NCN: [2025] UKUT 419 (AAC)
Appeal No. UA-2024-001584-AFCS

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

RULE 14 Order:
No one must publish or disclose the identity of the appellant in relation to these proceedings, or any matter likely to lead to his identification.

Breach of this order is punishable as a contempt of court.

Between:

BT

Appellant

- v -

SECRETARY OF STATE FOR DEFENCE

Respondent

Before: Upper Tribunal Judge Stout
Hearing date: 11 December 2025
Mode of hearing: In person

Representation:
Appellant: Peter Collins (Royal British Legion)
Respondent: Richard Evans (counsel)

On appeal from:
Tribunal: First-Tier Tribunal (War Pensions and Armed Forces Compensation Chamber)
WPAFCC Ref: AFCS/00182/2023
First-tier Tribunal Hearing: 19 June 2024, Fox Court (in person)
First-tier Tribunal Decision date: 7 July 2024

SUMMARY OF DECISION

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

The appellant had suffered injury to his mental health as a result of the death of his daughter by suicide. He claimed under article 9(1)(c) of The Armed Forces and

Reserve Forces (Compensation Scheme) Order 2011 (as amended) that his injury had been worsened by service. The Upper Tribunal holds that the First-tier Tribunal erred in law by failing to consider the requirements of article 9(5) in addition to article 9(1)(c) and therefore failing to focus on the four conditions of entitlement that must be satisfied under those sub-sections. The First-tier Tribunal also reached perverse conclusions on the evidence, including by failing to recognise that there was medical evidence that supported the appellant's case, and wrongly regarding evidence that the appellant's mental health condition resulted from his perception of work events as being incapable of constituting evidence that service was the cause of the mental injury. Despite giving itself a proper legal direction that the AFCS is not a fault-based scheme, the Tribunal failed to apply that approach when concluding that the various events that the appellant believed had contributed to the worsening of his mental health were not service causes.

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

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal.

REASONS FOR DECISION

Introduction

1. The appellant appeals against the decision of the First-tier Tribunal dated 7 July 2024, issued following a hearing on 19 June 2024. The Tribunal upheld the decision of the respondent Secretary of State that the claimant's mental health conditions were not predominantly made worse by service for the purposes of article 9(1)(c) of The Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (the AFCS).

2. I granted permission to appeal on the papers limited to the following grounds:-

   Ground 1 – The Tribunal reached a perverse conclusion at paragraph [27] that there was no medical evidence supporting the appellant's belief that his condition was worsened by service.

   Ground 2 – Although the Tribunal properly directed itself by reference to *EW v SSD* [2011] UKUT 186 at paragraphs [22]-[23], it failed to apply that law at paragraphs [27], [28] and [29] by failing to consider whether the matters identified by Dr Odysseus, and the transfer to the intelligence role and the journey home following news of his daughter's death were or were not 'service' and, if so,

whether they were (cumulatively) the predominant cause of the worsening. Alternatively, its reasons on these matters were inadequate.

Ground 3 – The Tribunal failed to provide any, or any adequate, reasons for rejecting the appellant's case that not offering him the Colchester role and posting him back to the Intelligence role were not 'service' or whether those acts/omissions worsened his injury.

Factual background

3. The appellant served in the British Army from 10 August 1988 to 26 January 2019. He left the service in the rank of Sergeant.

4. While on exercise in the United States of America, in April 2014, he received news that one of his daughters, aged 19, had died by suicide. He flew back to the United Kingdom via Heathrow Airport and then was driven to where his daughter's body was located.

5. The appellant was critical of the army for allowing him to fly unaccompanied, that a Unit Welfare Officer only spent five minutes with him on arrival and that the driver who took him to where his daughter's body was located had no welfare or other relevant training, and left him by the roadside. The appellant also states that he had no support from the army in dealing with the formalities which followed his daughter's death including the inquest and the funeral. He states his wife also received no support from the army.

6. After the funeral, the appellant returned to Suffolk where he remained for three months on sick leave. He states that he only received one welfare visit during this period, when he had expected to receive fortnightly visits. He states his wife also did not receive support.

7. Between 17 September 2014 and 20 January 2016, the appellant was downgraded for medical reasons to P7R. On 18 May 2015 he was diagnosed with an Adjustment Disorder. He was prescribed Citalopram.

8. On 20 January 2016, he was upgraded to "fully fit" and returned to duties as an ammunition sergeant in an Apache helicopter squadron. In addition to loading ammunition, he was also responsible for training ground crew. He went on full time exercises.

9. Due to his positive performance, he was transferred to new duties as an Intelligence Sergeant at Regional Headquarters. This involved a five week training course which he describes in his statement (p 110) as "the most stressful course I'd done in my 19yr career". He was critical of the decision to move him from his familiar role.

10. The role at Regional Headquarters was in a small office in an isolated location. The appellant was alone for much of his time during this posting. His statement

describes how difficult he found it. It affected his behaviour at home with his family and he had to spend time living on camp as his wife was struggling to cope with his anger and frustration at home.

11. According to the appellant's statement, it was in recognition of these difficulties that he was transferred to the Army Welfare Service. This involved an eight-month training course. He found this a rewarding experience and he did well on the course. Towards the end of the course he requested a posting to Colchester so that he could live with his family. He was told that no such posting was available. As a result, he withdrew from the course.

12. Following his withdrawal from the course, the appellant's wife contacted the Department of Community Mental Health at Colchester and stated that he had been emotionally abusive to her and shouted at the children. On 8 November 2017, he was admitted to a psychiatric ward at Edith Cavell Hospital for two weeks. His medical notes at this time record his conditions as "Adjustment disorders" and "Mania". On 6 November 2017 he was downgraded on medical grounds to P7R (not deployable on operations). On 30 November 2017 he was downgraded again to 0R (p 38R).

13. On 9 February 2018, he was diagnosed as suffering from Post-traumatic Stress Disorder (PTSD) and Generalised Anxiety Disorder by Dr Odysseos at DCMH Colchester (p 35).

14. On 26 April 2018, a Medical Board at Colchester determined that he should be discharged from the service on medical grounds. The principal conditions recorded were PTSD and Other Mood Disorder.

