IN THE UPPER TRIBUNAL **Case No.** CAF/1618/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 28 February 2017 is set aside and the case is remitted to a differently-constituted panel of the First-tier Tribunal to be re-decided.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 28 February 2017, whereby it confirmed the decision of the Secretary of State dated 15 June 2015 to the effect that the claimant was not entitled to benefit under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) in respect of mental illness from which he was suffering.

The legislation

2. Articles 8 and 9 of the 2011 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.
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> **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—
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> (a) within 6 months of the day service commenced; or
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> (b) 5 years or more after that day.
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> (5) In the case of paragraph (1)(c), benefit is only payable if the member—
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> (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
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> (b) the worsening was the predominant cause of the downgrading."

Article 2(1) provides that "'predominant' means more than 50%".

The facts and the proceedings before the First-tier Tribunal

3. The Appellant joined the Army in May 2008. Initially, he served in the Scots Dragoon Guards but, in 2012, he transferred to Queen Alexandra's Royal Army Nursing Corps. (He told me at the hearing of his application for permission to appeal that he had had experience as a care assistant before he joined the Army.) He showed signs of mental illness in 2013 and was admitted to hospital in Peterborough from 24 October to 12 December 2013, being subsequently admitted later in December 2013 to a hospital in Basingstoke and then to one in Staffordshire from where he was discharged to the care of community mental health services in February 2014. On 12 December 2013 he was downgraded by an Army medical board due to his mental health and, on 21 March 2014, another medical board recommended that he be discharged from the Army on medical grounds. On 21 May 2014, he claimed compensation under the 2011 Order on the ground that his mental illness had been caused by bullying in the Army. On 24 June 2014, the claim was rejected on the simple ground that the Appellant's illness was not caused wholly or partly by service because "bullying and harassment is due to the actions of individuals rather than a factor of service life". The appellant promptly appealed. He was medically discharged from the Army in November 2014.

4. On 15 June 2015, the Secretary of State reconsidered the original decision under article 53(5) of the 2011 Order but maintained it (doc 97-98). By then, the Secretary of State had decided that the approach he had been taking to bullying cases had been wrong. In relation to article 8 of the 2011 Order, he now said –

> "You have said that your depression and psychosis is caused by bullying. You say that the evidence of this bullying is well documented but you have not presented any of this evidence. You state you received treatment in three different hospitals; none of the three have any records relating to your attendance.
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> There are a number of factors which may have caused or contributed to depression; you have longstanding back pain; you have been in dispute with your ex-wife, you have had financial problems and are separated from your children. On the balance of probabilities service is not the predominant cause."

In relation to article 9, he referred specifically to article 9(5)(b) and said –

> "You were downgraded on account of his mental health on 12 December 2013. You remained downgraded until discharge. You were downgraded because of the presence and nature of his [sic] condition. You were prevented from having access

> to firearms for your own safety and that of others. You were not downgraded because service had made the condition worse."

5. Unsurprisingly, the claimant protested about the statement that none of the hospitals had any record of him and he provided further details of each of his admissions. (It is not entirely clear what the Secretary of State had meant by his statement. It is true that two of the hospitals had replied to requests for medical notes made in April 2015 by saying that they had no record of the claimant, perhaps partly because the Secretary of State had given no indication as to when the claimant had been admitted to the hospitals and had provided the claimant's current address without making it clear that his address when he was admitted was different. However, he had the claimant's service medical records for the relevant period which had referred to each of the admissions and so the fact of the admissions cannot really have been in doubt.) The claimant also denied that there had been a non-service cause of his mental illness, stating that he had had no financial problems, that the issues between him and his ex-wife and children "were already mutually resolved" and that back pain had not been an issue as he had been attending regular physiotherapy sessions for the six years of his career and the pain was managed by NSAIDs.

