IN THE UPPER TRIBUNAL **Case No.** CAF/2693/2016
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

The Appellant was represented by Mr Glyn Tucker of the Royal British Legion.

The Respondent was represented by Ms Galina Ward of counsel, instructed by the Government Legal Department.

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 12 August 2014 is set aside and there is substituted a decision as follows –

> Insofar as the injury to his hips and lower back suffered by the claimant on 21 January 2013 was caused by him slipping and falling, it was caused by service and none of the provisions of Article 11 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) that make benefit not payable applies. Other issues arising on the claimant's claim for benefit under the 2011 Order must be determined by the Secretary of State.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 12 August 2014, dismissing his appeal against a reconsideration decision of the Secretary of State dated 17 October 2013 confirming his earlier decision of 14 September 2013 to the effect that the claimant was not entitled to an award of compensation under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) because the relevant claimed injury to his hips and lower back was not caused by service.

Background – the facts, the legislation and the procedural history

2. The basic facts of the case were not in dispute before the First-tier Tribunal. The claimant was a colonel in the Army and worked in the headquarters building of the Army Air Corps, which was inside a secure compound within the Army base at Middle Wallop. The circumstances in which he was injured were succinctly summarised by the First-tier Tribunal in its findings at paragraph 10 of its decision –

> "On 21/1/13 at 7:45 am the appellant parked his car, walked and entered the army compound using his chip and PIN identity. The appellant ascended the steps to the HQ building and fell. The appellant fell due to a combination of a loose step and icy conditions. Immediately after the accident the ice was cleared and the steps were replaced two days later."

In the MOD Accident Reporting Form that the claimant had completed, a copy of which he provided (together with photographs of the scene of the accident, before

and after the ice was cleared) with his claim under the Armed Forces Compensation Scheme, he described the steps as having been "covered with sheet ice and snow" and his oral evidence to the First-tier Tribunal was to the same effect.

3. Article 8 of the 2011 Order provides –

> "**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."

4. Article 11 provides –

> "**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.
> (2) ….
> (3) Except where paragraph (4) or (9) applies, 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 that member slipping, tripping or falling.
> (4) This paragraph applies where the member was participating in one of the following activities in pursuance of a service obligation—
> (a) activity of a hazardous nature;
> (b) activity in a hazardous environment; or
> (c) training to improve or maintain the effectiveness of the forces.
> (5) ….
> (6) ….
> (7) ….
> (8) ….
> (9) This paragraph applies where the injury, the worsening of the injury or death was caused (wholly or partly) by reason of—
> (a) acts of terrorism or other warlike activities in each case directed towards the person as a member of the forces as such; or
> (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;
> (c) …."

5. The Secretary of State put his case in slightly different ways in his initial decision refusing the claim, his reconsideration decision and a "comment" in response to the claimant's appeal, but in essence he argued that the claimed injury was not caused by service for the purposes of article 8 because the claimant was not

"doing his job" when he was climbing the steps, which was "an activity that everyone is required to do". He further argued that article 11(3) applied because the claimant was not assisted by article 11(4)(a) and (b), because "[w]alking is not classified as a hazardous activity and HQ AAC, Middle Wallop is not a hazardous environment". The claimant argued that going up the steps was the only way of getting to the place where he worked and that the activity of going up the steps was made hazardous by the conditions and that the conditions also made the environment hazardous. At the hearing itself, the Secretary of State's representative appears also to have relied on article 11(1), but the claimant argued that he was already at work when the injury was incurred.

6. In the event, the First-tier Tribunal found it unnecessary to consider article 11 at all. It decided the case under article 8, stating –

> "The cause of the injury was icy, loose steps. The icy conditions were widespread across the region. There is nothing service related about the icy weather conditions. The tribunal does not find that service was the predominant cause of the injury."

7. The claimant applied for permission to appeal. The First-tier Tribunal appears informally to have stayed the application to await the Upper Tribunal's decision in *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC); [2016] AACR 3 but there was then further delay because the First-tier Tribunal's administration were expecting a submission from the Secretary of State for which no request had been made in this case because the appeal had already been determined. In any event, on 3 June 2016, the First-tier Tribunal refused permission to appeal. The application was renewed to the Upper Tribunal on the ground that the First-tier Tribunal's decision was not consistent with *JM*. When I gave permission to appeal, I said –

> "The ground of appeal merits consideration. It might be argued that there would be no need for much of article 11 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) if the First-tier Tribunal's analysis is correct. On the other hand, even if that analysis is not correct, it is arguable that walking up the icy and loose steps of an entrance to a permanent building does not amount to either "activity of a hazardous nature" or "activity in a hazardous environment" for the purposes of article 11(4). I currently consider that that issue ought to be addressed by the Upper Tribunal on this appeal. Are there any published consultation or other documents explaining the intended scope of the Armed Forces Compensation Scheme that might be both admissible and useful for the purpose of construing articles 8 and 11 of the 2011 Order?"

