IN THE UPPER TRIBUNAL **Case No.** CAF/3239/2015
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

The Secretary of State was represented by Mr Adam Heppinstall of counsel, instructed by the Government Legal Department

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

Decision: The Secretary of State's appeal is dismissed.

REASONS FOR DECISION

1. This is an appeal, brought by the Secretary of State with my permission, against a decision of the First-tier Tribunal dated 9 April 2015, allowing the claimant's appeal against a decision of the Secretary of State dated 21 November 2013 whereby he rejected the claimant's claim for a disablement pension in respect of injuries he suffered on 22 December 1987 on the ground that the injuries were neither attributable to, nor aggravated by, service.

2. The claimant joined the Army in 1984, straight from school. On 22 December 1987, he was a lance corporal in the Intelligence Corps, serving in the Main Building of the Ministry of Defence in Whitehall, when he fell from a window and suffered multiple fractures and other injuries. Happily, he recovered sufficiently to resume his career in the Army, eventually leaving as a sergeant in 2007 having been awarded the Queen's Commendation for Valuable Service two years earlier, but he was left with some residual disablement.

3. On 26 March 2013, the Secretary of State received the claimant's claim for a disablement pension under article 6 of the Naval, Military and Air Forces etc. (Disablement and Death) Service Pensions Order 2006 (SI 2006/606) on the ground that the disablement from which he still suffered as a result of the injuries he had sustained on 22 December 1987 was due to service. In the claim form, the claimant said –

> "Incident occurred 22 Dec 1987, whilst serving with DIS, MoD Main Building, Whitehall, London, whilst on duty at my normal place of work.
>
> I was asked to go and look for somebody, headed towards the toilets. [I] remember going to open door. [N]ext thing I remember is waking up in intensive care 31 Dec 87 having been on life support machine in Westminster Hospital, London.
>
> Incident was treated as a 999 emergency and an independent police enquiry investigation conducted by cannon Row Police Station CID. [T]hey returned an official verdict of 'Attempted murder by person or persons unknown'.

I was permitted to remain in the Army but remained medically downgraded [and] suffered pains to knees and back throughout service."

4. The claim fell to be considered under article 40 of the 2006 Order, paragraphs (1) and (3) of which provide –

"**Entitlement where a claim is made in respect of a disablement, or death occurs, not later than 7 years after the termination of service**
40.—(1) …, where, not later than 7 years after the termination of the service of a member of the armed forces, a claim is made in respect of a disablement of that member, …, such disablement … shall be accepted as due to service for the purposes of this Order provided it is certified that—
(a) the disablement is due to an injury which—
(i) is attributable to service, or
(ii) existed before or arose during service and has been and remains aggravated thereby; or
(b) ….
(2) ….
(3) Subject to the following provisions of this article, in no case shall there be an onus on any claimant under this article to prove the fulfilment of the conditions set out in paragraph (1) and the benefit of any reasonable doubt shall be given to the claimant.
(4) ….
(5) ….
(6) …."

This is in contrast to article 41, paragraphs (1), (3) and (5) of which provide –

"**Entitlement where a claim is made in respect of a disablement, or death occurs, more than 7 years after the termination of service**
41.—(1) …, where, after the expiration of the period of 7 years beginning with the termination of the service of a member of the armed forces, a claim is made in respect of a disablement of that member, …, such disablement … shall be accepted as due to service for the purpose of this Order provided it is certified that—
(a) the disablement is due to an injury which—
(i) is attributable to service before 6th April 2005, or
(ii) existed before or arose during such service and has been and remains aggravated thereby; or
(b) ….
(2) ….
(3) A disablement or death shall be certified in accordance with paragraph (1) if it is shown that the conditions set out in this article and applicable thereto are fulfilled.
(4) ….
(5) Where, upon reliable evidence, a reasonable doubt exists whether the conditions set out in paragraph (1) are fulfilled, the benefit of that reasonable doubt shall be given to the claimant.
(6) …."

5. The Secretary of State regarded the incident as an accident. In a document (docs 7 and 8) dated 20 September 2013, two months before he issued his decision,

the Secretary of State quoted most of the formal Opinion of a Regimental Inquiry given on 23 March 1988, as follows –

> "… [the claimant] had drunk sufficient alcohol to impair his senses …. We consider that it is improbable that he could have fallen from the lavatory window without first climbing onto the interior window edge. We do not know why he climbed onto the ledge but we are of the opinion that the quantity of alcohol he had consumed may have contributed to his falling from the window. The inquiry is of the opinion that [the claimant] was on duty, it being the normal custom in the branch for junior members of the staff to set up, attend and clear away after functions held in offices."

