



**Doyle and the Department of Defence [2018]
DHAAT 02 (12 April 2018)**

File number 2016/020

Re **Squadron Leader Kevin Joseph Doyle (Retd)**
Applicant

And **Department of Defence**
Respondent

Tribunal Mr Graham Mowbray (Presiding Member)
Ms Jane Schwager, AO

Hearing Date 5 December 2017

DECISION

On 29 March 2018, the Tribunal affirmed the decision of the Directorate of Honours and Awards of the Department of Defence that Squadron Leader (Retd) Kevin Joseph Doyle is not eligible for the award of the Republic of Vietnam Campaign Medal.

CATCHWORDS

FOREIGN AWARD – refusal to recommend the award of the Republic of Vietnam Campaign Medal

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VB(2), 110VB(6)

Joint General Staff of the Republic of Vietnam Armed Forces (RVNAF) Directive, Pertaining to awarding of Campaign Medal HT.655-430 – dated 1 September 1965

Republic of Vietnam Armed Forces (RVNAF) Order No. 183 Pertaining to the conferral of the Vietnamese Campaign Medal on Australian Military Forces – dated 31 August 1966

Air Board Orders - Issue No. 156, 'A5/30. Republic of Vietnam Campaign Medal for Service in South Vietnam Between 31 July 1962, and a date to be Determined'; dated 7 October 1968

REASONS FOR DECISION

Introduction

1. The applicant, Squadron Leader (SQNLDR) Kevin Joseph Doyle (Retd), seeks review of the decision by Ms Donna Burdett of the Directorate of Honours and Awards of the Department of Defence (the Directorate) on 15 June 2016 that he is not eligible for the award of the Republic of Vietnam Campaign Medal (RVCM).¹ SQNLDR Doyle served with No 79 Squadron at the Royal Australian Air Force (RAAF) Base at Ubon, Thailand for 4 periods totalling 204 days between 11 August 1966 to 8 March 1968.

2. On 2 February 2016 SQNLDR Doyle applied to the Directorate for the RVCM for his service of 206 days at the Royal Thai Air Force Base (RTAFB) Ubon in Thailand.² On 15 June 2016 the Directorate advised SQNLDR Doyle that he was not eligible for the RVCM because ‘RAAF Base Ubon is outside the geographical limits of South Vietnam and was not in direct combat support of the battlefield ...’ and ‘there is no evidence to show that you were on posted or attached strength of a unit or formation in South Vietnam ... to fight against the armed aggression.’³

Tribunal Jurisdiction

3. Pursuant to s110VB(2) of the *Defence Act 1903* the Tribunal has jurisdiction to review a reviewable decision of a *foreign award* if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) of the Defence Act and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence or foreign award in response to an application. The term *foreign award* is defined in s110T of the Defence Act as an honour or award given by a government of a foreign country, or by an international organisation. The RVCM was instituted on 12 May 1964 by the Government of the Republic of Vietnam (GRVN).⁴ On 24 June 1966, Her Majesty the Queen granted unrestricted approval for members of the Australian armed forces to accept and wear the RVCM.⁵ The RVCM is a foreign award and accordingly, the Tribunal has jurisdiction to review decisions in relation to this award.

4. The Tribunal is satisfied that SQNLDR Doyle’s application dated 5 October 2016⁶ constituted an ‘application properly made’ as required by s110VB(2) of the Defence Act and that his application to the Directorate for the RVCM dated 2 February 2016⁷ constituted an application as required by s110V(1)(c) of the Defence Act. The Tribunal is also satisfied that the Directorate’s decision of 15 June 2016⁸

¹ SQNLDR Doyle’s Application to the Tribunal dated 5 October 2016

² Application for Defence Medals by SQNLDR Doyle dated 2 February 2016

³ Directorate Letter to SQNLDR Doyle AF25285435 DHA – 0314829 dated 15 June 2016

⁴ Joint General Staff of the Republic of Vietnam Armed Forces (RVNAF) Directive, Pertaining to awarding of Campaign Medal HT.655-430 – dated 1 September 1965

⁵ Cable 6258, London to Canberra, 24 June 1966, NAA A3211, 1966/3374

⁶ SQNLDR Doyle Application to the Tribunal dated 5 October 2016

⁷ Application for Defence Medals by SQNLDR Doyle dated 2 February 2016

⁸ Directorate Letter to SQNLDR Doyle AF25285435 DHA – 0314829 dated 15 June 2016

constituted a refusal to recommend a person for a foreign award as referred to in s110V(1)(a)(iii) of the Defence Act.

5. Accordingly, the Tribunal is satisfied that the *reviewable decision* is the decision by the Directorate to refuse to recommend SQNLDR Doyle for the RVC. ⁹ The Tribunal is therefore bound by the eligibility criteria that governed the making of that decision in 2016 as required by s110VB(6) of the Defence Act. The role of the Tribunal is to determine whether the decision of the Directorate is the correct or preferable decision having regard to the applicable law and the relevant facts.

