



Australian Government

Defence Honours and Awards Appeals Tribunal

P and the Department of Defence [2014] DHAAT 28 (4 July 2014)

File number 2012/028

Re **Soldier P**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr J. Jones AM (Chair)
Ms C. Heazlewood
Vice Admiral D. Chalmers AO (Retd)
Mr K. Woods CSC, OAM

Hearing Dates 9 April 2014 and 11 April 2014

DECISION

On 4 July 2014 the Tribunal decided to recommend to the Minister that the decision to award a Commendation for Distinguished Service to Soldier C should be set aside and substituted with the decision to recommend that Soldier C be awarded the Distinguished Service Medal for his service in Afghanistan in 2009.

CATCHWORDS

DEFENCE HONOUR – Defence honour - Distinguished Service Medal – distinguished leadership in action – distinguished performance of duty in action.

LEGISLATION

Defence Act 1903 - ss 110V(1), 110VA, 110VB(1)
Distinguished Service Decorations Regulations 1991
Defence Force Regulations 1952 - Reg 93B

REASONS FOR DECISION

Introduction

1. On 16 February 2012 Soldier P requested that the Tribunal review the refusal by the Chief of Joint Operations (CJOPS) of the Department of Defence to recommend Soldier C for a Distinguished Service Medal (DSM) for his service in Afghanistan in 2009.¹
2. Soldier P submitted a recommendation for the DSM for Soldier C in November 2009 to the headquarters of Special Operations Task Group (SOTG), the unit in which they were both serving. On 26 January 2011, Soldier P became aware that Soldier C had been awarded a Commendation for Distinguished Service (CDS) in the Australia Day awards which were announced on that day.
3. In a letter received on or about 21 November 2011, Soldier P wrote to the Headquarters Joint Operations Command (HQJOC) requesting that the decision made at that headquarters to downgrade an award to Soldier C from the DSM to the CDS be revoked and substituted with the originally recommended DSM.
4. On 21 December 2011 the Deputy Chief of Joint Operations (DCJOPS) responded to Soldier P's request stating that he did not support the revocation or the substitution of the award of the CDS.

Jurisdiction

5. Pursuant to s110VB(1) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision properly made to the Tribunal relating to an application for a defence honour. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Defence Force to refuse to recommend a person for a defence honour. Any decision must be made in response to an application.
6. Section 110VA provides that an application for review can only be made by the person who made the application for the defence honour. In this matter Soldier P applied to the Tribunal to have the decision by CJOPS recommending that Soldier C be awarded CDS, reviewed. To establish whether Soldier P was the person who made the application for the defence honour to be awarded to Soldier C, the Tribunal must analyse the process that resulted in Soldier C being awarded the CDS.
7. Soldier P recommended that Soldier C, [redacted], be awarded a DSM in or about November 2009 following a series of operations in Afghanistan. This recommendation was supported by the chain of command and forwarded to HQJOC. The chain of command in the operational theatre consisted of Soldier P's immediate superior, Commanding Officer SOTG who endorsed the recommendation and the Commander Joint Task Force 633 (CJTF633) where it was also endorsed.
8. Once the recommendation was received by HQJOC it was prepared for the consideration of HQJOC Operational Honours and Awards Board (the Board) at their meeting on 22 April 2010. The Board considered the recommendation and decided to

¹ Names of members with protected identity status have been redacted by the Tribunal.

recommend to CJOPS that Soldier C be awarded the CDS. On Australia Day 2011 the Governor-General announced the award of the CDS to Soldier C.

9. The issue for the Tribunal to address is whether Soldier P is the person who made the application that resulted in Soldier C being awarded the CDS, and if he is that person, when was the application made. Section 110VA simply refers to the person who made the application which resulted in a decision, having the power to seek review by the Tribunal. It could be argued that the person who made that application was the CJTF633 because it was the endorsed application that was sent to HQJOC for the Board to consider.

