THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

The appeal is allowed.

The decision of the tribunal given at Edinburgh on 5 August 2015 is set aside.

The case is referred to the Pensions Appeal Tribunal (Scotland) for rehearing before a differently constituted tribunal in accordance with the directions set out below.

REASONS FOR DECISION

1. The claimant, who is the widow of a deceased former serviceman, appealed against a decision of a pensions appeal tribunal disallowing an entitlement appeal on an appeal decision of the Secretary of State dated 10 August 2013. The tribunal were not satisfied that the claimant's deceased husband's condition of Follicular Lymphoma was attributable to service. The decision of the tribunal is set out at pages 456 to 462.

2. The claimant is represented by Dr Busby, who had also provided evidence in the appeal which the tribunal refused to admit. The tribunal refused to admit Dr Busby's evidence on two grounds. These grounds were as follows:

> "In Forbes' case the alleged exposure occurred during the 1980s, and he first presented with symptoms of lymphoma in 2009. The (claimant) commented that although he had been treated for other medical conditions in the period during which she had known him (1996 onwards) he had no recognised lymphoma symptoms prior to 2009. This would suggest that if his lymphoma could be related to previous radiation exposure, it would have to have been during service more than 20 years before it presented. Lymphoma is not known to be present but asymptomatic over such a long period.
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> The Appellant was unable to provide evidence to the contrary, although reference was made to material which we were unable to consider as a result of the Upper Tribunal Decision of Abdale and others [2014] UKUT 0477 (from page 244 onwards within Statement of Case) and a Directive from the President of PATS (at page 238 of Statement of Case). Accordingly whilst this material was available to both the Appellant and the Veterans UK the Tribunal was not able to consider same in our deliberations."

3. The claimant sought permission to appeal against this decision and on 13 December 2018 I granted permission to appeal on a restricted basis. In doing so I said:

> "However permission is restricted to the issue set out in the tribunal's statement in the second paragraph at page 459 in which the tribunal determined that they were unable to consider the material referred to in that paragraph by reason of the case of *dale & Others* cited therein."

4. Attached to my determination was the following direction:

> "The Respondent will have one month in which to make a short submission, with reference to authority, the tribunal rules and the Scots Law of evidence as to whether it erred in law in refusing to hear the evidence of Dr Busby. The respondent is also directed to make a submission in the light of paragraph 238 of the decision in *Abdale* as to (1) whether *Abdale* was binding on the tribunal given that it appears to be obiter, (2) whether the comments in *Abdale* from paragraph 237 related to admissibility of evidence from him or the assessment of it, (3) if it was related to admissibility what was the legal basis for excluding his evidence, (4) whether the authority at page 525 has any bearing on this case standing the basis upon which it was decided in paragraph 7 of the judgement, (5) whether the exclusion of the evidence breached the principles of fairness, (6) whether if the tribunal erred in law that breach was material and (7) how I should dispose of the case. The appellant will then have one month to reply."

5. The Secretary of State responded with a submission at pages 698 to 705. The claimant's representative responded with a submission at pages 936 to 949. Neither party sought an oral hearing of the appeal.

6. The direction of the President of the Pensions Appeal Tribunal Scotland referred to in the Reasons of the tribunal is set out at pages 238 and is in the following terms:

> "I refer to the application dated 14 November 2014 by the Secretary of State for a direction regarding the opinion evidence of Dr Busby and the appellant's response dated 5 December 2014.
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> In light of the decision of the Chamber President, Mr Justice Charles in Abdale & Ors. v. Secretary of State for Defence [2014] UKUT 0477 (AAC) and, in particular, his comments at paragraphs 237 to 249, I direct that Dr Busby's opinion evidence is not admissible as expert evidence in this appeal. Accordingly, his documentary evidence should now be removed from the statement of case."

7. The Secretary of State in responding to my direction sought to set out the effect of the decision in *Abdale* by Charles J. The Secretary of State submitted that the directions given by Charles J in paragraphs 237 to 249 of his decision were neither obiter nor binding. The Secretary of State went on to say:

> "5. Having decided in paragraph 236 that the appeals in *Abdale* should be allowed, Charles J next had to decide under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 whether to remit the cases to the FTT with directions for reconsideration or re-make the FTT's decision. He decided to remit with the direction 1(x) recorded in paragraph of Ouseley J's decision in Dr Busby's application for judicial review (p.525): *"Dr Busby may not give expert evidence (whether in writing, orally or otherwise) at the remitted hearing".* The appellants had opposed that direction. As Charles J stated in paragraph 237 of *Abdale, "I must deal with this issue [of Dr Busby's suitability to give expert evidence in cases of this type] because it is relevant to the directions I will give concerning the re-hearing of these appeals".* The relevant parts of *Abdale* are not *obiter* because they were necessary for Charles J's decision about what directions to give.
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> 6. The PATS is bound by a decision of the UT on a question of legal principle: *Dorset Healthcare NHS Foundation Trust v MH* [2009] PTSR 1112 at

> paragraph 37. A single judge of the UT will normally follow a decision of another judge of the UT on a question of legal principle in the interests of comity and to avoid confusion: *ibid.* The relevant parts of *Abdale* are not a decision on a question of legal principle. (The relevance of *Abdale* to these appeals is described in paragraphs 13 – 14 below.)

