



Australian Government

Defence Honours and Awards Appeals Tribunal

BARRY and the Department of Defence [2017] DHAAT 05 (02 February 2017)

File Number 2016/008

Re **Richard Barry**
Applicant

And **Department of Defence**
Respondent

Tribunal Ms Naida Isenberg (Presiding Member)
Mr David Ashley AM

Hearing Date 9 December 2016

Date of Decision 02 February 2017

DECISION

The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Richard Barry is not eligible for the award of the Republic of Vietnam Campaign Medal.

CATCHWORDS

FOREIGN AWARDS – Republic of Vietnam Campaign Medal – Tribunal bound by criteria

LEGISLATION

Defence Act 1903 – Part VIIC – Sections 110T, 110V(1), 110VB(2), 110VB(6)

REASONS FOR DECISION

Introduction

1. The Applicant, Mr Richard Joseph Barry, seeks review of the decision by the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he is not eligible for the award of Republic of Vietnam Campaign Medal (RVCM or the claimed award). Mr Barry had lodged an application for the award of the RVCM to the Directorate on 29 September 2015. His application was based on his service in Vietnam from 19 May 1969 to 3 September 1969.

2. On 2 April 2016, Mr Michael Cannon, Supervisor, Assessments and Awards within the Directorate informed Mr Barry that it had been determined that he was not eligible for the claimed award because he did not meet the eligibility criteria of serving a minimum of 181 days in Vietnam.¹ On 18 May 2016, Mr Barry applied to the Tribunal for a review of the Directorate's decision.²

The Tribunal's Jurisdiction

3. Pursuant to s110VB(2) the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1), and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence award or foreign award in response to an application. The Directorate made the decision to refuse the award of the RVCM to Mr Barry following his application, and the Tribunal has jurisdiction to review decisions in relation to the claimed award. The role of the Tribunal is to determine the correct or preferable decision having regard to the applicable law and the relevant facts.

Conduct of the Review

4. In accordance with the *Defence Honours and Awards Appeals Tribunal Procedural Rules* as amended, on 26 May 2016 the Chair of the Tribunal wrote to the Secretary of the Department of Defence seeking a report on the decision of Defence to deny Mr Barry the claimed award.³ On 7 July 2016, the Directorate, on behalf of the Secretary, provided the Tribunal with the Defence submission in the form of a written report.⁴ In that report the Directorate confirmed its position that Mr Barry is not eligible for the award of the RVCM because he did not complete the required 181 days' service in Vietnam. On 8 July 2016, the Tribunal provided Mr Barry with a copy of the Defence report seeking his comments and inviting him to submit any further material he may have in support of his application for review. On 8 August 2016 Mr Barry provided his comments.⁵ On 28 November and 3 December 2016, Mr Barry provided further information to the Tribunal.⁶

5. A hearing was conducted in Canberra on 9 December 2016 at which Mr Barry appeared by conference telephone, supported by Mr Grahame Kingston. Defence was

¹ DH&A – AF24957669 dated 2 April 2016

² Application for Review of Decision by Mr Barry to the Tribunal dated 18 May 2016

³ DHAAT/OUT/2016/179 dated 26 May 2016

⁴ DH&A/OUT/2016/0120 dated 7 July 2016

⁵ DHAAT/IN/2016/079 dated 11 August 2016

⁶ DHAAT/IN/2016/122 dated 30 November 2016

represented by Ms Margot Kropinski-Myers. Defence tendered further information,⁷ which was provided to Mr Barry for comment. On 17 and 19 December 2016, Mr Barry wrote to the Tribunal with his comments, which have been taken into account by the Tribunal in reaching its decision.⁸

Mr Barry's Service History

6. On 4 October 1967 Mr Barry enlisted in the Australian Regular Army Supplement (National Service) (ARA(NS)) with a two year enlistment period. Following recruit training he was posted to the 6th Battalion, the Royal Australian Regiment (6 RAR). On 8 May 1969, Mr Barry departed Australia for Vung Tau, Vietnam arriving on 19 May 1969. In Vietnam, Mr Barry served as a private soldier and on 3 September 1969 he departed Saigon by air arriving in Sydney on the same day. In total Mr Barry served 119 days outside of Australia, of which 108 were in Vietnam.