6. He also quoted paragraph 4 of the Opinion of the Convening Authority (see paragraph 9 below) and then made the following observations –

> "… Whist it is confirmed that [the claimant] was on official duty when the accident occurred, the findings of the Regimental Inquiry were that he had consumed a large quantity of alcohol and must have climbed onto the window ledge of the lavatory window from which he fell. The Opinion of the Convening Authority was that there was no evidence of foul play which is not consistent with [the claimant's] statement that the Inquiry returned 'an official verdict of attempted murder'. The Secretary of State is of the opinion that it was [the claimant's] personal choice to climb onto the window ledge from which he fell and that there was no service compulsion for him to do so, service being the setting and not the cause of the accident. Therefore, based on evidence it has been shown beyond reasonable doubt that the accident was not caused by service."

In the light of those observations, a medical advisor decided on 6 November 2013, that a certificate could not be awarded in respect of six identified conditions – abdomen and thorax injury, fracture right scaphoid, fracture coccyx, fracture pelvis, fracture left femur and fracture right tibia and fibula, which were taken to include disablement in respect of recurrent low back, knee and hip pain, osteoarthrisis right wrist, right wrist pain, laparotomy, perforated duodenal ulcer and pneumothorax – although he or she did not give reasons at the time.

7. Nor did the Secretary of State give any reasons to the claimant when he issued his decision rejecting the claim on 21 November 2013 (doc 60), beyond saying that the conditions that he had identified "were not caused or made worse by your service". It is therefore not surprising that the claimant's grounds of appeal amounted to little more than a reiteration of the points he had made in his claim form.

8. On 11 February 2014, three months after refusing the certificate and a month after the claimant had appealed, the medical advisor said (doc 10) –

> "The SoS has not accepted the incident which resulted in the above injuries; therefore they are not attributable to service.
>
> He remains permanently downgraded following the incident and was managed appropriately for his multiple injuries. Beyond reasonable doubt therefore the conditions are not aggravated by service."

9. The full findings of the Regimental Inquiry upon which the Secretary of State had based his observations were, inexplicably, not included in the bundle of documents produced for the First-tier Tribunal by the Secretary of State. However, there was produced the Opinion of the Convening Authority, to which was attached a "Summary Sheet" (docs 19 and 20). The Opinion of the Convening Authority was as follows –

> "1. I am of the opinion that [the claimant] alone was to blame for the injuries he sustained. I support the Inquiry's finding, in particular that there is no evidence of foul play.
>
> 2. I concur with the opinion of the Inquiry that [the claimant] was on duty. His presence was required, by service custom, at the party. The party itself was given to thank professional colleagues and certain non-Government civilians for their support over the year relating to the conduct of official business.
>
> 3. I concur with the board's opinion that the quantity of alcohol consumed by [the claimant] contributed to the accident.
>
> 4. I am of the opinion that there are no steps which can be or should be taken to present a recurrence of an incident of this sort. The party was well controlled and attended by a large number of responsible senior officers. The windows from which [the claimant] fell are in a good state of repair and are not inherently more dangerous than any other windows of equivalent size."

10. The Summary Sheet recorded that there had been a civilian police investigation, followed by an investigation by the Special Investigation Branch of the Royal Military Police, that there had then been the Regimental Inquiry and that no disciplinary action had been taken. It summarised the Findings and Opinions of the Inquiry and the Opinion of the Convening Authority and recorded that the Superior Commander had endorsed the Inquiry's Findings and concurred with the Opinions of the Inquiry and the Convening Authority. Insofar as it dealt with the Findings and Opinions of the Inquiry, it stated –

> "The Inquiry found that [the claimant] sustained his injuries through falling from a third floor window, for reasons it was not able to establish. Whilst the Inquiry was unable entirely to rule out foul play, it found no evidence to suggest it.
>
> In the opinion of the Inquiry, [the claimant] was on duty at the time and had consumed sufficient alcohol to impair his senses. This may have contributed to his fall."

11. Apart from the documents to which I have already referred, the bundle of documents provided to the First-tier Tribunal included additional medical evidence and a "legal appendix" setting out, *inter alia*, the terms of article 40. However, as is regrettably usual, the Secretary of State made no written submission to the First-tier Tribunal in response to the claimant's appeal, presumably relying on his brief observations of 20 September 2013.