Conduct of the Review

6. In accordance with the Defence Honours and Awards Appeals Tribunal's Procedural Rules 2011, on 13 October 2016 the Tribunal wrote to the Secretary of the Department of Defence advising him of SQNLDR Doyle's application for review and seeking a report on the reasons for the original decision and the provision of relevant material that was relied upon in reaching the decision. ¹⁰ On 21 November 2016 the Directorate, on behalf of the Secretary, provided the Tribunal with the Defence report in the form of a written submission. ¹¹ The Tribunal forwarded a copy of the Defence submission to SQNLDR Doyle on 29 November 2016. ¹² On 11 January 2017 SQNLDR Doyle provided the Tribunal with comments on the Defence submission. ¹³ SQNLDR Doyle provided a further submission on 29 June 2017. ¹⁴

7. The Tribunal noted that SQNLDR Doyle's application for the RVC was made after the completion of the *Inquiry into Eligibility for the Republic of Vietnam Campaign Medal* (the first Inquiry) ¹⁵ and the further inquiry into the *Feasibility of Amending the Eligibility Criteria for the Republic of Vietnam Campaign Medal* (the second Inquiry). ¹⁶

8. On 4 December 2017 the Tribunal held a telephone hook-up to consider the material provided by SQNLDR Doyle and the Directorate. SQNLDR Doyle presented oral submissions and evidence by telephone to a hearing on 5 December 2017. The Department of Defence did not attend the hearing.

Republic of Vietnam Campaign Medal

9. In its 22 June 2017 decision on an application by Mr Michael Morrissey for a RVC the Tribunal provided an extensive analysis of the background and the criteria

⁹ Ibid.

¹⁰ Tribunal Letter to Secretary, Department of Defence, DHAAT/OUT/2016/423 dated 13 October 2016

¹¹ Directorate Letter to the Tribunal DH&A/OUT/ 2016//0194, 2016/1216360/1, AF26919244 dated 21 November 2016

¹² Tribunal Letter to SQNLDR Doyle DHAAT/OUT/2016/489 dated 29 November 2016

¹³ SQNLDR Doyle Letter to the Tribunal dated 11 January 2017

¹⁴ SQNLDR Doyle Letter to the Tribunal dated 29 January 2017

¹⁵ Report of the *Inquiry into Eligibility for the Republic of Vietnam Campaign Medal* dated 24 March 2014

¹⁶ Report of the *Inquiry into the Feasibility of Amending the Eligibility Criteria for the Republic of Vietnam Campaign Medal* dated 25 June 2015

for the medal.¹⁷ The Tribunal adopts that analysis which is followed below in paragraphs 10 to 24.

10. In May 1964, the GRVN established its campaign medal for the Vietnam War.¹⁸ The medal was for all military personnel of the Republic of Vietnam Armed Forces (RVNAF) who had 12 months service in the field and for allied soldiers assigned to the Republic of Vietnam who had 6 months service.

11. In September 1965, the Joint General Staff of the RVNAF issued a Directive setting out the eligibility criteria for the medal known now in Australia as the RVCM (RVNAF Directive HT.655-430)¹⁹ The criteria state

Chapter 1 : Eligibilities

Article 1: *All military personnel of the RVNAF who have 12 month service in the field during war time, may claim for Campaign Medal award.*

Article 2: *The RVNAF personnel, who don't possess the eligibilities prescribed in Art.1, but happen to be under one of the following circumstances, are qualified for Campaign Medal award:*

- *WIA (wounded-in-action)*
- *Captured in action by enemies or missing while performing his missions, but released later, or an escape has taken place.*
- *KIA or die while performing a mission entrusted.*

The above anticipated cases must take place during the war.

Article 3: *Allied soldiers assigned to the Republic of Vietnam after six months in war time with mission to assist the Vietnamese Government and the RVNAF to fight against armed enemies, are eligible for Campaign Medal decorations*
...

Article 6: *... Awarding procedures applied for each individual who possesses appropriate eligibilities will be accordingly made by various military authorities from the respective country.*
...

