



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**UT ref: UA-2023-000969-AFCS
[2024] UKUT 238 (AAC)**

On appeal from First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber)

Between:

DN

Appellant

- v -

The Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 31 July 2024
Decided after and oral hearing on 6 March 2024

Representation: **Nathan Searle**, solicitor advocate, for the appellant
David Mankell of counsel for the respondent

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This is an appeal against the decision of the First-tier Tribunal of 14 February 2023 (“the FTT”). By that decision, the FTT dismissed the appellant’s appeal from the decision of the Secretary of State for Defence dated 14 October 2021. That decision was to the effect that the appellant’s hearing loss (the accepted condition) fell below tariff level, and so no award could be made under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (“the AFCS”).
2. The essence of the appellant’s challenge to the FTT’s decision is an argument that the FTT, in deciding the correct tariff level for his hearing loss, was bound by the findings of fact made by the previous First-tier Tribunal which had decided that the appellant’s hearing loss was caused by service.
3. Although estoppel arguments had been relied on at one stage by the appellant, no such arguments were made before me. Instead, the appellant’s primary ground of

appeal focuses on what he argues are the applicable principles arising from case law such as paragraphs [32]-[39] of *SSHD v BK* (Afghanistan) [2019] EWCA Civ 1358.

The legislative scheme

4. Section 5A of the Pensions Appeal Tribunals Act 1943 deals with appeals in AFCS cases. It provides as follows:

“5A:-(1) Where, in the case of a claim to which this section applies, the Minister makes a specified decision—

(a) he shall notify the claimant of the decision, specifying the ground on which it is made, and

(b) thereupon an appeal against the decision shall lie to the appropriate tribunal on the issue whether the decision was rightly made on that ground.

(1A) This section applies to—

(a) any such claim as is referred to in section 1, 2 or 3 of this Act;

(b) a claim under a scheme mentioned in section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004 (compensation schemes for armed and reserve forces).

(2) For the purposes of subsection (1), a “specified decision” is a decision (other than a decision which is capable of being the subject of an appeal under any other provision of this Act) which is of a kind specified by the Minister in regulations.”

5. Regulation 3 of the Pensions Appeals Tribunals Act 1943 (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Regulation 2011s (“the Specified Decisions Regs”) is made pursuant to section 5A(2) of the Pensions Appeal Tribunals Act 1943. That regulation provides that a decision is a specified decision (and therefore is appealable), as follows:

“3(1)...the following decisions are specified for the purposes of section 5A(2) of the Pensions Appeal Tribunals Act 1943, that is a decision which—

(a) determines whether a benefit is payable;

(b) determines the amount payable under an award of benefit; and

(c) is issued under article 26(6) (refusal to make a temporary award permanent etc.) or 26(8) (addition of new descriptor) of the 2011 Order, relating to the making of a permanent award.

6. Section 5B of Pensions Appeal Tribunals Act 1943 further provides that:

“5B:- In deciding any appeal under any provision of this Act, the appropriate tribunal —

(a) need not consider any issue that is not raised by the appellant or the Minister in relation to the appeal; and

(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.

7. Section 1 of the Armed Forces (Pensions and Compensation) Act 2004 empowers the making of the AFCS. It provides, relevantly, as follows:

“Pension and compensation schemes: armed and reserve forces

1:- (1) The Secretary of State may by order establish schemes which, in respect of a person’s service in the armed forces, provide—

(a) for benefits, in the form of pensions or otherwise, to be payable to or in respect of him on termination of service or on death or retirement, or

(b) for payments to be made towards the provision of such benefits.

Such a scheme is referred to in this Act as an armed forces pension scheme.

(2) The Secretary of State may by order establish schemes which provide for benefits to be payable to or in respect of a person by reason of his illness or injury (whether physical or mental), or his death, which is attributable (wholly or partly) to his service in the armed forces or the reserve forces.

Such a scheme is referred to in this Act as an armed and reserve forces compensation scheme.”

8. Under article 8 of the AFCS it is provided that:

"Injury caused by service

8.—(1)benefit is payable to or in respect of a member or former member by reason of an injury which is caused (wholly or partly) by service where the cause of the injury occurred on or after 6th April 2005.

(2) Where injury is partly caused by service, benefit is only payable if service is the predominant cause of the injury.

9. Article 9 of the AFCS deals with the different situation of an injury not caused by service but worsened by service. It sets out, insofar as is material:

“Injury made worse by service

9.—(1)benefit is payable to or in respect of a former member of the forces by reason of an injury made worse by service if the injury....

(c) arose during service but was not caused by service,

And...service on or after 6th April 2005 was the predominant cause of the worsening of the injury.

(2) Benefit is only payable under paragraph (1) if the injury has been worsened by service and remains worsened by service on—

(i) the day on which the member's service ends; or

(ii) the date of claim if that date is later.

10. Article 15 of the AFCS is concerned with the benefits payable for an injury if, for example, an injury has been caused by service on or after 6 April 2005, and provides:

“Description of benefits - injury

15.—(1) Benefits payable for injury are—

- (a) a lump sum;
 - (b) a supplementary award;
 - (c) a guaranteed income payment payable until death;
 - (ca) armed forces independence payment;
 - (d) a fast payment; and
 - (e) medical expenses.
- (2) Schedule 3 has effect for the purpose of determining—
- (a) the descriptor;
 - (b) the tariff level;
 - (c) the amount of a lump sum;
 - (d) the conditions relating to payment of a supplementary award; and
 - (e) the amount of a supplementary award.”

11. Part 1 of Schedule 3 to the AFCS sets out what it describes as **DESCRIPTORS, TARIFF LEVELS AND AMOUNTS – “THE TARIFF”**. There are then listed under Part 1 various Tables dealing with different types of injury or illness. For example Table 1 is about “Burns”, Table 2 concerns “Injury, Wounds and Scarring”, Table 3 is about “Mental Disorders” and Table 7 deals with the “Senses”. Each Table is structured so that it covers “Item”, “Column Level” and “Description of injury and its effects (“descriptor”)”. What falls below in each Table are injuries graded in terms of their seriousness, from most serious down to least serious. So, under “Table 1 – Burns” the most serious injury is one which has left the person with “Burns, with partial, deep or full thickness burns affecting 70% or more of whole body surface area”, whereas the least serious type of ‘Burn’ is “Burns, with superficial burns affecting 1 to 4.4% of whole body surface area”.

12. In addition, certain of the descriptors in Schedule 3 deal with the effects of the injury. Thus under ‘Table 2 – Injury, Wounds and Scarring’ the injury may be a “Complex injury covering all or most of the area from thigh to ankle or shoulder to wrist, causing permanent significant functional limitation or restriction”. And under “Table 3 – Mental Disorders” includes a “Mental Disorder, causing functional limitation or restriction, which has continued, or is expected to continue for 5 years”. For completeness, under “Table 7 – Senses”, bilateral deafness and bilateral hearing loss

extends from “Total deafness in both ears” to “Bilateral permanent hearing loss of 50-75dB averaged over 1, 2 and 3kHz”.