12. The case was listed for hearing on 7 August 2014, but, in a letter dated 4 August 2014 (doc 72-73), the claimant requested a postponement so that he could obtain the police investigation report, at the same time replying to some of the points made in the bundle of documents. He argued that there was no evidence to support the theory that his fall had been all his own doing. Having explained that his role at the party involved talking with the guests and not just clearing away afterwards, he said –

> "My understanding from conversations with CID officers from Cannon Row Police Station was that there was insufficient evidence to support any theory. The investigating officer had stated they could not work out which window I had fallen from, as the position of the body was not true of a jump or drop. The Police investigation resulted in an open verdict into 'attempted murder by person or persons unknown'. I admit I find it hard to accept that anyone would try to murder me on a personal level.
>
> The MOD stated that the function was 'well supervised' to which I have no argument. This supports the claim that I was not in an unfit state to carry out my duties, otherwise I would like to think I would have been sent home. I would not have overdone the drinking, for fear of losing my security vetting which was at the highest level, to permit [me] to carry out my duties.
>
> It is my belief based on conversations had with Medical and Police involved that I did not have enough alcohol in my blood to fall from the window. I know I was not depressed as my wife and I had just found out that we were going to have a baby, having lost one earlier in the year. I had passed a psychometric evaluation, undertaken as part of the job requirement earlier in the year. [T]his indicated I was a stable individual fit for [the] role."

He apologised for the lateness of his request.

13. The First-tier Tribunal granted the request for a postponement, directed the Secretary of State to obtain the summary and conclusions of the Special Investigation Branch investigation and directed the claimant to request the report into the incident carried out by the civilian police (doc 63). It did not direct that documents from the Regimental Inquiry should be produced, possibly because it did not occur to it that only the Opinion of the Convening Authority and the Summary Sheet would have been provided if there had been any further documents relating to the Inquiry in the Secretary of State's possession or obtainable by him. Nor did the direction prompt the Secretary of State to produce any further documents from the Regimental Inquiry. In the event, the Special Investigation Branch was unable to provide any report (doc 68) and the claimant was eventually told by the Metropolitan Police on 2 March 2015 that "there is no information the Commissioner is required to supply you" (doc 119). Whether the Secretary of State or the Special Investigation Branch would have been able to obtain relevant information from the Metropolitan Police had he or it been asked to try was not explored, because both parties were content for the hearing on 9 April 2015 to proceed on the basis of the evidence already available.

14. This included "scene of crime" photographs from the Metropolitan Police investigation, that the claimant had been given at the time and which he showed to the First-tier Tribunal. The claimant also gave oral evidence. In answer to questions about the amount he had had to drink at the party, he said that the function had started just after 2pm, that he was used to drinking, that he had drunk red wine but that he had had been careful not to drink too much and that during the afternoon he had induced vomiting to remove alcohol from his system and so "reduce the likelihood of my making a fool of myself".

15. The First-tier Tribunal allowed the claimant's appeal (docs 160 and 161 – the version at docs 94 and 95 appears to have been a rejected draft). It accepted the Secretary of State's description of the claimant's injuries and then said –

> "7. Having assessed all the evidence the Tribunal's findings of fact material to this Appeal are, in summary: –
>
> (a) All the claimed injuries arise out of the same serious accident which happened on 22/12/1987.
>
> (b) The Appellant was attending a party (on the afternoon of that day) which was held in the MOD building in Whitehall. Some time in the early evening, he telephoned his wife to say he would be home soon. His attendance at the party had been effectively a service duty. Before leaving he went to the lavatory and the last thing he remembers is placing his hand on the toilet doors. He woke up in Intensive Care having been admitted to hospital at about 8.30 p.m.
>
> (c) The incident was investigated by the Civilian Police. No criminal charges arose. A Regimental Inquiry was held (21 to 23 March 1988). It was found that the Appellant had fallen from a 3rd floor window 'for reasons it [the inquiry] was not able to establish'. Although 'foul play' could not be 'entirely' ruled out, there was found 'no evidence to suggest it'. Consumption of alcohol by the Appellant 'may' have contributed to the fall, but no 'disciplinary action has been taken'. The Inquiry (and the convening officer) concluded that the Appellant was on duty at the time of the accident because 'his presence was required, by service custom, at the party'. No fault could be found with the level of supervision at the party or the condition of the window from which the Appellant fell (i.e. the window inside the toilets on the 3rd floor).
>
> (d) The essential facts are therefore effectively common ground. The accident occurred at the Appellant's place of work. He was to all intents and purposes on duty at the time. No-one knows what actually caused the accident. The reasons for the Appellant's fall remain uncertain. There is no evidence either way of third party involvement and although it is possible the Appellant was under the influence of alcohol at the time, there is no persuasive evidence that it played a causative role.
>
> (e) Under Article 40 the Claimant has no onus upon him of proving the conditions for an award of attributability. The effect of Article 40(3) is to place the onus of proof on the Respondent to establish beyond any reasonable doubt that the injury is <u>not</u> attributable to service.