15. Prior to discharge, the Appellant made an initial claim for compensation under article 8 of the AFCS on the grounds that service was the predominant cause of his mental conditions. The claim was refused and an appeal against that decision was withdrawn on 11 January 2021.

16. Subsequent to discharge, the Appellant lodged a claim for compensation pursuant to article 9(1)(c) AFCS on the basis that service was the predominant cause of the worsening of his injury. In a decision dated 25 May 2021, the claim was refused by the Secretary of State. The medical advisor stated: "His mental health problems arose during service following bereavement in May 2014. He developed a complicated grief reaction leading the initial diagnosis of Adjustment Disorder in August 2014 […] and subsequently complex PTSD (bereavement related) in 2018 […]. He has unshakeable beliefs that he was unfairly treated by the Army. However, SoS has found no evidence of this. He had input from DCMH from August 2014. He was appropriately downgraded for his mental health issues […]. He experienced reactive mood changes in response to positive and negative social and work circumstances; for example his mood improved when he secured an AWS role but dipped again when symptom recurrence rendered him unable to complete training. On the balance of probabilities, service was not the predominant cause of worsening."

17. The decision to refuse benefit was upheld in a decision dated 24 February 2023 for the same reasons.

18. The appellant appealed against this decision to the First-tier Tribunal.

The First-tier Tribunal's decision

19. The hearing before the First-tier Tribunal took place on 19 June 2024. The decision dismissing the appeal was made on 7 July 2024.

20. After setting out some basic facts, the Tribunal noted the following extracts from the appellant's medical records as being "of particular significance":

    a. 19 May 2014: "Was on Ex Crimson Eagle 3w ago when he was told his 19 year old daughter has died […] So far bereavement reaction is normal but pt keen for referral to DCMH.";

    b. 9 April 2015: "Feels he has hit a wall with his bereavement and doesn't know how he is going to progress. Has tried several charities including CRUSE which have helped a little […] Refer back to DCMH ? abnormal bereavement reaction.";

    c. 18 May 2015: "Diagnosis Adjustment Disorder Currently on Citalopram […] Pt feels exhausted with all the pressure and the constant feeling he has to keep his daughter alive in his mind. It is also apparent that he tries to bottle up some of the anger he feels towards his ex-wife and the friends who made the drugs available to his daughter. […] One strong protective factor is work focus and serves to be a good distraction […]"

    d. 14 September 2015: "[Other] Daughter … is probably going to come and stay with him and his wife and children. [Other daughter] has mental health problems of her own (smoking cannabis, DSH requiring sutures) so pt worried about the effect she may have on his family here. […] Pt says that relationship with his wife is better but that they still have small arguments";

    e. 14 September 2018: Summary report Dr Marianna Odysseos, Consultant clinical psychologist.: "[The appellant] has been seen for block periods over the past four years. On reviewing the records, progress was cyclic and greatly influenced by systemic issues. The main triggers of relapse were: anniversaries linked to his daughter .., unstable presentation of his [other] daughter …, and issues at work. Similarly positive circumstances such as family holidays, involvement in charity fundraising events and positive shifts in work situations would improve [the appellant's] mental health presentation and there would be a planned discharge from DCMH care before the process was then triggered off again" and "Although the initial reason for referral was the death of his daughter, this root trauma

> has become enmeshed with [the appellant's] perceptions of his experiences and how he felt he was being treated through the process. Therefore the main trauma becomes linked to his feeling that there was a lack of duty of care following receiving the news of [his daughter's] suicide. He has strong and vivid intrusive memories of being abandoned on the flight home, at the airport and being dropped off alone to identify his daughter's body. These almost unshakeable beliefs about feeling he was not properly cared for have therefore maintained and complicated the trauma symptomatology. This is further reinforced by several other incidents where [the appellant] has felt "let down" by the military and his unit. This process appears to have resulted in subtle yet significant changes in [the appellant] personality traits".

21. At [20], the Tribunal set out some provisions of the AFCS, but included only the first two sub-paragraphs of article 9. I return to the significance of this omission below.

22. At [23] the Tribunal made reference to *EW v SSD* [2011] UKUT 186, noting "that liability under the AFCS does not depen on whether the injury was intended or foreseen or on any breach of duty but solely on whether the terms of the AFCS are met".

23. At [24] the Tribunal stated that it "fully accepted" the formulation of Dr Odysseos of 14 September 2018 that the appellant:

> "has a genuine, deep-seated resentment of what he regards as being failures by the army to comply with its own standards for support of service people affected by bereavement. He believes that in particular he was failed by no arrangements being made for him to be accompanied on the aeroplane from [the USA], to be supported more on arrival at Heathrow, to have someone with welfare training accompany him … and stay with him during the identification of the body and making of subsequent arrangements, not allowing him to remain in his earlier team for a longer period, posting him to an unwelcome new job where he would work alone, and then to refuse him a welfare posting at Colchester so that he could stay with his family."

24. At [25] it acknowledged the appellant's belief that perceived failures in care by the army worsened his mental health and led to his discharge from the army.

25. At [26] the Tribunal stated that it considered the appellant's loss of his daughter in the context of family issues, including mental health issues of his other daughter, "was undoubtedly the predominant cause of his mental health problems".

26. At [27]-[30] it concluded that service was not a predominant cause of the worsening of the appellant's condition for the following reasons:-

27. We were unable to find anything in the extensive medical evidence provided in the document bundle supporting [the appellant's] belief that his condition was worsened by service. We asked [the appellant] if there was any such evidence and he could not point to any, nor did his experienced representative. It was particularly noticeable that the consistent thread in the contemporaneous medical records was the traumatic loss of [his daughter], but not the various perceived failures by the army now considered by [the appellant] as having exacerbated his condition.

28. We were unable to accept that the transfer to the Intelligence role was likely to have been a cause of the worsening. Although not involving a promotion to a higher rank this would be seen as a 'feather in his cap' and a route towards future promotion. The slightly lower grade on performance reports is a usual initial feature of a move to a new and unfamiliar role. Similarly, [the appellant's] wish to move to Army Welfare Services was accepted and he was placed on an 8-month course from which he withdrew after 7½ months as he did not expect to receive the subsequent posting that he wanted. This could not reasonably be regarded as a service cause.