13. It is important to note that on the face of it the AFCS does not set down a definitive, single stage at which the extent to which an injury has been caused (or made worse) by service is to be determined. No bright lines are drawn in the AFCS, demarcating where and when that issue (if it arises) must be decided. Putting this point another way, there is no express preclusion against determining that issue at the ‘regulation 3(1)(b) of the Specified Decisions Regs stage’ of deciding the correct amount of the award, if it has not already and clearly been decided.

14. In terms of claiming and adjudication under the AFCS, article 43 makes it a condition of entitlement that a claim is made for most benefits. Adjudication is dealt with in Part 7 of the AFCS. Under article 51 of the AFCS:

“Decisions

51.—(1) The Secretary of State is to determine any claim for benefit and any question arising out of the claim.

(2) The Secretary of State is to give reasons for the decision.

(3) The decision and the reasons for the decision must—

(a) be in writing;

(b) be given or sent to the claimant; and

(c) inform the claimant of any right that the claimant may have—

(i) to a reconsideration of the decision under article 53; and

(ii) to appeal that decision to the appropriate tribunal under section 5A(1) of the Pensions Appeal Tribunals Act 1943.”

15. Article 54 deals with finality in relation to the decision-making of the Secretary of State, and provides:

“Finality of decisions

54.—(1) Where the Secretary of State has made a final decision awarding benefit, there is to be no review of that decision except in the circumstances specified in articles 55, 56, 57, 58 and 59.

(2) Where the Secretary of State has made a final decision which makes no award of benefit, there is to be no review of that decision except in the circumstances specified in article 59.

(3) In this article, and subject to paragraph (4), a final decision is—

(a) a decision under article 51;

(b) a decision making a final award under article 52;

(c) a decision revised by the Secretary of State under article 55, 56, 57, 58 or 59;

(d) a decision made under article 55, 56, 57 or 59 which maintains the decision under review;

(e) a decision revised by the Secretary of State following a reconsideration under article 53; or

(f) a new decision which maintains the original decision following a reconsideration under article 53.

(4) The decisions referred to in sub-paragraphs (a) to (d) are final decisions where there has been no application for reconsideration under article 53, or the time for such an application has expired.

16. Therefore, when the Secretary of State decided (see further below) that the appellant's hearing loss was not caused by service, that was a final decision on that issue, subject to that decision being appealed. However, nothing in Part 7 of the AFCS mandated any necessary content or scope to that decision under article 8, such that it was required to determine the extent to which the injury had been caused by service. Moreover, Part 7 of the AFCS says, and can say, nothing about finality of decisions made by the First-tier Tribunal on appeal.

Relevant factual background

17. The appellant served in the Army from March 2011 to November 2018. Whilst still in the Army, on 10 April 2018 he submitted a claim under the AFCS. It was treated as being a claim for bilateral noise induced sensorineural hearing loss ("BNISH" or "hearing loss"). Understandably, this is not what the appellant said in his claim form. What he claimed for, under "Condition/Injury/Illness you are claiming", was "Loss of hearing on both left and right ears". The appellant went on in the same claim form to explain why he thought his loss of hearing had been caused by his service in the Army. That claim was rejected by the Secretary of State on 19 February 2019.

18. The decision of 19 February 2019 accurately set out the claimed injury as "Loss of hearing on both left and right ears". Under "Incident/Exposure/Behaviour" the decision form set out the appellant's case that the incident/exposure was in 2016. The decision form then narrated what the appellant had said on his claim form about losing his hearing gradually during his service in the Army, particularly after an exercise in Canada. The appellant had described in his claim form how he had felt some hearing loss as a drummer in his company, but the hearing loss had got worse after the Canada exercise. That exercise, as described by the appellant in his claim form, involved him driving a Warrior fighting vehicle and there had been lots of shooting and other vehicle noise exposure.

19. The reasons for the decision given in the 19 February 2019 decision form were that there was no evidence in the appellant's electronic medical records of unprotected noise exposure due to service, and the Secretary of State (therefore) did not accept, per article 8(1) of the AFCS, that the appellant's hearing loss was wholly or partly caused by service. The Secretary of State decision maker expressly relied on "the reason provided by the Medical Advisor on page 3&4 [of the decision form]". The request for medical advice referred the medical advisor to the "potential process causes" (e.g., the appellant driving the Warrior vehicle), said that the hearing tests had been inconsistent, and asked for advice as to whether "service is the predominant cause of hearing loss". The medical advice considered eight medical results from between 2016 and 2018 concerning the appellant's hearing. It concluded that:

"The results of the objective and subjective tests of hearing are inconsistent and conflicting. There is some evidence to support a diagnosis of bilateral sensorineural hearing loss. However, there is no evidence of unprotected noise exposure due to service. The Control of Noise at Work Regulations 2005....came into force for all industry sectors in Great Britain on 6 April

2006 and therefore [the appellant] would be sufficiently protected against any excessive noise in the workplace. On the balance of probabilities, the hearing loss is not wholly or partly caused by service and can be rejected under AFCS.”

20. Pausing at this point, it seems clear, in my judgement, that this decision was rejecting the claim on the ground that the claimed injury had not been caused by service. It was not a decision that the appellant did not have an injury. It was a ‘no service causation’ decision. Whether that lack of causation was in respect of the whole or any of the appellant’s hearing loss as it presented at the time of the 2018 claim was irrelevant to the decision. The decision was not, as it could have been, that only part of the hearing loss was caused by service (because some of the hearing loss presenting in 2018 had another, non-service, cause.) In the language of section 5A(1)(a) of the Pensions Appeal Tribunals Act 1943 and regulation 3(1)(a) of the Specified Decisions Regs, (the lack of service) causation was the ground on which the claim was rejected.

21. As the appellant had left the Army by the time of the decision, for completeness the decision also considered whether article 9(1)(c) of the AFCS was met, but this was also rejected. It did so because “[f]ollowing the audiogram in March 2016, there is no medical evidence of noise exposure due to service. [The appellant was] downgraded to protect you from any noise exposure. [S]ervice is not the predominant cause of worsening of the hearing loss.” The medical advice also addressed worsening and article 9(1)(c), though that advice was not expressly incorporated into the Secretary of State’s decision or the reasons for it (albeit the advice is in almost identical terms to the decision and the reason for it). The relevant part of the medical advice on ‘worsening’ reads:

“Following the audiogram in March 2016, there is no medical evidence of noise exposure due to service. [The appellant] was downgraded to protect him from any noise exposure. [T]herefore service is not the predominant cause of worsening of the hearing loss. Worsening can be rejected under Article 9[(1)](c).”

22. This decision was challenged by the appellant. In this (first) appeal the appellant argued:

“[t]he hearing test are inconsistent and hearing loss is [definitely] severe and caused by noise from service. I had low concentration at times and confusion with the noises to respond to I had to arrange a hearing test in Germany on my own and there it was confirmed that there is a hearing problem”.