(f) In the whole of the circumstances of this case we remain entirely uncertain as to how and why the Appellant fell from the window. We cannot exclude a reasonable doubt that the injuries resulting from the fall were attributable to a factor of service.

8. In these circumstances the Secretary of State has <u>not</u> discharged the burden of proof ….”

16. The Secretary of State, now represented by Mr Heppinstall, applied to the First-tier Tribunal for permission to appeal on the ground that, while the First-tier Tribunal had correctly considered whether attendance at the party had been a duty of service, it had failed to consider whether “the means and immediate prior circumstances by which C came to be on the ground outside Main Building and injured were to be treated as being ‘Due to Service’ under Article 40 or not”. Reference was made to the forthcoming decision of a three-judge panel of the Upper Tribunal in which Mr Heppinstall had appeared for the Secretary of State and which he anticipated would say something about the approach to be taken to the phrase “due to service”. It was also stated that, “due to oversight”, the Secretary of State had not submitted to the First-tier Tribunal evidence in his possession that he would wish to adduce on a rehearing should his appeal be successful. This, he said, included forensic evidence to the effect that the level of alcohol in the claimant’s blood at the time of the incident would have been 158 mg per 100 ml of blood (*i.e.*, approximately twice the drink/drive limit of 80 mg per 100 ml of blood) and evidence from a sergeant to the effect that he had seen the claimant being sick in the toilets during the party. He produced a witness statement taken by the police – presumably the Metropolitan Police given its date – from the sergeant and a manuscript transcript of the sergeant’s deposition to the Regimental Inquiry. The statement was to the effect that the sergeant had seen the claimant being sick in the toilets between 6.45 to 7 pm, that he had subsequently seen the claimant at the party “and he appeared fine”, that a security guard had come into the party at about 7.40 to 7.45 to ask if anyone was missing as someone had fallen from a window, that he had not seen the claimant for about five minutes before that and that he had accompanied the security guard and identified the claimant. None of the other evidence mentioned was produced.

17. The Temporary Chamber President gave the claimant an opportunity to respond to the application, observing that the forensic evidence had not been provided and that it appeared arguable that the First-tier Tribunal had failed to explain what it had made of the contemporaneous Opinion of the Convening Authority. His observations prompted a further submission from Mr Heppinstall, who provided a copy of the decision of the Upper Tribunal’s decision in *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC); [2016] AACR 3, which was the decision that he had anticipated might be relevant, and also the whole of the new evidence to which he had previously referred. The new evidence consisted of a two-page MOD Form 298 report on the claimant’s injuries and the 23-page complete record of proceedings of the Regimental Inquiry, which included the evidence of the claimant, the sergeant, a third witness who had been present at the party, an orthopaedic surgeon (whose statement had in fact been before the First-tier Tribunal at doc 18) and the forensic scientist who had carried out tests on blood samples

from both the claimant and the third witness, together with the Inquiry's formal Findings and Opinion. It seems quite extraordinary that those documents were not provided to the First-tier Tribunal.

18. Mr Tucker, who was now representing the claimant, opposed the grant of permission to appeal, referring to *Judd v Minister of Pensions* [1966] 2 QB 580 and contrasting cases where article 40 of the 2006 Order applies with cases where article 41 applies. He pointed out that the Convening Authority had not stated what burden of proof he had applied and submitted that the First-tier Tribunal had correctly applied article 40 and that it had in fact considered and adopted the findings of the Regimental Inquiry. He also provided the claimants' comments on the new evidence.