6. Four days before the reconsideration decision, the Upper Tribunal signed its decision in *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC); [2016] AACR 3 (docs 100-117A in the present case file). In the light of that decision, the Secretary of State sought from the claimant further details of the allegations bullying, which he provided by first completing a form on 6 October 2015 and then replying on 6 November 2015 to some more specific questions (see docs 145 to 149).

7. The Secretary of State then purported to carry out a review under article 59 of the Order whereby he decided that the original decision should be maintained. However, with the consent of the First-tier Tribunal, he did not issue a formal decision which would have generated a separate right of appeal. That approach did not cause any injustice in this case and so I need not consider whether it was technically either permissible or necessary. In effect, the "Decision Lay Certificate" dated 11 March 2016 (doc 153) became the Secretary of State's submission responding to the appeal.

8. In relation to Article 8 of the 2011 Order, it was now argued –

> "[The claimant] contends that his mental health problems are due to service, notably to harassing and bullying behaviour by a number of his peers. While the service medical records confirm a concern and a willingness to investigate the complaint [the claimant's] condition has been such that only limited opportunity to investigate during his time in service was available. The fixation with the allegations – which are high level and non-specific – have been described by the Consultant Psychiatrist as delusional.
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> Mental health disorders are always multifactorial. [The claimant] gives no pre-service history, but the service medical records confirm that from early in his service, he had many interactions with health professionals for mental health symptoms. Within these interactions there is a very clear relationship with domestic issues. These

include several wives/partners by whom he has had children, on-going issues with access and paternity, child protection issues and debt problems.

As the synopses of causation for depression and schizophrenia show, depression has different types. These disorders are multifactorial with genetics important and possible both biochemical and anatomical change in the brain. In the case of schizophrenia it is really a disorder of unknown aetiology and not predominantly due to external stressors.

The Secretary of State considers that there are clearly multiple stressors in his personal life as well as the alleged bullying and harassment in service.

In paragraph 110 of [*JM*] the Judge recognised that 'personal characteristics and factors that are not directly connected to service (such as … problems relating to his wife and child) may lead to banter and teasing amongst individuals living communally in close and regulated circumstances. It will be a question of fact and degree whether the teasing has crossed the line between servicemen having to learn to live with people who rub them the wrong way and bullying'.

The evidence suggests that what [the claimant] describes as harassment, if in fact it did occur, would be more accurately described as banter by his peers with whom he was having to learn to live with. When pressed for specifics, [the claimant] displays a significant over reaction to what at most is a bit of simple verbal criticism. Therefore on a balance of probabilities the Secretary of State considers that [the claimant's] depression and psychosis are not predominantly caused by service."

9. The argument in respect of Article 9 remained the same, it being said –

"[The claimant] was downgraded on account of his mental health on 12 Dec 13 and remained downgraded until his discharge. The reason for the downgrading was because of the innate nature of his illness and to prevent him having access to firearms, for his own safety and that of others. Therefore no benefit is payable by reason of worsening Article 9(4)(b)."

I am not sure whether the reference to article 9(4)(b) was a mistake or not. It is possible that a reference to article 9(5)(b), to which specific reference had been made in the reconsideration decision, was intended. However, both provisions were potentially relevant. Article 9(4)(b) could be relied upon for the proposition that the claimant could not rely on worsening of a pre-service condition because he became ill more than 5 years after enlisting (although it seems an unnecessary provision given the combined effect of article 9(3)(a) and (d)) but article 9(5)(b) was the provision that required that service be the predominant cause of any worsening of a non-service condition arising in service.

10. In any event, the claimant provided comments on the documents supplied to the First-tier Tribunal by the Secretary of State and, in particular, provided a list of witnesses of the abuse and harassment that he alleged he had suffered (doc 163) and, in yet a further letter dated 6 November 2015 (docs 225, 227 and 228), some details of the allegations in which he said that named senior non-commissioned officers gave him no opportunity to progress and criticised him unfairly and he made it clear that his complaints were limited to what had been said in his workplace.