10. The Tribunal considered correspondence, the Explanatory Memorandum and the Second Reading Speech in relation to the amendment of the Defence Act setting up the Tribunal, to ascertain whether the person who made the original recommendation was the person who made the application for the defence honour². In a letter dated 25 March 2009 the then Parliamentary Secretary for Defence Support wrote that the Tribunal was intended to have the power to review a decision concerning the nomination for a defence honour. A person whose application recommending a defence honour was refused had the right to apply for review of that decision.

11. Given the above information the Tribunal prefers to interpret s110VA so that the person who made the application for the defence honour is the person who made the original recommendation for the defence honour because this interpretation accords with the explanation of the Parliamentary Secretary in his letter of 25 March 2009. It also means that the person most familiar with the merits of the application has the power to request review if he or she believes an incorrect decision has been made. The Tribunal is satisfied that it was intended that a person in Soldier P's position have the right to request review by this Tribunal. Soldier P submitted his application that Soldier C be awarded the DSM in or about November 2009.

12. Regulation 93B of the *Defence Force Regulations 1952* defines a *defence honour* as being those honours set out in Part 1 of Schedule 3. Included in the defence honours set out in Part 1 is the DSM and the CDS. Therefore the Tribunal has jurisdiction to review the decision to recommend that Soldier C be awarded the CDS.

Steps taken in the conduct of the Review

13. In accordance with the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011 (No.1)*, on 7 June 2012, the Tribunal wrote to the Secretary of the Department of Defence informing him of Soldier P's application for review and requesting that he provide a report. On 13 June 2012, responses were received by the Tribunal Secretariat from HQJOC and the Directorate of Honours and Awards which were inconsistent with the requirements of the Tribunal Procedural Rules. Soon after this occurred, Soldier P asked that the review be postponed for a period of time. This was agreed to by the Tribunal.

14. In July 2013, the Tribunal Secretariat made contact with Soldier P asking if he wished for the matter to proceed, which he later confirmed that he did. The Tribunal again wrote to the Secretary on 7 August 2013, seeking further information, and a report in accordance with

² Section 15AB(1)(a) *Acts Interpretation Act 1901*

the Tribunal Procedural Rules. The Chair's letter also included a letter from MAJGEN Cantwell (ret'd), the former CJTF 633, in support of Soldier P's application.

15. On 17 September 2013, the Directorate provided the Tribunal with a report on behalf of the Secretary. A copy of the report of the Directorate was forwarded to Soldier P for comment. Soldier P provided a response to the Tribunal in writing on 30 October 2013.

16. Following its initial consideration the Tribunal requested Defence to provide information to assist in the Tribunal's deliberations as well as making available specified members and former members of the Board. The information requested relating to Soldier C's case was the complete record of all recommendations for gallantry and distinguished service awards submitted by Soldier P for service on Operation SLIPPER, showing all recorded considerations and all decisions made along the chain of command.

17. The Tribunal received a response to the request for information on 31 March 2014. This material was forwarded to Soldier P for comment in two tranches on 4 and 11 April 2014. Soldier P provided his comment on 6 May 2014, and further material on 28 May 2014.

18. Hearings were held on 9 and 11 April 2014. Because of the sensitivity of the matters to be discussed at hearing, the Chair of the Tribunal directed that they be conducted in private.

19. At the 9 April hearing, Brigadier David Webster (ret'd) and Dr Peter Collins QC provided oral submissions in support of Soldier P, who also made oral submissions, and Ms Helen Gouzvaris (Director Honours and Awards), Brigadier Dianne Gallasch and Commodore Braddon Wheeler provided submissions on behalf of Defence. Defence advised the Tribunal prior to hearing that its nominated representatives could assist the Tribunal to gain an understanding of policies, practices and guidance that might influence Board considerations of recommendations of honours.

20. At the 11 April hearing, Soldier P provided further oral submissions and Lieutenant General Ash Power (CJOPS) and WO David Devlin (Warrant Officer Joint Operations) provided further oral submissions on behalf of Defence.

21. On 15 April 2014, the Tribunal wrote to Defence seeking further information on changes made to the citation drafted by Soldier P in respect of Soldier C. A response was received on 22 April 2014, which was forwarded to Soldier P for comment on 29 April 2014. Soldier P provided his comment on 6 May 2014. A further request was put to Defence on 12 May 2014. Defence did not respond to this request.