19. The Temporary Chamber President refused permission to appeal in the light of Mr Tucker's representations, saying that he had discounted the new evidence and further that "it is perhaps questionable whether it is appropriate for such material to have been presented at this stage". The application was renewed to the Upper Tribunal, both on the Secretary of State's original ground and on the ground originally suggested by the First-tier Tribunal, that the First-tier Tribunal ought specifically to have addressed the Convening Authority's Opinion. When I gave permission to appeal, I did so on the basis that I did not find the Secretary of State's submissions particularly persuasive but that his original ground was arguable, although I did not formally limit my grant of permission to that ground. Mr Tucker effectively reiterated his previous submissions in his response to the appeal, although he also relied on *LA v Secretary of State for Defence (WP)* [2014] UKUT 477 (AAC): [2015] AACR 20, which was decided in the context of article 41 rather than article 40 but in which many of the authorities on the approach to the forerunners of both articles were analysed. Mr Heppinstall submitted in reply that the response misunderstood the grounds of appeal and that, had the correct approach been taken by the First-tier Tribunal, it would have been bound to dismiss the claimant's appeal. I granted the Secretary of State's request for an oral hearing.

20. As regards the new evidence, it has never been part of the Secretary of State's case that it is relevant to the question whether the First-tier Tribunal erred in law, because the First-tier Tribunal obviously cannot be criticised for not having regard to evidence that was not before it and, as Mr Heppinstall readily accepted at the hearing, the new evidence does not fall within the class of evidence receivable on an appeal in the interests of fairness (see *Ladd v Marshall* [1954] 1 WLR 1489, which in the context of an appeal to the Upper Tribunal on a point of law must be read with *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] 1 QB 1044 and, where the person seeking to rely on the evidence was not represented before the First-tier Tribunal, must now also be read with paragraph [27] of *Hussain v Secretary of State for Work and Pensions* [2016] EWCA Civ 1428).

21. It is true that a close reading of the Secretary of State's observations might have suggested to the First-tier Tribunal that the Secretary of State had had relevant evidence that he had not disclosed, but there is no unfairness to the Secretary of State in that point not having been taken when it was he who was responsible for the

non-disclosure and even a non-lawyer representative could not reasonably have failed to realise that the evidence should have been produced. (In fairness to the Secretary of State's representative at the hearing before the First-tier Tribunal, I should record that it is clear that he did not have the original file (see doc 83).) However, the new evidence would be relevant to the question of the disposal of the case in the event of an error of law being found and the appeal being allowed and Mr Heppinstall was perfectly entitled to refer to it in his application to the First-tier Tribunal for permission to appeal since the First-tier Tribunal had the power to review its own decision if, in the light of the application for permission to appeal, it was satisfied that there had clearly been an error of law. On the other hand, if the evidence itself was to be produced at that stage, either it all ought to have been produced or none of it.

22. As to whether the First-tier Tribunal erred in law in not referring to the Opinion of the Convening Authority, I accept Mr Tucker's submission. The First-tier Tribunal was entitled to treat the Opinion of the Convening Authority as irrelevant and in those circumstances it did not err in law in not mentioning it in its statement of reasons. It had to apply article 40(3), so that the Opinion of the Convening Authority as to what had happened – presumably reached on the balance of probabilities – was neither here nor there. There is no inconsistency between a finding that, on the balance of probabilities, the claimant was the author of his own misfortune and a finding that there is a reasonable doubt as to whether he was the author of his own misfortune or not. On that basis, the First-tier Tribunal's decision did not involve disagreement with the Convening Authority. In any event, as there was no detailed explanation for the Convening Authority's Opinion, it is difficult to see what the First-tier Tribunal could have provided as a reason for disagreeing with it other than its explanation for reaching a different conclusion.

23. I turn, then, to the parties' main submissions. Mr Heppinstall does not suggest that the First-tier Tribunal misdirected itself as to the effect of article 40(3). It is plain from paragraph 7(e) and (f) of the statement of reasons that it well understood the effect of that provision. It would be surprising if it had not done so, because articles 40 and 41 must be familiar to every judge and member of the First-tier Tribunal sitting in the War Pensions and Armed Forces Compensation Chamber. However, Mr Heppinstall submits that the First-tier Tribunal's decision was perverse and shows that it failed properly to analyse the evidence. Alternatively, it has failed to provide adequate reasons for its decision. Mr Tucker's submission is to the effect that the decision was not perverse but was one that the First-tier Tribunal was entitled to make and for which it has provided adequate reasons.

24. Mr Heppinstall places great emphasis on *JM*. He is plainly right to submit that that decision reiterated the point made in earlier authorities that not all injuries suffered by servicemen when on duty are due to service and Mr Tucker does not submit to the contrary. However, Mr Heppinstall further submits that the First-tier Tribunal ought to have decided whether the means and circumstances that led to the claimant being on the ground outside Main Building were such that the incident could be said to be due to service. He submits that there was evidence upon which a decision could be made as to that and that it was only after such a decision had

been made that article 40(3) fell to be addressed if it was still relevant. I do not consider that Mr Tucker misunderstood the argument. He merely submits that the answer to the argument lies in a proper understanding of article 40. I agree.

