



Neutral Citation Number: [2024] EWHC 1094 (Admin)

Case No: AC-2023-LON-002285

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 May 2024

Before :

Mr James Strachan KC sitting as a Deputy Judge of the High Court

Between :

THE KING
-on the application of-
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Claimant

- and -

THE SERVICE COMPLAINTS OMBUDSMAN
FOR THE ARMED FORCES

Defendant

-and-
MINISTRY OF DEFENCE

Interested
Party

Ms Nicola Braganza KC (instructed by Deighton Pierce Glynn Solicitors) for the Claimant
Mr Robert Cohen (instructed by Government Legal Department) for the Defendant
Mr Jack Castle (instructed by Government Legal Department) for the Interested Party

Hearing date: 6 February 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 9th May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

Mr James Strachan KC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is a claim for judicial review of two decisions of the Service Complaints Ombudsman for the Armed Forces (“the SCOAF or “the Ombudsman”) under Part 14A of the Armed Forces Act 2006 (“the AFA 2006”) and Regulation 7(2) of the Armed Forces (Services Complaints) Regulations 2015 (“the 2015 Regulations”), namely:
 - a. the Ombudsman’s decision dated 26 June 2023 not to review a decision by the army to treat the Claimant’s service complaint about his medical discharge as inadmissible. The Ombudsman concluded that the Claimant’s application for such a review had been made out of time, and she was not persuaded that the explanation given for the lateness of the application could be considered just and equitable in order to exercise her discretion to consider the application.
 - b. A refusal communicated by email dated 12 September 2023 to reconsider the decision of 26 June 2023. A Senior Investigator at SCOAF acknowledged the seriousness of the Claimant’s allegations in the service complaint, but stated that the Ombudsman’s decision was not based on the potential merits of the service complaint.
2. The principal issue which arises is whether the Ombudsman acted lawfully in rejecting the Claimant’s application for review. Regulation 7(2) identifies that the Ombudsman must not consider an application made outside the four week time period “unless the Ombudsman considers it just and equitable to allow the complainant to apply after that period.” The Claimant argues that in considering whether to exercise that discretion, the Ombudsman acted irrationally in not taking into account the merits of the Claimant’s underlying service complaint. By contrast, the SCOAF and the Ministry of Defence submit that the terms of Regulation 7(2) mean that the Ombudsman was not entitled to take into account any consideration of the merits of the service complaint.
3. By Claim Form of 26 September 2023 the Claimant originally advanced three grounds of challenge to the Ombudsman’s decisions:
 - a. Ground 1 is the contention that the Ombudsman acted irrationally or failed to consider all relevant considerations in not taking into account the merits of the Claimant’s service complaint.
 - b. Ground 2 is a contention that the Ombudsman misapplied the just and equitable test under Regulation 7(2) in any event and failed to consider all relevant factors.
 - c. Ground 3 was an allegation that the Ombudsman’s refusal to review the admissibility decision amounted to a breach of Articles 6 and 8 and/or those Articles taken with Article 14 of the European Convention on Human Rights

under the Human Rights Act 1998.

4. The Defendant resisted the claim for reasons set out in her Summary Grounds of Defence.
5. Permission to bring the claim was granted by the Hon. Mr Justice Calver by Order dated 31 October 2023. The Judge also granted the Claimant anonymity. The terms of that anonymity order prohibiting the publication of the Claimant's name, or any information liable to lead to his identification in connection with these proceedings, and making other provision for preservation of that anonymity, remain in force.
6. The Defendant provided notification that her Summary Grounds of Defence should stand as her Detailed Grounds of Defence (as permitted by paragraph 1 of the Order of Calver J). The Ministry of Defence, the Interested Party, submitted its own Detailed Grounds of Defence supporting the Defendant's interpretation of Regulation 7(2) of the 2015 Regulations.
7. By Application Notice dated 12 January 2024, the Claimant applied to rely on a witness statement. This was unopposed by the other parties. Permission to admit the statement was granted by Order of Sir Duncan Ouseley (sitting as a High Court Judge) dated 23 January 2024.
8. The Claimant had made various requests for disclosure from the SCOAF of material relating to the decisions in light of the Defendant's duty of candour. These requests began with in the Claimant's pre-action protocol letter before claim dated 19 September 2023, and continued into January 2024. They included a request for disclosure of any records relating to a telephone call between someone from SCOAF and the Claimant shortly after he had submitted his request for a review. No disclosure was provided by the Defendant until 19 January 2024 and then later on 26 January 2024. The first disclosure was provided on the date the Claimant's skeleton argument for the substantive hearing was due. He submitted a Note to deal with its content on 20 February 2024.
9. There was then a flurry of activity shortly before the hearing of the substantive claim including:
 - a. The filing of a Supplementary Trial Bundle dated 25 January 2024 containing documents disclosed on 19 January 2024, including those with

redactions.

- b. An application notice dated 26 January 2024 from the Defendant seeking permission to rely upon a witness statement from the Ombudsman, Mariette Hughes, dated 26 January 2024. This seeks to respond to matters raised by the Claimant in his Skeleton Argument and witness statement about the telephone contact between someone at SCOAF's office and the Claimant in June 2023. The Claimant's solicitors confirmed by email on 30 January 2024 that there was no objection to the application. At the start of the hearing, I granted the Defendant's application to rely upon that witness statement. It is elucidatory and its admission was not opposed.
- c. A letter from the Interested Party to the Claimant's solicitors dated 30 January 2024 asking the Claimant to confirm whether or not he was pursuing Ground 3 in light of recent events in Employment Tribunal ("ET") proceedings between the Claimant and the Interested Party where the issue was going to be addressed.
- d. A letter from the Claimant's solicitors dated 31 January 2024 confirming withdrawal of Ground 3 in these proceedings. This withdrawal was confirmed at the hearing. It is therefore unnecessary for me to deal with Ground 3 as originally pleaded.
- e. The filing of an Amended Supplementary Trial Bundle dated 31 January 2024. This includes the versions of disclosed documents provided by the Defendant on 26 January 2024.
- f. An Application Notice by the Claimant dated 5 February 2024 to amend his grounds. The attached Amended Statement of Facts and Grounds removes reliance on the original Ground 3. But it also seeks to introduce a new Ground 3 alleging procedural unfairness by the Ombudsman and a breach of paragraph 5.3.1 of the Defendant's disclosed Operations Manual. That application is resisted by the Defendant. It came before me at the start of the hearing of the substantive claim. With the agreement of the parties, I heard argument on the application and the substance of the proposed new Ground 3 together, with my ruling to form part of my decision on the substantive claim. I therefore deal with this application and the proposed ground later in my judgment.
- g. A very late application made by the Defendant at the beginning of the substantive hearing for retention of redactions in the disclosed material of the identities of less senior officials of the SCOAF, notwithstanding the decision

of the High Court in *R(IAB) v Secretary of State for the Home Department* [2023] EWHC 2930, and the subsequent decision of the Court of Appeal upholding the High Court ([2024] EWCA Civ 66) as handed down on 2 February 2024. In the absence of any specific reasons to justify those redactions, I refused that application at the start of the hearing applying the principles identified by the Court of Appeal in *IAB*.

10. Needless to say, this flurry of activity before and at the start of the substantive hearing of the claim was very unfortunate. Such activity at a late stage is contrary to the basic objectives of the directions in place which provide for an effective and efficient hearing of the substantive claim. Such directions are intended to ensure the provision of structured and considered arguments on identified issues in advance of the hearing, so that the hearing itself can then focus on the grounds for which permission was granted. It is regrettable the Defendant did not provide disclosure of documents until 19 January 2024 as part of its duty of candour. This lateness has, in no small part, been a significant contributor to the recent activity.
11. Despite these difficulties, I have considered all material and arguments advanced in an effort to address the issues raised in the claim. At the substantive hearing, the Claimant was represented by Nicola Braganza KC, the Defendant by Robert Cohen and the Interested Party by Jack Castle both of Counsel. I am very grateful to all of them for the clarity and helpfulness of both their written and oral submissions.
12. In advance of that hearing, the Claimant had invited the Defendant to adopt what the Claimant considered would be “a proportionate and reasonable response” to the claim in order to save time and costs: the Claimant made a request dated 5 January 2024 for the Defendant to agree to reconsider the decision to refuse to consider his request for a review of the admissibility decision in light of all the circumstances. The Defendant refused this request.
13. I endorse the general principle of a party seeking to achieve a proportionate and reasonable and pragmatic resolution of a claim that might save time and costs. That said, it is fair to recognise that the solution the Claimant proposed would necessarily involve the Defendant having to accept the correctness of the Claimant’s interpretation of Regulation 7(2) of the 2015 Regulations, as compared with the interpretation that the Defendant and Interested Party submit is correct. Their argument is that the Ombudsman is simply not entitled, as a matter of law, to consider the underlying merits of the Claimant’s service complaint when deciding whether it is just and reasonable to exercise a discretion to consider the Claimant’s application for review out of time. This is the principal issue which falls for determination by this claim.

14. After the conclusion of the hearing, the Interested Party’s solicitors sent a letter to the Court dated 21 March 2024 drawing attention to delivery of a judgment of the EAT: *Edwards v Ministry of Defence* [2024] EAT 18, a case to which Mr Castle had referred at the hearing. That decision relates to the question of whether a statement of a person’s service complaint provides enough information to indicate whether the subject-matter of the complaint is one that could be pursued in an Employment Tribunal, for the purpose of creating the necessary jurisdiction for the Employment Tribunal over a matter potentially raised in the complaint for the purposes of section 121 of the Equality Act 2010 (a provision considered later in this judgment). The decision generally establishes that a statement of complaint should be construed in a purposive way, taking into consideration Parliament’s intention that the armed forces should have the ability to consider and determine complaints internally prior to any ultimate resort to litigation. I am grateful to the Interested Party for bringing the outcome of that case to my attention. I also note and agree with the shared intention of the Claimant and Interested Party that any employment matters that arise in respect of this claim remain a matter for determination by the Employment Tribunal in the proceedings between those two parties. I have sought not to trespass into any matter that is more properly a matter for determination by the Employment Tribunal.