8. The Secretary of State's response was brief. In response to my question and the possible need to consider article 11, reference was made to *Secretary of State for Defence v PA* [2016] UKUT 500 (AAC); [2017] AACR 18, which I shall consider further below. However, in paragraph 9 of the response, the First-tier Tribunal's reasoning was defended–

> "9. There was only one predominant cause of the injury in this case and that was the weather conditions, service merely providing the setting. As there was a Health and Safety issue the Appellant has been advised to claim for civil damages."

The Secretary of State did not seek an oral hearing, but Mr Tucker did if the Upper Tribunal still considered that it ought to consider the effect of article 11(4). I granted that request.

9. Less than 48 hours before the hearing, the Government Legal Department, which was by then representing the Secretary of State, sent to the Upper Tribunal an email conceding that the First-tier Tribunal's decision was wrong in law in the light of *JM* and submitting that the Upper Tribunal was "self-evidently the wrong forum" for making a final decision because "it would require the Upper Tribunal to make far-reaching findings of fact as to whether service was the predominant cause of injury, as well as requiring the Upper Tribunal to make findings on complex factual issues that have not yet been assessed by the First-tier Tribunal: such as whether any of the exceptions – under article 11 of the Armed Forces Compensation Scheme – for trips, slips and falls (and the carve out to those sections) apply". It was submitted that the Upper Tribunal lacked the relevant experience and the necessary time to make proper assessments of those issues. I refused to revoke the direction for an oral hearing, saying that the outstanding issues appeared to be principally issues of law, rather than of fact.

10. At the hearing, Ms Ward maintained the position that the First-tier Tribunal had erred and that the case should be remitted. She argued that the question whether an injury was caused by service was a question of judgment that ought to be determined by the First-tier Tribunal which would have the advantage of the expertise of a member who has substantial experience of service in Her Majesty's naval, military, or air forces and, similarly, that the question whether an environment was hazardous required evaluation of the risk by reference to the standards of service life so that, again, the expertise of the service member of the First-tier Tribunal would be invaluable.

To remit or not to remit?

11. When it has set aside a decision of the First-tier Tribunal, the Upper Tribunal has a broad discretion either to remit the case to the First-tier Tribunal or to re-make the decision itself (see section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007). One consideration is simply convenience, both for the Upper Tribunal and for the parties, but another is the expertise that the First-tier Tribunal has and the Upper Tribunal does not. I do not doubt that there are many cases where it would be desirable for the question whether an injury was caused by service to be considered by the First-tier Tribunal due to the particular expertise of the members, whether it is because having the expertise is relevant when facts are being found or whether it is relevant in the process of evaluation required to determine whether an injury has been caused by service. However, here all the necessary facts relating to the accident suffered by the claimant have been found – or, at least, the evidence is reasonably clear and has not been contradicted or challenged – and the circumstances in which the injury was suffered were not peculiar to service. The nature of the evaluation required to determine whether the injury was caused by service is therefore no different from the type of evaluation that would be required to

determine whether a similar injury suffered by a civilian employee going up the steps of his place of work was "caused by accident arising out of and in the course of his employment" for the purposes of the civilian industrial injuries scheme (see now section 94 of the Social Security Contributions and Benefits Act 1992) or whether an employee was "in the course of his employment" for the purpose of determining whether an employer is vicariously liable for the acts of the employee. The result of the evaluation may be different, because the questions to be determined are different, but the nature of the exercise is the same and is not inherently beyond the capacity of a judge.

12. Moreover, the functions of the Upper Tribunal include determining points of law – which include points as to the construction of legislation – and also the giving of guidance more generally to the First-tier Tribunal and to the Secretary of State's decision-makers in order to promote consistency in decision-making and to make it unnecessary to decide every case from first principles (see *R.(Jones) v First-tier Tribunal* [2013] UKSC 19; [2013] 2 A.C. 48; [2013] AACR 25 at [41] to [48]) and, when the facts are clear and uncomplicated, it can be positively unhelpful to remit a case if it suggests that more than one decision is possible on the facts when really there is only one possible outcome. There are, of course, cases where different people may reasonably ascribe different weight to the various factors that have to be taken into account when determining whether an injury was caused by service and so different conclusions can reasonably be reached (see *JM* at [53] to [59]), but this is not such a case and I consider that the Upper Tribunal would be failing in its duty to provide guidance if it did not determine this case itself.