29. We were unable to accept that a failure by the army to provide particular support, such as accompanying [the appellant] on the aeroplane to Heathrow or providing welfare support immediately thereafter could be a service cause of worsening. Firstly, there was no evidence (other than [the appellant's] belief) that the condition was worsened by this. Secondly, it was not service that would have had this effect, rather the absence of some form of support that [the appellant] expected to be provided (but which the army was not obliged to provide). Thirdly, by January 2016 the emotional stability PULHEEMS grade had reverted to S2.

30. We accepted the opinion of Dr Odysseos and found that one factor in transient and cyclical downturns in his condition was his perception of work issues, but this was not the predominant cause of such downturns or of any lasting worsening of his condition. While we had the utmost sympathy for [the appellant] in the various traumatic events that he had experienced we could not accept, on the evidence provided, that service had worsened his condition, or was the predominant cause of any worsening of his condition.

Legal framework

Relevant legislative provisions

27. Articles 8 and 9 of the AFCS Order provide:

> **Injury caused by service**

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

(2) Where injury is partly caused by service, benefit is only payable if service is the predominant cause of the injury.

Injury made worse by service

9.—(1) Subject to articles 11 and 12, benefit is payable to or in respect of a former member of the forces by reason of an injury made worse by service if the injury—
(a) was sustained before the member entered service and was recorded in the report of the medical examination when the member entered service,
(b) was sustained before the member entered service but without the member's knowledge and the injury was not found at that examination, or
(c) arose during service but was not caused by service, and in each case service on or after 6th April 2005 was the predominant cause of the worsening of the injury.

(2) Benefit is only payable under paragraph (1) if the injury has been worsened by service and remains worsened by service on—
(i) the day on which the member's service ends; or
(ii) the date of claim if that date is later.

(3) Subject to paragraph (4), in the case of paragraph (1)(a) and (b), benefit is only payable if—
(a) the member or former member was downgraded within the period of 5 years starting on the day on which the member entered service;
(b) the downgrading lasted for a period of at least 6 months (except where the member was discharged on medical grounds within that period);
(c) the member or former member remains continually downgraded until service ends; and
(d) the worsening was the predominant cause of the downgrading.

(4) In the case of paragraph (1)(a) or (1)(b), benefit is not payable if the injury is worsened—
(a) within 6 months of the day service commenced; or
(b) 5 years or more after that day.

(5) In the case of paragraph (1)(c), benefit is only payable if the member—

> (a) was downgraded within the period of 5 years starting on the day on which the member sustained the injury and remains continually downgraded until service ends; and
> (b) the worsening was the predominant cause of the downgrading.

28. Articles 11 and 12, mentioned in articles 8 and 9, provide for exclusions from benefit in certain circumstances if the injury is caused by travel to and from work, sport, slipping and tripping, or misuse of substances (among other things). Of potential relevance in this case is article 11, which provides in material part:

> **Injury and death – exclusions relating to travel, sport and slipping and tripping**
>
> 11.—(1) Except where paragraph (2) or (9) apply, benefit is not payable to or in respect of a person by reason of an injury sustained by a member, the worsening of an injury, or death which is caused (wholly or partly) by travel from home to place of work or during travel back again.
>
> …
>
> (9) This paragraph applies where the injury, the worsening of the injury or death was caused (wholly or partly) by reason of—
>
> (a) ….
>
> (b) the member being called out to and travelling to or from an emergency.
>
> (10) In this article—
>
> (a) "home" means accommodation, including service accommodation, in which a member has lived or is expected to live for 3 or more months, and a member may have more than one home;
>
> (b) "place of work" means the place of work to which a member is assigned or temporarily attached;

29. Article 2(1) provides that:

> "downgraded" means downgraded for medical reasons as a result of which the person downgraded undertakes a reduced range of duties but retains rank and pay;…
>
> "predominant" means more than 50%;…
>
> "service" means service as a member of the forces…

30. Article 60 makes provision in relation to burden of proof as follows:-

> **Burden of proof**
>
> 1.-(1) Subject to the provisions of this article, the burden of proving any issue is on the claimant.
>
> (2) Where paragraph (3) applies there is a presumption in favour of the claimant unless the Secretary of State proves to the contrary.
>
> (3) This paragraph applies where-
> (a) a contemporary official record relating to a material fact which is relevant to deciding a condition for payment of benefit under Part 2 is missing; and
> (b) there is other reliable evidence to determine the material fact.
>
> (4) For the purposes of paragraph (3)-
> (a) "a contemporary official record" means a record, including an electronic record, held by the Secretary of State for Defence or the Defence Council;
> (b) "a material fact" need not be a decisive fact for the purpose of determining a claim under Part 2;
> (c) a record is missing where it has been-
> (i) lost and cannot be found after a diligent search; or
> (ii) destroyed.

31. By article 61, the standard of proof is the balance of probabilities.

Relevant case law

Caused by service

32. The question of whether an injury or worsening of an injury is caused by service is a difficult one in respect of which various Upper Tribunal decisions have sought to offer guidance.

33. In *EW v SSD* [2011] UKUT 186, which concerned a member who was struck by a car when walking to work, Judge Mesher concluded that the injury was not caused by service. The core part of his reasoning is as follows at [25]:

> 25. There is some assistance to be gained from considering the time-honoured formula of "personal injury by accident arising out of and in the course of employment", dating from the Workmen's Compensation Act 1897 and still current in the Social Security Contributions and Benefits Act 1992 in relation to industrial injuries disablement benefit. To be entitled to disablement benefit the claimant must not merely be in the course of employment at the time of the accident, but the accident must also arise from employment. The test under the AFCS Order of service being the predominant cause of injury corresponds to the "arising out of employment" part of that formula (although creating a considerably higher hurdle), but there is no equivalent of "in the course of

employment". That leaves a great deal of work to be done by the test of causation, and without the assistance of the many presumptions and rules within the industrial injuries legislation about when an accident is to be treated as arising out of employment. There is also the very significant condition that it is not enough, as it for disablement benefit, that service is a cause, of a substantial non-trivial kind; it must be the predominant cause. In the industrial injuries context, as mentioned above, there have been great problems raised by travel, some of which have been dealt with by specific legislative rules. For the moment, I merely note the acceptance in this context (as in others, such as income tax law and the rules as to vicarious liability for the acts of employees) of a fundamental distinction between travel to and from work and travel as part of work.