LEGAL AND POLICY FRAMEWORK

The Armed Forces Act 2006

15. Part 14A of the Armed Forces Act 2006 (“the AFA 2006”) provides for the making and determination of “service complaints” by those, like the Claimant, who are or were subject to service law.
16. Section 340A of the AFA 2006 sets out the basic entitlement to make such a “service complaint” as follows:
- “(1) If a person subject to service law thinks himself or herself wronged in any matter relating to his or her service, the person may make a complaint about the matter.
 - (2) If a person who has ceased to be subject to service law thinks himself or herself wronged in any matter relating to his or her service which occurred while he or she was so subject, the person may make a complaint about the matter.
 - (3) In this Part, “service complaint” means a complaint made under subsection (1) or (2);

- (4) A person may not make a service complaint about a matter of a description specified in Regulations made by the Secretary of State.”

17. Section 340B(1) empowers the Defence Council to make service complaints regulations about the procedure for making and dealing with a service complaint.

18. Section 340B(2) stipulates that the service complaints regulations must make provision:

- “(a) for a service complaint to be made to an officer of a specified description;
- (b) about the way in which a service complaint is to be made (including about the information to be provided to the complainant);
- (c) that a service complaint may not be made, except in specified circumstances, after the end of the specified period

“Specified” means specified in the Regulations.”

19. Section 340B(3) of the AFA 2006 identifies that the specified period referred to in section 340B(2)(c) must be at least three months beginning from the day on which the matter complained of occurred.

20. Section 340B(4) of the AFA 2006 further stipulates that the service complaints regulations must make provision:

- “(a) for the officer to whom a service complaint is made to decide whether the complaint is admissible and to notify the complainant of that decision;
- (b) for the Service Complaints Ombudsman, on an application by the complainant, to review a decision by the officer to whom a service complaint is made that the complaint is not admissible;

- (c) for securing that the Ombudsman’s decision in relation to admissibility, on such a review, is binding on the complainant and the officer to whom the complaint was made.”

21. Section 340B(5) of the AFA 2006 identifies that for the purposes of section 340B(4) a service complaint is not admissible if:

- “(a) the complaint is about a matter of a description specified in regulations made under section 340A(4),
- (b) the complaint is made after the end of the period referred to in subsection (2) (c) and the case is not one in which the circumstances referred to in that provision apply, or
- (c) the complaint is not admissible on any other ground specified in service complaints regulations.”

22. Section 340B(6) of the AFA 2006 identifies:

- “(6) Nothing in this Part with respect to the provision that must or may be made by service complaints regulations is to be taken as limiting the generality of subsection (1).”

23. It can be seen from these statutory provisions in the primary legislation that they envisage that service complaint regulations will make provision for what may be the subject of a service complaint, and for the time limits governing the making of such a service complaint. The relevant specified officer will then have the function of determining the admissibility of the complaint against those regulations, but subject to review by the SCOAF on an application by the complainant.

24. The role of the SCOAF in this respect is distinct from other statutory functions it is given in the AFA 2006, including in particular those set out in section 340H of the AFA 2006. Section 340H and the subsequent provisions set out the SCOAF’s role in specific circumstances, and accompanying powers, to investigate: (1) a service complaint after it has been finally determined; (2) allegations of maladministration in the handling of a service complaint after it has been finally determined; (3)

allegations of undue delay in the handling of a service complaint which has not been finally determined; and (4) an allegation of undue delay in the handling of a relevant service matter. The Defendant, and the Interested Party in particular, rely upon the different nature of those functions, and specified powers, as compared with the more limited review role of the SCOAF of admissibility decisions under section 340B of the AFA 2006.

The Armed Forces (Service Complaints) Regulations 2015 (SI 2015/1955)

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25. The 2015 Regulations are the relevant service complaints regulations for the purposes of section 340A and 340B of the AFA 2006. They variously set out matters that the relevant provisions of the AFA 2006 either permit or require to be specified in regulations. Thus, for example:

- a. Regulation 3 identifies who will be the “specified officer”.
- b. Regulation 4 sets out the procedure for making a service complaint.
- c. Regulation 5 sets out the action required on receipt of a service complaint and a requirement on the specified officer to decide whether it is admissible (for the purposes of s.340B(5) of the AFA 2006).
- d. Regulation 6 deals with the specified period for making a service complaint.
- e. Regulation 7 deals with the Ombudsman’s review of admissibility.

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26. As to Regulation 4 and the procedure for making a service complaint, Regulation 4(1) identifies that a service complaint is made by a complainant making a “statement of complaint” in writing to the specified officer.

27. Regulation 4(2) sets out the required contents of such a statement of complaint. It includes the following requirements:

“(2) The statement of complaint must state-

- (a) how the complainant thinks himself or herself wronged;
- ...
- (c) whether any matter stated in accordance with sub-paragraph (a) involved discrimination, harassment, bullying, dishonest or biased behaviour ...
- (d) if the complaint is not made within the period which applies under regulation 6(1), (4) or (5), the reason why the complaint was not made within that period;
- (e) the redress sought; and
- (f) the date on which the statement of complaint is made.

...

- (5) In this regulation, “discrimination” means discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender reassignment, status as a married person or civil partner, religion, belief or sexual orientation, and less favourable treatment of the complainant as a part-time employee.”

28. As already noted, the EAT’s decision in *Edwards* averts to the purposive approach to be adopted to the contents of a statement of complaint under this statutory regime.

29. As to Regulation 5, and action to be taken on receipt of a service complaint in relation to admissibility, Regulation 5(1) of the 2015 Regulations identifies the duty of the specified officer to make a decision on admissibility:

- “(1) After receipt of a statement of complaint, the specified officer must decide whether the complaint is admissible in accordance with section 340B(5).”

30. Regulation 5(2) of the 2015 Regulations makes further provision as to admissibility as follows:

“(2) For the purposes of section 340B(5)(c), a service complaint is not admissible if-

(a) the complaint does not meet the requirements of whichever of section 24(1) and (2) applies to the complainant; or

(b) the complaint is substantially the same as a complaint brought by the same person which has either been decided previously under the service complaints process or is currently being considered under the service complaints process.

31. Regulations 5(3) and (4) of the 2015 Regulations set out a requirement to notify a complainant as to the specified officer’s decision on admissibility. They provide:

“(3) If the specified officer decides that any part or all of the service complaint is admissible, he must notify the complainant in writing of the decision and refer that part or all of the service complaint to the Defence Council.

(4) If the specified officer decides that any part or all of the service complaint is not admissible he must notify the complainant in writing of the decision, giving the reasons for the decision and informing the complainant of his or her right to apply for a review of the decision by the Ombudsman.”

32. Regulation 6 of the 2015 Regulations deals with the relevant time limits for making a service complaint. These vary depending upon what is being alleged (a variation of potential relevance to the Claimant’s case here). There is a general three month time limit, but for a matter alleging discrimination that could be pursued as a claim under Chapter 3 of Part 9 of the Equality Act 2010, a longer period of six months is identified. The specified officer also has a discretion to consider service complaints made out of time if, in all the circumstances, the specified officer considers it “just and equitable” to do so.

33. Thus Regulation 6 provides (so far as material):

“(1) Subject to paragraphs (4) and (5), a person may not make a service complaint after three months beginning with the relevant day.

...

(4) If a matter is or has been capable of being pursued as a claim under Chapter 3 of Part 9 of the Equality Act 2010, a service complaint may not be made about the matter after six months beginning with the day on which the matter complained about occurred or, where the matter occurred over a period of time, the final day of that period.

...

(6) A person may make a service complaint after the end of the period in whichever of paragraphs (1) and (4) applies to the complaint if, in all the circumstances, the specified officer considers it just and equitable to allow this.”

34. Regulation 7 of the 2015 Regulations deals with the role of the Ombudsman in reviewing decisions on inadmissibility and the time limits for requesting such a review. It is the meaning of this Regulation, and words used in Regulation 7(2) relating to the time limits in particular, which is at the core of the principal point of dispute in this judicial review claim.

35. Regulation 7 provides as follows:

“(1) After receiving an application by the complainant for review of the specified officer’s decision that a service complaint is not admissible, the Ombudsman must decide whether the service complaint is admissible and notify both the specified officer and the complainant in writing of his or her decision and the reasons for it.

(2) The Ombudsman must not consider an application under paragraph (1) made after four weeks beginning with the day the complainant received notification of the specified officer’s decision, unless the Ombudsman considers it is just and equitable to allow the complainant to apply after that period.

(3) A decision by the Ombudsman in relation to admissibility is binding on the complainant and the specified officer.

(4) Where under paragraph (1) the Ombudsman decides that the service complaint is admissible, the specified officer must refer the complaint to the Defence Council as soon as reasonably practicable.”

36. Although not an issue before me, it is worth noting that Regulation 12(2) of the 2015 Regulations relating to a different function of an Ombudsman (namely reviewing of the Defence Council’s decision under regulation 11(2) on whether an appeal can be proceeded with) contains similar wording to that in relation to Regulation 7(2). Regulation 12(2) provides:

“(2) The Ombudsman must not consider an application under paragraph (1) made after four weeks beginning with the day the complainant received notification of the decision under regulation 11(2), unless the Ombudsman considers it is just and equitable to allow the complainant to apply after that period.

37. The Explanatory Note to the 2015 Regulations states:

“Regulations 7 and 12 provide respectively for the Service Complaints Ombudsman to review a specified officer’s decision that a complaint is not admissible and a Defence Council decision that an appeal may not be proceeded with. Regulation 7(2) and 12(2) specify the periods for applying for such a review and the circumstances in which an application may be considered after such a period.”

