before the FTT in this case was insufficient to diagnose specific causes for each of the Appellant's symptoms. Accordingly, the FTT was entitled to consider the functional effects of AD1 and AD4 together. Such an approach was moreover consistent with the FTT's task and with the purpose of the SPO in ensuring simplicity of usage.

26. I find Mr Castle's submissions to be the more persuasive. In particular, I consider that the Upper Tribunal authorities relied upon by Mr Hirst are more nuanced than is suggested. Notably, they do not purport to lay down a hard and fast rule about

a need for prior apportionment in cases involving a composite assessment. Thus, Judge Jacobs held in *CT v Secretary of State for Defence (WP)* [2009] UKUT 167 (AAC) that a tribunal "may find it useful, even perhaps necessary, to make individual assessments of different disablements as part of the process of determining the claimant's overall disablement" (at paragraph 20). However, what is 'useful' or 'necessary' will inevitably be fact-specific or context-specific. Judge Rowland was essentially making the same point in *AM v Secretary of State for Defence (WP)* [2013] UKUT 97 (AAC) at paragraph 15. Likewise, the Court of Appeal held in *Secretary of State for Defence v Duncan* [2009] EWCA Civ 1043 that "there will in some cases be difficulties in defining whether related injuries should be considered as a single complex injury or two distinct injuries. … It must ultimately be a matter for the tribunal of fact to determine which most fairly captures the essence of the injury" (at [60]). Of course, that observation by the Court of Appeal was made in the context of the AFCS, but it must apply with equal force by way of analogy to decision-making under the war pensions scheme.

27. It follows that Ground (a) does not disclose any error of law on the part of the FTT. Rather, it is a challenge to the FTT's findings of fact and its approach to the evidence.

**Ground (b)**

28. Ground (b) is that the FTT failed to ensure that the Appellant was able to participate fully in his appeal on the issue of the apportionment of the combined assessment as per rule 2(2)(c) of the Tribunal Procedure (First-tier Tribunal) (WPAFCC) Rules 2008.

29. It is not clear, on further reflection, that this ground of appeal adds anything to the other challenges, discussed both above and below, to the FTT's decision. The Appellant had made detailed and extensive written submissions to Veterans UK and to the FTT in support of his appeal. The FTT panel would have read these materials in advance and they would also have had the opportunity to discuss them in the course of previewing the appeal. Judging from the FTT's statement of reasons, the panel had also explored relevant issues with the Appellant in the course of his oral evidence at the hearing. The statement of reasons also shows that the FTT was well aware of the core arguments being advanced by the Appellant. That being so, the Appellant was given the opportunity to participate fully in the hearing of his appeal. This ground of appeal is really an attempt to cloak a disagreement over the FTT's findings of fact under the guise of an allegation of a procedural irregularity.

**Ground (c)**

30. Ground (c) is that the FTT failed to give adequate reasons to verify that prolapsed intervertebral disc C5-C6 (AD1) and cervical myelopathy (AD4) actually overlap.

31. As Mr Castle submitted, the FTT's approach to the question of the overlap between AD1 and AD4 essentially involved three stages. First, the FTT

recognised that the Appellant had both PID (paragraph [16]) and a diagnosis of CM (paragraph [17]). Second, the FTT explored the functional impacts of those conditions, as summarised at paragraph [36]. Thirdly, and finally, the FTT concluded that "the two neck conditions (prolapsed intervertebral disc C5/C6 and cervical myelopathy) could not be separated as they relate to the same part of the body. Cervical myelopathy clearly overlaps with the intervertebral disc disease C5/C6 as both they both cause pain and/or stiffness in the neck. It was, therefore, appropriate to consider the conditions together for the purposes of assessment" (paragraph [40]). The Appellant obviously disagrees with the FTT's methodology but has been unable to demonstrate an error of law in its approach.

**Ground (d)**

32. Ground (d) is put by the Appellant in the following way:

> The Tribunal failed to refer to material matters from 2005 and acknowledge the diagnosed 'spinal cord damage'; instead they have used 'no cord compression and scans' to play down the damaged spinal cord symptoms, especially bladder symptoms due to cervical myelopathy, and giving too much weight to an enlarged prostrate. In other words, the Tribunal did not attempt to carry out a sufficient systematic assessment of the Appellant's degenerative myelopathy disablement and MJOA score in accordance with article 42(2)(a) of the SPO 2006.