26. In my judgment, in the circumstances of the present case, the claimant could not be regarded as doing his job as member of the armed forces while walking from his apartment in Lille to the Citadelle. He was doing something which was necessary for him to carry out that job, but he was not yet doing it. I do not have to decide at what point before entering his office or work-building that would change. I suspect that it might be said to be at the point at which he entered an area where he was entitled to be only as a member of the armed forces and not as a member of the general public. However, the precise identification may not always matter because not everything that happens to a person while doing their service job can be accepted as caused by service, let alone as having service as the predominant cause. And some things that happen while the person is not doing their service job can be accepted as being caused by service. It does not affect my conclusions so far that the claimant was under a duty, in a sense, to get to the Citadelle to do his job (as are all employees) or regarded himself as (or even was in fact) on duty when doing so or when wearing his uniform or whether he was subject to military discipline. He was still not doing his job.

27. The injury on the journey to work being a manifestation of a risk run by the general public using the streets of Lille, that injury could not properly be regarded as caused by his service, let alone being predominantly caused by service. Nor was the nature of that risk in any way restricted to Lille as compared with any other place, including within the United Kingdom, where he might have been posted and had to live in non-service accommodation. I think that his RBL representative at the hearing on 28 October 2009 had it right when she said that service provided the setting for the incident. Where she went wrong was in the submission that that meant that service was the predominant cause. It is of course true that the claimant would not have been where he was on the pedestrian crossing in Lille if he had not been serving in the armed forces at the time. However, that factor cannot be differentiated from the great morass of other background factors in the absence of which he would not have been where he was at the particular time. Such factors cannot as a matter of common sense and common experience be

> regarded as a cause of the claimant's injury. They merely form part of the background setting.
>
> 28. There may of course in other circumstances be factors that mean that service is a cause, and potentially the predominant cause, of an injury suffered while a person is travelling to and from work. The examples mentioned above of a person being targeted because of their uniform or of carrying service equipment that is linked to the occurrence of the incident might qualify. It would be wrong in the present decision to seek to set out any more defined principles by which such circumstances can be identified. Each case must be considered on its merits. I do add this word of caution, linked to the hypothetical example of the claimant here having been ordered to divert from his normal morning route to meet a visiting officer at the Lille Eurostar/TGV station and, say, being knocked down on the same pedestrian crossing at the same time on the way to the Citadelle. In such circumstances, service might be regarded as differentiated from the overall background setting so as to be at least a cause, but the incident would still have been a manifestation of a risk run by the general public using the streets of Lille. There would then be a serious question to be answered whether service could be determined to be the predominant cause. I come back to the identification of predominant cause in paragraph 31 below when discussing some of the authorities relied on by Mr Shaw.

34. At [34] he continued:

> 34. What Mr Shaw said was that the Ministry of Defence, with a responsibility for the claimant's welfare and wellbeing, had done something that produced a situation in which he could have been injured on busy city roads in the dark and the wet by posting him to Lille in circumstances in which he had no service accommodation and no service transport to and from work. What happened was then a normal fact of life and a long way from something extraordinary.
>
> 35. That of course is in a sense undeniable, but it does not show in the context of the AFCS Order that service was a cause of the claimant's injury. That context is not the same as that being considered by Lord Hoffmann. Although the AFCS operates on a strict liability basis in the sense that entitlement to compensation does not depend on the injury having been intended or foreseen by the Ministry of Defence, neither does it depend on any breach of duty. There is simply a public law entitlement to compensation when the terms of the ASCS Order are met. The injury having been predominantly caused by service is one of those tests. One is not then looking at a question of causation for the purpose of attributing responsibility under some rule, but looking at the meaning of causation as part of the rule as to entitlement to and responsibility for the payment of compensation. …

> 36. Perhaps another way of expressing much the same point is that Mr Shaw's approach was, in the terms used by Denning J in Chennell, to start with the claimant's service and ask what its consequences were, rather than, as is preferable, to start with the claimant's injury and ask what the causes of it were and what was the predominant cause. …

35. Further guidance was given by the three-judge panel (Charles J, Upper Tribunal Judges Rowland and Lane) in *JM v SSD* [2015] UKUT 332 (AAC). Having reviewed the case law at [98], at [99]-[103], they held as follows:

> 99. The principle (or per Ormerod J in Giles the established rule) to be derived from these cases is that a claim must fail where the injury was sustained while the claimant was engaged on some personal enterprise unconnected with any duty or compulsion of service; or (as Denning J put it in Monaghan) service only gave the opportunity, or provided the setting, for the injury to occur.
>
> 100. The approach taken in the cases under the war pensions instruments:
>
> i) shows that the attributability test was construed and applied as a causation test,
>
> ii) demonstrates that a cause is distinct from the circumstances in or on which the cause operates. Cases often occur where the injury or disease would have arisen in any event, service or no service. In such cases it is not attributable to service unless caused by some special or particular characteristic, stress or strain attributable to service.
>
> iii) recognises that in some cases it will be very hard to draw the line between when an injury is sufficiently caused by or linked to service to be "attributable" to it and so a "service cause" and when it is not,
>
> iv) does not espouse a rule that a "one off incident" will not satisfy a causation test for payment, (and as we have mentioned this is recognized in the Secretary of State's statement of policy),
>
> v) demonstrates, as accepted before us, that the approach advanced by the Secretary of State before the FTT in this case … is too narrow and is accordingly wrong [the Secretary of State's position having been that causation would be established only "… where the claimant can clearly be shown to have suffered as a direct result of both the abuser/s and the victim (claimant) acting under a compulsion of service or in pursuance of the service's legitimate objectives"],
>
> vi) whether a serviceman is on duty may be relevant but is not determinative, and