38. The Interested Party’s policy and guidance on service complaints is set out in JSP 831: Redress of Individual Grievances: Service Complaints.

The Equality Act 2010

39. There is an important interaction between the service complaints regime and the jurisdiction of the Employment Tribunal (“the ET”) under the Equality Act 2010 (“the EA 2010”).

40. Section 120(1) of the EA 2010 provides that the ET has jurisdiction to determine a complaint relating to a contravention of Part 5 of the EA 2010 (work). However, in the case of members of the armed forces, this jurisdiction is subject to an important

qualification set out in section 121 of the EA 2010 concerning the requirement on the person to have made, and not withdrawn, a service complaint.

41. Section 121 of the EA 2010 provides (so far as material):

“(1) Section 120(1) does not apply to a complaint relating to an act done when the complainant was serving as a member of the armed forces unless—

- (a) the complainant has made a service complaint about the matter, and
- (b) the complaint has not been withdrawn.

(2) Where the complaint is dealt with by a person or panel appointed by the Defence Council by virtue of section 340C(1)(a) of the 2006 Act, it is to be treated for the purposes of subsection (1)(b) as withdrawn if –

- (a) the period allowed in accordance with service complaints regulations for bringing an appeal against the person's or panel's decision expires, and

...

(b) either—

- (i) the complainant does not apply to the Service Complaints Ombudsman for a review by virtue of section 340D(6)(a) of the 2006 Act (review of decision that appeal brought out of time cannot proceed), or
- (ii) the complainant does apply for such a review and the Ombudsman decides that an appeal against the person's or panel's decision cannot be proceeded with.”

(6) In this section –

“the 2006 Act” means the Armed Forces Act 2006;

“service complaints regulations” means regulations made under section 340B(1) of the 2006 Act.”

42. One of the issues which potentially arises for determination by the ET in the ET proceedings between the Claimant and the Interested Party (on which I have sought to avoid trespassing) is as to the meaning and application of section 121(1) and (2) where a service complaint is submitted which the complaint contends alleges disability discrimination, but the complaint is treated as inadmissible by the specified officer and an application for review of that decision is rejected by the SCOAF.

43. For the purposes of this claim, particular attention is drawn by the Claimant to section 123(1) and (2) of the EA 2010 which deals with the time limits for making discrimination complaints in relation to sections 120 and 121. Section 123 provides (so far as material):

“(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of-

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.”

44. The Claimant submits that if the same delay in question here before the SCOAF had been a matter before the ET by way of a discrimination complaint, the ET would have a wide discretion to consider whether, in all the circumstances of the case, it would have been just and equitable to extend time for that complaint to be considered, and this would entitle the ET to consider all the circumstances, including potential prejudice arising on both sides in the event that the extension were granted or denied.

45. In that respect, the Claimant has referred to a substantial body of caselaw that deals with the nature of the discretion afforded to the ET under s.123 of the Equality Act 2010. The Claimant refers to:

f. *Miller & ors v Ministry of Justice & ors EAT 0003/15* (Laing J) to the effect that:

(i) the discretion to extend time is a wide one;

(ii) time limits are to be observed strictly in ETs and there is no presumption that time will be extended unless it cannot be justified; the reverse is true: the exercise of discretion is the exception rather than the rule;

(iii) if a tribunal directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, ‘perverse’, i.e. no reasonable tribunal properly directing itself in law could have reached it, or the tribunal failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence;

(iv) what factors are relevant to the exercise of the discretion, and how they should be balanced, are a matter for the tribunal. The prejudice that a respondent will suffer from facing a claim which would otherwise be time- barred is customarily relevant in such cases;

- (v) the tribunal may find the checklist of factors in section 33 of the Limitation Act 1980 helpful, but this is not a requirement and a tribunal will only err in law if it omits something significant.
- g. *Southwark LBC v Afolabi* [2003] ICR 800 in which the Court of Appeal confirmed that, while the checklist in section 33 of the Limitation Act 1980 provides a useful guide for ETs, it need not be adhered to slavishly and there are two factors which are almost always relevant when considering the exercise of any discretion to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
- h. *Department of Constitutional Affairs v Jones* [2008] IRLR 128 in which the Court of Appeal confirmed that while the factors referred to by the EAT in *British Coal Corporation v Keeble* are a ‘valuable reminder’ of what may be taken into account, their relevance depends on the facts of the individual cases and tribunals do not need to consider all the factors in each and every case.
- i. *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 in which the Court of Appeal identified that it was plain from the language used in s.123(1) that Parliament had chosen to give the employment tribunal the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains a list of factors referred to in s.33 of the Limitation Act 1980 as referred to in the *Keeble* case. I note that the Court of Appeal also identified that because of the width of that discretion, there is very limited scope for challenging the ET’s exercise of that discretion as to what is just and equitable and an appellate court or tribunal should only disturb the tribunal’s decision if the tribunal “has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the tribunal’s conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable” see Leggatt LJ (as he then was) at [20] and as applied at [25]).
- j. *Chief Constable of Greater Manchester Police v Carroll* [2017] EWCA Civ 1992 in which the Court of Appeal summarised the balance of prejudice test and the burden being on the claimant to show that his or her prejudice would outweigh that to the defendant.
- k. *Wells Cathedral School Ltd v Souter* (UKEATPA/0836/20/JOJ), a decision of the EAT on the exercise of the just and equitable discretion.
- l. *Lupetti v Wrens Old House Ltd* [1984] ICR 348, EAT as a decision that proceeded on the basis that the merits of a claim may be a relevant factor in the exercise of the discretion to extend time; and
- m. *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132, a decision of the EAT considering *Lupetti* and concluding that it

is not necessarily wrong to take into account the merits of a claim.

46. In relation to the nature of the discretion under s.123 of the EA 2010, it is also important to have in mind the caution emphasised by the Court of Appeal in treating the *Keeble* factors as a framework for the ET's approach and the importance of avoiding too mechanistic an approach: see *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, Underhill LJ at [37]-[38].
47. In response to the Claimant's reliance on s.123 and the nature of the discretion afforded to an ET under that statutory regime, the Defendant and Interested Party do not materially dispute the Claimant's analysis and the caselaw that has been identified. Neither disputed that an ET would be entitled to take into account the merits of an underlying complaint when exercising that discretion. The Defendant and Interested Party submit, however, that the ET's discretion in s.123 of the Equality Act 2010 is different to that given to the Ombudsman in Regulation 7(2) of the 2015 Regulations. They submit that the latter is deliberately more circumscribed, having regard to the different words used in Regulation 7(2) and it does not permit consideration by the Ombudsman of the merits of the underlying service complaint. Indeed, the Defendant and Interested Party's point is essentially that if it had been intended to give the Ombudsman the same width of discretion that is afforded to the ET under s.123 of the EA 2010, then similar words would have been used but they were not.
48. These competing points of view were also expressed by the parties in relation to other discretions afforded under other statutory regimes to consider complaints or actions made outside specified time limits.
49. Thus, for example, at the hearing I raised the issue of the High Court's analysis of section 7(5) of the Human Rights Act 1998 in *Alseran and others v Ministry of Defence* [2017] EWHC 3289 (QB), Leggatt J (as he then was) at [849] and following. Under that provision, proceedings must be brought before the end of 1 year beginning with the date on which the act complained of took place or "such longer period as the court or tribunal considers equitable having regard to all the circumstances". In *Dunn v Parole Board* [2008] EWCA Civ 374, [2009] 1 WL 728 the Court of Appeal had identified that it was not appropriate for the courts to put any gloss on the words used in section 7(5)(b) of the Human Rights Act 1998, nor to fetter the very wide discretion given to the court by listing factors to be taken into account, or the weight to be attached to them. This approach was confirmed by the Supreme Court in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72, Lord Dyson at [75]. Applying that approach to section 7(5) in *Alseran*, it is clear that Leggatt J did take into account the merits of the claim (see [868] onwards), noting that in *Rabone* Lord Dyson had (at [79]) described as the "most important of all" the points which had militated in favour of extending time the fact that the claimants had a good claim for a breach of a Convention right (see also Lady Hale in *Rabone* at [108]). Leggatt J went on to state at [869] in *Alseran*:

"In a case where the delay in bringing proceedings has caused significant

evidential prejudice to the defendant, it would plainly be wrong to treat the merits of the claim as a factor weighing in the claimant's favour – at least insofar as the court's assessment of the merits is based on findings of fact which might have been different if the claim had been begun promptly and the defendant had not been disadvantaged. In the present cases, however, it has not been shown that the MOD has suffered significant evidential prejudice as a result of the claimants' delay in bringing the proceedings. In these circumstances it seems to me legitimate to take into account in deciding whether to exercise the discretion to extend time the fact that a refusal to do so would prevent the claimants from obtaining any redress for proven violations of their fundamental human rights not to be subjected to inhuman or degrading treatment and not to be unlawfully and arbitrarily detained.”

50. The Claimant would rely on the width of the discretion afforded to a decision-maker when deciding what is considered to be “equitable”, and as allowing the decision-maker to consider the merits of the underlying claim. By contrast, the Defendant and Interested Party rely upon the difference of wording in those different statutory regimes as compared with Regulation 7(2) of the 2015 Regulations. I will return to this basic difference between the parties under Ground 1.
51. Returning to other relevant provisions in the EA 2010, it is also relevant to note that the EA 2010 has other relevant provisions disapplying its potential application to the armed forces in certain circumstances. Amongst other things, paragraph 4 of Schedule 9 of the EA 2010 provides as follow:

“Armed forces

- 4(1) A person does not contravene section 39(1)(a) or (c) or (2)(b) by applying in relation to service in the armed forces a relevant requirement if the person shows that the application is a proportionate means of ensuring the combat effectiveness of the armed forces. [emphasis added]
- (2) ...
- (3) This Part of this Act, so far as relating to age or disability, does not apply to service in the armed forces; and section 55, so far as relating to disability, does not apply to work experience in the armed forces.”