13. The need for guidance as to the construction of the legislation and its application can be particularly acute in cases under the 2011 Order because there are several provisions in the Order that are expressed in language that potentially admits to more than one construction and it is not always easy to discern the purpose of its provisions either from the Order itself or from extra-statutory material. Indeed, there is very little extra-statutory material that might indicate the purpose of particular provisions of the Order, there not having been any public consultation before the Order was made and the Order not having been the subject of any detailed Parliamentary scrutiny. Such publicly available materials as there are, such as the guidance published by the Ministry of Defence as *JSP 765 Armed Forces Compensation Scheme: Statement of Policy*, mentioned in *JM* at [85] and [103], and the Armed Forces Covenant on which Mr Tucker relied, to both of which I shall refer further below, tend to be pitched at a high level of abstraction and so are often of little practical help in individual cases. Moreover, statements of policy made after legislation has been enacted need to be treated with some caution. Ms Ward argued that the Upper Tribunal had already given sufficient guidance in *JM* and *PA* on the issues arising in this case but the latter case was decided in a rather different context from the present case and it is plain that the parties are not agreed as to its significance.

The agreed error of law

14. As I have said, it is now common ground that the First-tier Tribunal erred in law in this case. The First-tier Tribunal's decision was made before *JM* was decided and so it did not have the advantage of the analysis of causation at [80] to [83] of that decision, where it was said –

> "80. 'Cause' is a word with many overtones. It may refer to an event that immediately brings about an outcome or one that leads to it more remotely. It can also be used to mean attribution, viz. that something is capable of bringing about an outcome, or can be regarded as bringing it about, or can explain an outcome. Whether something is capable of, or regarded as bringing about a particular result involves a degree of judgment which is not generally required in straightforward cases of physical cause and effect; for example, where *A* punches *B* on the nose which then bleeds.
>
> 81. Also the language of the test identifies 'service' as the cause or predominant cause. But, like 'negligence' or 'employment', 'service' is an abstract concept whilst 'injury' is caused by one or more events or processes acting on the body or mind.
>
> 82. So in identifying the abstract cause of an injury it is necessary, as a matter of language and concept, to identify the events or processes – which we shall call the 'process cause or causes' of the injury – and then to ask whether it is, or they are, sufficiently linked to service to satisfy the test that the injury due to each process cause is caused by service (or, using a shorthand, that that process cause is a service cause). Our use of the description 'process cause or causes' is merely that and nothing else should be read into it.
>
> 83. Deciding whether a process cause is a service cause is an exercise of attribution, and so, of categorisation."

15. After other issues had been considered, it was said –

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

16. In the present case, the relevant process cause of the injury was the effect of the claimant's body coming into contact with the ground when he fell. There might also have been some twisting before the claimant hit the ground but the precise mechanisms by which the injury or injuries were incurred are not material because they were all the consequence of the slip and fall and can be treated as a single process cause even though there may have been more than one injury for the

purposes of Schedule 3 to the 2011 Order. The question that arises on this appeal is whether the consequences of the slip and fall were "sufficiently linked to service to satisfy the test that the injury due to [that] process cause is caused by service". That the immediate causes of the fall were the weather and the loose step does not mean that there was no sufficient link to service. I agree with the parties that the First-tier Tribunal erred in failing to consider whether the claimed link to service – that the claimant was arriving at his place of work as an Army officer when he slipped and fell – was sufficient to justify categorising that process cause as a service cause. It is on that ground that I set aside the First-tier Tribunal's decision.

The relationship between article 8 and article 11

17. I turn, then, to the construction of the legislation and, in particular, the relationship between article 8 and article 11. A similar issue as to the relationship between articles 7 and 10 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2005 (SI 2005/439) was considered in *EW v Secretary of State for Defence (AFCS)* [2011] UKUT 186 (AAC); [2012] AACR 3. At first sight, there is no connection at all between articles 8 and 11 of the 2011 Order, but article 11 in fact addresses a number of issues that have caused difficulty when considering the scope of both the civilian industrial injuries scheme and the war pensions scheme (which preceded the Armed Forces Compensation Scheme and where the issue is whether disablement is "attributable to service") and might otherwise cause difficulty when considering whether an injury was caused by service for the purposes of article 8. The object of article 11 therefore appears to be to introduce an element of clarity in those areas, although whether it does so to the extent that it could have done may be debateable, even though some of the difficulties arising from the terms of articles 7 and 10 of the 2005 Order have been removed. In particular, it might have been conceptually neater if article 11 had been drafted so as to make provision for circumstances in which injuries would not be regarded as caused by service, rather than merely making provision for circumstances in which benefit would not be payable. As it is, there is an untidy overlap between the questions arising under article 8 and those arising under article 11.