On its face, this appeal was arguing that the hearing loss was caused by a service rather than that it was made worse by service.

23. The Secretary of State reconsidered the decision post this appeal but maintained it. In that reconsideration it was said that the Secretary of State remained content on the balance of probabilities that the appellant’s hearing loss was not wholly or partly caused by service. This was because:

“Whilst it is agreed that the objective and subjective hearing tests are inconsistent and conflicting with some evidence to support a diagnosis of

bilateral sensorineural hearing loss, there remains no evidence within your medical records of unprotected noise exposure during your Army service.”

24. In the appeal response to what I will term the (first) First-tier Tribunal, the Secretary of State referred to the decision under appeal as being a specified decision that “the condition hearing loss is not due to, or made worse by, service” and asked the tribunal to:

“decide if the claimed condition Hearing loss is either predominantly caused by, or predominantly made worse by, service in accordance with the rules of the [AFCS].”

I would note, again, that no part of this ‘section 5A(1)(b) of the Pensions Appeal Tribunals Act 1943’ question to the (first) First-tier Tribunal was about the extent of the appellant’s hearing loss. Nor was the question being asked whether the appellant had any hearing loss. The Secretary of State was only asking the (first) First-tier Tribunal to decide whether the claimed condition was caused (or made worse) by service.

25. On 15 June 2021, the (first) First-tier Tribunal allowed the appeal. Its decision reads:

“The unanimous decision of the Tribunal was to allow the appeal against the decision of the respondent that his hearing loss was not predominantly caused by service.

The tribunal found that the appellant suffered from bilateral sensorineural hearing loss and that it was predominantly caused by service.”

In making the first finding – that the appellant suffered from bilateral sensorineural hearing loss – the (first) First-tier Tribunal in my judgement answered a question it had not been asked.

26. In its reasons for the decision this (first) First-tier Tribunal took the view that the claim had been refused on the basis that “the appellant’s hearing tests were inconclusive as to whether he had suffered hearing loss and that, if he had done so, he had not shown that any such hearing loss was caused by service”. The (first) First-tier Tribunal then proceeded to address both issues. It found on the balance of probabilities that the appellant suffered from bilateral sensorineural hearing loss. In so doing, the (first) First-tier Tribunal founded particularly on the Institute of Naval Medicine’s report of 16 October 2018, which it found was the most reliable and objective report. It was also the most recent. Given the main ground of appeal concerns what the (first) First-tier Tribunal decided or found as a fact about the appellant’s hearing loss, I set out the most relevant parts of its reasoning around the Institute of Naval Medicine report.

“3. The claim was refused on 19 February 2019...on the basis that the appellant’s hearing tests were inconclusive as to whether he had suffered hearing loss and that, if he had done so, he had not shown any such hearing loss was caused by service.....

14. On 16 October 2018, tests were conducted by the Institute of Naval Medicine (INM) in Gosport. These test used Auditory Steady State Response (ASSR), which is a way to assess hearing loss by objectively evaluating the electrophysiological thresholds in a subject. The INM test result...and the report based thereon indicated that the appellant had

bilateral hearing loss of 65dB across the four frequencies measured, with the exception of at 500Hz in his right ear, which was normal.

15. As noted above the tribunal was presented with conflicting audiometric evidence, which included conflicting results between objective tests in Swindon, Paderborn and by the INM in Gosport. Of this evidence, however, the tribunal found the INM report, which was also the most recent, was the most reliable. The tribunal found that the Defence Audiology Service at INM is a centre of excellence and used a modern and reliable method to assess the appellant's hearing loss, which, whilst yielding results which were inconsistent with those from Swindon, were supported by those from Paderborn.

16. The findings of the INM were also supported by the appellant's subjective account of hearing loss and the fact that he continued to wear, and apparently benefit from, the hearing aids prescribed in Paderborn.

17. The tribunal therefore found that, on the balance of probabilities, the appellant suffered from bilateral sensorineural hearing loss....

19. The tribunal could find no evidence of noise exposure outside service and found that, in the absence of another cause, the most likely cause of the appellant's hearing loss was noise exposure in service.

20. Accordingly, the tribunal found that the appellant's hearing loss was predominantly caused by service and the appeal was allowed to this extent."

27. This (first) First-tier Tribunal's decision was not challenged by either party.

28. The appellant having succeeded in establishing under article 8 of the AFCS that he had an injury (the hearing loss) which had been caused by service, the Secretary of State then had to decide under article 15 of the AFCS the benefit payable for that injury (that is, the hearing loss). Importantly, it is not disputed that that (second) decision remained to be made. In other words, the appellant accepts that the Secretary of State (and, if that second decision was disputed, the First-tier Tribunal on appeal) still as a matter of law had to decide the extent of the appellant's hearing loss.

29. In a decision dated 14 October 2021 the Secretary of State decided that the appellant's injury of hearing loss did not merit any award under the tariff scheme in the AFCS. The decision of 14 October 2021 stated that there was no evidence of "blast injury to ears of acute acoustic trauma due to impulse noise", and accordingly in order for an award to be made there had to be evidence that the appellant had bilateral permanent hearing loss of 50-75dB averaged over 1, 2 and 3kHz (per Table 7 in Schedule 3 to the AFCS at Item 13, level 8). The 14 October 2021 decision said that on receipt of the First-tier Tribunal's decision the appellant's case had been referred to Veterans UK Medical Services. Those Services had observed that an audiogram performed in an audiology clinic on 15 March 2016 had (a) shown (only) high frequency hearing loss, with the appellant being advised to wear increased hearing protection, and (b) confirmed an average hearing loss over 1, 2 and 3kHz of (only) 25dB on the left and 26dB on the right. In other words, the hearing loss was not as severe as 50-75dB, and therefore no tariff award could be made.

30. In seeking medical advice before making the above decision, the Secretary of State's decision maker said that it seemed it had been accepted that the appellant had been a drummer in service, had driven a Warrior vehicle and had been on firing ranges,

but at the time he would have been provided with hearing protection. However, the (first) First-tier Tribunal had ruled that the most likely cause of the appellant's hearing loss was noise exposure in service. The decision maker drew the Medical Advisor's attention to the Institute of Naval Medicine's report of 16 October 2018.

31. The Medical Advisor's advice referred to an audiogram of 15 September 2016 which had shown severely abnormal hearing thresholds across all frequencies despite no further exposure noise. An ENT assessment in Germany in November 2016 had produced broadly similar results to those in March 2016. The medical advice continued by saying that the accepted noise exposure due to service had been prior to the audiogram in March 2016 and there was no evidence of noise exposure after March 2016. It further stated that it was medically accepted that once an individual was removed from the source (of the noise), no further damage could arise from it. Any further hearing loss the appellant suffered after March 2016 could not, therefore, be attributable to service. (This was seemingly the basis for distinguishing the Institute of Naval Medicine's report of 16 October 2018.) And the audiogram of 15 March 2016 showed only hearing loss over 1, 2 and 3kHz of 25dB on the left and 26dB on the right.