> vii) recognises that injuries caused by assaults, whether by civilians or by other servicemen, may be due to service or may not: it all depends on the circumstances.
>
> …
>
> 102. Importantly … there is no short cut to deciding the question whether an injury was caused by service by way of a simple formula that can be adopted in place of the statutory language. On the other hand, an appellate court or tribunal will not interfere with a finding of the FTT that an injury was caused by service if it has applied the proper test and the FTT has not in any other respect erred in law by, for instance, acting unfairly. …

Travel cases

36. As to the relationship between what was is now article 11 and articles 8 and 9, in *EW v SSD* Judge Mesher at [22] held:

> It may therefore be right in practice to make article 10 [now, article 11] the starting point in a travelling case, because if one of its tests is satisfied the article may provide a straightforward answer that the claimant qualifies under the AFCS, subject to the further determination that an injury within the Tables in Schedule 4 or within the terms of article 20 has been sustained. But article 10 can be no more than a starting point in a case where one of its tests is not satisfied. In that circumstance, it is necessary to go on and consider the relevant ordinary test. Accordingly, the tribunal of 22 October 2009 erred in law in dismissing the claimant's appeal for the reason it did.

Approach of the Upper Tribunal on appeal

37. The Upper Tribunal may only allow an appeal under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) if it finds that the making of the decision by the First-tier Tribunal involved the making of an error on a point of law.

38. Errors of law include misunderstanding or misapplying the law, taking into account irrelevant factors or failing to take into account relevant factors, procedural unfairness or failing to give adequate reasons for a decision.

39. An error of fact is not an error of law unless the First-tier Tribunal's conclusion on the facts is perverse. That is a high threshold: it means that the conclusion must be irrational or wholly unsupported by the evidence. An appeal to the Upper Tribunal is not an opportunity to re-argue the facts of the case.

40. These principles are set out in many cases, including *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[13].

41. In scrutinising the judgment of a First-tier Tribunal, the Upper Tribunal is required to read the judgment fairly and as a whole, remembering that the First-tier Tribunal is not required to express every step of its reasoning or to refer to all the evidence, but only to set out sufficient reasons to enable the parties to see why they have lost or won and that no error of law has been made: cf *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672 at [57]. That case also makes the point (at [58]) that where the First-tier Tribunal has correctly stated the law, the Upper Tribunal should be slow to conclude that it has misapplied it.

Why I am allowing this appeal

Preliminary observations

42. Before considering the individual grounds of appeal, it is important to have in mind what is necessary in order for a member or former member of the forces to be entitled to benefit under article 9(1)(c). The following conditions must be satisfied:

    a. The member or former member must have sustained an injury that arose during service but was not caused by service (art 9(1)(c));
    b. The member or former member must have been downgraded within the period of 5 years starting on the day on which the member sustained the injury and must remain continually downgraded until service ends (art 9(5)(a));
    c. The worsening of the injury must have been the predominant cause of the downgrading (art 9(5)(a)); and,
    d. Service must have been the predominant cause of the worsening of the injury (art 9(1)(c)).

43. In this case, the First-tier Tribunal omitted to include article 9(5) in its decision and did not address it. Neither did the appellant or the Secretary of State until I raised it at the Upper Tribunal hearing. That is unfortunate because article 9(5) is an essential condition of entitlement under article 9(1)(c) and it provides, or should provide, the focus for consideration of a claim. Although the four elements I have identified above could be dealt with in any order, and failure to satisfy any one of the conditions would lead to a refusal of benefit, it seems to me that in most cases it will make sense for a Tribunal to take the issues in the order that I have set them out above.

44. In the present case, following that route would have produced a decision with a very different structure and, hopefully, one that did not fall into the errors that I have identified below.

45. The Tribunal would need to have started by identifying the injury that arose during service but was not caused by service. In this case, that would be the appellant's initial bereavement reaction, diagnosed as an Adjustment Disorder in May 2015.

46. The Tribunal should then have identified the relevant downgrading decision for the purposes of article 9(5). In this case that was not the initial downgrading between 2014 and 2016 because the appellant did not remain continuously downgraded after that, but returned to full duties. The relevant downgrading decision was that on 6 November 2017 when the appellant was admitted as a mental health in-patient for two weeks and subsequently (in February 2018) diagnosed as suffering from PTSD.

47. The Tribunal then needed to decide whether the worsening of the original injury was the predominant cause of the downgrading. This required the Tribunal to consider whether what was evidently a worsening in the appellant's mental health in November 2017 was a worsening of the original bereavement reaction / Adjustment Disorder or some new and unrelated deterioration in his mental health. In this case, given the Tribunal's conclusion at [26] that the appellant's bereavement remained the predominant cause of his mental health issues throughout, it seems to me that if it had taken the correct approach, it would inevitably have concluded that the downgrading in November 2017 was predominantly caused by a worsening in the appellant's original bereavement reaction / Adjustment Disorder.

48. Finally, the Tribunal needed to consider whether service was the predominant cause of the worsening of the injury, i.e. of the deterioration in the appellant's mental condition between 2015/2016 and his downgrading in November 2017.

49. The Tribunal in this case did not follow that structure and the appeal could be allowed on that basis alone. However, failure to follow that structure was not one of the grounds of appeal, so I now turn to consider the actual grounds of appeal.

Ground 1 – The Tribunal reached a perverse conclusion at paragraph [27] that there was no medical evidence supporting the appellant's belief that his condition as worsened by service.

<u>The arguments</u>

50. In granting permission to appeal on this ground, I observed:

> 17. … at paragraph [27] the Tribunal states "We were unable to find anything in the extensive medical evidence provided in the document bundle supporting [the appellant's] belief that his condition was worsened by service". However, this statement is arguably perverse given that, as noted above, the opinion of Dr Odysseos on its face appears to be exactly that. It is not conclusive, but it is 'supporting'. It is arguable that Dr Odysseos's opinion is that events occurring during service (or, at least, the appellant's perception of those events) have worsened his condition. Dr Odysseos' opinion is not limited as the Tribunal notes at paragraph [30] to an opinion that "one factor in transient and cyclical downturns in his condition was his perception of work issues", but goes

> on (arguably) to express the opinion that these have (permanently?) "maintained and complicated the trauma symptomatology" and resulted in "significant changes in …. personality traits".
>
> 18. Of course, it does not follow that the appellant's appeal should have succeeded because the difficult task for the Tribunal was (arguably) to apply the guidance in EW in order to decide, first, whether the events in question actually count as 'service' rather than as 'service' providing the 'context' for those events. … the Tribunal arguably then needed also to consider whether, if those events were part of 'service', it was them that caused the worsening rather than the appellant's perception of those events (if that is a valid distinction in the context of a scheme that is not concerned with fault, which may also be an arguable point).