12. In May 1966, the GRVN raised the possibility of awarding the RVCM 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 at the time there were restrictions on the acceptance of foreign awards.²⁰ The Australian Ambassador

¹⁷ *Morrissey and the Department of Defence* [2017] DHAAT 14, 22 June 2017

¹⁸ *GRVN Decree No.149/SL/CT* dated May 12, 1964 creating 'Campaign Medal'

¹⁹ *Joint General Staff of the RVNAF Directive, Pertaining to awarding of Campaign Medal HT.655-430 – dated 1 September 1965*

²⁰ Cable 557, Canberra to Saigon, 5 May 1966, NAA:A1838, 696/8/6/6 Part 1

in Saigon however, advised that it would be ‘undesirable to reject a Vietnamese offer of this kind’.²¹

13. After consideration of the offer by the Department of Defence Chiefs of Staff Committee, on 24 June 1966 the Prime Minister wrote to the Governor-General advising that he had given the matter of the offer of the RVCM ‘careful consideration’ and that there were ‘exceptional grounds justifying acceptance of the Vietnamese offer’.²² He recommended that Her Majesty’s approval be sought to accept the RVCM.²³ Her Majesty granted unrestricted approval for members of the Australian armed forces to accept and wear the RVCM on 24 June 1966.²⁴

14. Unbeknown to Australia at the time of the consideration, it was subsequently discovered that on 22 March 1966 the GRVN had amended Article 3 of the original Directive for the award of the RVCM.²⁵ The amendment, at the request of the United States authorities, changed Article 3 to provide eligibility to foreign personnel

...serving outside the geographic limits of South Vietnam and contributing direct combat support to the RVNAF ...

15. Advice of this amendment was not provided to Australian authorities until 13 July 1966, after the approval had been granted by the Queen to accept the award under the auspices of the September 1965 eligibility criteria. This amendment also reinforced that

*...Foreign authorities will determine eligibility of their personnel for this award.*²⁶

16. The amendment to Article 3 was formally declared in RVNAF Order No. 183 dated 31 August 1966.²⁷ The relevant clauses of this Order that relate to the amendment provide that

ARTICLE 1. The Vietnam Campaign Medal’ with device 1960- is awarded to all Royal Australian Military personnel eligible as prescribed in Directive NrHT-655-430 dated 1 September 1965 as changed by amendment dated 22 March 1966 ...

ARTICLE 2. Eligibility of individuals for the award will be determined by Royal Australian authorities ...

17. Noting the conditions imposed by the amendment ‘foreign authorities will determine eligibility of their personnel for this award’,²⁸ on 16 September 1966, the

²¹ Cable 568, Saigon to Canberra, 10 May 1966, NAA:A1838, 696/8/6/6 Part 1

²² Letter Prime Minister Harold Holt to the Governor-General dated 24 June 1966, NAA:A1838, 696/8/6/6Part 1

²³ Defence Honours and Awards Appeals Tribunal, Report of the *Inquiry into eligibility for the Republic of Vietnam Campaign Medal*, Canberra, 2014

²⁴ Cable 6258, London to Canberra, 24 June 1966, NAA 3211, 1966/3374

²⁵ The actual amendment dated 22 March 1966 has not been found despite comprehensive searches of files and archives.

²⁶ Cable 882, Australian Embassy, Saigon, to Canberra, 13 July 1966

²⁷ RVNAF Order No. 183 Pertaining to the conferral of the Vietnamese Campaign Medal on Australian Military Forces – dated 31 August 1966

Secretary of the Department of Defence wrote to the Secretaries of the Departments of the Navy, Army and Air Force setting out the criteria for the award of the RVCM.²⁹ The Secretary stated that the amendment to Article 3 had been specifically requested by United States authorities to cover the US Seventh Fleet in Thailand and Guam ‘as well as the aircrews of aircraft operating out of Thailand ...’. The Secretary’s view on the amendment as expressed in the memorandum of 16 September 1966 stated that

... the Americans do not interpret the amendment to cover ground support staff in Thailand ... our interpretation is the same as that of the United States.

At present no Australians serving with Australian units outside the Vietnamese theatre would be eligible for this award ...

18. The memorandum to the Services stated that conditions for the grant of the award of the RVCM would require

(a) ‘Special service’ (as defined by the Repatriation (Special Overseas Service) Act) of a minimum of six months duration, either continuous or aggregated, in Vietnam with retrospective effect to 31 July 1962;

(b) ‘Special service’ in Vietnam of less than six months duration since 31 July 1962 if:

(i) killed on active service or wounded-in-action and evacuated, captured and later released or escaped.

19. The issue of whether or not the Services had the lawful power to issue Military/Naval/Air Board Instructions 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.³⁰

²⁸ See Cable 882, Australian Embassy, Saigon, to Canberra, 13 July 1966

²⁹ Memo, Secretary, Department of Defence ‘Vietnamese Campaign Medal’ dated 16 September 1966

³⁰ 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, para 44(4)

20. Therefore, having received the Secretary's memorandum of 16 September 1966, it now remained for each of the Services to determine and promulgate their respective instructions and orders regarding the conditions for the award of the RVCM to their personnel. The eligibility criteria for the RVCM for Australian airmen was declared in Air Board Order (ABO) A5/30.³¹ The Order states

...