7. On 3 October 1969, Mr Barry discharged from the ARA (NS). His discharge certificate states that the reason was 'having completed the prescribed period of service in the ARA (NS)'.

8. For his service Mr Barry was awarded the:

- Australian Active Service Medal 1945 – 75 with Clasp 'VIETNAM';
- Vietnam Medal
- Australian Defence Medal; and
- Anniversary of National Service 1951-1972 Medal.

The Republic of Vietnam Campaign Medal

9. In May 1964 the Government of the Republic of Vietnam established its campaign medal, the RVCM. In September 1965 the Joint General Staff of the Republic of Vietnam issued a directive setting out the eligibility for the medal. The essence of the directive is as follows:

Article 1: All military personnel of the Republic of Vietnam Armed Forces (RVNAF) who have 12 months service in the field during wartime, may claim the Campaign Medal award.

Article 2: RVNAF personnel who do not meet the requirements of Article 1 qualify for the award if they were:

- *Wounded in Action*
- *Captured in action by the enemy, or missing while performing their duties, but were later released or escaped; or*
- *Killed in action or died while performing a mission entrusted to them.*
- *The activities needed to take place during the war.*

⁷ SO1 RFI/OUT/2016/AB29747465 dated 7 December 2016 and e-mail from Ms Dawes to Lieutenant Colonel Manton dated 6 December 2016– no Folios allocated,

⁸ Letter Mr Barry to Executive Officer DHAAT dated 17 December 2016, and email from Mr Barry to Tribunal dated 19 December 2016– no Folios allocated

Article 3: *Allied soldiers assigned to the Republic of Vietnam after 6 months in wartime with the mission of assisting the Vietnamese Government and the RVNAF to fight against armed enemies were eligible for the Campaign Medal. Medals for allied soldiers were also to be awarded in accordance with the conditions set down in Article 2.*

Articles 4 and 5: *These articles describe how the medals were to be awarded to RVNAF personnel.*

Article 6: *Awarding procedures for each individual from a friendly country who possessed 'appropriate eligibility' would 'be accordingly made by various military authorities from the respective countries'.⁹*

10. In May 1966, the Government of the Republic of Vietnam raised the possibility of awarding the RVCN to Australian servicemen. The Australian Government was initially inclined to reject the offer on the basis that it was about to award its own campaign medal (the Vietnam Medal). It did not wish to award two campaign medals and there were restrictions on the acceptance of foreign awards. The Australian Ambassador in Saigon however, advised that it would be 'undesirable to reject a Vietnamese offer of this kind'.

11. After the consideration of the Department of Defence and the three services departments on 24 June 1966 the then Prime Minister, wrote to the Governor-General advising that he had given the matter of offer of the RVCN 'careful consideration' and that there were 'exceptional grounds justifying acceptance of the Vietnamese offer'. He asked that Her Majesty's approval be sought to accept the RVCN.¹⁰

12. On 24 June 1966, Her Majesty the Queen granted unrestricted approval for members of the Australian Armed Forces to accept and wear the RVCN.¹¹

13. It now remained for the Department of Defence and the three services to promulgate the conditions for the awarding of the RVCN. On 16 September 1966 the Secretary of the Department of Defence forwarded a memorandum to the Secretaries of the Departments of the Navy, Army and Air setting out the criteria for the award.¹² These criteria were based on and largely reflected those specified by the Republic of Vietnam with the March 1966 amendment. In that memorandum the Secretary stated that conditions for the grant of the award to Australian servicemen, 'which are in line with those laid down by the United States authorities', were as follows:

- (a) Special service – as defined by the *Repatriation (Special Overseas Service) Act 1962* – for a minimum of six months duration, either continuous or aggregated, in Vietnam with retrospective effect to 31st July 1962.
- (b) 'Special service' in Vietnam of less than six months duration since 31st July 1962 if
 - (1) Killed on active service or wounded in action and evacuated,
 - (2) Captured and later released or escaped.¹³

⁹ Government of the Republic of Vietnam Directive Nr HT.655-430, 1 September 1965.