11. On 25 October 2016, the case came before the First-tier Tribunal. The claimant attended the hearing and was represented by the Royal British Legion. The Secretary of State was also represented. Both representatives sought an adjournment. However, it is clear from the record of the proceedings made by the members of the panel that the claimant himself did not want an adjournment. The First-tier Tribunal decided to adjourn saying –

> "The response is materially incomplete. Having regard to paragraph 39 and 142 of [*JM*] in particular, it is in the interests of justice that the appeal is adjourned to allow production of further evidence relating to the bullying and harassment allegations by the appellant."

The First-tier Tribunal also issued directions, requiring the Respondent to trace the witnesses identified by the claimant and to forward to them any requests from the claimant for witness statements, to obtain medical records from the three hospitals to which the claimant had been admitted, to apply for the claimant's "P file", to submit a supplementary response by 24 January 2017 to include the documents that it had obtained, including some that the claimant was to provide, and to submit a medical advisor's opinion by 24 February 2017. (I observe that paragraphs [39] to [45] and [142] of *JM* might be thought to suggest that what was required first was a witness statement, or oral evidence, from the claimant himself, rather than the tracing of other potential witnesses.)

12. Unfortunately, but perhaps not surprisingly given what had happened at the hearing, the claimant then decided to dispense with the services of the Royal British Legion and he demanded that a decision in his case be made by the end of the year (docs 603 to 604). The First-tier Tribunal told him that he could ask for the case to be decided on the papers but there would inevitably be some delay while the Secretary of State obtained the relevant evidence. It also told him to send to it his requests for witness statements (doc 605). There was then a series of email exchanges between the First-tier Tribunal and the claimant in the course of which the claimant said that he was "terminating" his case but demanded a "verdict" (doc 614). He did not provide the Secretary of State with the requests for witness statements or the other documents that he had been asked to provide and he also did not send them to the First-tier Tribunal. The First-tier Tribunal interpreted the claimant's email correspondence as an indication that he did not wish to attend a hearing but, for reasons that are not entirely clear, appears to have decided before it had received the Secretary of State's response to its directions that the case should be decided on the papers unless the Secretary of State particularly wanted a hearing, which he did not. Having somewhat belatedly received from the Secretary of State the documents that it had directed him to provide, amounting to some 250 pages, but being satisfied that the claimant had received those documents earlier, the First-tier Tribunal proceeded to determine the appeal on the papers and dismissed it.

13. It did so on the basis that there was no substance in the claimant's allegations of bullying and that his perception that there had been bullying was the result of paranoia. It found that his "mental health problems had a number of causes", none of which was connected with service although, having considered the medical evidence in some detail, it had identified one stressor as being his feeling that he had been victimised at work and that seniors had been overcritical. It said –

> "16. The Tribunal assessed whether this expression of victimisation was in fact bullying or was a disordered perception of reasonable behaviour by those he worked with including his superiors. The Tribunal concluded that the feeling that he had been victimised at work was part of his paranoia. That [the claimant] had completely overreacted to instructions given to him at work is shown by his various references to how he would hurt, torture and kill these three female colleagues. … All of these assessments conclude that [the claimant's] expressions of feeling victimised by his work and the colleagues he worked with as a Health Care Assistant were based on paranoia and had no factual basis. …".