51. Mr Collins on behalf of the appellant expanded on my observations in his skeleton argument and orally at the hearing. In particular, he argued that even if the appellant did not put his case forward clearly at the hearing, it was incumbent on the Tribunal, exercising an inquisitorial jurisdiction, to read the bundle and identify the relevant evidence.

52. Mr Evans for the Secretary of State in response submitted that the Tribunal's conclusion that there was no medical evidence supporting the appellant's belief was not perverse. The Secretary of State had produced a transcript of the relevant part of the Tribunal hearing in which the Tribunal asked the appellant and his representative about the medical evidence. The parties at this hearing were agreed that this was the only part of the hearing that I needed to consider. I have annexed it to this decision. Mr Evans explained that the Tribunal was in that part of the hearing asking the appellant about a sentence in the report of Dr Eleanor Sorrell (Clinical Psychologist) at p 162, where she wrote "When [the appellant] was medically discharged, the Colonel stated that he was being medically discharged due to PTSD which was triggered by [his daughter's] death but exacerbated by his treatment by the army". Mr Evans submitted that it was open to the Tribunal, on the basis of the appellant's answers to its questions, to conclude that the appellant and his representative had not been able to identify any medical evidence in support of their case.

53. Mr Evans further submitted that Dr Odysseus's opinion is correctly reflected in the First-tier Tribunal's view that the appellant had an unsupported belief that his condition was worsened by service. It is based on the appellant's beliefs about lack of care and feeling let down. He submitted the Tribunal was drawing a distinction between whether the events had caused the worsening of the condition or whether they had felt that they caused a worsening of his condition. A belief in something having worsened a condition is not the same as something having actually worsened his condition. Although there is a connection, it does not mean that there is causation. The creation of beliefs in the appellant's mind breaks any link in the chain of causation to service and that justifies the Tribunal's conclusion at [27] that there was not any medical evidence to support his belief that the events had worsened his condition.

My conclusions

54. In my judgment, the Tribunal erred in law in [27].

55. First, it was not fair in my judgment for the Tribunal to conclude from the appellant's answers to its questions in the transcript of the hearing provided by the respondent that he and his representative had not been able to point to any medical evidence supporting the appellant's case. The Tribunal does not ask that question in an open way. Rather, it focuses on what the appellant had told Dr Sorrell about what the Colonel had said when deciding to discharge the appellant and the appellant then focuses on trying to remember the name of the Colonel.

56. Secondly, Mr Collins is right that the Tribunal exercises an inquisitorial jurisdiction. That does not mean that it is for the Tribunal to make out a party's case or to go looking through the bundle for material that a party has made clear either is not there or is not relied on, but it does mean that it must read the bundle for itself and take account of all substantial matters of evidence that are relevant to the issues to be decided, even if neither party refers to them. In this case, the Tribunal actually set the relevant passage from Dr Odysseos's report out in its decision, so it was not a question of it not being to find the evidence, just a failure to appreciate the significance of the evidence it had before it.

57. Thirdly, the Tribunal's conclusion that there was no medical evidence supporting the appellant's case was perverse. Mr Evans on this appeal has made a valiant effort to argue that the Tribunal was right to regard Dr Odysseos' opinion as not constituting medical evidence that supported the appellant's case. He argues that because Dr Odysseos links the deterioration in the appellant's mental health to his *perception* of work issues and events rather than to the work issues and events themselves, the Tribunal was right to regard that as being so obviously not evidence in support of the appellant's case that it did not even need to address the point in its reasons.

58. I am afraid, however, that is not a sustainable argument. The nature of mental health conditions, and particularly those relating to stress at work, is that they are in most cases linked to a person's perception of events rather than directly to the events themselves. Unlike a physical injury, mental injuries are inflicted through our perception and experience of events. The AFCS is a 'no fault' scheme so the fact that no one had done anything objectively wrong to the appellant is irrelevant. Evidence that a member or former member has perceived work as being a source of stress is itself *prima facie* evidence that work is the cause of the stress.

59. This is very much the same point as I dealt with in *MJU v SSD* [2025] UKUT 033 (AAC). Having in that case at [28] set out all the entries in the appellant's medical notes linking his stress to incidents at work, I continued:

> 29. In responding to the appeal, the Secretary of State has dealt with each of these entries and sought to explain why the Tribunal was right to

conclude that these did not provide evidence of a causal link between work and stress.

30. Again, I am afraid the Secretary of State's response is no answer to an appeal on a point of law. The Tribunal's conclusion that there was "no evidence" of a link between work and stress was perverse, even applying the high threshold required before such a conclusion is reached: see *R (Iran) v SSHD* ibid at [11]. There was in fact ample evidence of a link; it was not open to a Tribunal, properly directing itself on the evidence, to find that there was no such evidence. Of course, the Tribunal may nonetheless be able to conclude that the causal link is not made out for some or all of the reasons identified by the Secretary of State. However, in an appeal on a point of law, it does not assist for the Secretary of State to provide the evidence and reasons missing from the Tribunal's analysis. The Tribunal's role was to consider that evidence and explain what it made of it; it has not done that.

32. In the Secretary of State's submissions, it is argued (among other things) that the medical records "do not give any information as to the cause or nature of the stress", that "service proactively removed [the appellant] from any potential workplace stressors by preventatively signing him off" and that a reference [to] "lack of 'perceived' support isn't a specific indication of any service exacerbation, and would potentially suggest [the appellant] has a different view point relating to required support".

33. The difficulty with these submissions is that they suggest that fault and breach of duty are relevant to the question of whether the injury was caused by service. However, as Judge Rowland neatly summarised the law in the light of *JM in SN v SSD* (AFCS) [2018] UKUT 263 (AAC), "this is a no-fault scheme … a mental disorder caused by stresses at work in the Armed Forces may be caused by service even if no-one behaved improperly towards the claimant".