¹⁰ Defence Honours and Awards Appeals Tribunal, *Report of the Inquiry into eligibility for the Republic of Vietnam Campaign Medal*, Canberra, 2014.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

14. The RVCM is a foreign award. The conditions for its award are laid down by a foreign government and accepted by the Australian Government. It was up to the Australian authorities to determine which individuals were eligible for the award.

15. In accordance with the Secretary's memorandum of 16 September 1966, the criteria for the award of the RVCM to Australian service personnel were reiterated in Navy, Army and Air Force instructions between 1966 and 1970, which stated that to qualify a member must be allotted for 'Special Service' in Vietnam and must:

- a. Have served in Vietnam for a minimum period, either continuously or aggregated, for six months (181 days)¹⁴ from July 1962 inclusive to a future date, or
- b. Have served in Vietnam for a period of less than six months (181 days) from 31 July 1962 to a future date if the member was:
 - i. Killed on active service.
 - ii. Wounded in action and evacuated, or
 - iii. Captured and later released or escaped.

16. The service instruction for the Australian Army was Military Board Instruction 102-4 of 23 December 1968.¹⁵

17. The issue of whether or not the Army had the lawful power to issue orders was addressed by the Tribunal in the *Inquiry into the Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards*. The report of this inquiry stated:

*The Australian Parliament had the power to make laws for the Armed Forces, which it did in passing the Defence Act. The Defence Act set up the Military Board and the Naval Board and authorised the Governor-General to make regulations for the discipline and good government of the Army and the Navy. Later similar provisions were made for the Air Force. The regulations (the AMRs (Australian Military Regulations), Naval Regulations and the AFRs (Air Force Regulations) authorised the Military Board, the Naval Board and the Air Force Board to make orders for the governance of the Army, Navy and Air Force respectively. The Military Board made orders in the form of Instructions for the administration of the Army and the Naval and Air Force Boards made orders for the Navy and the Air Force...All these laws including the subordinate legislation were valid.*¹⁶

18. The Tribunal has completed two Inquiries into the eligibility for the RVCM. The Terms of Reference for the first inquiry, completed in March 2014, directed the Tribunal to inquire and report on:

- Application of the eligibility criteria for the Republic of Vietnam Campaign Medal over time;

¹⁴ The original criteria merely stated six months. Defence's initial intention was to set 183 days, but later reduced it to 181 days.

¹⁵ Defence Honours and Awards Appeals Tribunal, *Report of the Inquiry into eligibility for the Republic of Vietnam Campaign Medal*, Canberra, 2014.

¹⁶ Defence Honours and Awards Appeals Tribunal, *Report of the Inquiry Into the Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards* dated 7 September 2015, p44(4)

- Unresolved issues with the application of those criteria; and
- How any future claims for this award should be administered.

19. The Inquiry addressed a range of submissions relating to the administration of the RVCМ over time, including several submissions from Mr Barry, who sought to have the qualifying period shortened to accommodate the circumstances of National Servicemen of his intake (the 10th Intake). The Tribunal also heard oral evidence from Mr Barry at a public hearing in September 2013. Among other recommendations, on completion of the Inquiry, the Tribunal recommended that no action be taken by the Australian Government to change the RVCМ's eligibility criteria.

20. Following consideration of the Tribunal's Report, and having also received further correspondence from Mr Barry in the interim, in October 2014, Government directed the Tribunal to undertake a subsequent Inquiry to determine:

- The Australian Government's legal ability to amend the eligibility criteria for the RVCМ given the Government of the Republic of Vietnam no longer exists;
- If it is found to be legally possible to amend the criteria, in what manner should they be amended, and is it appropriate that they be amended; and
- If it is appropriate to amend the criteria, should the Government of the Republic of Vietnam's 1973 directive to the United States Secretary of Defence to reduce the duration of service eligibility from six months to two months be applied to Australian personnel.

21. After consideration of submissions and legal advice from the Australian Government Solicitor, the Tribunal recommended that the eligibility criteria for the RVCМ not be amended because the Australian Government does not have the legal authority to do so. This recommendation was subsequently accepted by Government in September 2015.