52. Again, these provisions give rise to potential issues in the ET proceedings between the Claimant and the Interested Party. The Claimant has brought proceedings against the Interested Party in the ET alleging disability discrimination. As alluded to already, the Interested Party is arguing in those proceedings (amongst other things) that because the Claimant's service complaint was decided to be inadmissible, and the SCOAF decided not to review that decision because the application to do so was made out of time, the Claimant is not entitled to bring his claim in the ET by virtue of section 121 of the EA 2010. However, the Interested Party is also advancing an argument that the jurisdiction of the ET is excluded in any event by reason of paragraph 4 of Schedule 9 to the EA 2010, and the provisions

relating to the exclusion of disability discrimination claims against the Armed Forces in the circumstances specified. The Claimant is opposing both those arguments in the ET proceedings. In respect of the latter argument, the Claimant is placing reliance on an ET decision in the case of *T v MOD* (ET 2201755/2021) which considers arguments that invoke the Human Rights Act 1998.

53. The Claimant is no longer pursuing any arguments based on the Human Rights Act 1998 in respect of this claim, and both of those arguments are matters which are being considered by the ET which do not arise for determination in this claim.

54. Finally, I note that the Claimant has also sought to rely on an ET judgment on a preliminary issue in the case of *Miss B Lodge (1) and Mr S McVicker-Orringe (2) v MOD* (2403443/2020 & 2403445/2020 30/11/21) on time limits and a SCOAF assessment under Regulation 7. In that case the ET stated (amongst other things):

“91. However, I note that while the SCOAF considered the question of time limits and the question of a just and equitable extension, I was not satisfied from the SCOAF written decision, that there had been a proper consideration of the application of time limits as they might be determined by a Tribunal under section 123 EQA and especially with regards to the just and equitable grounds advanced by the claimant. Accordingly, the SCOAF had accepted that the substance of these HoC were not the same as earlier service complaints and potentially they were admissible complaints. However, I find that it would be contrary to the legal principles discussed in the previous paragraph to prevent the claimants from having an admissible service complaint because of an insufficiently considered procedural defect.”

55. In my judgment, that is a matter which relates to the question of the ET’s jurisdiction and the approach it takes to that jurisdiction, rather than being a matter for determination by me in these proceedings. It does not directly bear on the issues that are raised in this claim as to the lawfulness of the SCOAF’s decisions under challenge.

B. FACTUAL BACKGROUND

56. The Claimant has provided a detailed chronology of what he considers to be relevant events in a pre-action letter dated 19 September 2023, along with a witness statement. The Claimant’s analysis of the factual background is set out in more detail in the Claimant’s Statement of Facts and Grounds for this claim.

57. I agree with the Defendant’s observation that much of that narrative is more directly concerned with detail about the Claimant’s grievance against the Interested Party. Significant parts are controversial so far as the Interested Party is concerned. I do not consider it either necessary, nor indeed appropriate for me to go into, let alone attempt to resolve, points of factual contention that may exist relating to that

underlying grievance.

58. In that spirit, I only provide a summary of the relevant background, taking account of the Claimant's account of events, but without purporting to decide contentious issues between the Claimant and the Interested Party which are not necessary for dealing with this judicial review claim.

59. The Claimant was a soldier in the army, with the rank of Private, from 17 July 2017 until 3 October 2022.

60. The Claimant was diagnosed with HIV in December 2019. He submits he is a disabled person in consequence of that diagnosis.

61. The Claimant relies upon an announcement made by the Interested Party in December 2021 (before the Claimant was medically discharged) that:

“serving personnel who have been diagnosed with HIV will continue to be supported to access suppressive treatment and will be recognised as fully fit for operations when there is no detectable virus in their blood tests”.

62. On 14 April 2022 Dr Widdrington, an NHS Consultant in Infectious Diseases treating the Claimant, expressed a view as to the state of Claimant's medical condition at that point in time as follows:

“Regarding the HIV infection, the HIV viral load is persistently undetectable, this means that you are not at risk of spreading HIV to others. The CD4 count remains below 200 but this is slowly improving over time and your immune system appears healthy.”

63. JSP950 Medical Policy Leaflet 6-7-7 Joint Service Manual of Medical Fitness (v2.4), page 5-N-2 (on which the Interested Party relies) explains the potential significance of a CD4 count for persons diagnosed with HIV:

“d. Personnel known to be infected with HIV who are on Antiretroviral Therapy (ART) may be graded to MLD subject to approval by the Military Advisor in Sexual Health and HIV Medicine (MASHH), if they:

(1) Have been on a stable treatment regimen

and for at least six months have consistently maintained:

(a) A CD4 count of at least 200 cells/mm³

(b) A viral load below 50 copies per ml.

e. Personnel infected with HIV who do not adhere to medication or follow-up requirements, have abnormal CD4 counts, viral loads over 50 copies per ml

(repeated tests 4 weeks apart) or any signs of HIV related illnesses or current infections must be graded no higher than MND.”

64. The terms ‘MLD’ and ‘MND’ therefore refer to concepts of being medically limited for deployment or medically non-deployable respectively.
65. The Claimant was the subject of a fitness for work assessment by a Unit Medical Officer in September 2021, confirmed on 4 May 2022. Under that assessment he was permanently graded as “MND Perm”, so treating the Claimant as being permanently medically non-deployable. This assessment was considered in light of his regiment being placed on high readiness and required for deployment abroad. The conclusion following on from that assessment was that the Claimant could no longer be employed and the Claimant’s discharge was authorised on 18 May 2022. The Claimant was notified of his discharge by letter of 24 May 2022.
66. The Claimant internally appealed against that fitness for work assessment on 7 June 2022. In her oral submissions at the hearing, Ms Braganza drew attention to the fact that the Claimant’s email submitting the internal appeal stated (in paragraph 4):

“I feel the decision to upgrade my deployment status is a direct medical discrimination. Physically, psychologically, emotionally or whatsoever, I am not limited to any activity that a soldier is required. (ref appendix 9). As a soldier, I have passed any fitness test as required by every soldier.”

67. The Claimant also sought to rely upon a further announcement made by the Interested Party on 21 June 2022, before his discharge took effect to the following effect:

“From today, serving personnel who are taking suppressive treatment for HIV and whose blood tests show no detectable virus, will now be recognised as fully fit for all service. The policy change also applies to anyone wishing to join the military, meaning living with HIV is no longer a barrier for those wishing to serve.”

68. By a letter dated 6 July 2022, Dr Konfortov considered the Claimant’s status as “MND Perm”. In that letter Dr Konfortov expressed the view that the Claimant met all criteria for being graded as “MLD” bar one measurable factor, namely his CD4 count. The historical values for his CD4 count from 20 December 2019 to 21 June 2022 are set out. These generally show an increasing CD4 count, although the latest identified were still below 200: as at 21 June 2022 the CD4 count was identified as being 190. Dr Konfortov concluded the letter by stating that the Claimant “shows a general steady increase. It is likely that he reaches a level of 200 in the next few months.”

69. The Claimant also refers to a letter dated 9 September 2022, again before the Claimant's discharge took effect, from the Claimant's treating Consultant, Lt Col Kate Clay in which she stated:

"I just wanted to let you know that I have discussed your case at our MDT and I am happy to write a letter supporting your upgrade to MLD. I am just awaiting your latest blood results from your clinic. I will be in touch with a letter in due course."

70. The Claimant claims that on 29 September 2022 he was informed by the Regimental Careers Management Officer ("RCMO") that his discharge process had been discontinued and that he was to be offered a different role by the RLC Corps Sergeant Major. The Claimant also relies on a further report dated 30 September 2022 from Lt Col Kate Clay in which she stated of the Claimant:

"...He is virologically suppressed and therefore poses no risk to his colleagues... been discussed at our HIV military MDT with Colonel Ngozi Dufty and Lt Colonel Daniel Burns. We would strongly support his desire to stay in the army. He is able to perform on his UK based job without restrictions and would be safe to work overseas if close to a supply chain. This is a more unusual case... I am very happy to discuss this further as required."

71. In the event, however, the Claimant's medical discharge took effect on 3 October 2022.

72. The Claimant states that since discharge, he: (1) has not been able to secure alternative employment; (2) is on Universal Credit; and (3) is a widower and single parent. He stated that he had intended to serve in the army until retirement.

73. Following the discharge, the Claimant submitted a service complaint to the army on 14th February 2023 using a Service Complaint Form. In his statement of complaint he began by describing the alleged wrong as "*DISCRIMINATION (MEDICAL)*".

74. The guidance notes to the Form he completed stated that generally the time limit for submitting a complaint is 3 months but that in cases of discrimination:

"This time limit is 6 months if your complaint is about discrimination."

75. Section 6 of the Form has a heading "Reasons for delay in submitting your complaint (if applicable)". There is then guidance to the following effect before a blank box is provided:

"Complaints submitted under the Armed Forces (Service Complaints) Regulations 2015 must normally be submitted within 3 months of the date that the matter complained of occurred or of the latest in a connected series of incidents. This time limit is 6 months if your

complaint is about discrimination and 9 months if it is about equal pay. Please provide an explanation if you think that this complaint is made outside the relevant time limit and why it should be considered - see JSP 831 , Part 2, Annex R for further guidance on what might constitute just and equitable reasons”

76. In the blank box the Claimant entered the following:

“I was still waiting for the appeal outcome which never came through till now. Also, I did not know of this process as I only depended on the appeal I made against the medical discharge.”

77. On 17 February 2023 the Claimant also issued ET proceedings against the Interested Party in the Newcastle ET alleging disability discrimination. He is legally represented for those proceedings. As noted above, the Interested Party is contesting those proceedings and has sought to have the proceedings struck out on the grounds identified above. The hearing of its strike out application was listed for 29-30 January 2024, but the hearing did not go ahead. There is a further hearing scheduled for late May 2024.