25. Article 40 is concerned with whether "disablement" is due to service. In cases where it is alleged that the disablement is due to a particular incident, it raises two questions: whether the incident was a service cause of the injuries sustained in it and whether those injuries were the cause of the disablement at the time relevant to the claim. If the claimant is to be entitled to benefit, both questions must be decided in the affirmative. Article 40(3) is therefore potentially relevant at both stages. There are cases where it is reasonably clear that the relevant injuries were suffered due to a service cause but there is uncertainty as to whether they are the the cause of the later disablement. However, in the present case, the medical advisor did not suggest that there was any doubt as to whether the claimed disablement was attributable to the injuries sustained in the relevant incident; the only live issue was whether those injuries arose due to a service cause.

26. Plainly, it is unnecessary to rely on article 40(3) or article 41(5) if the Secretary of State or the appropriate tribunal is satisfied that it is more probable than not that the claimant's disablement is due to service. It is only when the Secretary of State or the appropriate tribunal considers that, on the balance of probabilities, the disablement is *not* due to service that it becomes necessary to consider those provisions, which give the claimant the benefit of any reasonable doubt. It seems to me that there is no great significance in the inclusion of the words "upon reliable evidence" in article 41(5) but not in article 40(3). The word "reliable" merely emphasises that fanciful or worthless evidence is not to be taken into account and how else is anything proved one way or the other except on the basis of evidence? Moreover, all the evidence must be considered, irrespective of who has produced it. See, in respect of both these points, the discussion of earlier cases in *LA* at [58] to [71], particularly at the end of [70], and, in relation to the latter point only, the discussion of the duty to co-operate in the gathering of evidence in Baroness Hale of Richmond's speech in *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372; R 1/04(SF) at [61] and [62]. Thus the Secretary of State's formulation of the issue in this case in his observations of 20 September 2013 – "based on evidence it has been shown beyond reasonable doubt that the accident was not caused by service" – was perfectly appropriate, even though there is no explicit reference to "evidence" in article 40(3).

27. The difference between article 40 and article 41 is therefore solely as to the burden of proof. Where article 40 applies, it is for the Secretary of State to exclude any reasonable doubt or, in other words, to prove that the only reasonable possibility is that the disablement is not due to service. Where article 41 applies, it is for the claimant to prove that there is a reasonable doubt or, in other words, that there is a reasonable possibility that the disablement is due to service. In many cases, which of articles 40 and 41 applies may have little impact on the outcome. However, the burden of proof is particularly important where there is no, or insufficient, reliable evidence on an issue despite the parties' efforts to provide what they can. In such a

case, it determines "who should bear the consequences of the collective ignorance" (see *Kerr* at [66]).

28. The Secretary of State's argument before the First-tier Tribunal, as set out in his observations of 20 September 2013, was simply that the claimant had climbed on to a window ledge from which he fell and there was no service compulsion for him to do so. Therefore, he argued, it had been shown beyond reasonable doubt that the accident was not caused by service. In support of that approach, Mr Heppinstall now draws attention to paragraph [99] of *JM*, where, after consideration had been given to a number of cases including *Monaghan v Minister of Pensions* (1947) 1 WPA 971, the Upper Tribunal said –

> "… a claim must fail where the injury was sustained while the claimant was engaged on some personal enterprise unconnected with any duty or compulsion of service; or (as Denning J put it in *Monaghan*) service gave only the opportunity, or provided the setting, for the injury to occur."

29. However, it seems clear enough that, in the present case, the First-tier Tribunal did not decide against the Secretary of State because it doubted the proposition that, if the claimant had climbed onto the window ledge of his own volition and for no good reason, the disablement he suffered as a result of the injuries from his fall could not be due to service; it decided against the Secretary of State because it was not satisfied beyond reasonable doubt that the claimant had climbed onto the window ledge of his own volition and for no good reason. That is plain from the fact that, although it found that the claimant had been both on duty and at his place of work, it only found in his favour because it was could not "exclude a reasonable doubt that the injuries resulting from the fall were attributable to a factor of service". Thus the First-tier Tribunal did not make the error of assuming that, merely because the claimant was on duty and at his place of work, the injury suffered was due to service. For the same reason, it also seems likely that, had it had to decide the case as an ordinary civil claim, simply on the balance of probabilities with the burden of proof on the claimant, it would have decided it in the Secretary of State's favour.