18. Nonetheless, it will usually be unprofitable to consider whether injuries caused by travel, sport or slipping, tripping or falling might have been caused by service without considering at the same time whether the circumstances fall within an exclusion under article 11; if they do, that will be an end of the case. On the other hand, the fact that a claimant's case falls within one of the exceptions to the exclusions in article 11 is likely considerably to assist the claimant in showing that the relevant injury was caused by service, particularly when, as is the case with article 11(4), the exception applies only where the claimant is carrying out a relevant activity "in pursuance of a service obligation". As Ms Ward submitted, some cases will effectively be determined under article 11, whereas others will effectively be determined under article 8. In the present case, there are issues under both article 8 and article 11, but it is convenient to consider article 11 first.

Article 11 - travelling

19. Injuries caused by travel are one matter addressed in article 11. Even without article 11(1), I would not usually have considered an injury sustained while a claimant was travelling from home to his or her usual place of work to have been caused by service, for much the same reasons as Upper Tribunal Judge Mesher gave in *EW* when reaching a similar conclusion. It is to be noted that a civilian claiming industrial injuries benefit would not generally be regarded as being in the course of his employment during such a journey (*Smith v Stages* [1989] A.C. 928, applied in R(I) 1/91), unless travelling in his or her employer's transport (section 99 of the 1992 Act), and, while that is not determinative, I would see no reason to take a different approach in the circumstances of the present case.

20. However article 11(1) raises a question as to when the journey ends and the person has arrived at, or left, work. In the present case, it is not difficult to answer that question. I do not have to consider what the answer would have been had the claimant been injured on a road within the Army base but before he had reached the car park or, indeed, what the answer would have been had he slipped in the car park. In my judgment, once the claimant had entered the secure compound and was going up the entrance steps to the building where he worked, he was no longer travelling but had arrived. I am fortified in that view both by the fact that the service member of the First-tier Tribunal recorded the thinking of the First-tier Tribunal at the end of his record of the proceedings and it is apparent that it would have reached the same conclusion had it considered it necessary to do so (see doc 44A, although the notes of the deliberations should have been kept separate from the record of proceedings and not left in the First-tier Tribunal's file to be revealed to the parties and to me – see *R.(AW) v First-tier Tribunal (CIC)* [2013] UKUT 350 (AAC)) and also by the fact that I have no doubt that the same approach would have been taken under the civilian industrial injuries scheme (see, for example, R(I) 3/72 and R 2/75(II), the latter case a decision of a Tribunal of National Insurance Commissioners in Northern Ireland). Thus, article 11(1) does not apply in this case and it is unnecessary for me to consider the significance, if any, of the use of the words "by travel", rather than "while travelling".

Article 11 – slipping, tripping and falling

21. Injuries caused by slipping, tripping or falling are also addressed in article 11. As the First-tier Tribunal found the claimant to have fallen, article 11(3) has the effect that no benefit will be payable unless one of the exceptions identified in article 11(4) and (9) applies. It is not suggested that article 11(4)(c) or (9) is relevant to the present case; the question is whether article 11(4)(a) or (b) applies. Article 11(4)(a) or (b) applies if the claimant, in pursuance of a service obligation, was participating in activity of a hazardous nature or activity in a hazardous environment. (I have not heard argument as to the scope of article 11(4)(c) but it seems fairly obvious that that subparagraph exists because it is recognised that training in pursuance of a service obligation may contribute to a person slipping, tripping or falling and so should be within the scope of the scheme, even if the training is not inherently hazardous or carried out in a hazardous environment; otherwise there would be no need for specific provision to be made for it.)

22. I do not consider there to be any particular significance in the use of the words "participating" or "activity", which seem to have been used due to the structure of the paragraph. Where subparagraphs (a) or (b) are concerned, the issue is simply whether the claimant was doing something hazardous or was doing something in a hazardous environment.

23. However, the Secretary of State relied on an unpublished decision of the Upper Tribunal on file CAF/2260/2014 and on *PA*, which happen both to be cases in which Ms Ward appeared for the Secretary of State and Mr Tucker appeared for the claimant, for the proposition that participating in routine activities does not fall within the scope of article 11(4). I am not satisfied that those authorities support that proposition and, if they did, I would respectfully disagree with them on that point.

