



Australian Government

Defence Honours and Awards Appeals Tribunal

Bastow and the Department of Defence [2015] DHAAT 16 (19 April 2015)

File Number(s) 2014/027

Re **Mr Wayne John Bastow**
Applicant

And **Department of Defence**
Respondent

Tribunal Emeritus Professor D. Horner AM (Presiding Member)
Mr R. Rowe PSM

Hearing Date 12 March 2015

DECISION

On 19 April 2015 the Tribunal decided to recommend to the Minister that the decision of the Department of Defence not to review Mr Wayne Bastow's request that he be recognised by an honour while serving on HMAS *Hobart* in June 1968 be affirmed.

CATCHWORDS

DEFENCE HONOUR – Defence honour – medal for gallantry – Mention in Despatches – other acts of gallantry – in action – hazardous circumstances – worth of recognition

LEGISLATION

Defence Act 1903 – ss 110V(1), 110VA, 110VB(1)

Gallantry Decorations Regulations 1991

Distinguished Service Decorations Regulations 1991

Defence Force Regulations 1952 and the Amendment Regulations 2011 (No.1) – Reg 93B

REASONS FOR DECISION

Introduction

1. The applicant, Mr Wayne John Bastow (Mr Bastow), seeks review of a decision of the Minister Assisting the Minister for Defence and the Department of Defence not to review his eligibility for recognition for his action at sea in HMAS *Hobart* on 17 June 1968 during the Vietnam War. Early that morning a United States Air Force aircraft fired missiles at HMAS *Hobart*, killing two Royal Australian Navy (RAN) sailors and wounding several others. Subsequently various members of the ship's company were recommended for awards and honours. Mr Bastow, then a Leading Seaman, commanded the gun which returned fire, but he received no award. Mr Bastow seeks recognition by 'some type of award' in the following order:

- Distinguished Service Medal (DSM)
- Medal of the Order of the British Empire (BEM)
- Naval Board Commendation
- Letter of acknowledgement from the RAN
- Letter of commendation from the Tribunal
- Letter of acknowledgement from the Tribunal

2. On 27 January 2005 Mr Bastow sent an email to the Directorate of Honours and Awards in the Department of Defence (the Directorate) asking why he received no honour or award for his actions on 17 June 1968. On 9 February 2005 Mr Graham Wilson of the Directorate replied that with the passage of almost 37 years it would be impossible to ascertain why he had not received an award, and because the Vietnam End of War List had been published in 1998 no more consideration would be given to Vietnam awards.

3. On 7 June 2005 Mr Bastow wrote to his Federal Member of Parliament, the Hon Kevin Andrews, MP, seeking an answer to his request. On 12 October 2005 the Minister Assisting the Minister for Defence, the Hon De-Anne Kelly, MP, replied that Mr Bastow was not eligible for an award because no recommendation was made for him, and there were no grounds for him to receive an award for the events of 17 June 1968.

4. On 17 February 2014 Mr Bastow provided a submission to the Tribunal's *Inquiry into Refused, Withheld and Forfeited Defence Honours and Awards*. On 27 March 2014 the Chair of the Tribunal advised Mr Bastow that his application was not within the Terms of Reference for the Inquiry but, should he agree to it, the submission could be reviewed as an individual review. Mr Bastow agreed to this course, formally seeking a review on 2 April 2014 of the decision of the Minister Assisting the Minister for Defence and the Department of Defence not to review his eligibility for recognition for his action at sea on HMAS *Hobart* on 17 June 1968 during the Vietnam War.

Tribunal Jurisdiction

5. Pursuant to ss 110VB(1) and 110VB(2) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision relating to a defence honour 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 honour in response to an application.

6. The Commanding Officer of HMAS *Hobart*, Captain K. W. Shands, RAN, (now deceased) recommended three members of the ship's company for honours (one DSM (Imperial) and two Mentions in Despatches (MIDs)) and 36 members of the ship's company for Naval Board Commendations. Mr Bastow was not included in either list. Mr Bastow is not formally seeking to review Captain Shands' decision, but rather is seeking to review the decision of the Department of Defence not to review the decision.