30. Mr Heppinstall also argues that the absence of even circumstantial evidence of third party involvement was itself significant when taken with the circumstantial evidence that the building was highly secure and so he criticises the use of the words "either way" in paragraph 7(d) of the First-tier Tribunal's statement of reasons. (Those words appear only in the final version of the decision at doc 161, with the correct judge's name typed on it, and not also in the version at doc 95.) In particular, he submits that it was significant that there was no evidence of any argument at the party or of any history of bullying or harassment of the claimant. He could also have argued that even had the injuries been due to an assault on the claimant, they might not necessarily have been due to service if, for instance, the assault had been provoked by the claimant.

31. It was certainly open to the Secretary of State to argue before the First-tier Tribunal that, not only was it more likely than not that the disablement was not due to service, but that the probability of it being due to service was so low that there was

no reasonable doubt on the issue. Indeed, that, it seems to me, is how article 40 cases (and, perhaps, some article 41 cases) have to be argued by the Secretary of State.

32. However, it has to be borne in mind that the claimant's case was, in effect, that, however unlikely it appeared to be that his injuries were due to service, it was also very unlikely that they were due to his own actions and, if they were not due to his own actions, they were probably due to service given that he was both on duty and at his place of work. There was no evidence of an intention to commit suicide. He had had a responsible job for which he had been appropriately tested and vetted. He was in the presence of officers and other important guests and so likely to be on his best behaviour. He was aware of the obvious risks of drinking and had taken steps to reduce them. The Regimental Inquiry had found that he had drunk sufficient to impair his senses but had only said that the quantity of alcohol he had consumed "may" have contributed to his falling from the window. There was no evidence that any impairment due to the consumption of alcohol had been such as to have been noticed by anyone at the party. No reason had been advanced as to why he might have wished to climb onto the window ledge and the Regimental Inquiry had considered that it would have been improbable that he would have fallen unless he had first done so. The police had been unable to reach a conclusion as to what had happened. (Although it is not the function of the police to return verdicts, the claimant's evidence could be understood as the police having marked the file "unsolved" rather than closing it as "no crime".) All these points were made implicitly even if they were not made explicitly in quite those terms.

33. In these circumstances, there were clearly arguments to be made on both sides. Where there is a lack of evidence as to what actually happened – as opposed to a conflict of evidence – the answer to the question whether the inherent unlikelihood of possible service causes is sufficient to exclude a reasonable doubt obviously depends to some extent on the inherent likelihood or unlikelihood of possible non-service causes. This is a simple matter of logic. If there are only two alternatives and both are equally improbable, either must be an equal possibility. The less probable one of two alternatives, the more probable the other. At the extreme end of the spectrum where one of the two alternatives is impossible, whatever remains, however inherently improbable it appears to be, is the only possibility. (This is a point made several times to Dr Watson by Sir Arthur Conan Doyle's Sherlock Holmes. For example, in *The Sign of Four*, Ch.6: "How often have I said to you that when you have eliminated the impossible, whatever remains, *however improbable*, must be the truth?").

34. Excluding a reasonable doubt does not mean attaining absolute certainty. Nonetheless, notwithstanding the points now made by the Secretary of State, I am satisfied that this is a case that could reasonably have been decided either way and I am not satisfied that the First-tier Tribunal's decision was perverse. It was entitled to find that there was a reasonable possibility that the claimant's disablement was due to service even if it was satisfied that it was probably not due to service. Because article 40 applied, the Secretary of State suffered the consequences of the lack of evidence. Whether the First-tier Tribunal could properly have decided the

case in favour of the claimant if article 41 had applied is not something that I need to decide.

35. Was the decision adequately reasoned? There was no dispute between the parties as to either the primary facts or the law and so the First-tier Tribunal did not have to make detailed findings and the legal question in issue was clearly and correctly identified in its decision. Did it then address the competing arguments adequately?