78. In the meantime, on 28 February 2023 the service complaint officer tasked with making a decision on admissibility sought further information from the Claimant. Amongst other things, the officer sought confirmation that the following accurately summarised his statement of complaint in terms of Heads of Complaint (“HoC”):

- “a. HoC1. You alleged that your CO made a recommendation that you are discharged without considering properly, the opinion of your medical specialist.
- b. HoC2. You allege that the MO unfairly did not medically upgrade you despite your medical specialist’s recommendation.

Can you also please answer the following:

- 1. Are you also ultimately complaining that you have been unfairly medically discharged?

...

- 5. What redress do you seek, ie what do you ultimately want if your SC were to be upheld (please note this is not an indication that it is or will be but the redress listed on your Annex F is not a redress?)”

79. The Claimant responded to these questions on the same date, answering respectively:

“a. ... Yes the decision was made without considering the MOD medical specialists team recommendation.

b. ... Correct

...

1. ...Totally.

...

5. ... I want to be compensated for unfairly being discharged and the discrimination I faced.

”

80. On 19 April 2023 the Claimant spoke to an officer in respect of the service complaint, following which an email setting out a timeline of events was provided to the Claimant.

81. The Claimant has identified that it was on 24 April 2023 that the Interested Party submitted its application to the ET to strike out the Claimant’s claim.

82. By email dated 5 May 2023 the Claimant was provided with a notification that this service complaint had been ruled inadmissible on the basis it was out of time. The attached letter of notification set out reasons for that decision. Having set out a summary of the HoCs, the reasoning continued as follows:

“... The Relevant Day for the purposes of all three HoCs is 3 Oct 2022, the date of your discharge and the date therefore that the above alleged wrongs crystallised. As you submitted your Annex F to the Specified Officer on 14 Feb 2023, these HoCs are outside the three-month statutory time limit of the Relevant Day and therefore **inadmissible** as being ‘out of time’.

7. As HoC1-3 are inadmissible out of time, I considered the explanation for the delay that you supplied in your Annex F and in subsequent communication with the Army SC Sec. However, I do not consider your reasons to be compelling enough to account for the delay between the occurrence of the issue raised (your discharge in Oct 22) and the submission of your SC (14 Feb 2022). This is a significant period to have elapsed in the context of the alleged wrong (loss of your Army career) and it is reasonable to expect that you should have taken action sooner to address this. I note that you submitted your Annex F having stated that “*the appeal never came through till now*” but have not provided any evidence relating to this. Again, given the severity of the issue, I struggle to understand why you allowed such a significant period of time to pass before taking any action.

8. Time limits for raising SCs are set to ensure a level of fairness for complainants, respondents, and witnesses, to obtain evidence and witness accounts before details are lost due to time. The Principles of Fairness for the Handling of Service Complaints found at Annex H of JSP 831 says to “follow the Service Complaints policy” and “ensure that investigations are prompt, thorough and establish the facts”. Allowing matters to be included where substantial time has passed does not provide the protections afforded by the time limits or comply with the Principles of Fairness.

9. In summary, I am not persuaded that the explanation you have given for your late submission can be considered just and equitable for me to consider your application outside of the time limit. I therefore reiterate that these HoCs are **inadmissible.**”

83. In her oral submissions Ms Braganza pointed out that the letter does not reference the Claimant’s identification of discrimination, nor deal with that characterisation of the service complaint by the Claimant. As to the references to potential prejudice arising from any delay, Ms Braganza submitted that this comes in a context where there were delays occurring in the ET proceedings and, in any event the Claimant’s claim in respect of discrimination does not rely on witness memory, but is based on medical evidence, the decision that was taken and what the Claimant submits was the relevant policy applicable at the time. She submits that any concern about memories fading is necessarily of much lesser significance than for other types of service complaint, such as a bullying allegation.
84. Paragraph 13 of the specified officer’s letter identified that if the Claimant did not agree with the decision, he had the right to contact the SCOAF to seek an independent review and that he must do this within 4 weeks from the date he received the letter. It referred him to guidance on what an application must include and how to make one on the SCOAF’s website and further information contained in JSP 831.
85. The four week time limit for making such an application expired on or around 6 June 2023. The Claimant submitted his application to the Defendant to review the Interested Party’s admissibility decision on 16 June 2023. The Claimant accepts that this application was made 10 days after the relevant deadline.
86. The template for such an application includes a section on lateness as follows, with the Claimant’s answers to the questions posed:

‘Was the Decision posted or emailed to you more than 4 weeks and 2 days ago?’

Yes

If yes, why was your application late?

My legal representative was seeking way forward from the tribunal because the MOD defence team had written the court to struck off the case entirely.”

87. In his witness statement for these proceedings the Claimant has also stated that two or three days after submitting his application, a woman from SCOAF telephoned him to discuss his application. In his witness statement the Claimant states:

“... The woman said that she was calling from the Ombudsman and the purpose of the call was to get more information about the request for review.

The call lasted around 30 or 40 minutes. She asked me why I had made a Service Complaint, and I gave her a chronological account of the medical discharge. I told her about what had happened after I made the Service Complaint, ie that it had been deemed inadmissible on the basis that it was out of time. To the best of my recollection she did not ask me about my knowledge of the Service Complaints process or about the Ombudsman process, nor did she ask me to provide reasons for why my request for review had been submitted late. She also did not ask any questions about my ongoing case in the Employment Tribunal. She asked me to provide documents, and on 22 June 2023, she followed up this request with an email. I provided documents on the same day. My impression after all of this was that the Defendant would be looking into the inadmissibility decision.”

88. In the Trial Bundle (and therefore in the material previously available to the Claimant before the Defendant’s latest disclosure) there is an email dated 22 June 2023 from an Enquiries and Referrals Officer of the SCOAF to the Claimant. It begins:

“Further to my email dated 16 June 2023, I have noticed that we do not appear to have heard from you? If you have any questions please do not hesitate to contact us.

In our email we requested the following documents required to process your Application for an Admissibility Review:

Your written statement of complaint/Annex F

The Admissibility Decision

...”

89. It explained that these documents could be submitted by email. It went on to refer to the time limits for review applications and next steps as follows:

“Please Note:

You have 4 weeks and 2 days from the date your decision was posted or emailed to you to ask the Ombudsman to review it. You should have been informed of this on the decision letter. If you do not make your application to the Ombudsman within 4 weeks and 2 days, you need to provide reasons

for this and your application might not be accepted.

Once the above information has been received, your application will be passed to the Investigations Team and a member of the Investigations Team will aim to contact you within 10 working days.

Please also note that each application is treated on its own merits and not all applications to the Ombudsman will be accepted. If your application is not accepted, you will receive a decision letter outlining why. The decision made by the Ombudsman when determining whether to accept an application is final and binding.”

90. The witness statement provided by the Defendant dated 26 January 2024 refers to its internal records on the missing documentation and the request that was made of the Claimant for its provision. The Ombudsman identifies that there was also a telephone call by an Enquiries and Referrals Officer to the Claimant on 22 June 2023 to ask for the outstanding documents in response to which the Claimant stated he would provide them straight away. There is reference to that telephone call in the Defendant’s internal records that have been disclosed.

91. The Claimant duly provided the documents that had been requested, along with a “statement of events” summarising his account of events and dealing with the question of the delay in submitting his service complaint.

92. In the most recent disclosure from the Defendant a further email dated 23 June 2023 has been provided. This was from the same Enquiries and Referrals Officer. It is written to the Claimant thanking him for an email the previous day and for a copy of his Annex F Form. This therefore confirms that the Claimant had provided the requested documentation on 22 June 2023. The email of 23 June 2023 continued:

“Your application will be passed to the Investigations Team and a member of the Investigations Team will aim to contact you within 10 working days.

Please also note that each application is treated on its own merits and not all applications to the Ombudsman will be accepted. If your application is not accepted, you will receive a decision letter outlining why. The decision made by the Ombudsman when determining whether to accept an application is final and binding.

...”

93. At the hearing the Claimant sought to place particular reliance on the late disclosure of this email in support of its late application to include the new Ground 3. The

Claimant submitted that this disclosed email sets out that the Claimant would be contacted by a member of the Investigations Team, but that this did not happen. The Claimant relies on the timing of the provision of this email to support the timing of his very late application to amend. In resisting the lateness of the amendment application, the Defendant points out that the email dated 23 June 2023 was in very similar terms to the email dated 22 June 2023, which the Claimant already had available to him. The Defendant submits that the Claimant had the ability to advance the sort of ground he is now attempting to advance at the outset of his claim, or certainly much earlier.

94. In this context, however, the Claimant also refers to the Section 5.3.1 of the Defendant's Operations Manual on 'Admissibility Decisions' recently disclosed by the Defendant. It states (amongst other things):

"The following process outlines how reviews of Admissibility Decisions are handled, from initial application to completion.

After all required information has been obtained, the Enquiries and Referrals Officer will release the case to the Head of Investigations on CMS who will then allocate it to an investigator.

...

1. Clarification of Issues

Investigators must contact the complainant when they receive a new case and:

- clarify the nature of their complaint and request any additional information required;
- provide clear information on the process, the role of the Ombudsman and the role of the Investigator, explaining that they will act as the Ombudsman's point of contact until the final decision is issued;
- obtain reasons for the late submission of any application (ie where the application is submitted more than four weeks from the date the complainant received notification of the admissibility decision or the decision to not accept their appeal).

Investigators should make this contact within 2 working days of being allocated the case and should do so by phone or email noting any preferences as set out in the complainant's application form, unless reasonable adjustment or other issues prevent this. This is to ensure the Investigator properly understands the issues and to minimise the number of times the complainant needs to be contacted to obtain the information required. However, a written record of any phone conversation should be sent to the complainant to confirm their agreement and understanding of the issues discussed.