14. At the end of its very full statement of reasons, it explained its decision as follows –

> "19 The reason the Respondent decided to refuse [the claimant's] claim is that the Respondent determined that his illnesses were not caused, or not predominantly caused by service in accordance with Article 8 of the AFCS. The Tribunal considered this Article and agreed with the Respondent. There was no cause or causes including causes acting as a process which led to [the claimant's] mental health condition.
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> 20. Under Article 8(2) of the AFCS where injury is partly caused by service benefit is payable if service is the predominant cause of the injury. The Tribunal followed the staged approach set out below as summarised at paragraph 145 of the decision of the Upper Tribunal (Administrative Appeals Chamber) [2016] AACR 3 (JM v SSD) (Three-judge Panel) in coming to this conclusion. The Tribunal found that none of the causes were service causes so the predominance test did not apply. [The claimant's} mental health problems had a number of causes. These were not connected with service.
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> 21. [The claimant's] mental health problems were not made worse by service. He was downgraded on account of his mental health on 12 December 2013 and remained downgraded until his discharge on 30 November 2014. During this period whilst he was downgraded he continued to receive appropriate and caring treatment given by the Army for his mental health. He was given necessary support and help. He was downgraded to protect not only him, but to protect work colleagues. He was not able to work in any capacity as he was a risk to himself and others.
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> 22. [The claimant's] service did not cause psychosis with depression. It was caused by maltreatment during childhood, relationship breakdown with his wife which had led to personal debt and dispute over access to his children, an ongoing dispute regarding paternity, reliance on alcohol to deal with the stressors, an inability to accept female leadership when in a changed role and possibly other cultural influences as noted by Dr Perry. Further the allegations of victimisation in themselves are a result of paranoia. He directed his paranoia in other directions, including to the ward staff who were caring for him following his admission to hospital who he claimed victimised him. There is no evidence that he reported that he was being victimised or bullied either in his medical records or at his appraisal or to other vehicles of reporting which are available in the Army. …"

The proceedings before the Upper Tribunal

15. The First-tier Tribunal having refused the claimant permission to appeal, the claimant applied to the Upper Tribunal for permission to appeal and I granted his request for an oral hearing of the application. He appeared before me in person.

The Secretary of State, quite properly, neither attended the hearing nor was represented. I did not accept all of the claimant's arguments but I decided to give permission to appeal.

16. I recorded that the claimant had told me he was unwell and was receiving treatment at the time of the First-tier Tribunal's decision and during the period leading up to it when he was representing himself but pointed out that he had not produced any evidence from those treating him that he had not been capable of conducting his case and that there was a difference between, on one hand, merely being unwell and acting unwisely and, on the other hand, lacking the capacity to conduct litigation. I also explained why I did not consider JSP 763, *The MOD Bullying and Harassment Complaints Procedures*, on which the claimant placed a great deal of weight, to be of significant relevance. I adhere to that view and need not repeat here my reasons. However, I gave permission to appeal on the ground that it was arguable that the First-tier Tribunal had failed adequately to analyse the evidence before it in the light of the legislation. I said –

> "6. As regards article 8 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517), the First-tier Tribunal found that there were a number of causes of the claimant's mental health problems, including, first, his childhood experiences, secondly, what were clearly non-service triggers during service but related to his personal life and, thirdly and most importantly, his perception of being bullied or victimised at work by female non-commissioned officers. It found that he had not in fact been bullied or victimised but it appears to have accepted that he felt that he had been. What it did not do, but arguably ought to have done, was make a finding as to whether he had over-reacted to actual criticism and the imposition of punishments by non-commissioned officers exercising their authority over him when he was working or whether there had been no criticisms or punishments at all and the claimant had merely imagined them. If, which currently seems to me to be more likely, it was the former, then it is arguable that the criticisms and punishments were a service cause of his mental illness even if they were reasonable, in which case the real question for the First-tier Tribunal was whether they were the predominant cause. However, notwithstanding that the Scheme is a "no-fault" scheme, it may be arguable that whether any criticisms and punishments were reasonable or amounted to bullying or victimisation might be a relevant issue when considering the predominancy test.
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> 7. As to worsening under article 9, the Secretary of State's submissions to the First-tier Tribunal were arguably misconceived and the question whether article 9 applied, rather than article 8, depended on how the claimant's "mental health problems" were analysed. If a condition arises due to several causes and is not then worsened by another cause, it seems to me that only article 8 applies. If a condition arises due predominantly to non-service causes and then is worsened by predominantly service causes, it seems to me that only article 9 applies.
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> 8. Although the claimant might have had a personality disorder before he joined the Army, there does not appear to be any evidence of it giving rise to mental illness until late 2013. It seems to me that it was the illness that materialised in late 2013 that was the "injury" in respect of which benefit was claimed in this case. This analysis is arguably reinforced by article 9(4)(b) which has the effect in this case that worsening in late 2013 of a pre-service injury within the scope of article 9(1)(a) or (b) could not give rise to entitlement to benefit because it would have been arisen more than 5 years after the day service commenced. The explanation for that provision

