IN THE UPPER TRIBUNAL **Appeal No. CSAF/56/2018**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge A I Poole QC

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the Pensions Appeals Tribunal, issued on 13 June 2017 following a hearing dated 8 June 2017, is set aside. Under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I remake the decision. The remade decision is as follows:

> The appellant qualifies for an award of benefit under Article 8 of the Armed Forces and Reserved Forces (Compensation Scheme) Order 2011 in respect of the left knee injuries she sustained on 3 February 2015 because those injuries were caused by service. Those left knee injuries were a rupture of the anterior cruciate ligament of the left knee; a partial rupture of the medial collateral ligament of the left knee; a tear of the medial meniscus of the left knee; a sub articular fracture of the lateral femoral condyle of the left knee; and bone contusions involving both tibial condyles and the left lateral condyle of the left knee. The award under the Armed Forces and Reserved Forces (Compensation Scheme) Order 2011 must now be determined by the Secretary of State.

REASONS FOR DECISION

Background

1. The issue in this appeal is whether the appellant is entitled to an award of benefit under the Armed Forces and Reserved Forces (Compensation Scheme) ("**AFCS**") Order 2011 (the "**Order**") in respect of injuries to her left knee. These are the relevant facts found by the Pensions Appeal Tribunal (the "**tribunal**") and set out in its statement of reasons.

> "7. On 3 February 2015, the Appellant was deployed on the Army Medical Services Ski Championships as head coach. She was representing the Royal Army Dental Corps.
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> 8. Skiing was an approved sport, and the Army Medical Corps Ski Championships were recognised by the relevant Service in terms of paragraph 11(6) of The Armed Forces and Reserved Forces (Compensation Scheme) Order 2011 ("The Order").
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> 9. At or about 11.00 am on 3 February 2015, the Appellant was on duty as head coach at the Ski Championships when she sustained injuries to her left knee as a result of a French civilian skier colliding into her from behind.
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> 10. At the time of the accident, she was observing those whom she was coaching as they descended into a slalom course. She was standing 1 or 2 metres to the side of the piste, which had been reserved for those taking part in the Championships. The

piste was partly fenced off and there were notices saying 'Piste Fermé' to indicate that it was closed to members of the public.

11. The reserved piste ran side by side with another piste which was being used by recreational skiers. The Appellant was standing on an area of snow between the two pistes about 7 or 8 metres from the recreational piste.

12. The point at which she was standing was one of three places where she could properly position herself in her coaching role. She was a well qualified and experienced coach and she considered it to be a safe place.

13. There was no-one else standing in the area where the Appellant had positioned herself. There was nothing to prevent either other service personnel or members of the public from standing there.

14. The French civilian skier who collided with the Appellant was a teenager who had been skiing on the recreational piste and had lost control. After the collision, the teenager's mother asked the Appellant if she was alright before she and her son skied off. The Appellant, in the heat of the moment, did not ask her for details.

15. As a result of the collision, the Appellant sustained the injuries to her left knee in respect of which she now seeks compensation, namely a rupture of the anterior cruciate ligament of the left knee; a partial rupture of the medial collateral ligament of the left knee; a tear of the medial meniscus of the left knee; a sub articular fracture of the lateral femoral condyle of the left knee; and bone contusions involving both tibial condyles and the left lateral condyle of the left knee…

18. There is no doubt that at the time of the accident, the Appellant was on duty and acting in the course of her service as a coach at the Army Medical Services Ski Championships…

19. She was an experienced coach and was very aware of safety issues. She explained in evidence that while observing those whom she was coaching, she chose to stand in what she considered to be a safe and recognised position. There was no-one else standing in the same area, although there was nothing to prevent them from doing so. There was no criticism of where she had chosen to stand. There is no doubt that the Appellant would not have been standing where she was but for the fact that she was on duty in the course of her service".