7. Section 110VA provides that an application for a review can only be made by the person who made the application for a Defence honour. Mr Bastow applied to the Department of Defence to have the recommendation not to recognise his service reviewed. This was denied by the Department of Defence. The Tribunal was satisfied that Mr Bastow had made a request for a review of a reviewable decision.

8. It is no longer possible for the Australian Government to award an honour in the Imperial Honours System. Instead, honours are now awarded in the Australian Honours System. The equivalent of the DSM (Navy – Imperial) in the Australian Honours System is the Medal for Gallantry (MG).¹ In one of his submissions Mr Bastow refers to a desire to be awarded the MID. The equivalent in the Australian Honours System is the Commendation for Gallantry or the Commendation for Distinguished Service. Regulation 93B of *Defence Force Regulations 1952* as amended by the Defence Force Amendment Regulations 2011 (No.1) defines a Defence honour as those honours set out in Part 1 of Schedule 3. Included in the Defence honours set out in Part 1 is the DSM (Imperial), the MID, the MG, the Commendation for Gallantry and the Commendation for Distinguished Service. The BEM and the Naval Board Commendation are not included in the list of honours that can be reviewed by the Tribunal.

Conduct of the review

9. In accordance with its *Procedural Rules 2011*, on 16 April 2014 the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Bastow's application for review and requesting that he provide a report. On 15 July 2014 the Director of Honours and Awards, on behalf of the Secretary, provided the Tribunal with a report. In that report the Directorate recommended that the decision of Captain Shands not to recommend Mr Bastow for recognition for the actions while serving in HMAS *Hobart* during the Vietnam War in 1968 be affirmed. Mr Bastow responded to Defence's submission on 28 July 2014.

11 The Tribunal met on 13 November 2014 when it considered the material provided by Mr Bastow and the Department of Defence. The Tribunal conducted a hearing on 12 March 2015 when it heard oral evidence from Mr Bastow and telephone evidence from Lieutenant Commander P.I. Playford (Retd) who was a

¹ Defence Honours and Awards Appeals Tribunal, *Report of the Inquiry into Unresolved Recognition for Past Acts of Naval and Military Gallantry and Valour*, 2013, p. 57.

gunnery officer on HMAS *Hobart* (but not at the time of the incident), Commodore M. B. Rayment AM, (Retd) who was navigating officer of HMAS *Hobart*, and Pastor W. J. Young DSM, who was a gun captain on HMAS *Perth*, a similar ship to HMAS *Hobart*, and which came under enemy fire during the Vietnam War.

Background

12. Mr Bastow enlisted in the RAN as a rating on 4 June 1962, and after recruit training he specialised in the gunnery branch as a Weapons Mechanic. On 2 September 1967 Mr Bastow was confirmed in the rank of Leading Seaman and this was his substantive rank in June 1968. Mr Bastow joined HMAS *Hobart* on 8 October 1967 serving on the ship until 22 December 1968. Mr Bastow discharged from the RAN as Petty Officer Weapons Mechanic in 1973. He later joined the RAN Reserves serving from 1980 to 1998, attaining the rank of the Chief Petty Officer Quartermaster Gunner.

13. While serving in HMAS *Hobart* Leading Seaman Weapons Mechanic Bastow was a member of the gunnery division and was in charge (gun captain) of the forward Mount 51, a 5 inch/54 Mark 42 quick firing, automatic single barrel gun. The head of the gunnery division was the ship's gunnery officer, Lieutenant Commander I. A. Callaway RAN (now deceased).

14. HMAS *Hobart* served on operations in the Vietnam theatre of war from 22 March 1968 to 11 October 1968, during which time it conducted patrols along the coast of North Vietnam, provided naval gunfire support to United States forces operating in South Vietnam, conducted anti-infiltration operations off the coast of South Vietnam, and escorted United States Navy aircraft carriers.