32. It was this decision that the appellant appealed to the FTT and which the FTT upheld. Adopting the wording used by the FTT in its decision notice, the question before the FTT under section 5A(1)(b) of the Pensions Appeal Tribunals Act 1943 and regulation 3(1)(b) of the Specified Decisions Regs was where to place the accepted condition (i.e., the hearing loss) in the tariff in Part 1 of Schedule 3 to the AFCS.

33. The FTT's decision was to:

“dismiss the appellant's appeal against a decision by the respondent to place his accepted condition:

Bilateral noise induced sensorineural hearing loss:

at or below tariff level.”

34. In its reasons for decision the FTT recorded as the “Background of the appeal” that the appellant's claim had initially been rejected as it was not accepted that the appellant's hearing loss was caused by noise exposure in service, but on appeal the (first) First-tier Tribunal had allowed the appeal and found the appellant suffered from BNISHL which was predominantly caused by service. As for the decision under appeal to the FTT, the FTT described it as a decision that the appellant had not reached the required level of hearing loss for an award under the AFCS, and therefore the accepted condition of BNISHL fell below tariff level. The FTT said that the respondent had considered that the accepted noise exposure was prior to 2016 and that the most appropriate hearing test was an audiogram dated 2016, after which the appellant had been advised to wear increased hearing protection.

35. The appellant was represented by Mr Searle before the FTT. His argument did not rely on an analysis of the many and differing hearing test results in the FTT's bundle. The appellant argued, instead, that the FTT was bound by the findings of the (first) First-tier Tribunal and, in particular, was bound by the finding that the Institute of Naval Medicine's report of 16 October 2018 was the most reliable and most accurate record of the appellant's hearing loss. At that stage, the appellant's argument was founded on (issue or cause of action) estoppel to the effect that where an issue had been determined between the parties in earlier proceedings, it was binding on them in

subsequent proceedings: per *Virgin Atlantic Airways Ltd v Zodiac Seats Ltd* [2013] UKSC 46; [2014] 1 A.C. 160.

36. In rejecting these arguments, the FTT stated that it was not satisfied that the (first) First-tier Tribunal had addressed its mind to the matter of quantum or tariff selection when it gave its reasons for its entitlement decision. Moreover, the FTT was satisfied that the (first) First-tier Tribunal had no intention of binding the FTT in deciding the correct tariff selection. In the FTT's view, the main finding of the (first) First-tier Tribunal was that the appellant had suffered hearing loss due to service, rather than the quantum of that loss. Looking afresh at the hearing tests before it, the FTT said that it had before it a very clear trail of evidence from cortical evoked response audiometry (CERA) tests. These in the view of the FTT were more reliable than the audiogram tests. The audiogram tests had given inconsistent and unreliable results. Given the very clear thread of evidence of CERA tests between February 2017 and November 2018 showing normal hearing, the FTT said that it could not consider itself bound by the (first) First-tier Tribunal, which the FTT said was dealing with a different appeal. The FTT concluded its reasons for dismissing the appeal as follows:

“The Tribunal is satisfied that, at most, the appellant's hearing loss due to service can be shown to be as recorded in the March 2016 audiogram, and there is a strong argument that he has no reliably verified hearing loss. The [Institute of Naval Medicine] was not asked to comment on the flat line hearing loss across all frequencies, which is not consistent with noise induced hearing loss. The Tribunal finds that the decision that the hearing loss is below tariff is correct.”

Grounds of appeal

37. Pursuant to permission granted by the First-tier Tribunal, the appellant appeals to the Upper Tribunal on three main grounds.

38. **Ground 1** is that the FTT erred in law by allowing the respondent to relitigate factual matters finally decided by the (first) First-tier Tribunal. In essence, this contains the key argument that the Secretary of State on the tariff decision, and on appeal the FTT, was bound by the issues of fact finally determined by the (first) First-tier Tribunal which were common to both the entitlement decision and the tariff selection decision.

39. As I have indicated earlier, this main ground of the appeal is not based on any estoppel argument but the argument that the FTT erred in not following the approach set down in paragraphs [32]-[39] of *SSHD v BK (Afghanistan)* [2019] EWCA Civ 1358; [2019] 4 WLR 111, and factor 6 within para. [32] of *BK (Afghanistan)* in particular, which says:

“(6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.”

40. Reliance was also placed on *TK (Consideration of Prior Determination, Directions) Georgia* [2004] UKIAT 149 under the first ground of appeal, and the statement in paragraph [19] of *TK* that :

....Unless some very good reason was advanced to the contrary, for example, compelling new evidence to show that X's evidence (which

originally had been disbelieved) was mistakenly appraised by the original Adjudicator, a future Adjudicator is, in the Tribunal's view, not merely entitled to read the Determination in X's case but also to treat it as determinative as to X's account."

41. The first ground of appeal argues that as a result of this case law, the FTT erred by permitting the Secretary of State to re-litigate the same arguments he had made before the (first) First-tier Tribunal, namely the Secretary of State's argument that the March 2016 audiogram was the most reliable measure of the appellant's hearing loss and that it should be preferred to the Institute of Naval Medicine's report of 16 October 2018 because any hearing loss after March 2016 was not attributable to service. In the hearing before me the point was put slightly differently. It was argued that the FTT had erred in law by allowing the issue of causation (that is, whether all of the appellant's hearing loss presenting in 2018 was caused by service) to be relitigated

42. **Ground 2** is that the FTT erred in law by failing to give the parties a reasonable opportunity to address relevant matters. It is argued under this ground that the parties ought to have been afforded the opportunity to address the FTT's view that the flat line hearing loss in the Institute of Naval Medicine's report was not consistent with typical noise induced hearing loss.

43. **Ground 3** is that the FTT erred in law by reaching a decision that no reasonable First-tier Tribunal could have reached. It is said under this ground that no reasonable First-tier Tribunal could have concluded that the Institute of Naval Medicine's report was not consistent with noise induced hearing loss given (it is argued) "there was a total absence of medical opinion before the [FTT] to support such a finding".

The Secretary of State's submissions on the appeal

44. In opposing this appeal to the Upper Tribunal the Secretary of State for Defence argues as follows.

45. First, the sole issue for the (first) First-tier Tribunal was whether the appellant's injury was caused by service. That tribunal was not deciding the extent of any injury caused by service. It had qualified its finding that the appellant's hearing loss was predominantly caused by service, and the appeal before it was allowed, to this extent. Nor had the (first) First-tier Tribunal made any finding as to the extent of the appellant's hearing loss. The extent of the appellant's hearing loss remained to be decided, and that is what had occurred, leading to the FTT's decision.