Background

22. Soldier C served in Afghanistan from July to November 2009 as the commander of a commando platoon [redacted].

23. Just before the completion of their tour of duty in Afghanistan, Soldier P initiated a recommendation that Soldier C be awarded the DSM for his service throughout the tour on some 22 operations, exemplified by his performance on three particular operations. Soldier P submitted the recommendation to HQ SOTG before leaving Afghanistan.

24. Soldier C's nomination for the DSM was supported in turn by the commanding officer of SOTG, the chief of staff at the headquarters of the joint task force in Afghanistan (JTF633) and the commander of JTF633, Major General Cantwell, who forwarded the nomination to HQ JOC for consideration at the Board which met in April 2010 to consider recommendations for awards to be announced on Australia Day 2011. The Board decided to downgrade Soldier C's nomination to a CDS which became the recommendation which was sent forward from CJOPS to the CDF and thence to the Governor-General.

Soldier P's Case

25. In his response to the Defence submission dated 12 September 2013, Soldier P provided the Tribunal with copies of the citations for the award of the DSM in relation to Soldier C and another member, Soldier A, which he had drafted and submitted to his commanding officer in November 2009. Soldier A served in Afghanistan as the commander of a commando platoon within the same commando company at the same time as Soldier C.

26. In his written submissions, and in his verbal evidence to the Tribunal, Soldier P made the following arguments:

- a. The wording in the citation which was considered by the Board was significantly different to the citation which he had submitted to his commanding officer. In particular, a whole paragraph about the performance of Soldier C in an operation in the Shah Wali Kot district of Northern Kandahar which took place from 1 to 9 November 2009 was excised from the citation which accompanied the recommendation. There were also changes to key words in the précis narrative.
- b. These changes were made by or on behalf of the Board without adequate consultation with the nominating and recommending officers in the chain of command.
- c. It is not reasonable that officers who might not have served on operations can override the recommendations of officers with experience in operations and more complete and detailed knowledge of the actions and circumstances which led to the nomination for an award being made.
- d. The Board was inconsistent in its consideration of recommendations made to it. The citation for Soldier C was very similar to the citation which Soldier P submitted for Soldier A. Soldier A was awarded the DSM by the Board, even though he had participated in fewer operations than Soldier C and Soldier P rated Soldier C's performance as better than Soldier A's.

Arguments of Defence

27. The Defence submission to the Tribunal was provided by HQJOC. In the submission, and the evidence provided by its representatives, it was argued that:

- a. Changes to the narrative précis were made after the Board had decided to downgrade the recommendation. These changes were made in order to ensure that the wording satisfied the criteria which are set out in the Regulations for the level of award which the Board had decided was appropriate.
- b. Other changes to the narrative which had been received by HQJOC via the chain of command were minor and editorial in nature.

- c. The Board which considered and decided to downgrade the recommendation in respect of Soldier C was properly constituted and followed proper procedures and processes in accordance with relevant defence instructions.
- d. The Board also decided to downgrade the recommended level of award to 12 other nominees as well as to Soldier C. Two of those 12 were nominations for the award of the DSM.
- e. In making those decisions the Board took into account:
 - (i) The details contained in each of the nominations and the supporting citations,
 - (ii) The criteria set out in the award regulations,
 - (iii) The need to ensure consistency across all the nominations, and
 - (iv) The knowledge, experience and professional judgement of the Board members.

Distinguished Service Decorations

28. The *Distinguished Service Decorations Regulations 1991* (the Regulations), stipulated the following conditions for award of decorations:

3. (1) The Distinguished Service Cross shall be awarded only for distinguished command and leadership in action.

(2) The Distinguished Service Medal shall be awarded only for distinguished leadership in action.

(3) The Commendation for Distinguished Service shall be awarded only for distinguished performance of duty in warlike operations.