Procedural history

2. On 5 August 2015, the Secretary of State for Defence ("**SSD**") rejected a claim by the appellant for an award of benefit under the AFCS. It did so on the basis that the injury to the appellant was caused by the actions of a civilian third party and not by service. The decision was reconsidered on 29 February 2016 but not changed. It was decided that service provided the background for the injury to take place but did not intrinsically cause the injury. There was no greater likelihood of the incident occurring in a non-service environment than in a service environment. Accordingly the SSD found that service was not the predominant cause of the injury.
3. Following a hearing on 8 July 2017, the tribunal upheld the decision of the SSD. It issued both a Decision Notice and a Statement of Reasons, both signed and dated 13 June 2017, referred to in more detail in the reasons below.

4. Leave to appeal was granted by the President of the tribunal on 5 February 2018, on the basis that an arguable case had been stated by the appellant in grounds of appeal. By submission dated 19 April 2018, the SSD does not support the appeal.

5. Both parties have requested a decision with reasons. Neither party has requested an oral hearing. I am satisfied that I can determine the appeal fairly on the papers.

Grounds of appeal for the claimant

6. Grounds of appeal dated 17 and 24 July 2017 were received by the Upper Tribunal on 19 February 2018. Further Observations on the Appeal dated 24 May 2018 were also made by the appellant, following receipt of the submission by the SSD. The appellant requests that the appeal is allowed and a decision is substituted that there was a service cause for the injuries. I summarise the appellant's grounds of appeal as follows:
   6.1 The tribunal erred in its application of Article 8 of the Order.
   6.2 The tribunal applied the wrong test, having regard to the case of *JM v SSD* [2015] UKUT 332, and *War Pensions and Armed Forces Compensation Law and Practice* by Andrew Bano at page 112, in that it did not consider first whether without the service cause the injury would have occurred at all. The appellant's claim would succeed on that basis alone. It was an error to apply the four step approach identified in *JM*.
   6.3 The tribunal erred in its approach to the cases of *JM v SSD* [2015] UKUT 332, *EW v SSD* [2011] UKUT 186, *SV v SSD* [2013] UKUT 0541 and *JH v SSD* [2017] UKUT 0140. To the extent that these cases found that there were non service causes for injuries, they were distinguishable on the facts. All four concerned incidents occurring outwith a service environment, for example when people were off duty engaged in activities such as walking to or from work or accommodation and being knocked over, swimming during free time, or being head butted by a roommate. In contrast, the incident in this case occurred while the appellant was performing her service duties in a normal and competent manner.
   6.4 The tribunal erred in that if its reasoning was correct, even if a person was on active duty and in a combat situation, if their injury was caused by a third party assailant they would not be entitled to make a claim. That could not be right.

7. In a letter dated 25 April 2017 the appellant disputes that there was no greater likelihood of the injury occurring in a non-service environment. She argues that had she been skiing in a non-service environment she would not have been standing at the side of the piste for long periods of time coaching racers. She also disputes the finding that service was not the predominant cause. Had she not been deployed as a race coach, she would not have been on the exercise or the hill, or spending time stationary at the side of the piste.

Submissions for the SSD

8. The SSD argues that the injury was caused by a wayward third party skiing into the appellant. Service provided only the setting for and was not the cause of the accident. Following the case of *JH*, service was the reason the appellant was where she was, but was not the cause of the injuries sustained. The predominant cause of the accident and consequent injury was the civilian skier who collided

with the appellant. The SSD disagrees that cases cited by the tribunal were irrelevant. Refusal of an award is the only decision which a tribunal reasonably applying the facts of the case could arrive at.

Governing law

9. The key provision in the Order for the purpose of this appeal is Article 8, "Injury Caused by Service", which provides:

> "(1) Subject to articles 11 and 12, benefit is payable to or in respect of a member or former member or the forces by reason of an injury which is caused (wholly or partly) by service where the cause of the injury occurred on or after 6 April 2005
> (2) Where injury is partly caused by service, benefit is only payable if service is the predominant cause of the injury".

In Article 2 of the Order it is provided that "service" means service as a member of the forces, and "predominant" means more than 50%.