24. The case on file CAF/2260/2014 concerned a soldier who had slipped while trying to get into a camp bed in a tent. He had been on duty guarding the perimeter of an exercise ground and the main issue was whether he fell within the scope of article 11(4)(c), as the First-tier Tribunal had found. Upper Tribunal Judge Lloyd-Davies said –

> "5. It is clear that the applicant was not himself a trainee on the exercise – see sub-paragraphs (a) and (d) of the tribunal's decision. His was a supporting role of being on 'maintenance duty', which included guard duty. In my judgment it is clear that in order for Article 11(4)(c) to apply the applicant must actually be taking part in the training to improve or maintain the effectiveness of the forces. Taken in the context of Articles 11(4)(a) and (b), it is clear that the exceptions provided for are where the applicant is participating in an activity of a non-routine nature. It does not suffice if the applicant is part of a team which is facilitating the training activity to take place: active participation in the training is necessary."

25. Reference was made to that decision in *PA*. In particular, when pointing out that her interpretation of article 11(4)(b) was consistent with previous Upper Tribunal case law, Upper Tribunal Judge Knowles QC said –

> "33. … the exceptions in Article 11(4) to the general exclusion of slipping tripping and falling accidents were intended to capture "*non-routine*" activities (see paragraph 5 of [CAF/2260/2014])."

26. The Secretary of State argues that climbing the steps in the present case was a routine activity, as indeed it was. It is, however, to be noted that Judge Lloyd-Davies remitted the case before him for the First-tier Tribunal to consider article 11(4)(b), rejecting the written submission of the Secretary of State that there could be no basis for a decision in the claimant's favour under that subparagaph, although he did record that Ms Ward did not resist the possibility of remittal at the hearing. In any event, I do not consider that Judge Lloyd-Davies can be taken to have intended to add a gloss to article 11(4) by using the word "non-routine". It seems to me that he was simply making the point that the claimant had to be participating in one of the specified activities if he was to fall within the scope of the article and that he considered that the fact that subparagraphs (a) and (b) required there to be an element of hazard for the claimant indicated that subparagraph (c) did not extend to

those merely facilitating training. In particular, I do not consider that he intended to suggest that article 11(4)(b) could not apply in a case where there was a service obligation to carry out a routine activity in a hazardous environment.

27. Such a construction could not be supported either on the wording of the legislation or on any likely policy grounds. If, as is presumably the case, the purpose of article 11(4) is to ensure that those servicemen who have been sufficiently seriously injured to qualify for an award under the 2011 Order are eligible for such an award if they have been injured as a result of being exposed to a hazard by a service obligation, I cannot see any justification for refusing an award on the ground that the activity the serviceman was obliged to do was routine. The only issue should be whether the activity was hazardous or carried out in a hazardous environment or was training of the specified kind. That, indeed, was the approach taken by Judge Knowles in *PA*. Her decision did not depend on the activity in which the claimant was participating being routine, which arguably it was not, and I do not consider that she can be taken to have endorsed the Secretary of State's reading of Judge Lloyd-Davies' decision.

28. The next question that arises is whether the claimant was acting in pursuance of a service obligation when he ascended the steps to the headquarters building. In my judgment, he clearly was. The claimant had finished travelling and had arrived at work. He was climbing those steps at this particular time because he had to do so to reach the office where he was required to work. There are no complicating issues. I do not, for instance, have to consider what the position would have been had the claimant been acting in breach of an instruction to use another entrance when the conditions were icy, because there has been no suggestion of any such instruction and the claimant's oral evidence to the First-tier Tribunal was that the front entrance was the only way in. Nor do I have to consider what the position would have been had the claimant arrived early so as, say, to fit in before he started work a game of squash with a colleague – or, if it would make a difference in a service context, a game of chess or poker – because, again, there has been no such suggestion (although he had earlier made a detour to collect some items before entering the secure compound). This is a straightforward case. By seeking remittal of the case, the Secretary of State concedes that the claimant could be found by the First-tier Tribunal to have been acting under a service obligation. I cannot see any reason whatsoever for finding that he was not.

29. Was the claimant participating in activity of a hazardous nature so as fall within article 11(4)(a)? Plainly, climbing a flight of steps would not usually be described as a hazardous activity. Can it become one if the steps are loose or icy? In the absence of article 11(4)(b), I might accept that it could. However, it seems to me that, if article 11(4) applies at all, this is a case where the claimant was doing something that was not of a hazardous nature but was being done in a hazardous environment. That, indeed, is how Mr Tucker puts the claimant's case.