He then went on to submit:

> "7. The comments in paragraphs 237 – 249 in *Abdale* related to the assessment of Dr Busby's evidence rather than its admissibility.

The Secretary of State admitted in paragraph 8 of the submission that Charles J was not asked to decide whether Dr Busby's evidence was inadmissible. The submission made to him was that the First-tier Tribunal should give it no weight. I also accept that submission and note that as is set out in paragraph 5 of the Secretary of State's submission the instruction given about Dr Busby's evidence quoted therein was a specific direction to the tribunal which was to rehear the case that Charles J was deciding.

8. The Secretary of State then sought to deal with the relevance of *Abdale* to Pensions Appeal Tribunals in different cases. In his submission he said:

> "13. *Abdale* was relevant to the appellant's appeal to the PATS in two ways. First, it is evidence of what Charles J decided about Dr Busby's suitability to give expert evidence, to which the PATS is entitled to give weight: *Sinclair Gardens Investments (Kensington) Ltd v Ray* [2015] EWCA Civ 1246 at paragraphs 1 and 26.
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> 14. Secondly, Charles J's judgment was intended as guidance to tribunals presented with evidence from Dr Busby about the existence and effect of ionising radiation. That is clear from: (a) his rejection of the submission that the *"impact on future cases"* should stop him from dealing with Dr Busby's suitability because *"it would be wrong not to do so given the time, cost and effort expended in this case which would have to be repeated if it was left to other courts or tribunals"* (paragraphs 237); and (b) his statements that Dr Busby was not a suitable expert witness *"in cases of this type"* (paragraphs 239 and 240). Having heard him give extensive oral evidence, it was lawful and desirable for Charles J to give guidance about Dr Busby's suitability as an expert witness: *MN v Secretary of State for the Home Department* 2014 SC (UKSC) 183 at paragraphs 26 – 27, 34 and 37. The guidance is persuasive; not binding *MN at paragraphs 28, 30, 46 and 50 and 60."*

It is to be noted that the Secretary of State's position, which I accept, is that the guidance given by Charles J is persuasive and not binding.

9. In paragraph 15 of his submission the Secretary of State conceded that the tribunal erred in law but that the error was not material.

10. The Secretary of State submitted:

> 15. The PATS gave two reasons why it was *"unable to consider"* Dr Busby's report **(p. 459)**. The first was the decision in *Abdale.* It erred in law in thinking that *Abdale* prevented it from reaching its own view about whether the report should be considered. That error does not matter if the second reason can

stand. It was that the President of the PATS ("the President") had given a case management direction that Dr Busby's report *"is not admissible as expert evidence in this appeal".* It was procedurally fair for the PATS to refuse to consider Dr Busby's report on that ground.".

11. I accept the Secretary of State's submission in relation to the error in law identified by him in respect of the tribunal's view that *Abdale* prevented it from reaching its own view about whether the report of Dr Busby should be considered.

12. The second part of his submission involves the tribunal's reasoning in respect of the direction given by the President of the Pensions Appeal Tribunal Scotland. It is to be noted from paragraph 16 of the Secretary of State's submission that in making the direction the tribunal acted within the rules and that the direction made by the President was not challenged by the means available to the claimant. However it is accepted in paragraph 18 of the Secretary of State's submission that if the President's direction was unlawful the Secretary of State is content for me to determine that the decision appealed against to me was unlawful also. However it is the Secretary of State's clear submission that the tribunal did not err in law in giving that direction. The Secretary of State sets out the reasons for this at paragraphs 19 and 20 of his submission. It is said there:

> "19. Paragraph 5(1)(b) of schedule 1 to the 1943 Act provides for rules to be made about the admissibility of evidence in the PATS. Rule 12(5) of the 1981 Rules provides that the PATS *shall not refuse evidence tendered to them on the ground only that such evidence would be inadmissible in a court of law".* Thus the PATS may refuse evidence tendered on other grounds: see too rule 15(1) in relation to evidence of difficult medical and technical questions. It should decide whether to admit or refuse evidence in accordance with the presumption that all relevant evidence should be admitted unless there is a compelling reason to the contrary: *Atlantic Electronics Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2013] EWCA Civ 651 at paragraphs 30 – 31. Compelling reasons why evidence should be refused include: (a) the evidence is weak: *LN v Surrey NHS Primary Care Trust* [2011] UKUT 76 (AAC) at paragraphs 22 – 24; and (b) the burden that dealing with the evidence would put on the opposing party: *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534 at paragraph 6.
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> 20. For the reasons given in paragraphs 16 – 17 above, the President followed a fair procedure when she gave her direction. The SSD's application for the direction was based on Charles J's finding in *Abdale* that Dr Busby is not a suitable witness to give expert evidence in this type of case because he is not impartial **(p.236)**. The material before the President when she considered the application included:
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> (a) A copy of *Abdale*, which shows:
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> (i) The serious criticism that Charles J made of Dr Busby's objectivity after having had the benefit of hearing him give evidence. The President was entitled to give weight to Charles J's decision and be persuaded by his guidance.
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> (ii) The burden that dealing with Dr Busby's evidence put on the SSD. The issue of Dr Busby's suitability to give expert evidence took oral evidence spread over three days (paragraph