Qualifying Service

6. *Qualifying service for the award is completion of a minimum of six months, either continuous or aggregated, while on the posted or attached strength of a unit or formation in SOUTH VIETNAM for the purpose of assisting the South Vietnamese and the RVNAF to fight against armed aggression.*

7. *The requirement for six months service may be waived where a member's period of qualifying service is curtailed because of being killed in action, wounded in action and evacuated, or captured and later released or escaped.*

...

21. A subsequent review by the Department of Defence in 1997 established the cut-off date for the award of the RVCM to be 28 March 1973.³² The GRVN ceased to exist in 1975.

22. The Tribunal has completed two Inquiries into the eligibility for the RVCM. The first Inquiry was commenced in 2013 to report on the application of the eligibility criteria for the RVCM over time; identify unresolved issues with the application of the criteria and review how future claims for the award should be administered. The Inquiry recommended that no action be taken to change the criteria, that Defence amend its interpretation of 'wounded-in-action' to include psychological injury and that assessments of claims for the award continue, cognisant of the first two recommendations. In regard to the application of the amended Article 3 in the eligibility criteria for the RVCM, it was noted that

While it was open to the Department of Defence to apply the provisions of the amended Article 3, it did not do so ..., and

*The Australian Government was not bound to apply the provisions of the amended Article 3 ...*³³

23. The Government accepted the recommendation regarding definition of wounded-in-action and agreed that assessments of claims for the RVCM should continue. In relation to the Tribunal's recommendation that no action be taken to change the criteria, the Government directed that a second Inquiry be conducted to determine if it had the legal authority to amend the eligibility criteria for the RVCM given the GRVN had ceased to exist in 1975. The second Inquiry was completed in September 2015 and recommended that the eligibility criteria not be amended as the

³¹ Air Board Orders - Issue No. 156, 'A5/30. Republic of Vietnam Campaign Medal Award for Service in South Vietnam Between 31 July 1962, and a date to be Determined'; dated 7 October 1968

³² 'Extension of Eligibility for the RVCM Campaign Medal' dated 11 March 1997

³³ Report of the Inquiry into Eligibility for the Republic of Vietnam Campaign Medal dated 24 March 2014, para 48

Australian Government did not have the legal authority to do so.³⁴ This recommendation was accepted by Government.

24. Therefore, the eligibility criteria for the RVCM for Australian servicemen and women is as declared in respective Service Orders and Instructions – in this case for airmen ABO A5/30 dated 7 October 1968.³⁵

Squadron Leader Doyle's Service Record

25. SQNLDR Doyle enlisted in the Permanent Air Force on 11 March 1960 and was discharged at his own request on 10 September 1979. He served as a pilot for the whole period and on retirement held the rank of Squadron Leader.³⁶

26. SQNLDR Doyle's service record indicates that he was a member of No 78 Wing Headquarters, Butterworth, Malaysia at various periods from 14 March 1966 to 1 November 1967. During this time and for two other periods he also served with No 79 Squadron (79SQN) at Ubon, Thailand. These periods at Ubon were

- 11 August 1966 to 5 October 1966 (56 days)
- 6 April 1967 to 29 June 1967 (85 days)
- 13 December 1967 to 11 January 1968 (30 days)
- 5 February 1968 to 8 March 1968 (33 days).³⁷

27. The total service of SQNLDR Doyle at Ubon was thus 204 aggregated days. It is common ground that at no time was SQNLDR Doyle 'on the posted strength of a unit or formation in South Vietnam'.

28. For his service in the Permanent Air Force SQNLDR Doyle has been awarded

- Australian Active Service Medal 1945-75 with Clasps 'THAILAND' and 'MALAYSIA'
- Australian Service Medal 1945-75 with Clasp 'SE ASIA'
- Vietnam Logistic and Support Medal
- Defence Force Service Medal
- National Medal
- Australian Defence Medal

³⁴ Report of the *Inquiry into the Feasibility of Amending the Eligibility for the Republic of Vietnam Campaign Medal* dated 25 June 2015

³⁵ Air Board Orders - Issue No. 156, 'A5/30. Republic of Vietnam Campaign Medal for Service in South Vietnam Between 31 July 1962, and a date to be Determined'; dated 7 October 1968

³⁶ RAAF Personal Record R/314829/H/1– Doyle, KJ, document as at 26 August 1979

³⁷ *Ibid.*

- Pingat Jasa Malaysia
- Returned from Active Service Badge.

Squadron Leader Doyle's Submissions

29. SQNLDR Doyle made three separate written submissions to the Tribunal – with his application on 5 October 2016, in response to the Department of Defence report and submission on 11 January 2017, and on 29 June 2017. He also presented oral submissions and evidence at the hearing on 5 December 2017.