15. In the early hours of 17 June 1968 a United States Air Force aircraft, an F-4 Phantom, launched three missiles at HMAS *Hobart* in the mistaken belief that *Hobart* was an enemy ship.

16. The missile director room was damaged, but operating under local control the gun in Mount 51 fired at least five rounds at the aircraft at a range of 8000 yards, causing it to turn away. *Hobart* suffered two killed and seven wounded.

17. On 27 September 1968 Captain Shands forwarded a letter to the Flag Officer Commanding the Australian Fleet in which he recommended three members of the ship's company for honours. Those men were:

- Engineering Mechanic G.H. Sculley for the DSM
- Lieutenant Commander I. A. Callaway for an MID
- Able Seaman Weapons Mechanic D. D. Cleak for the MID

18. In the same letter Shand submitted the names of 36 members of the ship's company for commendation by the Naval Board. Mr Bastow's name does not appear in the official submission by Captain Shands.

19. Navy Office took into consideration the operational scale of awards to RAN personnel serving with the US Seventh Fleet in Vietnam and recommend that Able Seaman Cleak's MID be downgraded to a Naval Board Commendation. A further

nine members whose citations were considered 'not as praiseworthy' were removed from the list of Naval Board Commendations.

Eligibility Criteria for Distinguished Service and Gallantry Decorations

20. Distinguished service decorations were established by Letters Patent and Regulations in the *Commonwealth of Australia Gazette* No. S25 dated 4 February 1991. The conditions for the award of the decorations include the following:

3. (1) the Distinguished Service Cross ...
(2) The Distinguished Service Medal . . .
(3) The Commendation for Distinguished Service shall be awarded only for distinguished performance of duties in warlike operations...
4. (conditions for posthumous issue)
5. The persons to whom the decoration may be awarded are:
 - (a) members of the Defence Force and
 - (b) other persons determined by the Minister for the purposes of this regulation.

21. Gallantry decorations were established by Letters Patent and Regulations in the *Commonwealth of Australia Gazette* No S25 dated 4 February 1991. The conditions for the award of the decorations include the following:

3. (1) The Star of Gallantry . . .
(2) The Medal for Gallantry shall be awarded only for acts of gallantry in action in hazardous circumstances.
(3) The Commendation for Gallantry may be awarded for other acts of gallantry in action which are considered worthy of recognition.
4. (conditions for posthumous issue)
5. The persons to whom the decoration may be awarded are:
 - (a) members of the Defence Force and
 - (b) other persons determined by the Minister for the purposes of this regulation.

Mr Bastow's Submission

22. Mr Bastow states that as the sailor in charge (gun captain) of the Mount 51 gun he was in charge of eleven other sailors, two in the gun turret, (W. Stokes and D. Cleak), one in the carrier room, and eight others in the forward shell and powder magazine. Leading Seaman Stokes was second-in-command of the gun (mount captain) and in charge of the Port side firing circuit panel. Able Seaman Cleak was the Port side gun aimer.

23. Mr Bastow states that as a result of damage to the ship, the gun could only be operated in local control (operated manually) and there were poor communications from the control area to the gun. He heard a faint voice on his headphone ordering him to shoot. He therefore loaded the gun with a live round and ordered Able Seaman Cleak to fire. Mr Bastow states that he was the only person who could load the gun. Also, he needed to hold the control panel lever in the manual position. Before Cleak

could fire, Stokes needed to place the fire control lever to the fire position. In his evidence Pastor Young confirmed these procedures.

24. Mr Bastow claims that because he was in charge of the gun he should have received recognition, given that Cleak, who was a junior member of his crew, was awarded a commendation.

25. Mr Bastow drew attention to the citation for Able Seaman Cleak's MID (which was later downgraded to a Naval Board Commendation). This states:
On 17th June 1968 this sailor was the one man control sight operator of the forward five inch gun mount when HMAS Hobart came under air attack. On his own initiative he ordered the mount to stand to and it was ready to open fire by the time the order to stand to was relayed from the control position. His calm action saved valuable seconds and enabled the ship to engage the attacking aircraft earlier than might otherwise have been possible. As a result damage to the ship was minimised.