46. As for the appellant's first ground of appeal, the Secretary of State argued that *BK (Afghanistan)* is only authority for the proposition that the earlier finding or decision is a starting point, rather than being determinative. This was plain from paragraph [43] of *BK (Afghanistan)* where the Court of Appeal said:

"... That ...raised the question of the appropriate response to [the Adjudicator's] earlier findings of fact. [Counsel for the SSHD] ...accepted that as a matter of practice, the tribunal must address its mind to the reasons put forward by the party which is seeking to depart from the previous findings as to why that finding is unreliable so that it should in effect be carried forward into the determination of the appeal now before it. That must be right given what the UT said in the *Mubu* case about the earlier decision being a starting point, rather than determinative of the issue.

47. Moreover, in this context *SSHD v Patel* [2022] EWCA Civ 36 (at paragraph [31]) makes it clear that estoppel does not apply, but that the overarching consideration is one of fairness:

“...the proper approach to be taken by a FTT judge faced with a decision made in an earlier appeal was set out fully at [45] to [50] of [*Sultana v SSHD* [2021] EWCA Civ 1876]. It would not be helpful to repeat the analysis other than in the following very summary form. The essential position is that the second FTT judge cannot be subject to any principles of estoppel in relation to an earlier finding. Rather, the judge must conscientiously decide the case in front of them applying principles of fairness. Those principles include the potential unfairness of requiring a party to re-litigate a point on which they have previously succeeded. These propositions were drawn from *Devaseelan, Djebbar v SSHD* [2004] EWCA Civ 804 and *BK (Afghanistan)*.”

48. The Secretary of State’s primary argument opposing the first ground of appeal is that there was no necessary overlap between the matters decided, or findings made, by the (first) First-tier Tribunal and that which was decided/found by the FTT, and therefore the *BK (Afghanistan)* line of case law did not apply.

49. In the alternative, the Secretary of State argued that if the FTT’s findings had overlapped with those made by the (first) First-tier Tribunal, the FTT had, per para. [43] of *BK (Afghanistan)*, sufficiently and conscientiously addressed its mind to whether it should depart from any findings said by the appellant to have been made by the (first) First-tier Tribunal.

50. Turning to grounds 2 and 3, the Secretary of State argued that the expert FTT had addressed all the relevant medical evidence in detail, the consideration that flat line hearing loss is not consistent with noise induced hearing loss is matter of general medical knowledge which it was appropriate for the FTT to apply, and in any event was only one part of the FTT’s analysis. In these circumstances, the FTT did not need to raise the point with the parties, and it had arrived at a decision that was rationally open to it.

Oral argument on ground 1

51. One focus of the oral argument of the parties before me concerned what the (first) First-tier Tribunal had decided on 15 June 2021.

52. The appellant argued that the (first) First-tier Tribunal had decided that all of his hearing loss had been (predominantly) caused by service. Accordingly, albeit on the basis of the *BK (Afghanistan)* line of case law, it had been wrong for the FTT to have trespassed on this and redecide the extent to which his hearing loss had been caused by service.

53. The respondent argued that the issue before the (first) First-tier Tribunal was limited to whether the appellant had any hearing loss that had been caused by service. In overturning the Secretary of State’s negative decision on this issue all the (first) First-tier Tribunal had been deciding was that the appellant had an injury (hearing loss) which had been caused by service. But that tribunal was not in so doing assessing the extent of the appellant’s hearing loss. Further, and in the alternative, all the FTT had done was to assess the extent of the appellant’s hearing loss on the basis of all the evidence before it and found it fell below the minimum tariff in the AFCS, and it was not in so doing deciding the extent of the hearing loss caused by service.

54. As will become apparent in the discussion below, in my judgement the correct approach to identifying what the (first) First-tier Tribunal had decided is (i) to consider what question or issue was before it, and (ii) in that context consider what it had decided.

BK (Afghanistan) and related case law

55. It is convenient at this stage to consider *BK (Afghanistan)*, and related case law, in a little more detail before turning to discuss the grounds of appeal. It was not argued before the FTT and so has not been subject of any consideration by that tribunal, but the broad considerations arising under it are similar to those that arose under the estoppel argument which was made to the FTT.

56. As I have said above, the estoppel argument was not pursued before me. This was on the basis that estoppel not applying in or between First-tier Tribunals is the binding legal effect of *BK (Afghanistan)* (at paragraphs [37], [39] and [44]) *Sultana v SSHD* [2021] EWCA Civ 1876 (at [35] and [49]-50) and *SSHD v Patel* [2022] EWCA Civ 36 (at 31)). I proceed on that basis in deciding this appeal.

57. All of the above three decisions of the Court of Appeal arose in the context of adjudication on immigration claims, latterly in the First-tier Tribunal (Immigration and Asylum Chamber). The important foundational basis of all three decisions of the Court of Appeal is that the first adjudicator or First-tier Tribunal had made a material finding of fact in deciding the appeal before them and that issue of fact then became relevant in later and separate appeal proceedings (possibly involving different parties, though the Secretary of State would be the same respondent) before a second adjudicator or First-tier Tribunal. The issue of law that arose was the extent to which the second adjudicator or First-tier Tribunal was bound to accept the finding of fact.

58. The eight factors set out in *BK (Afghanistan)* are derived from *Deveseelan v SSHD* [2002] UKIAT 702, and are as follows:

- “(1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.
- (2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.
- (3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.
- (4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.
- (5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.
- (6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's

determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.

(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.

(8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case."

59. It is important to stress a number of points about the eight *Devaseelan* factors summarised in paragraph [32] of *BK (Afghanistan)*.

60. First, they were preceded, in para. [31], with a discussion of the case in *Devaseelan*. That context was:

"31..... The proper approach of the second tribunal should reflect the fact that the first adjudicator's determination stands as an assessment of the claim that the appellant was then making at the time of that determination. It is not binding on the second adjudicator but on the other hand the second adjudicator is not hearing an appeal against it. It is not the second adjudicator's role to consider arguments intended to undermine the first adjudicator's determination but the second adjudicator must be careful to recognise that the issue before him is not the issue that was before the first adjudicator:

"38. ... In particular, time has passed; and the situation at the time of the second adjudicator's determination may be shown to be different from that which obtained previously."

61. Second, they are dependent on, here, the (first) First-tier Tribunal having made a finding of fact in its decision on the appeal before it which the FTT may have needed to reconsider in deciding the appeal which was before it. (Given estoppel is not in play, the appellant accepts that as a matter of law the FTT was not bound by any finding of fact made by the (first) First-tier Tribunal.)

62. Third, the factors are guidelines. They are not laying down any strict legal code that must be followed.

63. Fourth, the guidelines seek to ensure consistency of approach by decision makers and respect finality of litigation. However, finality of litigation is subject always to the discretion of the tribunal (or court) if wider interests of justice so require. And, per paragraph [30] of *Djebbar v SSHD* [2004] EWCA Civ 804, "perhaps the most important feature of the guidance is that the fundamental obligation of every [First-tier Tribunal] independently to decide each new application on its own individual merits was preserved": per paragraphs [34]-[39] of *BK Afghanistan*.