30. **2016 Application for Review.**³⁸ SQNLDR Doyle's claim is based on his 206 (sic) days service as a RAAF Sabre pilot in No 79 Squadron operating from the RTAFB at Ubon, thus exceeding the minimum 181 days required. This service he submits was

- recognised 'warlike' as part of Australia's contribution to the Vietnam War
- providing 'direct combat support' (DCS) within Thai airspace to United States Air Force (USAF) operations in support of the GRVN
- within the amended articles and orders of the GRVN criteria of 31 August 1966 indicating his entitlement to the award.

31. Much of SQNLDR Doyle's submission is a critique of a series of reports to the Australian Government on recognition for those who served at RTAFB in Ubon, Thailand.³⁹ It provides context to the application but is only of marginal assistance in deciding whether SQNLDR Doyle is entitled to the RVCMM.

32. SQNLDR Doyle first considers whether No 79SQN's combat air defence operations were 'warlike operations' having regard to the series of Australian Government initiated reports on the Ubon involvement of the RAAF. He concludes that these operations were and must be classified as being in direct combat support of the Republic of Vietnam Armed Forces even though the engagements were outside South Vietnam.

33. SQNLDR Doyle contests the view that the amended Article 3 could not be applied to members of the RAAF Contingent Ubon and 79SQN. The amended

³⁸ SQNLDR Doyle's Application to the Tribunal dated 5 October 2016

³⁹ Report of the *Committee of Inquiry into Defence and Defence-Related Awards* (The CIDA Report) 1994

Report of the *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75* (The Mohr Review) 2000

Report of the *Independent Review Panel on Vietnam Campaign Recognition for RAAF Service at Ubon, Thailand, 25 June 1965 to 31 August 1968* (The Riding Review) 2004

Report of the *Review of Service Recognition for RAAF Ubon (1965-68)* (The Abigail Review) 2008

Report of the *Inquiry into Unresolved Recognition Issues for Royal Australian Air Force Personnel who Served at Ubon between 1965 and 1968* (The Defence Honours and Awards Appeals Tribunal Inquiry or Pearce Report) 18 February 2011

Report of the *Inquiry into Eligibility for the Republic of Vietnam Campaign Medal* (The DHAAT First Inquiry) 24 March 2014

Report of the *Inquiry into the Feasibility of Amending the Eligibility for the Republic of Vietnam Campaign Medal* (The DHAAT Second Inquiry) 25 June 2015

Article 3 ‘includes an offensive approach and is more comprehensive in its overall coverage of the Vietnam conflict’.⁴⁰ It covers foreign military personnel, not just allied soldiers, and extends to those serving beyond the geographic limits of South Vietnam, including those ‘contributing direct combat support’. The air bases in Thailand were continually under threat and were considered to be providing direct combat support to operations in South Vietnam.

34. He submits that although the GRVN left the final decision on the application of the amended Article 3 to individual governments, the Australian Government was never given that opportunity. Rather the matter was dealt with by the Secretary of the Department of Defence, incorrectly maintaining the criteria in the original Article 3.⁴¹ He asserts

*... there is now a need to once again revisit the provisions of the RVCM to reassess if any change to Australia’s RVCM criteria is warranted, ...*⁴²

35. SQNLDR Doyle examines the notion of ‘direct combat support’ and whether 79SQN at Ubon was so engaged. He says that the squadron’s air defence combat role required two fully armed Sabre aircraft to be maintained at a daily readiness state of ‘Alert 5’ from dawn to dusk. He states

*The other RAAF personnel at Base Squadron Ubon were also concurrently performing duties in direct support of 79 SQN’s operational commitments. ... 79SQN’s combat air defence role was also providing DCS and top cover for USAF aircraft operations mounted from the RTAB Ubon ...*⁴³

...

*Simply put, the RAAF presence at Ubon was a continuous commitment of providing DCS if and when required to assist the USAF in successfully conducting the air war against North Vietnam and against enemy forces in Laos.*⁴⁴

36. In SQNLDR Doyle’s view the military term ‘theatre of operations’ indicates a far greater operational setting than just that involving South Vietnam. Even though the RAAF Sabres did not enter Laos or South Vietnam, they were ‘operating within the ‘*theatre of operations*’ as part of the FWMF (Free World Military Forces), and thus limiting to some extent the enemy’s capability to attack South Vietnam.’⁴⁵

37. Having examined advice from the Australian Government Solicitor to the Tribunal,⁴⁶ SQNLDR Doyle asserts that

⁴⁰ SQNLDR Doyle’s Application to the Tribunal dated 5 October 2016, para 24

⁴¹ Ibid, para 29

⁴² Ibid, para 30

⁴³ Ibid, para 39

⁴⁴ Ibid, para 50

⁴⁵ Ibid, paras 64, 71

⁴⁶ Australian Government Solicitor Advice to the Chair, Defence Honours and Awards Appeal (sic) Tribunal dated 3 February 2015

... if the Australian RVCM criteria do not align with the GRVN's amended Article 3, changes to the existing criteria are now possible within the context of a 'measure of discretion in interpreting and applying the criteria'.