30. Was the claimant participating in an activity in a hazardous environment so as fall within article 11(4)(b)? A flight of steps is not normally hazardous; the question is whether it may become so if steps are loose or icy with the result that climbing the

steps is an activity in a hazardous environment. Again, in arguing for remittal, the Secretary of State implicitly accepts that it could be found that article 11(4)(b) applied in this case, but it is his submission that it should not be found to apply and he again relies on *PA*.

31. In *PA*, the claimant had overbalanced when going to sit on a wall outside a hotel in Israel while waiting for a bus to take him and other soldiers in his unit to a place where a training exercise was to take place. The First-tier Tribunal held that the whole of the territory of Israel was a hazardous environment for British Army personnel. Judge Knowles QC allowed the Secretary of State's appeal, beginning her summary of her conclusions as follows –

> "2. I have concluded that a "*hazardous environment*" is one where the risk of slipping, tripping or falling during activity performed in pursuance of a service obligation is likely to be increased. The focus is not solely on whether the environment could in general terms be described as "*hazardous*" but on whether the activity being carried out by the member in pursuance of a service obligation was rendered more hazardous due to the nature of the environment. …"

32. Having set out the facts and the law, she explained the background to article 11 at [19] to [21] and concluded that –

> "22. … the slipping and tripping provisions in the 2011 AFCS introduced greater clarity as to when such accidents qualified for an award of compensation. The current provisions of the AFCS are aimed at identifying those trips, slips and falls that are likely to have been caused (or at least predominantly caused) by service, because a service obligation has increased the risk of slipping, tripping or falling to the extent that it can be regarded as the predominant cause of the accident."

I would be inclined to add that article 11(4)(b) is also concerned with identifying circumstances in which the environment increases the risk of injury if the claimant does slip, trip or fall even if it does not increase the risk of slipping, tripping or falling in the first place. I have in mind a person working in close proximity to dangerous machinery. However, that point does not arise in the present case.

33. Judge Knowles QC then put her conclusion in two different ways, having considered the case by reference to two activities, waiting for a bus and going to sit on a wall –

> "34. … The environment in which the Respondent came to be injured could not, on any sensible interpretation of the 2011 AFCS, be classified as "hazardous". There was nothing about the activity of a soldier waiting for a bus outside a hotel more likely to lead to a slip, trip or fall than if a civilian had been participating in the same activity in ordinary – that is non-service – circumstances."

> "47. … Going to sit on a wall outside a hotel was not an activity of a hazardous nature in that it did not of itself increase the risk of a fall occurring. Equally it was not an activity in a hazardous environment because there was nothing about the physical environment outside the hotel which made it more likely that the Respondent – or indeed any other person present outside the hotel – would fall. …"

34. This shows that there are different ways of analysing a case of this nature and that it may be important to consider more than one of them. Indeed, in the light of the way that Judge Knowles QC identified the issues at [2] and [22], it may well be the best approach in most cases to consider first whether there was a potentially relevant hazard and then, if so, whether it was either due to the nature of the activity or was environmental. It is neither necessary nor helpful to identify in the abstract a geographical area for the purpose of considering whether it is a hazardous environment.

35. Weather conditions are plainly environmental and a loose step is equally obviously part of the physical environment. Therefore, in this case, if either the ice or the loose step was properly to be described as a hazard, so that the environment was hazardous, the present case falls within article 11(4)(b).

36. In submitting that this case should be remitted, Ms Ward argued that it was necessary to judge hazards by the standards of service life. However, she denied that it was the Secretary of State's case that, because servicemen are required to take more risks than most civilians, there was a correspondingly higher threshold for judging whether an activity or environment was hazardous than there would otherwise be. In my judgment, it is irrelevant whether there is a greater likelihood of a serviceman slipping, tripping or falling than there would have been of someone participating in the same activity in non-service circumstances; the question is simply whether the environment would have significantly increased the likelihood of any person slipping, tripping or falling or suffering injury if they did so. If an environment is hazardous to a serviceman, it is likely to be equally hazardous to anyone else and *vice versa*. It is plain that Judge Knowles QC did not mean to suggest a different test in paragraph [34] of her decision from that in paragraph [47] and that, in comparing the position of a serviceman to that of a civilian in paragraph [34], it was implicit that the environment would not be hazardous to a civilian and the judge was merely explaining that the environment was not hazardous to the claimant because it was obviously not hazardous for a civilian and, contrary to the claimant's case, there was no reason to distinguish between the two.