10. Article 8 is expressly "subject to Articles 11 and 12". These Articles contain a number of exemptions from awards of benefit. Article 12 covers matters such as injuries caused by tobacco, alcohol, the use of drugs, consensual sexual activities, and events before the member entered service. Although mentioned by the appellant, it is not directly relevant to this appeal, because it is not relied on by the SSD as a reason not to make an award of benefit. Article 11 also is not directly in point. This excludes from awards of benefits matters such as travel to and from work, slipping and tripping, and sporting injuries in certain circumstances. However, it is accepted by the SSD that the Article 11(5) exemption of sporting injuries from the remit of compensation under the AFCS does not apply in this case, because the sporting activity in which the appellant was engaged was approved under Article 11(6). Article 11 does not therefore exempt the appellant from an award.

11. Accordingly what is in issue in this case is whether the appellant is entitled to an award under Article 8 of the Order. Articles 11 and 12 are of peripheral relevance only, in that it is evident that they contain a significant amount of detail about what will not be covered by the AFCS. In neither Articles 11 or 12 is there an express exemption for injuries caused by civilians or third parties.

12. The leading case on Article 8 is the decision of the three judge panel in the case of *JM v Secretary of State for Defence* [2015] UKUT 332 ("***JM***"). I summarise the salient parts as follows:

    12.1 The AFCS aims to establish an entitlement to benefit based on cause, as opposed to breach of duty or fault, for those who sign up to serve the nation. The consequence is that if service is not the cause (or sufficiently the cause) of the relevant injury, the claimant is left to pursue other claims for compensation or support (paragraph 85). There is an underlying intention that compensation may be paid for an injury that has more than one cause (paragraph 137).

    12.2 The correct approach to the issues of cause and predominant cause under Article 8 of the AFCS is:

"First identify the potential process cause or causes (ie the events or processes operating on the body or mind that have caused the injury);
Secondly, discount potential process causes that are too remote or uncertain to be regarded as a relevant process cause;
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.
Fourthly, if all of the relevant process causes are not categorised as service causes, apply the predominancy test". (Paragraph 118).
If there is only one cause, which is not a service cause, this fourth stage will not fall to be applied (paragraph 123).

12.3 In carrying out this four stage assessment, it is helpful to bear in mind that:

""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…" (paragraph 80).
"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 (paragraph 81)".

12.4 Deciding whether something is a service cause is an exercise of attribution (paragraph 83). When a claimant is engaged on a personal enterprise unconnected with any duty or compulsion of service, service provides only the setting for injury and is not the cause (paragraph 99).

12.5 The 'predominant' test in Article 8(2) was a deliberate change from earlier compensation schemes where it was sufficient if one of the causes of an injury was a service cause, even if there were other causes (paragraph 78).

12.6 This guidance is not intended to be prescriptive and it may need to be modified or abandoned in some cases (paragraph 138).

13. In relation to the appellant's argument that it was an error of law to apply the 4 stage test set out in *JM*, when the particular dicta in *JM* relied on by the appellant to make this argument are read in context, it is clear that they were directed at the situation where the only competing causes are service and pre-existing weakness. This is not such a case. Page 112 of *War Pensions and Armed Forces Compensation Law and Practice* by Andrew Bano does not detract from this position, because it quotes the dicta below in the context of cases "where a claimant has a constitutional vulnerability to the injury giving rise to the claim". The relevant passages of *JM* are:

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** (bold added) 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.

135. If the answer to the first question is that the injury would not have occurred at all in the absence of the service cause, we consider that this can and generally should found a conclusion that the service cause is the predominant cause of the relevant injury. It seems likely that a claimant in Mr Marshall's position would succeed on this basis.

136. If however that is not the answer to the first question, the second question will generally found the answer to whether the service cause is the predominant cause of the relevant injury. Thus the second question is likely to be determinative in the present case if it is found that the claimant's depression was caused both by service and by pre-existing domestic factors".

14. I therefore find that the tribunal did not err in finding that it should be guided by the four stage test in *JM* rather than the test at paragraphs 134-6 of *JM*, because this appeal is not presented as a case about pre-existing weaknesses. The general four stage approach was applicable. However, for reasons set out below, I consider that the tribunal erred in its application of the four stage test to the facts which it found. Before explaining why, I deal first with an additional error in law by the tribunal arising from inconsistency between the tribunal's Decision Notice and Statement of Reasons.