29. The requirement for service to be ‘in action’ was amended to ‘in warlike operations’ by Letters Patent signed 13 December 2011 and published in CAG S18 of 22 February 2012. The requirement to be ‘in action’ still applies to Soldier C’s nomination because his nomination preceded this change.

Nomination Process for Decorations

30. BRIG Gallasch and CDRE Wheeler each gave evidence regarding the procedures followed by the Board in receiving and considering nominations for decorations. They both stated that there is a requirement that draft citations not exceed one page and that this requirement was well known to everyone who might be involved in the process.³ BRIG Gallasch stated that any citation exceeding one page in length would not be considered by the Board. It would be returned to the author or reduced to one page. The witnesses agreed that, while it was not uncommon for minor editing to be applied to drafts received, no substantive change would be made to any recommendation without consultation with the lower headquarters.

³ DI(G) PERS 31-1, the relevant policy document in operation at the time the nominations were being considered by the Board, stated that the narrative citation should “usually be around three quarters of a page in length”.

The Citation for the DSM

31. The original citation prepared by Soldier P recommended that Soldier C be awarded the DSM for his service in Afghanistan from July to November 2009. The citation relating to Soldier C, drafted by Soldier P, was one and a half pages long and included nine paragraphs. Soldier P referred to at least 22 special operations against insurgent forces where Soldier C 'displayed admirable leadership and sound tactical acumen'. He referred to three particular operations in more detail.

32. The first operation, named Operation NULLARBOR VI occurred in the Mirabad Valley in August and September 2009. Soldier P described Soldier C 'skilfully manoeuvring his Platoon over difficult terrain to overcome a determined enemy fighting from prepared defensive positions'.

33. The second operation, Operation BURS SIMI PULSE III, took place in Northern Helmand in October 2009, when the platoon was involved in a 'significant and prolonged 11 hour engagement six kilometres behind the Forward Line of Enemy Troops'. This resulted in the platoon providing support for the company despite heavy enemy fire. The operation was successful.

34. The third operation, Operation SARA TOFAN, occurred in Northern Kandahar in November 2009 over nine days when Soldier C led his platoon in a clearance operation over difficult terrain and on several occasions under heavy enemy fire. This operation was also successful.

Considerations of the Tribunal

35. The issue for the Tribunal is which, if any, of the criteria set out in the *Distinguished Service Decoration Regulations* has been satisfied by the actions of Soldier C based on the best available evidence.

36. The recommendation which was initiated by Soldier P was that Soldier C should be awarded the DSM. To satisfy the criteria for the DSM it is required that the nominated person demonstrated *distinguished leadership in action*.

37. The recommendation which was presented to the Board in the form of a Defence Form AD104 was supported at each level in the chain of command.

38. The Board recommended that Soldier C be awarded the CDS which means that the Board decided that Soldier C had exhibited *distinguished performance of duty in warlike operations*.

39. The Tribunal has more complete evidence than was provided to the Board.

40. Soldier C's performance during Operation SARA TOFAN was described in the seventh paragraph of Soldier P's draft citation which appeared on the second page of the draft.

41. The draft citation which was considered by the Board in April 2010 consisted of six paragraphs. The paragraph in Soldier P's draft which related to Operation SARA TOFAN in

Northern Kandahar in November 2009 was not included even though that operation was referred to as well as the other two operations named in paragraphs 31 to 33.

42. The draft citation relating to Soldier A was very similar to the one for Soldier C in content and format. It made reference to the same three operations as evidence of the quality of Soldier A's performance. In contrast to the draft for Soldier C, the paragraph in Soldier A's draft relating to Operation SARA TOFAN began on the first page and was included in the citation narrative which was presented to the Board.

43. The evidence presented by Soldier P clearly shows that a significant part of the citation drafted by Soldier P on Soldier C was omitted from the citation which was forwarded with the recommendation for the DSM by Commander JTF633. The evidence did not reveal when, by whom or for what reason this significant material was omitted.