The proposed citation reads:

For outstanding initiative and exemplary conduct when HMAS Hobart came under air attack on 17th June 1968. His quick thinking in a moment of stress was largely responsible for the ship's ability to engage an attacking aircraft thereby keeping damage and personnel casualties to a minimum.

26. Mr Bastow disagrees with the wording in Able Seaman Cleak's citation/recommendation in that he did not do the actions for which he is credited. Mr Bastow claimed that:

- When he heard the explosion from the first missile he 'immediately flashed up' his gun, and he was the only person who could have done that.
- Cleak was the last man to take station because he had further to travel to his action station.
- The gun plot operator ordered Bastow to load shells with anti-aircraft, variable time fuses
- After the second explosion remote control was lost; the gun could only operate in local control.
- After being ordered to shoot Bastow loaded a round and ordered Cleak to fire.
- Two days after the attack he gave a full verbal report to the Gunnery Officer. Bastow did not report that Cleak had ordered the gun to stand to and bring it to a state of readiness because he believed that was not the case.
- He made no further report.
- Cleak could not have saved valuable seconds because he was the last one to close up.

27. Mr Bastow argues that officers in the chain of command should have known that Cleak could not have acted as he did because Cleak was the gun aimer and the junior member of the gun crew and hence he could not have ordered it to stand to. Mr Bastow also argues that the officers in the chain of command should have investigated further to ensure that the recommendation for Cleak was correct. Mr Bastow believes that if this had happened he, rather than Cleak, would have been recommended for an MID.

28. Mr Bastow emphasised that he is happy that Cleak received some recognition, but that he too should be recognised.

29. Mr Bastow acknowledged that he had provided no witnesses to support his claim. However, he stated:

- The powder case from one of the gun's shells had been damaged several days earlier, and Captain Shands had directed that the guns should only be fired in an emergency. If the gun was fired there was the danger of a 'cook off'.
- It is not contested that he (Bastow) was the gun captain of Mount 51
- It is accepted that the gunfire from Mount 51 caused the US aircraft to cease its attacks, thereby saving the ship from further attacks, which might have been disastrous. Commodore Rayment confirmed this conclusion.
- The most important single factor in saving *Hobart* from further attack was the gunfire from Mount 51.
- Had he not fired the gun, the ship would have been in grave peril.
- He brought the gun crew to their action stations on his own initiative.

30. Mr Bastow also acknowledged that in showing leadership and initiative he did what he was expected to do as gun captain of Mount 51. Had he not done so he would have been liable to censure by the gunnery officer and the ship's captain. Nonetheless, he thought that he should have received at least a 'well done' for his command of Mount 51 during the air attack.

Defence's Submission

31. Defence submitted that because of the operational scale that was applied during the Vietnam War the ship's company of HMAS *Hobart* were entitled to receive one decoration and two MIDs over a six month period. These were the DSM for Engineer Mechanic Sculley and the MID for Captain Shands (recommended separately) and for Lieutenant Commander Callaway.

32. Defence argued that the correct procedures were followed with regard to the administration of recommendations for members of *Hobart's* ship's company.

33. Defence also argues that the citation for Able Seaman Cleak indicated that it was he who brought the gun to immediate readiness. There is no documentary evidence showing what Leading Seaman Bastow did during the action, and no evidence that he was under consideration for recognition at any time.

34. Defence argues that 'intellectual rigour' was applied in considering who among the ship's company could be considered for recognition. Defence states in its report (paragraph 18):

A review of the supporting documentation included with HMAS *Hobart's* letter 46/1/2 of 27 September 1968 revealed that considerable effort was made by the command of HMAS *Hobart* to describe the contribution made by each of those individuals who were considered worthy of recognition. The names that were submitted by Captain Shands demonstrate that a generous cross-

section of the ship's company was considered based on individual merit, and that intellectual rigour was applied as part of that process.