34. The Secretary of State's submissions also suggest that weaknesses, or the appellant's subjective perception of matters at work, may be the cause of the stress rather than work. That is an issue that the Tribunal will need to consider on remission. In doing so, the Tribunal will need again to take account of the guidance in JM that having a "thin skull", and thus being more susceptible to work-place stressors, does not remove the causal connection between the work and the stress. In *JM* the Upper Tribunal held as follows:-

> 132 In this context we do not see any sign that the intention behind the AFCS is to deprive those with constitutional weaknesses from the protection usually regarded as appropriate in other compensation schemes, that is to say the "thin skull" approach.

> 133. We acknowledge that, in exercising the judgment between process causes that have been categorised into service and non-service causes of the injury, a literal approach to the language of the test in the 2005 and 2011 Orders could, in an equivalent case to Marshall, found the view expressed by Denning J with the result that the claimant would not get an award because the predominant cause of the injury was the constitutional weakness and the cough was a lesser cause.
>
> 134. But in our view the width of the language permits a more sophisticated approach to deciding whether, as the Secretary of State put it, conceptually the service cause contributes more than one half of the causative stimulus for the injury claimed, and thus whether service is the predominant cause in a case where (after the categorisation process) the only competing causes are service and constitutional or other pre-existing weaknesses. In such a case the decision-maker generally should firstly consider whether without the "service cause", the injury would: (a) have occurred at all, or (b) have been less than half as serious.

60. I am therefore satisfied that the Tribunal's conclusion at [27] that there was no medical evidence supporting the appellant's view that service contributed to the worsening of his mental health condition was perverse. Dr Odysseus's opinion was that evidence and the Tribunal needed to consider what it made of it and, if it consider that it was not evidence that service was contributing to his mental health condition, it needed to explain why.

Ground 2 – Although the Tribunal properly directed itself by reference to *EW v SSD* [2011] UKUT 186 at paragraphs [22]-[23], it failed to apply that law at paragraphs [27], [28] and [29] by failing to consider whether the matters identified by Dr Odysseus, and the transfer to the intelligence role and the journey home following news of his daughter's death were or were not 'service' and, if so, whether they were (cumulatively) the predominant cause of the worsening. Alternatively, its reasons on these matters were inadequate.

<u>The arguments</u>

61. In granting permission to appeal, I observed as follows:

> 19. … at paragraph [28] the Tribunal explains why it has found that the transfer to the Intelligence role was not likely to have been a cause of the worsening. However, its reasons for so concluding arguably impermissibly import considerations of foreseeability and fault. The Tribunal says that although not a promotion this would be seen as a 'feather in his cap'. The suggestion seems to be that it was not reasonable for the appellant to have any difficulty with this role. But it is arguable that that was irrelevant and what the Tribunal should have been focusing on was whether the move to that role in fact caused a worsening

> of the appellant's condition, which arguably required a focus on his evidence of his reaction to it and the medical evidence as to his mental health before, during and after that posting.
>
> 22. … the Tribunal may at paragraph [29] be right that the army was not obliged to provide more welfare support than it did on the appellant's journey home following the news of his daughter's death, but it is again arguable that the Tribunal has failed to ask itself the right question, which is arguably whether that journey home was 'service' or not. The question of whether the army was or was not 'at fault' for allowing the appellant to undertake so much of that journey home alone was not relevant.

62. Mr Collins for the appellant developed these points further in his skeleton argument and orally at the hearing. He argued that the Tribunal should have considered, systemically, whether the matters that the appellant identified as causing his mental injury were 'service' or not, applying the guidance in *EW* and *JM*, or whether service merely provided the background against which the injury occurred. He in particular emphasised that the intelligence role was not a promotion, and the appellant's evidence in his statement was that he was very unhappy in that isolated role.

63. Mr Evans for the Secretary of State submits that the Tribunal did not fail to consider these matters, and that the reasoning given was adequate, albeit succinct. He submitted that the Tribunal's conclusions were clear. The Tribunal records that the appellant and his legal representatives were asked whether there was anything lending support to his belief that his condition was worsened by service and were unable to provide such evidence. The respondent accepts that transfers to specific roles would be part of service, but in this case the Tribunal found that it did not cause a worsening of his condition. The respondent submits that this was a conclusion the Tribunal was entitled to reach on the facts having heard oral evidence from the appellant. The Tribunal considered on the evidence that the claimant perceived the transfer to the intelligence role as a 'feather in his cap' and a promotion and thus that it could not have caused worsening.

64. As to the journey back from the US, the Tribunal concluded that failure to provide welfare support was not part of service because it was not mandated. These incidents related to the appellant's journey home following the death of his daughter. The respondent submitted that the Tribunal had properly considered whether this was service and concluded that it was not. The respondent accepted that the analysis should have been undertaken by reference to the provisions of article 11, but submitted that it was sufficient for the Tribunal to conclude that it was not a cause of worsening. Mr Evans submitted that is important to read the conclusions in the light of the Tribunal's legitimate conclusion at [26] that the death of his daughter was the predominant cause of his mental health problems and therefore, it is submitted, the worsening.

My conclusions

65. In my judgment, the Tribunal has erred in law in the respects I identified when granting permission to appeal.

66. First, the Tribunal's error identified in Ground 1 above has infected its conclusions on the issues covered by Ground 2.

67. Secondly, as to the journey back from the US, if the Tribunal had approached the case in the way that I have explained it should in my preliminary observations, then this issue would have assumed a background role as it occurred prior to the appellant being upgraded to full duties again in 2016. While there is no reason in principle why service before that point could not contribute to a later worsening of condition, the timing does mean that this is not a foreground issue in relation to the worsening that led to the downgrading in November 2017. The Tribunal itself effectively noted this in the last sentence of its paragraph 29.