44. The Chief of the Defence Force (CDF) has been given the power to recommend to the Governor-General what gallantry awards should be awarded to members of the Australian Defence Force. CDF has delegated responsibility to make such recommendations to him (CDF) to CJOPS. The processes which have been established to produce those recommendations have the confidence of CDF. Members of the Board are appointed by CJOPS and appropriate experience is ensured in the composition of the Board.

Findings of Fact

45. The Tribunal makes the following findings of fact:
- a. The citation for Soldier C which was considered by the Board was substantially the same as the version which was recommended by the Commander of JTF633.
 - b. The citation for Soldier C which was considered by the Board was incomplete because the paragraph relating to the operation, conducted in the Shah Wali Kot district of Northern Kandahar, between 1 and 9 November 2009, had been excised.
 - c. The changes to Soldier P's draft citation were made at a level in the chain of command below the Board.
 - d. The citation for Soldier C originated by Soldier P was very similar in its substantive content to that which Soldier P initiated in relation to Soldier A.

Conclusion

45. In 2009 the condition for the award of the DSM was that the person must exhibit distinguished leadership in action. The Regulations do not define the terms 'distinguished leadership' and 'in action'. The Tribunal considered the various definitions of these two terms in dictionary.com, The Macquarie Dictionary, The Oxford Dictionary and The Merriam-Webster Dictionary.

46. 'Action' is defined amongst other definitions, as military combat or a small battle. All definitions included a referral to fighting. In this matter Soldier C was deployed on a six month tour of duty in Afghanistan. He was the commander of a commando platoon which on at least three operations engaged with the enemy. The Tribunal is satisfied that Soldier C was 'in action' during the 22 operations including the three operations described in detail by Soldier P in the citation recommending that Soldier C be awarded the DSM.

47. The dictionary definitions of 'leadership' include the notions of guidance and direction and the ability to lead. The definitions of 'distinguished' refer to qualities such as conspicuous, excellence and eminent. The Oxford Dictionary defined 'distinguished' as 'very successful, authoritative and commanding great respect'. The term 'distinguished leadership' implies that a person with this quality has the ability to guide and direct a platoon with authority and displays conspicuous and excellent leadership that leads to a successful outcome. It could be argued that all platoon commanders would exhibit this quality and this is why they are made commanders. To be awarded the DSM a person must exhibit qualities that distinguish him or her from the usual commander⁴. The person would exhibit the above qualities in such a way that they would be considered an exceptional leader of their platoon.

48. Soldier P has described Soldier C's leadership as being distinguished because he 'displayed admirable leadership and sound tactical acumen'. Soldier P outlined three particular operations where Soldier C manifested these qualities. He described Soldier C as displaying exceptional leadership which resulted in a successful outcome. His leadership revealed qualities that distinguished him from other commanders because he was able to guide and direct his platoon with such authority.

49. The Tribunal carefully considered Soldier P's submission and the citation and concluded that Soldier C displayed distinguished leadership in action. His leadership was exceptional because of his ability to lead and guide his platoon in difficult combat operations that resulted in successful outcomes.

50. The Tribunal's conclusion is reinforced by the decision of the Board to award the DSM to Soldier A. Soldier A and Soldier C were in Afghanistan at the same time in the same company. They were involved in the same operations. Soldier A was involved in five less operations and in the citation for Soldier A, Soldier P referred to the same three operations he referred to in the citation for Soldier C. The Board had decided that based on that citation it should recommend that Soldier A be awarded the DSM. The Tribunal is of the opinion that Soldier C should also be awarded the DSM because he had exhibited distinguished leadership in action in the same manner as Soldier A. Given that an important paragraph had been omitted from Soldier C's citation the Tribunal can understand why the Board reached the conclusion it did to recommend that Soldier C be awarded the CDS.

51. For the above reasons the Tribunal recommends that Soldier C be awarded the DSM because he exhibited distinguished leadership in action.

DECISION OF THE TRIBUNAL

52. The Tribunal recommends to the Minister that the decision to award a Commendation for Distinguished Service to Soldier C should be set aside and substituted by the award of the Distinguished Service Medal for his service in Afghanistan in 2009.

⁴ Jess v Scott (1986) 12 FCR 187