Failure to provide adequate reasons arising from inconsistency between Decision Notice and Statement of Reasons

15. The tribunal's Decision Notice prepared after the hearing on 8 June 2017 and signed and dated 13 June 2017 states:

"In the opinion of the tribunal, the service cause would not have been predominant: it merely provided the setting for the accident and consequent injury. The predominant cause (that is more than 50%) was the French civilian skier colliding with the appellant".

16. However, the Statement of Facts and Reasons dated 13 June 2017, says at paragraph 16:

"The Tribunal found that the appellant's injuries were caused solely by a non-service cause, namely the appellant being struck by the French civilian skier. The Appeal is therefore dismissed".

At paragraph 30, after finding there were no countervailing factors to suggest a service cause, the tribunal went on to say that if it was wrong on this, the tribunal would have found that the service cause was not the predominant cause of the injury. It then went on to repeat the wording in the Decision Notice set out above.

17. In my view, there is a clear inconsistency between the Decision Notice and the Statement of Facts and Reasons. Under Article 8(2) of the Order set out above, the issue of predominant cause only arises where a tribunal has already found that injury is partly caused by service. The Decision Notice of 13 June 2017 therefore supports a process of reasoning that the tribunal was satisfied that there was a service cause of the injury, but it was not predominant. But the Statement of Facts and Reasons finds in terms that the injuries were caused solely by a non-service cause, which is not consistent. I do not consider that the 'fall-back' position in paragraph 30 results in the reasons being adequate. Since the key questions in this case were what the cause or causes of the injury were, and whether they were service or non-service causes, this was a material matter. The inconsistency gives rise to legitimate doubts as to the reasoning process actually adopted by the tribunal, and its application of the law to the facts which it found.

18. In *LA v SSWP* (ESA) [2014] UKUT 482 (AAC), at paragraph 8, it was found that care has to be taken when drafting summary reasons in a Decision Notice, in a context where there was also a Statement of Reasons. The wording used must reflect the process of reasoning actually deployed by the Tribunal. At paragraph 12 the Upper Tribunal Judge stated:

> "While there may be two documents involved, there can only ever have been a single reasoning process. Therefore, if the contents of the two documents are inconsistent, the Tribunal will not have given adequate reasons. No one can know exactly what the reasons were. In fact, the need for consistency applies even if the two documents are not unified by a statement that they are to be read together (see the decision of Social Security Commissioner Jacobs, as he then was, in CCR/3396/2000)".

A similar finding has more recently been made in *SSWP v C O'N* (ESA) [2018] UKUT 80 (AAC) at paragraph 1.

19. I therefore find that the tribunal erred in law by failing to provide adequate reasons, as a result of the inconsistency between the Decision Notice and the Statement of Reasons.

Error in law in the application of Article 8

20. I turn now to the main issues in contention between the parties, concerning the application of Article 8 of the Order to the facts found by the tribunal. In this case it was not in issue that the appellant suffered an injury to her left knee, the cause of the injury occurred on or after 6 April 2005, and the appellant was a member of the forces. What was in issue under Article 8 was what the causes of the injury were, whether they were service causes, and if so whether a service cause was the predominant cause. The tribunal correctly at paragraph 22 identified its task as answering the following questions: "Firstly, was the injury caused wholly or partly by service and, if the latter, was service the predominant cause?" (as previously suggested in *JH v SSD* [2017] UKUT 0140 at paragraph 21). It then proceeded, correctly in my view, to point to the four stage test set out in *JM* to

assist it in reaching the answer to these questions. However, as explained below, the tribunal then erred in law in how it applied these legal tests to the facts it had found.

JM Stages 1 and 2

21. These stages may be dealt with together. They entail the tribunal first identifying the potential process cause or causes (ie the events or processes operating on the body or mind) that have caused the injury, then discounting any which are too remote. The tribunal did this, finding that there was only one process cause – being struck from behind by the French civilian skier (paragraph 29) (the "**civilian collision**" cause). In my view, in doing so, the tribunal erred in applying the law to the facts. It took too narrow approach to 'cause' for the purposes of Article 8.