33. Broken down into its component parts, this ground of appeal involves two separate propositions. First, it is argued that the FTT failed to refer to material evidence from 2005. However, this criticism must fall away in the light of the FTT's finding at paragraph [17], acknowledging the diagnosis of DCM in 2005. The second constituent element to this ground is a full-frontal challenge to the FTT's evaluation of the evidence. However, questions of weight are quintessentially matters of fact for the first instance tribunal to determine. As the Court of Appeal has recognised, it is not the Upper Tribunal's role to "set the appeal tribunal to rights by teaching them how to do their job of weighing the evidence" (*Fryer-Kelsey v Secretary of State for Work and Pensions* [2005] EWCA Civ 511, reported as *R(IB) 6/05*, at paragraph [25]). Thus, absent a challenge premised on perversity, an attack on the FTT's factual evaluation is impermissible on an appeal limited to an error of law jurisdiction.

34. This is a convenient juncture to deal with the adequacy of reasons challenge insofar as it concerns the Appellant's mobility and the assessment of his disablement. I have to say that on granting permission to appeal this appeared to be potentially the most promising aspect of the grounds of appeal. As I put the point rhetorically when granting permission to appeal, "has the FTT done enough to explain why the AD1/AD4 assessment has remained the same as in 2005? At that earlier date the Applicant argued that his DCM symptoms were in their infancy. Notably, his walking ability had deteriorated from 800m in 2005 (107) to 20m-50m in the PIP assessment in 2023 (117)."

35. Mr Hirst's submission was admirably clear and succinct. In short, he argued that the FTT's decision not to increase the AD1/AD4 award was inexplicable in the context of such a marked decrease in the Appellant's mobility. If that reduction in walking ability is not a deterioration, he asked, what is? As such, he submitted that the FTT's decision was plainly inconsistent with the downward trajectory of the Appellant's CM.

36. Mr Castle's submission to the contrary placed reliance on another passage in Judge Jacobs's decision in *CT v Secretary of State for Defence* [2009] UKUT 167 (AAC):

> 34. Consistency is obviously desirable. But each assessment must be made on the basis of the tribunal's assessment of the evidence before it. That may lead to reductions in assessments when the claimant believes that nothing has changed or only for the worse. The tribunal has to explain why it has made that decision. The explanation must meet the arguments put to the tribunal. If the claimant has argued that the disablement has not changed, the tribunal's reasons must be sufficient to justify its assessment. That may require some explanation of why the assessment has changed: *R(M) 1/96* at [15]. However, the scope for this is limited. Given the 10% bands in which assessments over 20% are made, a tribunal will not know with precision what the previous assessment was. It is only in the clearest cases, such as a reduction from 60% to 20% without any change in the relevant facts (to take an obvious example), that the sort of explanation envisaged by *R(M) 1/96* will be possible.

37. In particular, Mr Castle took four points from this passage. First, consistency in disablement assessments was desirable but inconsistency, in and of itself, did not constitute an error of law. Second, each disablement assessment had to be based on the available evidence at the material time. Third, it was necessary to explain the assessment in the context of the arguments being made. Fourth, and lastly, the 10% percentage bands are broad and so the precise calibration of a previous assessment may not be known.

38. Bearing those various points of principle in mind, as well as taking into account the appropriate judicial restraint which must be shown on further appellate review, and so eschewing 'unduly critical analysis', I am not persuaded that the FTT's decision involves any error of law. The FTT recorded the Appellant's central submissions but explained why it had reached the conclusion that the combined assessment for AD1 and AD4 remained at 50%. It accepted that, overall, there had been a worsening in the Appellant's condition, resulting in a total composite assessment of 80% rather than 70%, as had previously been the case. In effect, the Appellant's deterioration in functionality had been ascribed to the new accepted disablement of lumbar disc disease. It is also important not to lose sight of the fact that the process of disablement assessment is multi-factorial in nature. Accordingly, that process will necessarily take into account a range of other factors (such as the Appellant's age at the date of the fresh assessment). In addition, the FTT highlighted the Appellant's mobility as now being limited to 50

metres (see e.g. paragraphs [34] and [36]), so clearly had that degree of restriction in mind when making its determination. This assessment process is quintessentially a question of fact for the first instance tribunal. Furthermore, this was not one of those clear-cut cases where some further degree of explanation was called for.

**Ground (e)**

39. Ground (e) is that the FTT failed to give adequate reasons to justify not to 'sense check' and/or reassess the Appellant's mental health condition of "anxiety with features of depression".

40. This ground (together with ground (f)) was one that I considered had limited traction when I granted permission to appeal. I have not had cause to change that provisional assessment. Mr Hirst gamely sought to argue that the FTT had made no meaningful attempt to assess the level of disablement caused by the Appellant's anxiety and depression. However, on closer analysis this ground of appeal was no more and no less than an attempt to re-argue the factual merits of the underlying appeal. The FTT's findings on the functional impact of the accepted conditions (paragraphs [28]-[35]) include those relating to his mental health and are summarised at paragraph [37]. No error of law has been identified in the FTT's approach – instead we are left with a (sincere) disagreement as to the FTT's findings of fact. Thus, this ground of appeal is at heart an attempt to re-run the appeal below. Yet, as noted above, the Upper Tribunal must as a matter of principle respect the fact-finding role of the FTT. No error of law is disclosed in the approach of the FTT.