64. Fifth, the first decision or finding of fact is a starting point, it is not determinative: para. [43] of *BK Afghanistan*. This in my judgement very significantly waters down what was said in *TK* (see paragraph 40 above). However, the case law still emphasises that the "second FTT judge necessarily will look for a very good reason to depart from the earlier findings. Whether the evidence could have been adduced at the previous hearing may be relevant to that issue. Equally, a very good reason may be that the

new evidence is so cogent and compelling as to justify a different finding”: per paragraph [37] of *Patel*.

65. Sixth, the key consideration is fairness. This is made clear from paragraph [44] in *BK (Afghanistan)* where the Court of Appeal said that it did not:

“44...accept that in addressing the question of whether the finding of fact should be carried forward in that way, the tribunal is only entitled to look at material which either post-dates the earlier tribunal's decision or which was not relevant to the earlier tribunal's determination. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them. The basis for the guidance is not estoppel or res judicata but fairness. A tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal. (The underlining is mine and has been added for emphasis.)

See further, *Sultana* at paragraph [50] and (as set out in paragraph 47 above) *Patel* at paragraph [31].

66. I need to make one final observation about this *BK Afghanistan* line of case law. The Secretary of State accepted for the purposes of this appeal that that line of case law applies to equal effect in the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal. I have, accordingly, not heard any argument to the contrary, and I proceed on that same assumed basis. However, I am mindful that the same policy considerations that led to the *BK Afghanistan* line of case law (e.g., per paragraph [27] of *Ocampo v SSHD* [2006], as well as fairness, the “maintenance of proper immigration control”) may not have an analogue in armed forces compensation appeals. The approach of the Court of Appeal in the *Duncan and McWilliams* case which I discuss immediately below, as well as the possible application of a similar rule to that set out by Baroness Hale in paragraph [41] of *Gillies v SSWP* [2006] UKHL 2 (that the system tries to ensure that the claimant receives the correct award of benefit), might suggest a different approach may apply in AFCS (and War Pensions) appeals.

Discussion and conclusion

Ground 1

67. The decision of the Court of Appeal in *Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043; [2010] AACR 5 provides general (and binding) authority for the proposition that the relevant date for assessing the injury is the date of the decision on the claim (or that aspect of the claim) and not the date of the injury itself, and that the task of the decision maker is to identify the descriptor most accurately describing the injury: see paragraphs [47]-[55] and [110] of that decision. As the Court of Appeal made plain (at para. [50]) “all relevant evidence before the tribunal should be considered when assessing which injuries were caused by service, and what their actual and likely trajectories were”.

68. *Duncan and McWilliams* also explains that the intention behind the immediate predecessor to the AFCS (with which it was concerned, though the same must in my view apply to the AFCS) “was to provide a fair system, easy to administer” (at paragraph [2]) and, as the initial decisions on claims is taken by lay persons appointed by the Secretary of State, it was important that “the scheme should be relatively simple”

(para. [3]). The Court of Appeal later refers to decision making under the AFCS being “a practical kind of jurisprudence” and the AFCS being “a practical scheme intended to work broad justice” (para. [93]).

69. As I have foreshadowed in paragraph 54 above, the identification of what the (first) First-tier Tribunal was deciding must begin with the statutory basis under which the appeal came before it and on which it was to be decided. That is covered primarily by section 5A of the Pensions Appeal Tribunals Act 1943.

70. Section 5A of the Pensions Appeal Tribunals Act 1943 deals with appeals against specified decisions made under the AFCS. Under section 5A(1)(b) the (only) question for the (first) First-tier Tribunal was “whether the [Secretary of State’s decision of 19 February 2019] was rightly made on that [specified] ground”. As was confirmed by the three-judge panel of the Upper Tribunal in paragraph [25] of *JM v SSD* [2015] UKUT 332 (AAC); [2016] AACR 3, the ground of the Secretary of State’s decision is that the statutory condition of entitlement was not satisfied. *JM* was confirming what was said in paragraph 12 of *CAF/656/2006*. Paragraph 11 of *CAF/656/2006* (further) sets out that the wording of section 5A(1)(B) makes apparent that it is the decision appealed against and the ground on which that decision was made which define the scope of the appeal.

71. What then was the specified ground of the 19 February 2019 decision of the Secretary of State? In my judgement, the ground was, as the Secretary of State contends, (only) that the appellant’s hearing loss was not wholly or partly caused by service. The key reason for that decision (which as *CAF/656/2006* and *JM* confirm is not the ground on which the Secretary of State’s decision was made) was that the appellant would have been sufficiently protected against excessive noise in the workplace (reasoning with which the (first) First-tier Tribunal very arguably did not grapple, though that is not a matter for me as that tribunal decision was never challenged and is not under appeal before me).

72. No part of the Secretary of State’s decision of 19 February 2019 purported to determine the extent of the appellant’s hearing loss or the extent to which it was caused by service. That this was the ground of the Secretary of State’s decision is, moreover, consistent with terms of article 8(1) of the AFCS and the critical entitlement provision that the appellant had an injury which was caused by service. Bearing in mind that the appellant’s claim was (understandably) put on a fairly general basis about the loss of his hearing in both ears and that the hearing loss had been caused by service, and bearing further in mind (per *Duncan and McWilliams*) the need for a non-technical approach to adjudication by the Secretary of State’s decision makers, it seems to me that what the (first) First-tier Tribunal was limited by section 5A(1)(b) of the Pensions Appeal Tribunals Act 1943 to deciding was whether the Secretary of State had been right to decide that none of whatever hearing loss the appellant may have had had been caused by service. That specified decision of the Secretary of State on its own determined, per regulation 3(1)(a) of the Specified Decisions Regs, whether a benefit was payable. And that decision, following *JM* and *CAF/656/2006*, was a decision that the statutory condition of entitlement in article 8 of the AFCS was not met. In these circumstances, it was not necessary, indeed it would have been illogical, for the Secretary of State to have made a further specified decision, under regulation 3(1)(b) of the Specified Decisions Regs, about the amount payable under an award of benefit. And it was at that regulation ‘3(1)(b) stage’ of specified decision making in this case

that the extent of the hearing loss, and potentially the extent of the hearing loss caused by service, came into issue.

73. I am mindful that section 5A of the Pensions Appeal Tribunals Act 1943 may not be the end of the matter as it can be supplemented by section 5B of the same Act. Section 5B(a) mirrors section 12(8)(a) of the Social Security Act 1998 and required the FTT in this case to consider any issue raised by the appellant (or the Secretary of State) in relation to deciding whether the Secretary of State's specified decision as to satisfaction of article 8 of the AFCS was rightly made. It seems to me unlikely that that section 5B(a) consideration could extend to deciding the entirely separate and distinct issue, under regulation 3(1)(b) of the Specified Decisions Regs, of the level of any award to be made to the appellant for his bilateral hearing loss. That would seem to run contrary to the need for the issue raised in the first appeal to be *in relation to whether article 8 of the AFCS was satisfied*. Moreover, it is plain the (first) First-tier Tribunal did not take this step and, as I have noted above, it is no part of the appellant's case that a decision on the correct tariff level was not required after the (first) First-tier Tribunal's decision.