2. Decision to conduct review

...

When application is made outside of this [four week] timeframe, it can only be accepted if the Investigator determines it is just and equitable to do so. To make this determination, Investigators must obtain sufficient information from the complainant to determine why the application has been made late. Any decision to accept a late application on “just and equitable” grounds must be recorded on the CMS and documented in the final decision letter. All decisions must be recorded in a case decision log.

If the Investigator determines that there are not just and equitable grounds to accept a late application, the review process will end at this stage and a final decision letter will be sent to both the complainant and the Defence Council, via the Single Service Secretariat, outlining the decision not to accept the application and the reasons for this.

...”

95. In respect of his proposed new Ground 3, the Claimant submits that the Operations Manual was not followed because no investigator contacted the Claimant to obtain reasons for the late submission of the application and the Defendant herself has explained that the only contact was by an Enquiries and Referrals Officer. In resisting the late amendment, the Defendant submits that the Defendant would have filed evidence dealing further with this allegation if the application to amend had been made promptly. It would have explained that the Operations Manual is out of date in the respect identified, as the form that an applicant has to complete requires reasons for any lateness to be submitted. The Defendant also submits that no prejudice can have arisen from any technical breach of the Operations Manual as the Claimant did provide his reasons for the delay in any event, and has not offered any further substantive explanation beyond that he had advanced in the form at the time.
96. On 26 June 2023 the Ombudsman wrote to the Defendant setting out her decision not to review the admissibility decision. The reasons given in that letter were:

“Having considered all the information available to me, we have decided not to review the admissibility decision because your application to SCOAF has been made outside the statutory four weeks and two-day time frame. Your reasons for the late application have been carefully considered.

Your admissibility decision letter was issued on 5 May 2023, so the deadline to submit an application to SCOAF was 6 June 2023. However, you submitted your application to SCOAF on 16 June 2023, which was ten days out of time. I have taken into consideration that in your application you stated the date of the admissibility letter was 11 May 2023, but irrespective of this, your SCOAF application was still submitted out of time.

When considering the submission of applications to SCOAF outside the statutory time frame, I must consider whether there are just and equitable reasons for the late submission. I note you said your application was submitted late because, ‘My legal representative was seeking way forward from the tribunal because the MOD defence team had written to the court to

struck off the case entirely.” However, it is unclear how or why the tribunal case impacted you submitting your application to SCOAF in time, and you have also not provided any supporting evidence for this.

I have considered the information provided in your ‘statement of events’, but I am not persuaded that this contains any information to support the reason for the delay in your application to SCOAF. I note you were aware of the different avenues open to you, so it remains unclear why you felt the need to wait for progress on your tribunal before applying to SCOAF as well. In addition, the admissibility decision letter you received clearly stated that you had four weeks from the date of the letter to apply to SCOAF. As such, I deduce that you would have been aware of the avenues and associated time frames open to you immediately following the original admissibility decision.

You also added: “I strongly feel that I am being unfairly treated and that the MOD wants block me from being heard using time factors.’, and therefore it remains unclear why you did not submit your application to SCOAF within the statutory four weeks and two-day time frame to prevent any risk of a late application being a factor in its consideration by us as well.

In summary, I am not persuaded that the explanation you have given for your late application can be considered just and equitable for me to exercise my discretion to consider your application outside of the time limit. I will therefore be taking no further action on your case.”

97. The letter referred to the decision being final and subject only to the remedy of judicial review.
98. The Defendant has disclosed an internal form entitled “Eligibility Assessment” which was completed by an Investigator prior to the issue of the Ombudsman’s decision. It identifies that the application for review was made out of time and in response to the question of “If it is just and equitable, why? And if not, why not?”, the Investigator has stated “No J+E reasons”.
99. By email dated 12 September 2023 the Claimant’s solicitor acting for him in the ET proceedings wrote to the Defendant requesting that the Defendant reopen the issue and setting out reasons why it invited the Defendant to do so. These included that on the face of the papers the Claimant had been fundamentally wronged in his initial discharge for having HIV though being fit for service, and that he made a discrimination service complaint which was brought within the the specified 6 month time limit for discrimination complaints, as notified on the Annex F form and therefore the wrong time period had been applied to the service complaint and the potential consequences for the ET proceedings.
100. By email on the same day, a Senior Investigator of the Defendant responded refusing the request. In so doing, the Senior Investigator stated:

“As explained in our letter dated 26 June 2023, we did not review Mr L’s admissibility decision because he submitted his application to SCOAF out of time and we did not consider there were just and equitable reasons to accept it out of time.

Whilst I acknowledge the seriousness of Mr L...’s allegations, our decision was not based on the potential merits of his Service Complaint. All Service Persons are subject to the same time limits when applying to SCOAF and I do not consider it would be appropriate to make an exception based on Mr L...’s decision to proceed with an Employment Tribunal.”

101. One of the submissions made by the Claimant under Ground 2 in respect of the decision of 26 June 2023 and the response on 12 September 2023 is that the SCOAF applied the just and equitable test to the reasons for the delay, rather than the question whether it would be just and equitable to consider the application.

102. The Claimant has also referred to guidance document published by the Defendant “Just and equitable – what does it actually mean” dated 31 July 2018. In that document it is stated (amongst other things):

“The time limits are important because the more time that passes after an event occurs, the more difficult it is to investigate properly and come to a clear and correct decision about what did and did not happen. Documents or other essential evidence might only be kept for a certain period of time. People’s memories of events fade and are no longer reliable. Witnesses may be difficult to locate, unable to engage in the process for health reasons or have even passed away.

However, there are times when not accepting a complaint outside these time limits would be unfair. That is why there is some flexibility built into the process.

The law allows Service complaints and applications to my office to be accepted out of time if it is considered “just and equitable in all the circumstances.”

What does that mean in plain English? It means that the time limit can be extended in individual cases where it is considered to be right and fair to do so.

That might seem confusing. After all, how could it not be right and fair to investigate a complaint? The answer to that question depends on the circumstances of each individual case.

The “just and equitable” discretion is quite wide. In terms of the work my office does, it allows us to consider any relevant factors. This can include, but is not limited to:

-How far outside the time limit it is

-The reason for the delay

-If it is still possible to conduct a fair and reliable investigation given the delay

-Whether the individual had information about the time limits , or is reasonably expected to have known about them

-Whether the individual has acted unreasonably in making their application.

Although we have this discretion, accepting the applications outside of the time limit is the exception and not the rule.

If you are making an application to our office outside of the time limit, you will be asked to include on the form reasons why it is late. There is no set response that will ensure a late application is accepted. You simply need to provide an honest explanation of why you were unable to make the application in time. If further information or clarification is needed, my investigators will ask you for this. They will also seek information from other sources if required. They will then make a decision, under my delegation, taking into account all of the relevant factors ...”

103. The Claimant refers to the guidance identifying the width of the discretion and the absence of any express articulation on an inability to consider, for example, the merits of the underlying service complaint.

104. The Claimant has also referred to the SCOAF Review of Admissibility decisions pamphlet, the SCOAF Annual Report and the SCOAF Customer Charter, and a House of Commons Defence Committee report ‘Fairness without Fear: the work of the Service Complaints Ombudsman’, 16th report of Session 2017-19 dated 9 July 2019. The Claimant’s main reliance on these documents is to support a submission that the SCOAF commits itself to transparency. However, it is not clear to me how any of these documents can materially affect the correct interpretation of the Regulations with which I am faced under Ground 1, nor how a notion of transparency could alter the lawfulness of the Ombudsman’s decision if, as the Defendant and Interested Party contend, the Ombudsman is not entitled to consider the underlying merits of a service complaint when considering the discretion under Regulation 17(2) of the 2015 Regulations.

THE GROUNDS OF CHALLENGE

Ground 1 – Irrationality

105. Under Ground 1, the Claimant states that he is challenging the rationality of the SCOAF's decision, but the details of the claim as articulated are not strictly confined to an assertion that the decisions were irrational in the *Wednesbury* sense, as the Claimant is also alleging, for example, that the Ombudsman failed to take into account material considerations and the Defendant and Interested Party have responded to such allegations. As already noted, their principal contention is that the merits of the underlying service complaint was necessarily an irrelevant consideration on the correct interpretation of Regulation 7(2) of the 2015 Regulations.
106. Under this ground, the Claimant first submits that the SCOAF has conceded that in considering whether to grant the extension of time, she did not consider the facts, and so the potential merits, of the Claimant's case, beyond the pure reasons for delay. The Claimant argues that is irrational and contends that the merits and details of the case, by reason of the starkness of the discrimination and the terms of the new MoD policy, warranted consideration.
107. Secondly, the Claimant submits that there was no consideration of the fact that the Annex F form specifically identified a time limit of "*6 months for discrimination complaints*" and that the Claimant had headed that part of his form dealing with the wrong he was identified as "DISCRIMINATION – MEDICAL". He submits that, in itself, should have raised alarm bells for the SCOAF's consideration of the circumstances.
108. Thirdly, the Claimant submits that there was no consideration of the balance of prejudice by the SCOAF. He submits that denial of a review of the admissibility decision brought the entire service complaints' process to an end for the Claimant, who had also attempted through other internal processes to prevent his medical discharge. The Claimant refers to his reliance on medical evidence supporting the case he was making to the army. He submits that, by contrast, there was no prejudice at all to the service complaint system, or to the SCOAF, in agreeing to consider his request for review by reason of a 10 day delay.
109. Fourthly, the Claimant submits that the wider prejudice of the SCOAF's decision potentially putting an end to his ET claim was not considered.
110. Fifthly, he submits there was a failure to act with transparency. He relies on the fact he was contacted and interviewed by the SCOAF, but no reference was made to that within the decisions. He notes that the SCOAF defends this part of the challenge by reference to the admissibility decision being a filter and gateway to any consideration of the merits, but the Claimant submits that he was asked in the phone call he had about the merits of his case. He says that demonstrates that the SCOAF did go on to seek information as to the wider circumstances, in which case these were plainly relevant to the exercise of discretion in balancing up all relevant factors.
111. Finally, the Claimant argues that there was a failure to consider all relevant considerations, whether in the refusal to grant the extension as out of time, or in the

refusal to consider whether to review that decision. He contends that to deny the Claimant access to a process which he considers he should not be within in the first place, and for the SCOAF to refuse to recognise this and to perpetuate the fundamental procedural wrong despite the Claimant's submissions, was irrational, unreasonable and unfair. He also claims that it fundamentally undermines the aims of the SCOAF of providing overview, and of ensuring the fairness of the service complaint system. He argues this was an obvious case of plain unfairness and unlawfulness to the Claimant, and in refusing an extension of 10 days, the SCOAF acted contrary to its own commitments. In short, he contends that by reason of a procedural technicality of time, the SCOAF refused to consider a far greater potential injustice to the Claimant.