**Ground (f)**

41. Ground (f) is that the FTT failed to take into account or acknowledge the total evidence and/or material fact, when failing to consider nocturia (sleep disturbance) as a separate condition, nor even assess it as part of DCM and its impact on the Appellant's quality of life and mental state.

42. This ground can be dealt with relatively shortly. The essence of this ground of appeal is that the FTT had disregarded the Appellant's nocturia. However, the FTT was plainly well aware of this condition – see, for example, its reference in the findings on functional impact that "his sleep is mainly impacted by the problem of urinary frequency/urgency" (paragraph [28]) and its finding that as regards bladder dysfunction "the problem caused sleep disturbance" (paragraph [41]; see also paragraph [37]). Relatedly, the FTT also confirmed in its decision that "lower urinary tract symptoms accepted as part and parcel of AD1, AD4 and AD5." In any event, the criticism that the panel disregarded nocturia is simply not made out. The reality is that this is a further attempt to challenge the FTT's fact-finding and in particular the weight to be attached to the evidence. The FTT's recognition of the condition was part of the context for its overall assessment. This ground discloses no error of law on the part of the FTT.

## Materiality

43. The FTT, in its reasons, also explained that it had made the following 'reality check':

> 42. The composite assessment, including all the accepted conditions, amounted to 80%, which represents a severe degree of disablement, particularly when considering the list of prescribed disablements in Part V of Schedule 1 of the SPO. In *AM v Secretary of State for Defence (WP)* Upper Tribunal Judge Rowland said that referring to Part V enabled a Tribunal to carry out a "quick reality check of an assessment by asking themselves whether, taken in the round, the claimant in any particular cases is more disabled or less disabled that a person suffering from one of the injuries in respect of which an assessment of the same percentage is prescribed". The Tribunal noted that the 80% included a disablement arising from an amputation below the shoulder, amputation of both feet and amputation below the hip.

44. In earlier written observations on the appeal, I posed the question as to whether any error of law in the process of arriving at the 80% assessment was not material to the outcome of the appeal, given the FTT's finding on this 'reality check'. In raising this point, I had in mind the fact that this form of benchmarking has received the seal of judicial approval; see *CT v Secretary of State for Defence (WP)* [2009] UKUT 167 (AAC) at paragraph 23 and *AM v Secretary of State for Defence (WP)* [2013] UKUT 97 (AAC) at paragraph 19.

45. Mr Hirst argued that the FTT had failed properly to assess the Appellant's disablement, rather than the condition or injury. The combined effect of the accepted disablements had yet to be properly assessed. This failing, he contended, was also evident in the FTT's reference to the Schedule of prescribed disablements. Moreover, it could not be the case that the decision on the assessment was destined to be the same, absent the errors of law – see *Detamu v Secretary of State for the Home Department* [2006] EWCA Civ 604.

46. Mr Castle, in contrast, emphasised that the 'reality check' showed that the FTT had stood back and determined that 80% was the proper overall assessment in the light of the benchmarks in the Schedule of prescribed disablements. In addition, the FTT's function was to make a composite assessment applying the Article 42 criteria. The attribution of percentages to individual accepted disablements was to provide reasons for that decision. However, it was clear why the holistic decision had been made – thus, paragraph 42 of the FTT's reasons provided a separate reason based on unassailable findings of fact for the evaluative assessment of 80%.

47. I do not consider that *Detamu v Secretary of State for the Home Department* [2006] EWCA Civ 604 provides any support for Mr Hirst's submission. As Moses LJ held in the Court of Appeal, "The obligation of this court is to consider the decision of the fact finder – in the instant case the adjudicator – and determine

whether there is an error of law; and if there is, to determine whether it was material" (at paragraph 17). An error is not material only if the tribunal "would have been *bound* to have reached the same conclusion, notwithstanding an error of law" (at paragraph 14), given findings it made that are not tainted by error. However, the tribunal's benchmarking of disablement by reference to the Schedule of prescribed disablements was just that – an entirely separate factual and evaluative assessment which does not disclose any error of law, material or otherwise. Any error of law in the process of the determination of the composite assessment was therefore not material to the overall decision.

## Conclusion

48. I therefore conclude that the decision of the First-tier Tribunal on 4 April 2024 does not involve any error of law. My decision is also as set out above.

**Nicholas Wikeley**
**Judge of the Upper Tribunal**

Authorised by the Judge for issue on 15 July 2025