He requests that the Department of Defence address the 'RVCM anomaly' and adopt the correct interpretation of the amended Article 3.⁴⁷

38. SQNLDR Doyle examines the role of the Department of Defence in 1966 and outlines shortcomings which he considers resulted in 'an ongoing anomaly in regard to the issue of the RVCM award for eligible RAAF Ubon Veterans.'⁴⁸ In particular, he submits that 'the Secretary's incorrect interpretation of the GRVN's amended Article 3 was not approved by the Australian Government through the normal procedures applicable to the introduction of new medals.'⁴⁹ Furthermore, in his view there is no documentary evidence that a deliberate decision was made to not apply the amended Article 3.⁵⁰

39. SQNLDR Doyle identifies six 79SQN pilots, including himself, who served the minimum of 181 days at Ubon during the relevant period and who would meet the eligibility criteria under amended Article 3.⁵¹ SQNLDR Doyle contends that in fairness and equity, especially bearing in mind the recognition given to USAF colleagues, these men are deserving of the award of the RVCM.

40. SQNLDR Doyle concludes by proposing that the RVCM criteria be amended 'to more correctly reflect the GRVN's amended Article 3 of March 1966, based on my interpretation ...'.⁵² He therefore recommends that the criteria be amended to include RAAF service at RTAFB Ubon of 181 days or more (continuous or aggregated) between 25 June 1965 and 31 August 1968.⁵³

41. **SQNLDR Doyle's Response to the Department of Defence Report and Submission.**⁵⁴ In this response SQNLDR Doyle says that the Department had failed to address any of the major issues which he had raised in his appeal. He firmly stood by his appeal application.⁵⁵ He again refers to some of the reports to the Government on recognition for those who served at Ubon,⁵⁶ with some commentary on their assessments. He asserts that the Department had 'failed to adequately recognise the provisions of the GRVN's amended Article 3' and that 'an anomaly still exists in respect of the eligibility criteria for the award of the RVCM'.⁵⁷

42. After examining the comparable regulations for the United States Vietnam Service Medal and the United States Republic of Vietnam Campaign Medal, SQNLDR Doyle submits that 'the decision of the Department of Defence to ignore

⁴⁷ SQNLDR Doyle Application to the Tribunal dated 5 October 2016, paras 75,77

⁴⁸ Ibid, para 5(f)

⁴⁹ Ibid, para 78

⁵⁰ Ibid, para 95

⁵¹ Ibid, para 103

⁵² Ibid, para 119

⁵³ Ibid, para 129

⁵⁴ SQNLDR Doyle's Letter to the Tribunal dated 11 January 2017 and attached Review of Defence Submission

⁵⁵ Ibid, para 3

⁵⁶ See footnote 39

⁵⁷ SQNLDR Doyle's Review of Defence Submission dated 11 January 2017, paras 10-11, 29

the amendment (*to Article 3*) and limit the award of this foreign medal only to those ADF personnel serving in South Vietnam could be considered as not legal.’⁵⁸ Drawing on the Australian Government Solicitor’s advice⁵⁹ he reasserts that the Australian Government still has the legal authority ‘to honour the eligibility criteria already included in the amended Article 3’.⁶⁰

43. SQNLDR Doyle submits that his service at the RTAFB Ubon during the period 25 June 1965 to 31 August 1968 (sic) entitles him to the RVCM.⁶¹

44. **SQNLDR Doyle’s Submission of 29 June 2017.**⁶² Much of this submission is directed at errors SQNLDR Doyle says can be found in correspondence from the then Parliamentary Secretary to the Minister for Defence to the National President of the Australian Flying Corps and Royal Australian Air Force Association National Council. They relate to amendments made by the Governor-General on 4 December 2012 to the Declaration and Determination under the Australian Active Service Medal 1945-1975 Regulations.⁶³

45. SQNLDR Doyle provides further material in support of his contention that the operations at RAAF Ubon 1965-1968 were primarily in support of the Vietnam War and not in the defence of Thailand.⁶⁴ He submits that equity requires that changes be made to the eligibility criteria for the RVCM.⁶⁵

46. SQNLDR Doyle concludes by suggesting amendments to the Parliamentary Secretary’s letter and recommending the award of the RVCM to ‘eligible RAAF veterans who served at the RAAF Contingent Ubon’ for the requisite period.⁶⁶

47. **Oral Evidence and Submissions from SQNLDR Doyle.** At the hearing on 5 December 2017 SQNLDR Doyle reaffirmed his written submissions by reference to various documents before the Tribunal.