22. As *JM* notes at paragraph 80, "cause" has many overtones. There can be a range of causes of an event such as injury, all with differing degrees of proximity to the injury. On the wording of Article 8, what is meant by a 'cause of an injury' is wider than only the most proximate causes of the injury. This is because Article 8 specifically includes "service causes", in a context where service is defined as service as a member of the forces. Generally speaking, injuries will have more direct causes than simply a person being a member of the forces. The immediate cause of physical injury might be a bullet entering the body or a blunt object impacting on a limb. But Article 8 invites the tribunal to go further down the chain of causation than the immediate cause, because it has to be considered whether there is a 'service' cause, which is an abstract concept. (This is consistent with dicta in *EW v SSD* [2011] UKUT 186 at paragraph 31 that it is wrong to look only at the immediate or precipitating cause). In my opinion, the traditional 'but for' test is of assistance when identifying causes which must be considered in the application of Article 8. The question has to be asked, but for an event or process, would the injury have happened? If the answer is that the injury would not have happened without a particular event, then the event is a cause. The significance of these potential causes will be refined in later stages of the four stage test in JM (they may be discounted in stage 2 as too remote, found to be non service causes in stage 3, and (if service causes) found not to be predominant in stage 4), but they cannot just be ignored.

23. In my opinion the tribunal erred in its application of the law to the facts it found, in finding that there was only one process cause. There were other events without which the injury would not have happened, which were also causes of the injury. The tribunal had before it a submission from the appellant (at page 36 of the bundle) arguing that had she not been deployed as part of her service as Head Coach at the Army Medical Corps Championships, she would not have been at the championships (the "**championships deployment**" cause). She further argued that had she not actively been carrying out her coaching duties to which she had been assigned as part of her service, she would not have been standing still on the side of the piste for a prolonged period of time observing skiers and would not have been standing in the place where the French skier collided with her (the "**coaching duties**" cause). In paragraphs 7-13, and 18-19, the tribunal effectively accepted all of this as fact. I agree with the appellant that both the championships deployment cause and coaching duties cause were part of the

chain of causation of the appellant's injuries. But the tribunal failed adequately to explain why it excluded them as causes for the purposes of the application of Article 8. Rather, the tribunal says that the appellant was exposed to the same risk of being struck as any member of the skiing public on the day in question, and anyone could have positioned themselves on the side of the piste where the appellant was struck (paragraph 29). But the point is that the appellant was not there as a member of the skiing public, but as part of her service, actively coaching in the course of her duties. As the tribunal finds at paragraph 29 "There is no doubt that the Appellant would not have been standing where she was but for the fact that she was on duty in the course of her service". It expressly finds that but for her service, in which she was actively engaged, she would not have been standing where she was hit. In my view it follows from the findings made by the tribunal that there were three causes of the appellant's injuries at Stage 1, the championships deployment, coaching duties, and civilian collision causes. None of these three causes were so remote they fell to be discounted at Stage 2.

JM Stage 3

24. I also consider that there was an error by the tribunal in its application of the law to the facts in Stage 3 of the *JM* test. This is the stage at which the causes identified in Stages 1 and 2 have to be categorised as service or civilian causes. The tribunal, not having identified the championships deployment and coaching duties causes as requiring to be considered, did not categorise them. They fall to be categorised as service causes, arising from the appellant's service as a member of the forces. But I also consider that the civilian collision cause was, in the circumstances of this case, a service cause. There are a number of reasons for this finding.

    24.1 While participation in skiing is not the same as being in active combat, Article 11 of the Order sets out clear parameters for when members of the forces engaged in sporting events are, or are not, exempt from an award under the AFCS. Fitness, initiative and endurance are important for the forces. Approved sporting activities may contribute to these attributes, and keep the forces fit for the work they do. Accordingly, some sporting activities are part of service, and are not excluded from the parameters of Article 8 by Article 11(5), for example where they are approved under Article 11(6). It has been said that "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…" (*SM v SSD* [2017] UKUT 286 at paragraph 18).