Tribunal Consideration

35. The first matter to be considered was whether the Tribunal had any discretion in considering the award of an honour. In its Valour Inquiry the Tribunal concluded that if the correct process was followed, if there was no maladministration, and if there was no compelling new evidence, the original decision should stand. The Tribunal noted that in the Valour Inquiry the Tribunal had Terms of Reference which required it to maintain the integrity of the Australian honours system and identify any consequential impact any finding or recommendation may have on that system. While the Tribunal concluded that widespread retrospective recognition was generally not desirable, the Tribunal considered each case to determine if the correct process had been followed and whether there was any new, compelling evidence.

36. In considering an application for review the Tribunal was in a different situation to when it was conducting an Inquiry. Under Part VIII C of the *Defence Act 1903*, if an application is properly made for a review of a reviewable decision, the Tribunal 'must review the decision'. That is, even if the process of how the original decision was made was correct, and if there was no maladministration, the Tribunal must still review the decision.

37. The second matter to consider was to determine what Mr Bastow actually did. The Tribunal was satisfied that he was the gun captain of Mount 51, and accepted his assertion that he had ordered the gun crew to their action stations, and that responding to an order, he ordered the gun to fire. The Tribunal accepted that Mr Bastow showed leadership, and initiative, but also noted that his actions were those expected from an experienced, well-trained gun captain in the RAN. In acting as he did, Mr Bastow played a major role in ensuring the safety of his ship and should be commended for his actions. Lieutenant Commander Playford described Mr Bastow's actions (as related to him) as 'commendable'.

38. The third matter to consider was whether Mr Bastow's actions warrant a recommendation for an MG, a Commendation for Gallantry or Commendation for Distinguished Service. The Tribunal noted that there was no independent witness to Mr Bastow's actions. In that case, the Tribunal felt that it was necessary to apply a 'very high bar' in considering whether he should be recommended for an honour.

39. The criteria for an MG require that it 'shall be awarded only for 'acts of gallantry in action in hazardous circumstances'. The criteria for the Commendation for Gallantry require that it 'may be awarded for other acts of gallantry in action which are considered worthy of recognition'. Mr Bastow did not claim that he displayed particular gallantry, and no evidence was presented to support such a claim. The Tribunal concluded that his actions did not warrant the award of the MG or the Commendation for Gallantry.

40. The criteria for the Commendation for Distinguished Service require that it 'shall be awarded only for distinguished performance of duties in warlike operations'. The Tribunal accepted that Mr Bastow showed leadership, but considered that this

was what was expected of him in the circumstances. The Tribunal concluded that Mr Bastow's actions were not at the level warranting the award of the Commendation for Distinguished Service.

41. This is not to suggest that Mr Bastow's actions were not commendable, but simply that they were not at the required level to warrant a recommendation for the awards, given the earlier comment about needing to apply 'a very high bar' in considering the awards.

42. The Tribunal noted Mr Bastow's assertion that there were errors in the wording of the recommendation and citation for Able Seaman Cleak's award of the Naval Board Commendation, but considered that it was not the Tribunal's role to seek to rectify this matter. This is not to suggest that Mr Cleak's action were not worthy of the Commendation he received.

43. On the evidence presented to it, the Tribunal considered that Mr Bastow could have had a reasonable expectation that his name might have been among the 39 members of the ship's company who were put forward for recognition. But with limited evidence available to it, and almost 47 years after the event, the Tribunal was unable to determine why his name was not included. It is possible that Mr Bastow might have been overlooked by some error, but it is equally possible that his name was among those initially considered, but for some reason was not included in the final list submitted by Captain Shands.

DECISION

44. The Tribunal decided to recommend to the Minister that the decision of the Department of Defence not to review Mr Wayne Bastow's request that he be recognised by an honour while serving on HMAS *Hobart* in June 1968 be affirmed.