Mr Barry's Submission

22. Mr Barry provided a number of very detailed submissions.

23. In his written submissions to the Tribunal Mr Barry sought to have discretion applied, due to his circumstances, in the interpretation of the eligibility criteria for the RVCМ, or, alternatively to have those eligibility criteria changed (although he subsequently claimed he was not seeking an amendment to the eligibility criteria.) Mr Barry accepted though that after a Tribunal recommendation to Government following the *Inquiry into the Eligibility for the Republic of Vietnam Campaign Medal* and the following *Inquiry into the feasibility of amending the eligibility criteria for the Republic of Vietnam Campaign Medal*, that the Australian Government 'does not have the legal liability to change the criteria for the RVCМ. The Tribunal notes that Mr Barry made submissions to these Inquiries.

24. Mr Barry contended that he should have never been posted to Vietnam because he only had another 147 days remaining on his term of National Service. Mr Barry was of the view that this was against the rules set out in Military Board Instructions of the time.

25. Mr Barry further contended that he was not offered the opportunity to extend his national service, despite there being provisions in the Military Board Instructions for him to do so. He described his return to Australia as 'involuntary' and that, ever since that time, he

has been distressed that he was unable to continue serving with his mates and, consequently, had let them down. The issue of the perception of fairness to National Servicemen, and the 'uniqueness' of National Service, permeates Mr Barry's submission. He sought consideration of his 'special circumstances', namely '*being sent home without the medallic award*'.

26. Mr Barry stated several times throughout his submissions and in his evidence that he was not offered, nor was he aware, of the option to extend his deployment in Vietnam. He contended that he should have been able to continue to serve in Vietnam as a reservist, given that after his period of national service ended, he was required to serve for another three years in the Regular Army Reserve. He made extensive submissions in his evidence that this option was not brought to his attention. In his application Mr Barry stated that the only other option available to him in September 1969, such as would entitle him to receive the RVCM, was to sign on with the Australian Regular Army (ARA) for three or six years. However, he considered that his continued civilian employment (with the Rural Bank of New South Wales) would have been jeopardised had he re-enlisted in the ARA.

27. Mr Barry has also cited the Government's recent decision to allow veterans of the 1st Battalion, the Royal Australian Regiment (1 RAR) to wear the Republic of Vietnam Cross of Gallantry with Palm Unit Citation as an example of the Australian Government's ability to determine eligibility for South Vietnamese awards.

28. Mr Barry made a number of other contentions in his submission, including:

- That although members of philanthropic organisations were not covered in the Vietnamese directive, they were allowed to wear the RVCM;
- That the eligibility period for US personnel had, after 28 January 1973, been shortened to two months. Mr Barry believes that this shows that the eligibility criteria could be changed, as it was for US personnel serving in Vietnam after the ceasefire.
- That the wording of the Vietnamese directive 'foreign authorities will determine eligibility of their personnel for the RVCM' indicates the intention of the Government of the Republic of Vietnam was 'the Australian Government to determine eligibility for their own personnel in special or extenuating circumstances, as was the recent case involving 1 RAR;
- That the Australian Government's decision to amend the eligibility criteria for the Australian Defence Medal to suit the employment conditions relating to National Servicemen is relevant to his case; and
- because the Vietnamese directive was written before the introduction of national service in Australia, the 181 day qualifying period does not fairly address the employment conditions of national servicemen.

29. In his response to the Defence submission Mr Barry indicated that he originally made submissions on this matter to the Tribunal in 2008. For this reason, he contended his eligibility for the RVCM should be considered having regard to the guidelines concerning the acceptance and wearing of foreign honours and awards in place at the time, which he believed allows further discretion to be applied in his case.

30. In his application, Mr Barry referred to the many letters of support he received relating to his case. In accordance with Mr Barry's request this information was before the Tribunal.

The Defence Submission

31. In its submission Defence referred to Mr Barry's Certificate of Discharge, which confirmed he had 119 days service outside Australia. Of this, 108 days were eligible service towards the claimed award, thus falling short of the 181 days required.