    24.2 The concept of attributability may assist in deciding whether a cause is a service cause or a non service cause, as set out in *JM*. In this case, in contrast to other cases considered by the tribunal where causes were found to be non service causes, the appellant was actively engaged in service at the time of the accident. She was actively coaching from the side of a piste, and engaging in an approved activity. She was not, for example, skiing in her free time (in contrast to a serviceman swimming in his time off duty in *SV v SSD* [2013] UKUT 0541) or travelling to accommodation after coming off duty (as in *EW v SSD* [2011] UKUT 186, although this case was under a 2005 Order and in the Order applicable to the present case there is express

exclusion of travel to and from work from the remit of Article 8, under Article 11), or waiting for a bus to take her to training (as in *SSD v A* [2016] UKUT 500). She was actually doing her job (cp *EW v SSD* [2011] UKUT 186 at paragraph 26 and *SSD v A* [2016] UKUT 500 at paragraph 44). Her injuries had a service cause, not just because she was on duty at the time, but because the accident happened as a result of her standing carrying out service activities (coaching) which put her in the range of the out of control French skier. The tribunal, in my view correctly, identified at paragraph 27 that the situation in the present case was a close parallel to an example of a service cause suggested in submissions on behalf of the SSD in *JH v SSD* [2017] UKUT 0140 at paragraph 27. The scenario suggested as involving a service cause in *JH* was a serviceman stationed in the middle of the road, directing traffic round a broken down convoy, who was then accidentally struck by a passing motorist. In exactly the same way, the appellant was standing actively carrying out her service duties (in this case coaching skiing) when a civilian struck her accidentally.

24.3 The tribunal's reasoning for ruling out that the civilian collision was a service cause is unconvincing. In my opinion the appellant's case is clearly distinguishable from *JH v SSD* [2017] UKUT 0140, where injury resulting from a road traffic accident was caused on the way back to accommodation after coming off duty (paragraph 29). It was not caused during actual service, as in this case. The tribunal failed to explain why it rejected the appellant's position that she would not have been standing where she was for significant periods of time opening her up to collision, had she not been carrying out service duties of coaching, when it suggested in paragraph 27 that the injury was only a manifestation of a risk run by the general public. As for the tribunal's reasoning that service merely provided the setting for the injury (paragraphs 27 and 30) or the reason the appellant was where she was, care has to be taken with dicta taken from earlier cases about 'service merely providing the setting'. Service will frequently provide the setting in both service and non service causes. Service providing the setting therefore has limited use as a touchstone between whether an award should be made or not. The focus should instead be on the activity in which the claimant was engaging at the time, and how the injury related to that. Further, the fact that members of the public and members of the forces are exposed to risk does not exclude a person in active service from an award. For example, either a civilian member of the public or a member of the forces might be unfortunate enough to step on a land mine. I fail to see how the member of the forces would be excluded from an award if this accident happened as a result of service, merely because a member of the public might also have stepped on a land mine.

24.4 I test the conclusion that the civilian collision cause is a service cause against slightly altered facts. If one of the members of the forces who the appellant was coaching collided with her accidentally, why would this not count as a service injury? It seems to me, assuming the sporting activity was approved under Article 11(6) and no other exemption applied, that this situation would be attributable to service. Should it then make a difference that the person who collided with the appellant was a civilian? This seems to be the effect of the SSD's submission that it was a third party civilian skier who collided with her, and so service was not the cause. In my opinion the

appellant is not excluded from an award because it was a civilian who skied into her. The civilian collision only happened because the appellant was on the side of the piste carrying out service duties. There is no express exclusion from the AFCS for injuries caused by civilians to members of the forces, even though as noted above there are a number of specific exclusions set out in Articles 11 and 12 of the Order. It seems to me correct in principle that injuries caused by third parties or civilians should not be excluded from compensation under the AFCS, provided when properly analysed the injuries have a service cause or service is the predominant cause. Members of the forces in active service may be injured due to actions of persons not in service, or actions of other persons in service. A member of the forces on patrol duties, for example, could be hit by a car being driven by another member of the armed forces, or a car being driven by a civilian. They could be injured as a result of a hazard created by a civilian, or by a hazard created by somebody in armed service. In my view, it is not the identity of the perpetrator which is the key factor for compensation under the AFCS, but the fact that an injury suffered by a member of the forces is caused by service of their country. The focus is on a service cause, not who the perpetrator was.