112. In response, the Defendant and Interested Party focus on the terms of Regulation 7(2) in support of their submission that the Ombudsman did not err in any of the ways alleged. The Defendant's principal argument (developed with conspicuous clarity and succinctness by Mr Cohen at the hearing) is a short and straightforward one. The Defendant submits that the words used in Regulation 7(2) do not entitle her to consider the merits of the putative application for review as part of any assessment of whether it would be just and equitable to allow an application out of time. The Defendant submits that the wording of Regulation 7(2) means that the consideration of whether it would be just and equitable to allow the application to proceed "is logically prior to considering the application" and argues that Regulation 7(2) contains a deliberate inversion in contrast to other statutory regimes which are not so limited. On this basis, so the Defendant submits, the Ombudsman did not err in law in not considering the merits of the Claimant's application for review of the admissibility decision because she was precluded in law from doing so.

113. In this regard, the Defendant focuses specifically on the structure of the wording and approach in Regulation 7(2) (in contrast to other discretions such as that in section 123 of the EA 2010 on which the Claimant relies). It begins with a prohibition: the Ombudsman "must not consider an application under paragraph (1)" if it is made out of time. It is only after this prohibition is imposed that the qualification appears "unless the Ombudsman considers it is just and equitable to allow the complainant to apply after that period". The Defendant submits that on this basis, any consideration of what is "just and equitable", does not involve any consideration of the merits of the application itself and the Ombudsman is not entitled to take those into account.

114. As I have already noted, the Defendant submitted that this interpretation of the provision was inferentially supported by the adoption of this structure in contrast to that which appears in other legislation, like s.123 of the EA 2010, where no such prohibition is imposed subject to a qualification, but instead provision is made for a tribunal to extend time where it considers it just and equitable in all the circumstances.

115. The Interested Party adopted these submissions and supported that interpretation as the body responsible for the legislation. The Interested Party also sought to draw attention to the Ombudsman's limited function of review of admissibility decisions under this part of the statutory scheme, in contrast to the Ombudsman's other investigation functions and powers expressed elsewhere.

116. Despite the attractiveness with which these submissions were made, I reject that

interpretation of the meaning of Regulation 7(2). In my judgment, it imposes an artificial limitation on the breadth of the Ombudsman's discretion that is not articulated in the Regulation itself, nor can it properly be inferred from the language or structure of the Regulation.

117. Applying well-established principles of construction, the basic starting point must be the natural and ordinary meaning of the words used in the Regulation itself. The Regulation begins by articulating a prohibition on the Ombudsman from considering an application that is made out of time. That is clear from the mandatory words that the Ombudsman "must not consider an application" which is made outside the four week period identified. That prohibition, however, is immediately qualified by the word "unless" used in the same sentence. The qualification is "unless the Ombudsman considers it is just and equitable to allow the complainant to apply after that period."
118. The use of the words "just and equitable" themselves immediately connote a broad discretion, given the nature of such concepts. But the intended breadth of the discretion is put beyond doubt by the fact that the Regulation makes it clear that the question of what is just and equitable is a matter for the Ombudsman. The qualification is expressed as "unless the Ombudsman considers it is just and equitable". The Regulation is therefore affording the Ombudsman a discretion to consider whether it is just and equitable to extend time. These words of themselves indicate the provision of a broad discretion, without needing to draw on other statutory regimes where similar concepts (such as in s.123 of the EA 2010, or s.7(5) of the Human Rights Act 1998 on what is equitable) have been found to give rise to a broad discretion. Reference to use of similar words giving rise to broad discretions in other contexts potentially reinforce the conclusion I reach on the wording used in Regulation 7(2), but I reach that conclusion simply on the words used in that provision itself.
119. In my judgment, the natural and ordinary meaning of the words used strongly indicates as a basic starting point that the Ombudsman is being given a broad discretion to make a decision on whether it is just and equitable to allow the complainant to apply for a review of a specified officer's admissibility decision out of time. No express constraints, limits or other words of qualification are applied to what factors the Ombudsman may take into account, or the weight to apply to such factors. On the basis of this starting point as to the words used, I would conclude that such limits should not be imposed by way of gloss on that discretion.
120. The Defendant and Interested Party seek to justify a necessary limitation from the way in which the prohibition is expressed first, followed by the qualification. They suggest that the Ombudsman is not entitled to consider the underlying application at all when making a decision as to whether it is just and equitable to allow the complainant to make the application outside the identified time period. I regard this approach as untenable for at least three reasons.
121. First, I consider it is artificial to break up the sense of the sentence used in the regulation in this way. To suggest that one cannot consider the underlying application at all because of the preceding prohibition on doing so where it is out of time, in circumstances where the prohibition is being expressed in the very same

sentence that contains the qualification to the prohibition is, in my judgment, artificial and unrealistic. It is artificial to suggest that the intention of a single sentence, expressed in the way it is, requires one to shut out any consideration of the application at all when making a decision on whether it is just and equitable to allow the complainant to apply after the time limit. If such a restriction had been intended, it could have been much more clearly expressed, and I would expect it to have been done so if imposing restrictions on the discretion afforded.

122. Second, even if there were merit in this artificial approach, I do not consider it ultimately assists the Defendant and Interested Party, or supports their conclusion. On the hypothesis advanced, the Ombudsman would still be required to consider whether it is just and equitable to allow the complainant to apply after the time limit has expired (before considering the application itself). But there is nothing in the statutory language used which prevents the Ombudsman from considering the potential merits of the Claimant's case (without determining any question of admissibility) in making an assessment of whether it is just and equitable to allow the complainant to apply out of time. Thus, for example, the Ombudsman could, potentially decide it is just and equitable to allow a complainant to apply out of time (having regard to the merits of a complaint's case), but then subsequently to reject the application itself and uphold the inadmissibility decision in due course.

123. Third, in addition to the absence of any express restriction on what the Ombudsman may consider, I cannot see any other compelling logic for inferring any such restriction. True it is that the Ombudsman's review function of admissibility decisions is a more limited one than that of carrying out an investigation of the service complaint itself. But there is no obvious reason why the Ombudsman's general discretion to allow a complaint out of time is intended to be limited or constrained in the way that the Defendant and Interested Party suggest, so as to preclude any consideration of the merits of a complainant's case. That is particularly so where admissibility decisions in this context can have potential significant consequences for a complainant. There is no reason to think that the Ombudsman cannot be entrusted to exercise a broad "just and equitable" jurisdiction to extend time in a careful manner, with proper regard to the importance of respecting the four week time limit. In that respect, although I reject the notion that what the Defendant describes as the inverted structure of Regulation 7(2) has the effect for which the Defendant contends, it does lend force to the principle that the starting point is the prohibition on considering complaints made outside the four week period, so that the exercise of the discretion will be the exception rather than the rule.

124. For these reasons, I reject the Defendant's principal argument under Ground 1. I do so without reliance upon section 123 of the EA 2010, and the cases that apply to that jurisdiction. I recognise the force of the submissions from the Defendant and Interested Party that one needs to be very careful in applying principles expressed in respect of different statutory regimes where the wording is different. But in my judgment, the words of Regulation 7(2) do articulate a broad discretion afforded to the Ombudsman for the reasons I have identified.

125. Having reached that conclusion on the language used, I consider that the breadth of that discretion afforded to the Ombudsman is in fact subject to other equivalent principles that have been expressed in relation to s.123 of the EA 2010, namely that

it is for the Ombudsman (rather than this Court) to exercise such a discretion, where the factors the Ombudsman may take into account, and the weight to be attached to those factors, are for the Ombudsman subject only to general public law principles.

126. In this particular case, the SCOAF clarified through its Investigations Officer in September 2023, and this claim was defended on the basis that, the Ombudsman did not consider the merits of the Claimant's application. This was because the Defendant's position is that the Ombudsman was precluded from doing so by Regulation 7(2). The decision was therefore not taken, nor defended, on the basis that the Ombudsman was entitled not to take into account the merits of the Claimant's application on the facts of this case, as a matter of discretionary judgment. No arguments were advanced on that basis, nor dealing with the correct legal approach to such a decision if it had been made on that basis. In general, there is now a well-established principle in administrative law that unless a potentially material consideration is a mandatory one required to be taken into account by law or policy, or it is so obviously material that it would be an error of law not to take it into account, it will be a matter of judgment for the decision-maker as to whether or not it is taken into account in a particular case: see eg *R(Khatun) v Newham LBC* [2004] EWCA Civ 55 [2005] QB 7 (applying the approach expressed in the New Zealand case of *Creed NZ*) as applied in a number of other areas of administrative law).