36. It seems to me that the difficulty with the Secretary of State's case on this issue – and presumably the reason that Mr Heppinstall relied primarily on perversity rather than inadequate reasoning – is that, despite the fact that he accepted that the claimant would succeed unless he (the Secretary of State) proved beyond reasonable doubt that the accident was not caused by service, he had merely asserted before the First-tier Tribunal that that much had been proved, without advancing a single argument properly addressed to the question whether there was a reasonable doubt. Certainly there was no argument that analysed the evidence of fact rather than relying on the Opinion of the Convening Authority or, more tendentiously, the more tentative Opinion of the Regimental Inquiry. Perhaps the Secretary of State was relying on the erroneous approach he took before the First-tier Tribunal in *JM*, where he argued that the First-tier Tribunal could accept a conclusion of a contemporaneous inquiry without considering evidence that it was wrong and also argued that, in a bullying case, an injury could only be accepted as due to service "where the claimant can clearly be shown to have suffered as a direct result of both the abuser/s and the victim (claimant) acting under a compulsion of service or in pursuance of the service's legitimate objectives". In any event, Mr Tucker submitted that the Secretary of State did not do enough to make his case before the First-tier Tribunal and that he cannot now say that he would like to have another go.

37. A failure of the First-tier Tribunal to give adequate reasons for a decision is a procedural defect that amounts to an error of law, but the way that any court or tribunal gives its reasons for a decision is inevitably influenced by the way the case was argued before it and the standard of reasoning required reflects that practical consideration. A court or tribunal is obliged to deal with the main points advanced before it but it is no obliged to deal with every point and will not be found to have erred in law if it does not deal with points that were not argued unless they are of obvious importance and its failure to mention them suggests that they might have been overlooked or not properly addressed or that there might be some other serious question about the correctness of the decision. In *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119, Griffiths LJ said at 122c –

> "When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by Counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal, the basis on which he has acted, and if it be that the judge has

> not dealt with some particular argument but it can be seen that there are grounds on which he would have been entitled to reject it, the court should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion."

Earlier, at 121e, Griffiths LJ had described the appeal in that case as being "from the exercise of a judge's discretion" and the last part of the last sentence of that passage has to be read with that in mind. However, the same approach seems appropriate on an appeal from the exercise of a specialist tribunal's judgment in a case like the present. Indeed, while only the first three and a bit sentences of that passage were held to be applicable to all cases in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, the whole passage was held to be applicable to appeals from immigration adjudicators to the Immigration Appeal Tribunal – equivalent to the First-tier Tribunal and the Upper Tribunal respectively – in *R (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982; [2005] EWCA Civ 982 at [13].

38. Clearly there was some circumstantial evidence in this case but I have no doubt that the First-tier Tribunal's statement that there was "no evidence either way of third party involvement" was either referring to direct evidence or else encompassed its view that the circumstantial evidence was insufficient to indicate what had happened. It did not analyse the circumstantial evidence in its reasoning but I have come to the conclusion that, in the absence of any submission on that point from the Secretary of State, it was not obliged to do so.

39. The First-tier Tribunal was presented with circumstantial evidence and asked to make a straightforward judgment as to whether or not there was a reasonable possibility in the light of that evidence that the disablement flowing from the injuries incurred by the claimant on 22 December 1987 was due to service. It appears to have accepted that it was unlikely that the claimant's disablement was due to service and the question it had to answer was effectively: how unlikely? The issues were obvious enough. It is clear what it decided and that it applied the correct legal test. It is also clear that it took account of such points as were raised before it. The decision it reached was one it was entitled to reach and there is no reason to suppose that it overlooked anything material. I am therefore satisfied that, in the circumstances of this case, the statement of reasons was adequate.

40. For these reasons, I am satisfied that the First-tier Tribunal's decision is not erroneous in point of law.

41. The First-tier Tribunal's decision therefore stands. The Secretary of State accepts that the evidence that he failed to produce to the First-tier Tribunal cannot now justify a review of that decision. Would it have made any difference to the case if it had been produced before the First-tier Tribunal? In my view it might have done, but not necessarily, and I did not understand Mr Heppinstall to have put the Secretary of State's case any higher than that. In the claimant's favour, the blood/alcohol analysis might be thought to explain why the Regimental Inquiry was not sure about the extent to which alcohol contributed to the events. On the other hand, there are some inconsistencies between the claimant's evidence to the Inquiry

and his evidence to the First-tier Tribunal and between his evidence and that of the third witness, upon which he would no doubt have been questioned had the evidence been available. But then again, some inconsistency may be unsurprising after a quarter of a century and may be explicable or might have been resolved and none of the witnesses at the Inquiry was cross-examined in detail in the light of the others' statements, so that the relevance of the inconsistencies between them was not explored as it would have been in a court or a tribunal. In any event, none of this matters now. The Secretary of State must turn his attention to arranging for the assessment of the degree of the claimant's disablement resulting from the injuries he sustained on 22 December 1987.

Mark Rowland
23 May 2017