JM Stage 4

25. Given that all three causes identified (the championships deployment, the coaching duties, and civilian collision causes) were service causes, Stage 4 of the *JM* approach did not arise on the facts. The predominance test only requires to be considered where an injury is caused only partly by service. On the correct application of the law to the facts found by the tribunal, there were three service causes and no non-service causes. The only conclusion properly available to the tribunal was that the appellant's left knee injuries sustained on 3 February 2015 were wholly caused by service.

26. Even if I were wrong that the civilian collision cause was a service cause, I would not in any event have upheld the decision of the tribunal on the basis of its "fall-back" conclusion on Stage 4 (that under Article 8(2) service was not the predominant cause of the injury). In order to carry out the assessment of the contribution of differing causes to an injury for the purposes of Article 8(2), it is necessary first to identify the relevant causes. Since the tribunal had erred in Stage 1 in identifying the relevant causes, it was not in a position to carry out the Stage 4 exercise properly. In my opinion, given that the tribunal had found the appellant had been deployed as coach at the ski championships, and expressly found that she would not have been standing where she was but for the fact that she was on duty in the course of her service, the championships deployment and coaching duties causes were clearly important contributory causes. Having concluded that there was only one cause, the civilian collision, the tribunal was in the position of seeking to back up a decision it had already made when considering Article 8(2), rather than entering into an open minded assessment of whether service causes were predominant.

Conclusion on error of law in the application of Article 8

27. In all the circumstances I find the tribunal erred in law. For reasons given above, I agree with the appellant that the tribunal erred in its approach to Article 8 of the Order; that other cases relied on by the tribunal in its refusal of the appeal are distinguishable on their facts because they concerned injuries not caused or predominantly caused by service; and that claims under the AFCS are not excluded because a civilian was part of the reason the injury happened. In so finding, I am not suggesting that all injuries caused by civilians or third parties to members of the armed forces are service injuries attracting compensation within Article 8. It will ultimately depend on the circumstances of a particular case. As set out above, I do not agree with the appellant that the tribunal should have applied a different test from the four stage test in *JM*. I also do not agree with the SSD that there was only one cause of the injuries and that was not a service cause. Nor do I accept that the out of control skier being a third party civilian resulted in there being no service cause in this particular case. It is not in dispute that, although skiing is a recreational sport enjoyed by the general public, coaching skiing can also be part of active duty and service in the forces. Where injury has been caused by service, a claimant qualifies for an award under Article 8. On the facts found by the tribunal, I consider that in this case, the appellant met the legal tests in Article 8 of the Order for an award of benefit.

Disposal

28. This appeal before the Upper Tribunal is brought under Section 6A of the Pensions Appeal Tribunals Act 1943. Appeals lie on the ground that the decision of the Pensions Appeal Tribunal for Scotland was erroneous in point of law. By virtue of Section 6A(4A), the powers of the Upper Tribunal in this appeal are as set out in Section 12 of the Tribunals, Courts and Enforcement Act 2007. Powers include setting aside decisions and either remitting cases or re-making decisions.

29. I have identified two separate errors of law above; inadequate reasons due to the inconsistency between the Decision Notice and the Statement of Reasons, and error in the application of the law to the facts. But I have also found in paragraph 25 above that, on proper application of the law to the facts found by the tribunal, there was only one conclusion available to the tribunal. Because all of the necessary facts have been found by the tribunal, it is appropriate that I set the tribunal's decision aside but also re-make the decision. I do so in the terms set out at the beginning of this decision. What happens next is that the SSD should make a determination of the amount of the award due to the appellant, under Article 51 of the Order. I hope that will be sufficient to finalise matters between the appellant and SSD, but in the event of any disagreement the appellant will retain any rights to request reconsideration arising under the Order, and appeal rights to the tribunal under Section 5A(1) of the Pensions Appeal Tribunals Act 1943.

Signed on the original
on 26 June 2018

A I Poole QC
Judge of the Upper Tribunal