74. However, even if it is arguable that section 5B(a) of the Pensions Appeal Tribunals Act 1943 enabled the appellant to raise an issue about the extent to which his hearing loss had been caused by service on his appeal about satisfaction of article 8 of the AFCS, and even assuming he was raising such an issue in his appeal when he said the "hearing loss is [definitely] severe", I can find nothing in the (first) First-tier Tribunal's decision that gives any clear consideration to this raised issue, let alone a clear decision by that tribunal on that issue. That, I have to say, is unsurprising. At this stage in the decision-making process, no decision had been made as to the severity of the appellant's bilateral hearing loss. The (first) First-tier Tribunal would have known this and have known that its decision would have led to a tariff decision being made by the Secretary of State (i.e., a decision as to the extent of the hearing loss). Moreover, the appellant's argument about the severity of his hearing loss was not directly or obviously about how much of that loss had been caused by service, and nothing in the Secretary of State's decision-making on whether article 8 was satisfied was in terms of it only being some of the hearing loss that was caused by service. In any event, even if the (first) First-tier Tribunal ought to have considered this issue under section 5B(a), there is nothing showing it clearly made a decision on this issue, and its decision is not under appeal.

75. It is the case, however, that as a matter of fact the (first) First-tier Tribunal considered that two issues arose on the appeal before it: first, whether the appellant had any bilateral hearing loss and, second, if he did, whether the hearing loss was caused by service. For the reasons I have given above, I consider the (first) First-tier Tribunal was wrong to consider, per section 5A(1) of the Pensions Appeal Tribunals Act 1943, that an issue before it was whether the Secretary of State had rightly rejected the claim on the ground that the appellant had no injury/hearing loss. But the (first) First-tier Tribunal did decide both that the appellant suffered from bilateral sensorineural hearing loss and that that injury had been caused by service. It may be that its consideration and decision on the first issue arose under section 5B(a) of the Pensions Appeal Tribunals Act 1943, though its decision and reasoning is silent on this if this was its reasoning.

76. It was in the context of deciding whether the appellant had any hearing loss that the (first) First-tier Tribunal relied on the Institute of Naval Medicine's (INM's) report

and, per paragraph 17 of its reasons, “therefore found that....the appellant suffered from bilateral sensorineural hearing loss”.

77. However, even assuming that whether the appellant had bilateral hearing loss was an issue on that appeal, this was the sole context for the (first) First-tier Tribunal decision and its reliance on the INM report. It was satisfied that the appellant had hearing loss because of its acceptance of the cogency of the evidence in the INM report, and the (first) First-tier Tribunal then further decided that the hearing loss had been caused by service. But, as I have already said, it did not purport to decide the level of the hearing loss (i.e., and per *Duncan and McWilliams*, identifying the descriptor most accurately describing the injury).

78. The more difficult issue is whether the (first) First-tier Tribunal decided that the whole of the appellant’s 2018 presenting hearing loss was caused by service. It did not expressly make this decision. Moreover, as I have indicated above, it did not really grapple with the Secretary of State’s case on causation that the appellant would have been sufficiently protected in the workplace and so any hearing loss the appellant had could not have been caused by service. Additionally, it was not, for the reasons I have endeavoured to give above, an issue which the (first) First-tier Tribunal was legally bound to decide. Furthermore, its use of “to this extent” indicates that it considered its decision was limited. On the other hand, the (first) First-tier Tribunal rejected the Secretary of State’s reliance on causation (albeit it may not have adequately explained why it did so), and as it was assessing matters at the date of the decision on the claim, it may be argued that it was deciding that all of the hearing loss it decided the appellant had had been caused by service.

79. In the end, I have decided it is not necessary for me to decide this point. I say this because the appellant, having abandoned his estoppel argument, accepts that the FTT was entitled as a matter of law in deciding the tariff decision (which he accepts it was required to do on his appeal) to redecide matters which the (first) First-tier Tribunal had decided. The appellant’s argument is that in so doing the FTT had to act in accordance with the guidance stemming from *BK Afghanistan* and it had failed to do so.

80. I would simply add, in terms of a general perspective that the extent to which an injury was caused by service can lawfully come into play at the stage of determining the amount payable under an award of benefit, finds support in consideration of some of the other injuries covered by Schedule 3 to the AFCS and the *Duncan and McWilliams* approach to how claims should be decided, as well as by the fact that article 8 of the AFCS does not necessarily require that issue to be decided at that stage. One particular injury I have in mind is the Mental Disorder descriptor set out in paragraph 12 above. It requires that the mental disorder caused by service causes functional limitation or restriction which.....is expected to continue for five years. There may be no dispute in such a case that the service person’s initiating mental disorder was caused by service. However, on its face this descriptor would seem to allow for consideration to be given to other non-service causes which might instead be said to be the cause of the functional limitation or restriction being expected to continue for five years, and that particular consideration may only arise at the stage of the identifying the most appropriate descriptor. As for *Duncan and McWilliams*, it identified a need for flexibility in decision making (see for example paragraphs [50] and [55] of the Court of Appeal’s decision) and seemingly did not discount reassessing which injuries were caused by service even at the tariff selection stage of decision-making: para [50].

81. Turning back to the first ground of appeal and whether the FTT erred in law in not following *BK (Afghanistan)*, it is no answer to that ground to say that this argument was not made to the FTT. The FTT has to be judged on whether it erred in law in coming to its decision and such an error can arise independently of the actual arguments made to the FTT.

82. Further, reliance on estoppel having been abandoned, it is not clear to me that the issue estoppel principle - that an issue which was necessarily common in both proceedings and which was decided in the earlier proceedings is binding in the second proceedings – necessarily reads across into the *BK Afghanistan* line of case law. *BK Afghanistan* itself makes plain (at para. [44]) that the basis for the guidance it endorses has nothing to do with estoppel. I am not sure, therefore, that it can be a complete answer to the appellant's first ground of appeal to show that there was no necessarily common issue in both appeal proceedings before the (first) First-tier Tribunal and the FTT, and therefore the *BK (Afghanistan)* line of authority does not apply.