37. Were the steps hazardous in the present case? The mere fact that someone slips or trips does not necessarily imply a hazard, and I accept that a minor degree of slipperiness or unevenness in a surface might not lead to the surface being described as hazardous. Thus, this question is fact specific and there may be room for different opinions in some cases. But, where slipperiness or unevenness creates a significant risk of people injuring themselves, participating in an activity on the surface should be regarded as participating in an activity in a hazardous environment.

38. Ice on pavements and roads is generally regarded as creating a hazard, which is why people responsible for such surfaces are often, although not invariably, expected to do something about it. Ice on steps creates an even more obvious risk. I do not have much in the way of detail about the hazard created by the loose step, but it seems to me significant that not only was the ice cleared promptly but the

defect in the step was repaired two days later (a point that the First-tier Tribunal thought important enough to mention in its very short decision). It is irrelevant whether anyone was at fault in not clearing the steps of ice or repairing the loose step earlier. I am satisfied that the ice and loose step had the effect that article 11(4)(b) applied in this case, so that article 11(3) did not have the effect of preventing benefit from being paid.

39. Insofar as extra-statutory materials provide any assistance, they tend to support this approach to article 11(4). In *PA*, Judge Knowles QC recorded that Ms Ward had told her that, prior to the implementation of the 2011 Order, the services had been asked for examples of hazardous environments likely to make slipping, tripping or falling more likely and that only the Royal Navy had come up with an example – being on board ship – that had been used in the *Statement of Policy* which, at the time that *PA* was decided, said –

> "2.29 Being on board ship is considered to be a hazardous environment due to the presence of hatchways, ladders and doors with sills for sealing etc. Subject to meeting the balance of probabilities test, slips and trips which occur on board ship are more likely to be considered to be predominantly due to service relative to other circumstances. All other claims will be considered on the facts of the case."

40. However, the reference to a ship was removed shortly after her decision was given and paragraph 2.29 of the December 2016 version of the *Statement of Policy (V4.0)* says –

> "2.29 Being in a hazardous environment, refers to the immediate environment for example having to carry out essential duties in unfamiliar or unlighted environment, or extreme weather conditions, such as a severe storm or in a flood. It is not about duties in an operational or deployed zone as such. Subject to meeting the balance of probabilities test, slips and trips which occur in extreme weather conditions or unfamiliar environments are more likely to be considered to be predominantly due to service relative to other circumstances. All other claims will be considered on the facts of the case."

41. Ms Ward had not been made aware of that change until I drew it to her attention during the hearing of this appeal and it seems to me that it rather undermines some of her arguments. The first two sentences of the paragraph are expressed in more general terms than before which, in this context, is more useful. Had she been aware of the change, she might not have submitted that the term "environment" suggests that a wide area must be considered (although in this case the First-tier Tribunal in fact found that the icy conditions had affected a wide area). In any event, the *Statement of Policy* is, unsurprisingly, consistent with the approach taken in *PA* when it states that article 11(4)(b) is concerned only with the immediate environment in which the relevant activity is being carried out. The examples given – particularly the "unlighted environment" – support the view that it was wrong in the present case to consider, as the Secretary of State originally did, whether the whole of the headquarters building was hazardous. In the circumstances of this case, the focus needed to be on the steps.

42. Ms Ward submitted more generally that the 2011 Order should not be construed so as to place a duty on the Secretary of State to pay compensation in respect of accidents like the one in the present case and that a person who was not eligible for compensation under the 2011 Order could bring a civil claim for damages. She told me that the claimant in this case had in fact brought such a claim, which had been settled. That in my judgment is neither here nor there. The 2011 Order is clearly intended to provide a reasonably comprehensive no-fault scheme for those injured due to service. There are many cases in which a person slips, trips or falls due to hazards in respect of which no-one is liable to pay damages and it cannot be assumed that awards of damages will be more generous than awards under the 2011 Order. There are provisions to avoid double payment. The common law allows the amount of damages to be reduced if an award under the 2011 Order is made first and an award under the 2011 Order will be reduced under article 40 if an award of damages is made first. It is immaterial that there may in many cases have been no fault on the part of the Secretary of State or anyone else.

43. It is relevant that, by virtue of section 115(3) of the Social Security Contributions and Benefits Act 1992, members of the Armed Forces are expressly excluded from the civilian industrial injuries scheme which provides a no-fault scheme for those injured in the course of employment and it would, in my view, be surprising if the equivalent scheme for members of the Armed Forces were not to provide compensation in broadly similar circumstances to those covered by the civilian scheme although, of course, the benefits under the 2011 Order are very different to reflect the differences in the terms and conditions of service of servicemen.