48. SQNLDR Doyle said that he served as one of many RAAF fighter pilots at Ubon as part of the Free World Military Forces to defend the operations of the 7th US Air Force from that base. This allowed the USAF to maximise its attacks outside that base.

49. SQNLDR Doyle

- reiterated that the Australian Government Solicitor’s advice would allow changes to the eligibility criteria for the RVCM consistent with the amended Article 3 of the GRVN directive

⁵⁸ Ibid, paras 10-18

⁵⁹ See footnote 46

⁶⁰ SQNLDR Doyle’s Review of Defence Submission dated 11 January 2017, para 20

⁶¹ Ibid, para 29

⁶² SQNLDR Doyle’s Letter to the Tribunal dated 29 June 2017 and attached Additional Input Submission

⁶³ Ibid, paras 1-27, 51-56 See also Parliamentary Secretary to Minister for Defence Letter to National President, Australian Flying Corps and Royal Australian Air Force Association, dated 24 April 2014 and associated correspondence

⁶⁴ SQNLDR Doyle’s Additional Input Submission dated 29 June 2017, paras 28-43

⁶⁵ Ibid, para 45

⁶⁶ Ibid, para 56

- noted that this had been done for the Korean and US forces
- asserted that the amendment had been mishandled in Australia by the Secretary to the Department of Defence⁶⁷ when it should have been handled by the Joint Chiefs of Staff Committee
- said that the Department of Defence had decided to restrict access to the RCVN by not applying the amended Article 3, although there was no documentary evidence that the *Australian Government* made a deliberate decision along those lines
- submitted that there was no evidence that the Department of Defence had considered applying amended Article 3 *specifically* to those at Ubon.

50. SQNLDR Doyle concluded that ABO A5/30⁶⁸ which sets out the conditions for award of the RVCN to RAAF members could be changed to take in the amended Article 3. The current wording contained an ‘administrative anomaly’ which would take no effort to remedy.

51. Significantly, the Squadron Leader agreed that his application to the Tribunal was essentially to seek review of the Air Board Order to incorporate the amended Article 3.

Department of Defence Submission

52. The Department of Defence submission dated 21 November 2016⁶⁹ identified the eligibility criteria for award of the RVCN as those contained in the Royal Australian Air Force (sic) Order A5/30 which relevantly provides

6. *Qualifying service for the award is completion of a minimum of six months, either continuous or aggregated, while on the posted or attached strength of a unit or formation in SOUTH VIETNAM for the purposes of assisting the South Vietnamese and the RVNAF to fight against armed aggression.*

53. The qualifying service was to fall between 31 July 1962 and 28 March 1973.

54. On review of SQNLDR Doyle’s service records it was confirmed that he was not posted to Vietnam. However, he did render service at Ubon in Thailand with 79SQN on four separate occasions

- 11 August 1966 to 5 October 1966 (56 days)
- 6 April 1967 to 29 June 1967 (85 days)
- 13 December 1967 to 11 January 1968 (30 days)

⁶⁷ See Memo, Secretary, Department of Defence ‘*Vietnamese Campaign Medal*’ dated 16 September 1966

⁶⁸ See para 20 above

⁶⁹ Directorate Letter to the Tribunal dated 21 November 2016

- 5 February 1968 to 8 March 1968 (33 days).

55. Squadron Leader Doyle thus served at Ubon for a total of 204 aggregated days.

56. After an exchange of correspondence, Defence advised SQNLDR Doyle on 15 June 2016 that he was not eligible for the RCVM because

- RAAF Base Ubon was outside the geographical limits of South Vietnam and was not in direct combat support of the battlefield in Vietnam
- there was no evidence that he was on the posted or attached strength of a unit or formation in South Vietnam.

57. Following SQNLDR Doyle's application to the Tribunal, a further review was conducted on his eligibility. This confirmed that he was not on the posted or attached strength of a unit or formation in South Vietnam for the minimum six months qualifying period.

58. Consequently Defence recommends that the decision 'to not authorise SQNLDR Doyle for the RVCVM be affirmed.'⁷⁰

Tribunal Consideration

59. **Merits Review.** The Tribunal is required to review decisions 'on the merits'. This requires an examination of the merits of the matter in dispute rather than the lawfulness of the decision under review.⁷¹ 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.

60. The facts, law and policy aspects of the decision are all considered afresh and a new decision made.⁷² 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 decision was correct.⁷³ 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.

61. **The Reviewable Decision.** There is no dispute that the reviewable decision is the decision by the Directorate on 15 June 2016 to refuse to recommend SQNLDR Doyle for the RVCVM. The Tribunal is therefore bound by the eligibility criteria that governed the making of that decision in 2016 as required by s110VB(6) of the Defence Act.