> appears to be that "[w]here an individual has an existing injury when they enter service, it is considered medically reasonable that if there is no further injury and clinically the injury does not worsen within five years of starting service, then any subsequent worsening cannot be considered to be caused by service" (paragraph 2.18 of JSP 765). Article 9(4)(b) was mentioned on doc 583, but in connection with the reasons for downgrading, which I would suggest are irrelevant.
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> 9. Article 9(1)(c) would appear to have applied only if a mental illness developed during service from non-service causes and then was made worse by service. Neither party argued that that was the position here and it could arise only if the First-tier Tribunal made the necessary findings of fact in relation to the claimant's mental health problems. The explanation for the downgrading given in paragraph 21 of the First-tier Tribunal's decision seems totally irrelevant to the question whether there was worsening. Only the first sentence of that paragraph seems necessary and arguably that would have been sufficient if the First-tier Tribunal was entitled to find that none of the causes of the claimant's mental health problems was a service cause."

17. The Secretary of State's response to the appeal summarised the background, the First-tier Tribunal's decision and my observations and concluded –

> "16. The Respondent considers, having regard to the Application, the Tribunal's Reasons for Decision and Judge Rowland's Judgements and case management Directions that this matter should be remitted to a fresh tribunal which could be instructed to provide full reasoning for its decision."

I take that to be an expression of broad agreement with my observations and an acceptance that the First-tier Tribunal erred in law for the reasons I had suggested. The claimant has not replied to the response. Neither party has asked for an oral hearing.

General observations on the law

18. In these circumstances, I can be fairly brief in this decision but I ought to enlarge slightly on the observations I made when giving permission to appeal in order to make them clearer. I will do so by making four general observations on the law, suggesting the implications they have for this case.

19. First, because "benefit for injury is payable only in respect of an injury for which there is a descriptor" (article 16(1)(a)), the injury in respect of which benefit is claimed when mental illness is the basis of the claim must be an injury within Table 3 of Schedule 3 to the 2011 Order, which lists "mental disorders", each of which is described in terms of the extent to which, and time for which, it causes "functional limitation or restriction". (The term "descriptor" is defined in article 2(1) and provision is made in article 5 for the interpretation of descriptors, including a definition of "functional limitation or restriction".)

20. Secondly, any injury sustained more than five years after the commencement of service cannot be regarded as a worsening of a pre-service injury and so must be regarded as a separate injury. This follows from the terms of article 9, under which a pre-service injury cannot be said to have been worsened more than five years after the commencement of service. The Secretary of State's explanation for the drafting

of article 9 is that, "[w]here an individual has an existing injury when they enter service, it is considered medically reasonable that if there is no further injury and clinically the injury does not worsen within five years of starting service, then any subsequent worsening cannot be considered to be caused by service" (JSP 765, *Armed Forces Compensation Scheme Statement of Policy*, para.2.18). For a similar reason, an injury occurring more than five years after a non-service injury sustained during service must be regarded as a separate injury and not the result of a worsening of the non-service injury. I do not consider that it matters whether or not this analysis is the one that doctors would normally accept in a particular case; it is workable and it is required as a matter of law in order to avoid a gap in the scheme of compensation that cannot possibly have been intended.