44. I would take that view even without regard to the Armed Forces Covenant, but, in reply to Ms Ward's argument, Mr Tucker referred to Part C of the Covenant, which "describes the expectations and aspirations implicit in the Armed Forces Covenant, but not the specific actions being taken to achieve them", and of which Section 5 provides –

> "**5. Benefits and Tax**
>
> Members of the Armed Forces Community should have the same access to benefits as any UK citizen, except where tailored alternative schemes are in place. …"

That seems to me to imply that any tailored alternative scheme will not be significantly disadvantageous by comparison to a civilian scheme without a good reason for the difference and so supports the approach that I have taken. As the *Statement of Policy* recognises, article 11(4) is not concerned only with the sort of hazards encountered in an operational or deployed zone. The 2011 Order has to do duty as an occupational injuries scheme, covering more mundane incidents such as the one in the present case.

45. In any event, even without having regard to these extra-statutory materials, I am satisfied that article 11(4)(b) applied in this case, so that article 11(3) did not have the effect of preventing benefit from being paid.

Article 8

46. It does not automatically follow from the fact that article 11(4) is satisfied that an injury can be regarded as caused by service for the purposes of article 8 although, as I have indicated and as Ms Ward accepted, that will often be the case because key considerations that are relevant under article 8 in a case involving slipping, tripping or falling are the same as those arising under article 11(4). I need not consider whether the exceptions to the other exclusions carry the same sort of implication.

47. Ms Ward pointed to the lengthy consideration in *EW* of article 7 of the 2005 Order, the precursor of article 8 of the 2011 Order, when arguing that this case ought to be remitted. However, the need to consider article 7 at length in that case arose partly because article 10 of the 2005 Order, the precursor of article 11 of the 2011 Order, was expressed in terms of inclusion, rather than exclusion, and partly because Judge Mesher considered it necessary to consider predominancy, which aspect of his decision was held to be wrong in *JM* at [123]. Unless there is something in the point that I mentioned above about the use of the words "by travel" rather than "while travelling", it seems to me that a claimant in the same position as the claimant in *EW* would now find himself excluded from payment under article 11(1) and it would be unnecessary to consider article 8 at all in such a case.

48. However, while an injury caused by slipping and falling in circumstances within the scope of article 11(4) will normally be found to be due to service, article 8 raises at least two additional questions.

49. The first arises because article 11(4) applies if a person is participating in a relevant activity even if the relevant slip, trip or fall is not caused by that activity. If, although a claimant was exposed to a hazard in pursuance of a service obligation, a slip, trip or fall is not caused by that hazard, it may well be that any resulting injury will not be found to have been called by service for the purposes of article 8. However, this is not such a case. Here, the First-tier Tribunal found that the slip and fall *were* caused by the ice and the loose step. In those circumstances, the claimant's injury was caused by the hazardous environment to which a service obligation exposed him and I can see no reason why, under article 8, service should not be regarded as a cause of the injury.

50. Secondly, there may be cases where there is another cause of the injury in addition to the service cause and so there will arise the question under article 8(2) whether the service cause is the predominant cause. In the light of *JM*, this will only arise if there is another process cause in the sense in which that phrase is used in that decision. In the absence of such another process cause, the injury should be found to have been wholly caused by service. There has been no suggestion so far of another cause of the injury in this case – *e.g.*, something giving rise to a predisposition to injury – and, even if there were, it is unlikely to have been the predominant cause in the light of *JM* at [127] to [138]. However, I word my decision so as formally to leave this issue open, because I am not sure whether the Secretary

of State has yet looked at the medical evidence in the case and I have certainly not seen it.

Conclusion

51. Subject to the point considered in paragraph 50 above, I am satisfied that the claimant's injury in this case was wholly caused by service.

52. Thus, I am satisfied that, not only was the First-tier Tribunal's decision wrong in law but also that the Secretary of State's decision was wrong on the only issues that he decided and I re-make the decision on those issues. None of the other issues potentially arising on the claimant's claim has yet been considered by either the Secretary of State or the First-tier Tribunal because, on their view of the law, it was unnecessary for them to do so. The Secretary of State must now consider those issues and the claimant will be able to bring another appeal to the First-tier Tribunal in the event of a disagreement. I accordingly give the decision set out above.

Mark Rowland
10 July 2017