62. **Eligibility Criteria for the RVCVM.** Having reviewed SQNLDR Doyle's written and oral submissions, it is clear that his claim for the RVCVM depends on the eligibility criteria for the RVCVM encompassing the amendment of 22 March 1966 to

⁷⁰ Ibid, para 38

⁷¹ *Council of Australian Tribunals Practice Manual* dated 7 April 2006 para 1.3.1.2

⁷² Pearson, Linda, "Merit Review Tribunals", in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, page 68

⁷³ *McDonald v Director-General of Social Security* (1984) 1 FCR 354

Article 3 that is referred to in the Secretary of Defence's memo of 16 September 1966.⁷⁴ This would allow Australian military personnel who served outside the geographic limits of South Vietnam and contributing direct combat support to the RVNAF for six months to be eligible. Towards the end of his hearing however SQNLDR Doyle appeared to resile from this contention and asserted that he was seeking to have the Air Board Order which incorporates the eligibility criteria reviewed. This is also reflected in various parts of his written submissions.

63. The analysis of the background and criteria for the RVCN set out at paragraphs 10-24 above make it abundantly clear that the 22 March 1966 amendment to Article 3 was never adopted by the Australian Government. It cannot be doubted that at law the eligibility criteria for Australian airmen are those in Air Board Order A5/30 issued on 7 October 1968. This relevantly provides

6. Qualifying service for the award is completion of a minimum of six months, either continuous or aggregated, while on the posted or attached strength of a unit or formation in SOUTH VIETNAM for the purposes of assisting the South Vietnamese and the RVNAF to fight against armed aggression.

64. **Squadron Leader Doyle's Service.** It is agreed that SQNLDR Doyle was a member of the Permanent Air Force and was posted to the RAAF Base at Ubon in Thailand for 204 aggregated days between 11 August 1966 and 8 March 1968. There is no evidence that the Squadron Leader's service included any period within the geographical limits of South Vietnam. He himself does not contest this.

65. **Squadron Leader Doyle's Eligibility for the RVCN.** SQNLDR Doyle served more than six months at Ubon. But none of this was within South Vietnam, something he did not dispute.

66. Consequently SQNLDR Doyle does not meet the critical criterion for the grant of the RVCN; that is at least six months service within the geographical limits of South Vietnam.

67. The vast bulk of SQNLDR Doyle's submissions were directed at asserting that the South Vietnamese amendments to Article 3 in the 22 March 1966 directive had, should or could be enacted in the criteria under the relevant Australian orders. Much of this was beside the point as the Tribunal is bound by the applicable law, in this case ABO A5/30. The Tribunal must conduct a merits review applying the established criteria.

68. Nevertheless the Tribunal is conscious of the huge effort that SQNLDR Doyle put into presenting the case for recognition for airmen like himself who made significant contributions to advance the Australian and United States prosecution of the war in Vietnam. His extensive detailed submissions and his critique of the various reports to the Government and the Government's responses are appreciated.

⁷⁴ Memo, Secretary, Department of Defence 'Vietnamese Campaign Medal' dated 16 September 1966

69. **Amendment of Article 3.** SQNLDR Doyle's contention that the criteria should be changed to incorporate the 22 March 1966 South Vietnamese amendments to Article 3 is one for the Australian Government.

70. However the Tribunal notes that the broad issue of entitlement of Australians who served at Ubon, including amendment of the eligibility criteria, has been the considered in some seven reports to the Australian Government.⁷⁵ SQNLDR Doyle has received the Australian Service Medal 1945-75 with Clasp 'THAILAND', later upgraded to the Australian Active Service Medal 1945-75 with Clasp 'THAILAND', and the Vietnam Logistic and Support Medal following three of these reviews.⁷⁶

Tribunal Finding

71. For the reasons set out above, the Tribunal finds that SQNLDR Doyle is not eligible for the RVCM for his service in the RAAF at Ubon, Thailand, between August 1966 and March 1968. He did not serve on the posted or attached strength of a unit or formation in South Vietnam for a period of six months.

TRIBUNAL DECISION

72. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Squadron Leader (Retd) Kevin Joseph Doyle is not eligible for the award of the Republic of Vietnam Campaign Medal.

⁷⁵ See footnote 39

⁷⁶ Report of the *Committee of Inquiry into Defence and Defence-Related Awards* (The CIDA Report) 1994 : Australian Service Medal with Clasp 'THAILAND'

Report of the *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75* (The Mohr Review) 2000 : Upgrade of Australian Service Medal with Clasp 'THAILAND' to Australian Active Service Medal with Clasp 'THAILAND'

Report of the *Inquiry into Unresolved Recognition Issues for Royal Australian Air Force Personnel who Served at Ubon between 1965 and 1968* (The Defence Honours and Awards Appeals Tribunal Inquiry or Pearce Report) 18 February 2011