68. Nonetheless, the Tribunal needed to approach the question of whether the effects of the journey back from the US (and all that went with that on the appellant's account) were caused by service in accordance with the correct principles. In my judgment, the Tribunal failed to do this. The language it uses in [29] is fault-based language. The Tribunal considers that because the army was not at fault in not providing support, this was not a service cause. However, that is not the test. The test is whether that journey home was a journey undertaken in the course of service or not. The analysis in fact needed to begin with article 11, which deals with travelling. However, in the light of *EW* (see above), the analysis would not stop there. The Tribunal would need to consider whether that journey was service or not. To the extent that the army did provide some support on the journey (albeit inadequate on the appellant's account), that would tend to suggest that it was treated as part of service, but whether it was or not would be a question for the Tribunal to determine on the facts.

69. Thirdly, as to the transfer to the intelligence role, the Tribunal's reasoning is wholly flawed. The fact that the move to the intelligence role "would" objectively have been seen as a 'feather in his cap' and a route towards future promotion has nothing at all to do with whether this was 'service', or with whether it caused a worsening in the appellant's condition. As the respondent accepts, a role transfer is a service cause. It follows that the Tribunal's conclusion was perverse on that point alone. However, the Tribunal also needed to consider the evidence. The appellant's own evidence described how awful he found the isolating working conditions in that role. Unless the Tribunal was rejecting the appellant's account as not credible (which does not appear to have been its intention), it could not simply set that evidence to one side on the basis that, objectively, the appellant ought to have welcomed the move. Again, therefore, the evidence was there of a *prima facie* link between service and a deterioration in the appellant's mental health as a result of his perception of his working conditions. The Tribunal failed to recognise the evidence as such or to provide any adequate reasons as to why it reached the conclusion it did.

Ground 3 – The Tribunal failed to provide any, or any adequate, reasons for rejecting the appellant's case that not offering him the Colchester role and posting him back to the Intelligence role were not 'service' or whether those acts/omissions worsened his injury.

The arguments

70. In granting permission to appeal, I observed:

> 20. … the Tribunal has also not dealt at all with the decision to place him back in that role after the Army Welfare Services training course, even though the appellant's case is that it was the return to the Intelligence role which precipitated the final decline in his mental health that led to him being discharged. The decision does not explain why the Tribunal considered that that did not constitute a worsening of the appellant's mental injury caused by service.
>
> 21. … nor does the Tribunal include any reasoning of its own as to why the decision not to offer him the Colchester posting was not a 'service cause'. The parties' submissions on this point are recorded at paragraphs [21]-[22] but arguably there is no conclusion by the Tribunal. There does not seem any obvious reason why a decision taken in the course of service not to do something makes that decision not part of service. To hold otherwise arguably creates an unsustainable distinction between omissions and actions in the course of service.

71. Again, the appellant amplified those points in written and oral argument. The appellant further pointed to [30] where the Tribunal said that it had found worsening, but not lasting worsening. The appellant submitted it was implicit that the Tribunal recognised that there had been worsening but had failed to follow through the consequences of that conclusion. Mr Collins also reminded me that the appellants' factual case was there were in fact roles available in Colchester, but the appellant was told that he could not have one and it was this that impacted on his mental health,

72. In response, Mr Evans submitted that the Tribunal at [16] was right to conclude that a failure to accede to a request when no job was available could not reasonably be regarded as a service cause. The respondent further submitted that the reference to "lasting worsening" did not show that there had been an improper application of the test because there was a proper application of the "predominant cause" test in the last sentence of that paragraph.

My conclusions

73. In my judgment, this third ground of appeal also succeeds. Again, the Tribunal seems to have been equating 'service cause' with a need for fault on the part of

the army, but that is not required. This was a request by the appellant for a role transfer that was refused by the respondent. The Tribunal appears to have thought it was so obvious that this was not a service cause that it did not need to provide any reasons for its conclusion. However, it is far from obvious. The appellant has made the request in the course of his work out of a genuine desire to be posted to that role in order to work. If, as the respondent accepted in relation to ground 2, a role transfer is part of service, there is no obvious reason of principle why a refusal of a role transfer is not part of service too. The fact that the appellant is asking for something which (as it turns out) the respondent says it has no business need for, and thus is not at fault for not providing, is not sufficient to take the request and refusal outside the scope of work.

Conclusion

74. For all these reasons, I find that the decision of the Tribunal involved material errors of law. I set the decision aside and remit it for re-determination by a fresh Tribunal.

Rule 14 Order

75. I have made a rule 14 order of my own motion anonymising the appellant. I have done so because this decision includes a lot of sensitive personal information about the appellant, who is a vulnerable person as a result of his mental health conditions. In making the order, I have given substantial weight to the principle of open justice, and paid particular regard to the important Convention right of freedom of expression, but I consider that it is necessary in order to protect the Article 8 rights of the appellant in this case to authorise a limited derogation from open justice by anonymising the decision. The hearing was, however, held in public and this decision will be published. Anybody who objects to this order may apply to the Upper Tribunal for a variation to the same.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 15 December 2025

Re-issued 29 January 2026

Annex: Transcript of extract of FTT hearing

FTT So you said – at the bottom of the reverse of page 162, the last entry reports that, when medically discharged, the colonel stated it was due to PTSD which was triggered by [your daughter's] death but exacerbated by his treatment by the army. Can you take me to which Colonel - who - where that was said to you? Was it a medical colonel? A regimental colonel? Because that's the only mention we have of anybody thinking that, you know, your PTSD was exacerbated by your treatment in the army rather than your personal circumstances, so - but you can't remember who that was?

Appellant Not off the top of my head, I mean, I had numerous psychology sessions for five years nearly, psychiatrist sessions, over that five years.

FTT Yes, but a lot of those were with a clinical psychologist who wasn't a colonel.

Appellant I think that Doctor Schriver was a psychiatrist and a colonel, we spoke about medication.

FTT But you can't say - I went through quite a lot of his entries and couldn't see anything about - I couldn't actually see any personal history at all, that was done by the clinical psychologist? Because unfortunately the medical discharge is only in note form. Now sometimes it might be said when you are on a discharge "medical". But I couldn't see it written there.

Appellant What, my medication?

FTT No - whether your condition was worsened by your treatment in the army. Because you've made that statement to the clinical psychologist.

Appellant I guess that was a statement I made and my belief.

FTT Yes - you said a colonel had told you that, and what I was asking was, who was that colonel - you can't remember?

Appellant No.