21. It does not follow that the earlier injury is irrelevant when considering a claim in respect of the later injury, because the earlier one may be regarded as a cause of the later one when the case is considered under article 8. Indeed, it may be unnecessary in practice to decide which of articles 8 and 9 applies in a particular case. This is because, in many cases where both non-service causes and service causes contribute to a mental disorder causing functional limitation or restriction, the same result may be reached whether the non-service causes and service cause combined to cause the condition or whether the non-service causes caused the condition and service worsened it. In the former case, benefit will be payable only if the service cause was the predominant cause of the injury (article 8(2)). In the latter case, benefit will be payable only if service was the predominant cause of worsening (article 9(1)) and that in turn was the predominant cause of downgrading (article 9(3)(d) or (5)(b)). Thus, where a service contribution to an injury is found to be predominant or if it is found that service is not a contributor at all, the result will inevitably be the same on either analysis. But it is possible to envisage a case where service is not the predominant contributor to an injury and so could not be the predominant cause but could be the predominant cause of worsening that has been the predominant cause of downgrading. In such a case, article 9 acts to mitigate the effect of the predominancy test in article 8(2).

22. Thirdly, although an underlying condition or previous injury may be a cause of a later injury, in a case where there is a more proximate service cause it will be necessary to determine which is the predominant cause for the purpose of article 8(2) and so the causative potency of each cause will have to be considered. Some consideration was given to this issue in *JM* at [132], where the three-judge panel said that it did not see "any sign that the intention behind the AFCS is to deprive those with constitutional weakness from the protection usually regarded as appropriate in other compensation schemes, that is to say the 'thin skull' approach".

23. Fourthly, because this is a no-fault scheme (as to which, see *SM v Secretary of State for Defence (AFCS)* [2017] UKUT 286 (AAC) at [42] to [44]), 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. Service may, of course, merely be the setting in which an injury occurs, but the question whether a person has been subjected to inappropriate behaviour is not determinative of that issue. The only reason that, when giving permission to appeal, I suggested that it was arguable that it might matter whether any criticisms and punishments were reasonable or amounted to bullying or victimisation when considering the

predominancy test is that the nature of the criticisms and punishments might, as a matter of fact rather than as a matter of law, have a bearing on the degree of stress suffered by the claimant and so might be a factor to be taken into account when assessing the relative causative potency of service and non-service causes (and, indeed, it might be a factor in determining whether service caused any stress at all).

Applying the law in this case

24. It follows from the first two of those observations that the "injury" in respect of which the claim was made in this case was the mental disorder that manifested itself while the claimant was in the Army, rather than any underlying condition or pre-existing disorder.

25. There was potentially a question whether any underlying personality defect or the effect of abuse suffered in childhood could be regarded as a cause of the mental disorder manifesting itself in 2013 and if so, the potency of its causative effect by comparison with more contemporaneous causes. Whether it was necessary to answer that question depended on whether any of the more contemporaneous causes was a service cause. The First-tier Tribunal found that none of them was.

26. Plainly it was right about most of the causes it identified but, in paragraph 22 of its decision, the First-tier Tribunal included "an inability to accept female leadership when in a changed role" as one cause of the claimant's mental illness and in paragraph 16, it had referred to an over-reaction to instructions (a point I appear not fully to have appreciated when I gave permission to appeal and suggested that it had not made a finding on the issue). Non-commissioned officers exercised authority over the claimant in this case because the claimant was a private soldier and, to the extent that the exercise of that authority may have been a relevant stressor leading to the development of the injury, it seems to me that service must have been a cause of the injury since those interactions with colleagues were made necessary by the claimant's service in the Army.