83. This perspective would seem to be supported by the fact that in each of *BK Afghanistan*, *Sultana* and *Patel* it was a core finding of fact that was directly common in both sets of proceedings. In *BK Afghanistan* the common factual issue was whether the appellant had committed terrorist acts; in *Sultana* the common factual issue was whether the appellant had relied on false documents; and in *Patel* the common issue in both sets of proceedings was whether the appellant had committed deception, albeit the first finding that she had not committed a deception had been made in her husband's appeal. Moreover, paragraph [31] of *BK Afghanistan* identifies the key point as being the approach to be taken by the second tribunal to findings of fact made by the first tribunal. And it may be observed that in each of these three Court of Appeal cases the legal issues may be said to have been different: e.g., in *BK Afghanistan* the legal issue on the first appeal concerned BK's claim for asylum, the issue on the second appeal was the cancellation of the indefinite leave to remain BK had been granted five years after his claim for asylum had been decided against him. Additionally, the appellant's core argument under the first ground of appeal relies on the sixth guideline in paragraph [32] of *BK (Afghanistan)* which is concerned with findings of fact. Furthermore, his argument, based on *BK Afghanistan*, is that the FTT should have regarded as settled the (first) First-tier Tribunal's 'finding of fact' that the "INM report was the most reliable" report.

84. Where the lack of commonality between the statutory issues being decided by the two different tribunals may have some relevance is as a relevant factor bearing on that which it is that the second tribunal has to conscientiously decide when applying the *BK (Afghanistan)* guidance. The (first) First-tier Tribunal was, as is accepted, not deciding the level of the hearing loss. It decided, and only decided, whether the appellant had bilateral hearing loss and whether that injury was caused by service. The FTT had to decide, and per paragraph [44] of *BK Afghanistan*, conscientiously decide, the extent of the appellant's hearing loss.

85. However, I can put the observation in the immediately preceding paragraph to one side. This is because the crucial issue in this case, in my judgement, is the 'finding of fact' on which the appellant seeks to base his *BK Afghanistan* argument. That finding is that the "INM report was the most reliable" report. I have to say I have doubts about whether an assessment as to the reliability of evidence constitutes a finding of fact as opposed to being an evaluative judgement (see the discussion on this in paragraph [55] of *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575; [2022] 1 WLR 1002).

86. More importantly, however, based on the (first) First-tier Tribunal's reasoning that finding (if it was a finding of fact) was made **only** in the context of the (first) First-tier Tribunal deciding whether the appellant had (any) bilateral hearing loss. It was not made in the context of the (first) First-tier Tribunal deciding whether the hearing loss had been caused by service. Nor, it must follow, was it made in any adjudication the (first) First-tier Tribunal may have made as to the extent to which the hearing loss was caused by service. Even less so was it made in the context of that tribunal deciding the extent of the appellant's hearing loss. As is agreed, that separate statutory question remained to be addressed and answered only after the (first) First-tier Tribunal had made its decision. It was not therefore a finding by the (first) First-tier Tribunal that the extent of the appellant's hearing loss was, per what the INM report indicated, bilateral hearing loss of 65dB in each ear. The FTT in its decision did not either trespass on or subvert the (first) First-tier Tribunal's decision that the appellant had hearing loss or that the hearing loss had been caused by service. It was not therefore allowing either of those issues to be relitigated.

87. Translating this into the language of the *Devaseelan* guidance as set out in paragraph [32] of *BK Afghanistan*:

- (i) per guidance factor (1), the (first) First-tier Tribunal's decision was taken as the (necessary) starting point by the FTT, and that decision was an authoritative assessment of the appellant's status at that time on the basis of the issues before the (first) First-tier Tribunal at that time (namely, but limited to, whether the appellant had hearing loss which was caused by service);
- (ii) per guidance factor (6), although there was no new evidence before the FTT and the appellant was relying on the INM report, and even though the FTT accepted "the issues as settled by the [first First-tier Tribunal's] decision", the FTT in deciding the separate statutory question before it could not make its decision "in line" with the two issues decided by the (first) First-tier Tribunal. This is because it had to decide the separate statutory issue before it (the extent of the hearing loss) and that issue had not been settled by the (first) First-tier Tribunal; and
- (iii) per guidance factor (8), the first seven guidance factors did not cover the appeal to the FTT.

88. Accordingly, as factor (6) in the *Devaseelan/BK Afghanistan* guidance does not apply, and the first ground of appeal is founded on that factor (6) alone, the first ground of appeal must fail.

89. However, even if this is to read the *Devaseelan/BK Afghanistan* guidance too narrowly and too literally, and more broadly speaking the starting point for the FTT under that guidance was that the INM report had been found to be the most reliable evidence generally about the appellant's hearing loss, in my judgement the FTT did not offend against the more general guidance in *BK (Afghanistan)* (as endorsed in *Sultana* and *Patel*). I agree with the Secretary of State that, per paragraph [43] of *BK Afghanistan*, what the FTT had to do was "address its mind to the reasons put forward by the party [the Secretary of State] who was seeking to depart from the previous finding as to why that finding is unreliable". The FTT did this. The extent of the appellant's hearing loss had not been in issue before the (first) First-tier Tribunal and the FTT was "not satisfied that the previous Tribunal had addressed its mind to the matter of quantum or tariff selection when giving reasons for the entitlement decision,

and was satisfied that it certainly had no intention of biding any future Tribunal in deciding a tariff selection". Furthermore, the FTT set out why it did not consider the INM report to be the most reliable. And, in the proceedings before it, the FTT, in fairly and conscientiously deciding the appeal as to the extent of the appellant's hearing loss, gave the appellant adequate notice that it wished to consider the reliability of the INM report: see further on this under the second ground of appeal below.

90. For all these reasons, the first ground of appeal fails. I can take the remaining two grounds much more quickly.

Ground 2

91. The FTT in my judgment did not err in law in not giving the appellant an opportunity to address it on its view that the flat line hearing loss in the INM report was not consistent with typical noise induced hearing loss. I have concluded this for two reasons. First, the appellant's arguments through Mr Searle before the FTT were not concerned with cogency of the findings in the INM Report. The appellant's argument to the FTT was simply that it was bound by that report. Second, and in any event, I was taken through the transcript of the FTT's hearing and it is apparent that, notwithstanding the appellant's stance, the FTT did seek to raise with the appellant and Mr Searle concerns about the INM's report. The appellant did not seek an adjournment to address the concerns there might have been about that report. In these circumstances, I do not consider the FTT acted unfairly or otherwise erred in law when it relied in its reasoning (a) on the fact that the INM Report had not been asked to comment on flat line hearing loss across all frequencies, and (b) in finding that such flat line hearing loss was not consistent with noise induced hearing loss. In the circumstances of the appeal to the FTT and how it was argued, it seems to me that the FTT did its best to raise with the appellant, through Mr Searle, its concerns about the INM's report.

Ground 3

92. In the absence of any evidence showing the FTT was plainly and obviously wrong in its view about the Institute of Naval Medicine's report, and bearing in mind the specialist membership of the FTT and the need for it to bring that specialist expertise (medical as well as legal and military) to the evidence before it, the FTT did not make a legal perverse decision about that report.

**Approved for issue by Stewart Wright
Judge of the Upper Tribunal**

On 31st July 2024