32. The Defence submission referred to the eligibility criteria and that there was no discretion to consider 'special circumstances'. Defence referred to the Inquiries conducted by the Tribunal into the RVCN and to the relevant Military Board Instructions regarding National Servicemen that were in force during Mr Barry's service in Vietnam.

33. At the hearing Defence tendered two documents in support of its position. The first was a supporting minute from the Staff Officer Grade 1 at Career Management Army and the second a copy of the Duty Officers log annex for Mr Barry's unit in Vietnam for the period 1-31 May 1969¹⁷. This log required all members of Mr Barry's unit to be read the contents of Routine Orders for this period. V59 of these orders, headed 'Extension of National Service Obligation' states in part '*Attention is directed to MBI 154-1 which establishes Commanding Officers as approving authorities for certain extensions. ...*'. Mr Barry accepted that there may have been such a Routine Order, but denies he was ever informed of it.

Tribunal Consideration – The Merits Review

34. **Background.** The Tribunal is required to review decisions 'on the merits'. The merits review revolves around the evidence and accordingly, the Tribunal conducts an independent review, with values, expertise, methods and procedures of its own, and not those of the decision maker.

35. The facts, law and policy aspects of the decision are all considered afresh and a new decision made¹⁸. The Tribunal reviews the decision, and not the reasons for the decision. In doing so, there is no legal onus of proof, and there is no presumption that the original decision was correct.¹⁹ The Tribunal is bound to make what it regards as the 'correct or preferable' decision and must reach a decision that is legally and factually correct.

36. In considering any application for review the Tribunal is bound by the relevant eligibility criteria: s110VB(6) of the *Defence Act 1903*. In that regard, the Tribunal has no discretion. In the case of the RVCN, the criteria specifically require 181 days service in Vietnam.

37. The Tribunal considered Mr Barry's claim of '*special circumstances*'. However, there is no provision in the eligibility criteria for the RVCN allowing for the consideration of

¹⁷ SO1 RFI/OUT/2016/AB297747465 dated 7 December 2016

¹⁸ Pearson, Linda, 'Merits Review Tribunals', in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, P.68

¹⁹ *McDonald v Director-General of Social Security* (1984) 1 FCR 354

‘special circumstances’. Further, Mr Barry raised a number of perceived anomalies, referred to above.

38. The Tribunal considered Mr Barry’s submission, in effect, seeks a change to the award’s eligibility criteria. In September 2015, the Australian Government accepted that it does not have the legal authority to amend the eligibility criteria for the claimed award, after the conduct, and the recommendations from two Inquiries conducted by the Tribunal²⁰. While it is open to the Tribunal to make recommendations in the course of its decision report²¹, it considered that the previous Inquiries into the claimed award were both comprehensive and exhaustive. In particular, the Tribunal was satisfied that it had previously adequately canvassed, through the earlier Inquiries, issues pertaining to National Servicemen in regard to eligibility for the claimed award.

39. The Tribunal observes, in relation to Mr Barry’s contention, pressed strongly at the hearing, that he was never offered the opportunity to extend his National Service, there is evidence of the requirement for that option to be brought to attention, but the Tribunal considered there was no evidence that Mr Barry was actually informed of this choice. As to whether Mr Barry would have taken up this option however is entirely speculative. While Mr Barry gave evidence of his distress at being sent home and leaving his colleagues, the Tribunal cannot be satisfied that he would necessarily have taken up the offer. It remains though, a fact that Mr Barry did not serve the requisite 181 days in Vietnam.

Finding

40. The Tribunal finds that Mr Barry did not serve for the 181 days required to be eligible for the award of the claimed award. As a consequence, the Tribunal finds that Mr Barry is not eligible for the award of the RVCM.

DECISION

41. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Barry is not eligible for the award of the Republic of Vietnam Campaign Medal.

²⁰ Defence Honours and Awards Appeals Tribunal, *Report of the Inquiry into eligibility for the Republic of Vietnam Campaign Medal*, Canberra, 2014, and *Report of the Inquiry into the feasibility of amending the eligibility criteria for the Republic of Vietnam Campaign Medal*, Defence Honours and Awards Appeals Tribunal, Canberra, 2015.

²¹ Per s 110VB(3) of the *Defence Act 1903*