27. On the other hand, there was clearly an issue, given the other near contemporaneous causes identified, as to whether service was the predominant cause of the injury (if the case required consideration under article 8 – see article 8(2)) or of a worsening of an injury (if the case required consideration under article 9 – see the closing words of article 9(1)). If it was the predominant cause of a worsening, there was the further question whether that worsening was the predominant cause of the downgrading (see article 9(5)(b)). These issues of predominancy were, in my judgment, really the central area of dispute in this case. Clearly, there was not a great deal of evidence as to exactly what had been said to whom and in what context and I certainly accept that, there being obvious non-service causes of the injury, the First-tier Tribunal might have been entitled to find that any service cause was not the predominant cause of the injury without necessarily being precise about what exactly had occurred. But that is not how the First-tier Tribunal reasoned. It expressly said that predominancy was not in issue because it did not regard any of the causes as being a service cause.

28. That, in my judgment was wrong. This case was, in some respects, like *JM*, where the claimant suffered depression that he said was due to service but where

there was also evidence of non-service causes and so, if it was accepted that there were both service and non-service causes, it would have been necessary for the First-tier Tribunal to consider the relative potency of those causes. The same weighing of the various causes was required in this case.

29. It is for that reason that I find that the First-tier Tribunal erred in law.

30. I also consider that the First-tier Tribunal erred in at least partly adopting, in paragraph 21 of its statement of reasons, the Secretary of State's faulty reasoning in his various submissions in relation to article 9. The fact that the claimant was downgraded for the safety of himself or others would not prevent the claimant from succeeding under article 9 if the reason for the concern about safety was a worsening of a non-service injury. However, because the first sentence of paragraph 21 of the statement of reasons would have been sufficient against the background of the finding that there was no service contribution to the injury, I do not regard the error in the rest of the paragraph to be a material error of law in itself. On the other hand, the error in the reasoning for finding there to be no service cause obviously affects the First-tier Tribunal's decision in relation to article 9 as it does in relation to article 8.

31. As I suggested in paragraph 7 of my reasons for giving permission to appeal, articles 8 and 9 are alternatives. If a condition arises due to several causes and is not then worsened by another cause, only article 8 applies. If a condition arises due predominantly to non-service causes but is worsened by predominantly service causes and that worsening is then the predominant cause of downgrading within the relevant period of five years, only article 9 applies. Often, it will be obvious under which article a case should be determined, but sometimes it will depend on what findings of fact are made. Thus, in the present case, article 9(1)(a) and (b) clearly could not apply because the claimant was not downgraded until he had been in the Army for more than five years (see article 9(3)(a)). However, this case would fall to be determined under article 9(1)(c), rather than article 8, if it were found that the claimant had been suffering from a mental disorder causing functional limitation or restriction due to non-service causes while in service and that service had worsened it. That is neither party's primary case but, if there were more detailed findings of fact than were probably possible on the evidence before the First-tier Tribunal when deciding the case on the papers, the timing of non-service and service causes of a mental disorder and the timing and pattern of the development of symptoms might have suggested such a conclusion. On the other hand, for reasons I have given in paragraph 21 above, it is unnecessary in practice for the Secretary of State or the First-tier Tribunal to consider a case in such detail for the purpose of deciding which of articles 8 and 9 applies if he or it is confident that the same result would be obtained on either analysis.

Conclusion

32. Because I have found the First-tier Tribunal to have erred in law, I set its decision aside. I do not consider that I ought to remake this decision myself on the basis of the findings made by the First-tier Tribunal, particularly as the Secretary of State's submission that the case should be remitted may have contributed to the claimant's lack of response to this appeal. Medical expertise may be desirable,

given the nature of the issues in the case and the analysis of causation that is required, and I also bear in mind the claimant's apparent health when he decided in late 2016 and early 2017 that he did not wish to appear before the First-tier Tribunal. As I observed when giving permission to appeal, the tone of his emails between 14 November 2016 and 5 December 2017 might be thought to be very different from those both before and after that period. However, the claimant should not assume that, because he has been successful on this appeal, he will necessarily be successful when the First-tier Tribunal reconsiders his case. He may therefore wish to seek assistance from the Royal British Legion again, or from a similar organisation, in preparing and presenting his case.

Mark Rowland
30 July 2018