127. Given the explanation as to the approach the Ombudsman's adopted and the position that the Ombudsman was precluded from considering the merits of the Claimant's application, I consider that the Claimant's claim to quash the Ombudsman's decisions must succeed under Ground 1. The Ombudsman acted on an erroneous understanding of the effect of Regulation 7(2). She treated it as precluding her ability to take into account the merits of the Claimant's application for review, such that no decision was ever made by her as to whether or not those merits should be taken into account in this particular case. This is therefore not a case where that error can be said to have made no difference, or that it is highly likely that error was not material to outcome of the decision. Equally, however, the discretion under Regulation 7(2) is one for the Ombudsman to exercise, rather than this Court. I agree with the Defendant that if the Ombudsman is found to have erred in the way I have identified, then the decision falls to be remitted for the Ombudsman to take in accordance with the law.

128. In my judgment, this conclusion renders it unnecessary and inappropriate to deal with the various alternative ways in which the Claimant sought to articulate Ground 1, in the absence of a decision by the Ombudsman applying the correct interpretation of Regulation 7(2). It will be a matter for the Ombudsman to consider the exercise of her discretion under Regulation 7(2), without the erroneous understanding that she is precluded from considering the merits of the Claimant's case, and the various related points relating to the respective prejudice that the Claimant has sought to articulate, in addition to the reasons for the delay and its consequence. On conventional principles, if the Ombudsman approaches the exercise of that discretion correctly, her exercise of that discretion will only be reviewable on irrationality grounds and the high hurdle that presents, provided she has correctly directed herself and taken into account all required considerations and ignored irrelevant ones. It is not

appropriate for this Court to arrogate for itself that statutory function which belongs to the Ombudsman. As to the arguments based on procedural failings that were expressed under Ground 1, but also pursued under the new Ground 3, I will deal with those under Ground 3.

Ground 2 – Misapplication of the test of just and equitable/ failure to consider all relevant factors

129. The Claimant's second ground of challenge is a contention that the SCOAF applied the wrong test under the Regulations. He submits that whether by reference to the actual wording used within each of the decision letters, or by reference to the content of those letters, it is clear that the SCOAF did not consider whether it was just and equitable to extend time in the circumstances of the case. By reference to the words used by the Ombudsman, he submits that the test is not whether the *reasons* the Claimant gave for the application being late are "just and equitable", but rather whether exercising the discretion would be just and equitable.
130. Under this ground the Claimant also seeks to repeat arguments that arose under Ground 1 in this respect as to the Ombudsman's failure to consider the consequences of refusing the extension of time. In short, the Claimant submits that the SCOAF failed to carry out the proper balancing exercise in deciding whether to grant an extension of time was just and equitable and in the interests of justice.
131. The Claimant submits that the SCOAF's failure to take into account all factors as to the merits of the Claimant's claim amounted to a fettering of her discretion. He argues that the key factors include: the plainly wrong refusal to accept the SC as in time and also, significantly, the fact that the MoD, before discharging the Claimant, lifted its ban on dismissing service personnel taking suppressive treatment for HIV and whose blood tests show no detectable virus as "fully fit for service".
132. The Claimant argues that the SCOAF also failed to consider the fact that the service officer's identification of the Heads of Complaint misleadingly did not refer to discrimination when the Claimant had repeatedly raised that he was bringing a discrimination complaint. He submits that given the potential consequences for an individual when their Service Complaint is deemed inadmissible and when there is a refusal by the SCOAF to consider reviewing the decision, it was essential that the SCOAF consider all the circumstances of this matter. He contends that on any preliminary view of the detail submitted by the Claimant it would have been immediately plain that he was subjected to the most serious disability discrimination and that the original inadmissibility decision was wrong, the failure to treat it as a discrimination complaint was wrong and the decision to rely so heavily on a 10 day delay to refuse outright to consider the matter further was a far too severe and disproportionate sanction in all the circumstances of the case.
133. The Defendant submits that the Claimant's argument under this Ground is not well-founded. She submits that the Claimant is reading the decision letter more strictly than is justified or fair, and that it is readily apparent from the internal documents

provided that the Defendant was well aware of the test to apply under Regulation 7(2). She argues that the Claimant's argument is a restatement of the argument that the Defendant ought to have considered the merits of his complaint and his arguments on prejudice, but in circumstances where the Defendant has argued under Ground 1 that she was not entitled to take these into account.

134. In reality my conclusion under Ground 1 has rendered Ground 2 academic. The Ombudsman will necessarily have to retake the decision applying the correct interpretation of Regulation 7(2) I have identified. This means that the Ombudsman's reasoning will fall away and the Ombudsman will need to apply the test under Regulation 7(2) to the new decision. In circumstances where the Ombudsman submits that the Claimant's arguments under Ground 2 apply too strict an interpretation of the words she used, the Ombudsman will no doubt be aware of the need to ensure that the correct test is articulated and applied in her decision-making.

135. As a matter of principle, I doubt that it is appropriate to construe decisions of the Ombudsman too legalistically, given the function she is performing. There is considerable learning in other contexts as to a general need to avoid reading administrative reasoning of this kind like a tax statute.

136. That said, I do consider it problematic for the Ombudsman's internal documentation, and for the reasoning in this case, to be expressed in the way it was. The Claimant is correct that Regulation 7(2) is concerned with whether the Ombudsman considers it just and equitable for an application to be made out of time, not whether the reasons advanced by a complainant are considered to be just and equitable. The reasons for a delay might not be "just and equitable", in the sense that the Ombudsman concludes that they were not sound reasons for delaying, but the Ombudsman might still come to the view in a particular case that it is still just and equitable for the application to be considered. There is a danger that the Ombudsman will not approach her discretion correctly if the words "just and equitable" are applied to the reasons given for the delay, rather than applied to an assessment overall. This danger was particularly relevant in this case, where the Ombudsman considered herself not entitled to consider the merits of the application itself, and so was artificially inhibiting the potential scope of her assessment as to what she considered to be "just and equitable".

137. In the event, Ground 2 is academic. However, for the reasons articulated above, whilst cognisant of the need to read the Ombudsman's decision as a whole and without undue legalism, I would have allowed the claim under Ground 2 so far as it alleged that the Ombudsman applied the wrong test under Regulation 7(2), and that the Ombudsman consequently considered the question of whether the reasons given by the delay were just and equitable, rather than considering whether it was just and equitable to extend time.

New Ground 3 – Procedural Unfairness

138. Given my conclusions on Ground 1, I consider that the Claimant's application to amend her claim to include the new Ground 3 alleging procedural unfairness, as with the allegations of lack of transparency made under Ground 1 in not following the

disclosed Operations Manual, have become academic.

139. However, having heard argument on the issue of transparency under Ground 1, and the application to amend to include the new Ground 3 and the question of procedural unfairness, and the need to determine the application to amend, I will set out my views on them briefly.

140. As to the application to amend to include a new Ground 3, I refuse the application. It is academic in light of Ground 1. However separately from that, in my judgment it was made far too late in the judicial review claim process (even allowing for the unfortunate conduct on the part of the Defendant in providing late disclosure) and I refuse it independently on that basis as well.

141. The main reason advanced for making the application so late was the belated disclosure of the email dated 23 June 2023. It was claimed that this confirmed that the Claimant had not been contacted by an Investigation Officer before the Ombudsman made her decision. I reject that as being a good reason for advancing the application to amend so late in the day just before the hearing was due to start.

142. I agree with the Defendant that the email dated 22 June 2023 which the Claimant already had in his possession articulated the same point on which the Claimant is now seeking to rely, namely that an Investigation Officer would contact the Claimant, but where the Claimant knew that there was no such contact after that email before the Ombudsman's decision was issued. The Claimant could therefore have advanced the new Ground 3 from the outset. This ground of claim might then have been legitimately reinforced by the Claimant upon the late disclosure of the Operations Manual, but there was no reason why the Claimant could not have put forward Ground 3 from the outset. Failing that, on receipt of the Defendant's witness statement dated 26 January 2024, the Claimant could have made its application for amendment earlier than he did, with the potential for the Defendant then to have had a greater (albeit limited) opportunity to respond with evidence. The failure to articulate the new Ground 3 earlier has caused prejudice to the Defendant in being able to respond with evidence in time for the claim, and the Court in being able to consider such evidence.

143. I also separately refuse the application, along with rejecting the Claimant's criticism under Ground 1 in relation to transparency / failing to following the Operations Manual process, on the basis that the Claimant has not made out any material prejudice in respect of any procedural failings of this type. I agree with the Defendant that the reality was that the Claimant did have the opportunity to set out reasons for the delay, along with his contentions as to the merits of his application, and he took that opportunity in making his submissions to the SCOAF. Accordingly, assuming that there was a failure on the part of the Defendant in not following the Operations Manual by requiring an Investigations Officer to contact the Claimant to establish the reasons for the delay in making the application, I am satisfied that no prejudice arose from any such failure. The Claimant has not articulated what he would have added of substance to what he had already identified in his application form and accompanying documentation. The question as to whether the Ombudsman acted lawfully in limiting her consideration of that material is a different one addressed under Ground 1. But I cannot see anything of

significance that would have been established by the Investigations Officer contacting the Claimant in this particular case. To like effect, if there was a failure to comply with what was stated in the emails of 22 June 2023 and 23 June 2023, there was also no prejudice that arose.

144. There is a point of potential dispute on the face of those emails, along with the underlying guidance, as to whether it is intended that an Investigations Officer will contact a complainant before making a decision as to admissibility, rather than contacting them if the application is treated as admissible. The Ombudsman's communications and internal guidance, along with the Operations Manual, would undoubtedly benefit from greater clarity in this regard. But I find it unnecessary to resolve the issue in relation to the emails. Even assuming there was such an expectation from those emails, any failure did not result in material prejudice.
145. For these reasons, I refuse the application to amend the claim to include the new Ground 3. I also reject the challenge under Ground 1 so far as it is based on alleged procedural failures concerning the Operations Manual in the absence of material prejudice arising in this particular case.
146. For the reasons set out above, this claim for judicial review is allowed under Ground 1 (to the extent identified in the judgment above).