238) and two cross-examination bundles that included evidence from other (expert) witnesses (paragraphs 231, 243, 247 and 249). Dr Busby's evidence conflicts with the established scientific view (paragraphs 231 and 239(iv)). Therefore if the PATS were to consider his evidence, the SSD would have to lead expert evidence to answer it **(p.233).**

(b) The appellant's submission about the SSD's application, which does not address the problem of Dr Busby's lack of impartiality **(p.239)**.

(c) Dr Busby's report for the appellant, which includes more advocacy." [2]

13. In paragraph 19 of his submission the Secretary of State makes reference to the Pensions Appeal Tribunal (Scotland) Rules 1981. The rules insofar as pertinent to this appeal are contained in rules 12(1), (5) and (6). These rules are in the following terms:

12 - (1) The appellant may give evidence in support of his appeal and the appellant and the Secretary of State may, subject to the provision of the next following paragraph, call a doctor or any other witness, and may produce at the hearing any further documentary evidence not already in the possession of the tribunal.

……

(5) The tribunal shall not refuse evidence tendered to them on the ground only that such evidence would be inadmissible in a court of law.

(6) Subject to rule 22 and to any direction given by the President under rule 6 or by the Chairman under rule 15, every document tendered in evidence or considered by the tribunal for the purposes of the appeal shall be made available to the appellant or his representative (if any) and to the Secretary of State or his representative in such manner as the tribunal may direct.

14. Thus on the face of the rule the claimant was both entitled to submit the evidence of Dr Busby and have it considered. There is nothing in rule 15 which is headed "power of tribunal to take expert evidence" which deals with the exclusion of evidence tendered by the claimant. It is simply a power given to the tribunal to obtain expert evidence at its own volition. Thus the Secretary of State is dependent upon finding support from authority for the proposition that the evidence of Dr Busby should be not admitted for some compelling reason notwithstanding that all relevant evidence should be admitted unless there is a compelling reason to the contrary. The reason given by the President in this case was that in light of the decision in *Abdale* and in particular the comments of Charles J at paragraphs 237 to 249 Dr Busby's opinion evidence is not admissible as expert evidence in this appeal. The Secretary of State has given examples of cases in which such compelling evidence is said to exist. The question for me if the authorities support the proposition is whether there was such a compelling reason in this case, which on the face of it runs contrary to the rules.

15. I am not persuaded that in this case they do. There is no doubt that Charles J's criticism of Dr Busby's evidence given in *Abdale* is both trenchant and severe. It goes beyond whether Dr Busby's evidence should be admitted or excluded. It extends to the issue as to whether Dr Busby should be excluded as a witness. He set out a persuasive narrative as to why this is so. However, I do not consider that the President was entitled simply to make a decision on the admissibility of Dr Busby's evidence in the form a direction, based solely on the directions given by Charles J upon his own assessment of Dr Busby's suitability as an expert witness and his evidence itself in another case. She required to apply

her own consideration of the admissibility of evidence by Dr Busby tendered in the case which was before her, given the general rule in relation to the admission of evidence. Accordingly her direction erred in law. In the circumstances as the tribunal followed the direction of the President I hold its decision errs in law and must be set aside.

16. The case will be remitted to a freshly constituted tribunal for a rehearing. Whilst the Upper Tribunal and the Pensions Appeal Tribunal have no power to direct the claimant as to which representative she chooses to act for her in her appeal I consider that I am entitled to express my reservations about Dr Busby both representing the claimant and providing evidence which is crucial to the case which she wishes to make. There is a substantial difference between giving evidence and making submissions and if the same person is acting both as representative and witness there is a concern that evidence and submission could be confused. Quite clearly the evidence of Dr Busby will require to be assessed along with the other evidence in the case. I can see no reason why in making that assessment the tribunal cannot have regard to the guidance as to the quality and nature of Dr Busby's evidence as set out in *Abdale*. If that were to be the subject of submission before the new tribunal it is a further indication as to the desirability of the claimant separating her representation from the evidence she may wish to lead.

(Signed)
D J MAY QC
Judge of the Upper Tribunal
Date: 11 April 2019