



## Australian Government

### Defence Honours and Awards Appeals Tribunal

#### **Counihan and the Department of Defence [2018] DHAAT 023 (17 October 2018)**

File number 2018/004

Re **Mark Anthony COUNIHAN**  
Applicant

And **Department of Defence**  
Respondent

Tribunal Ms Naida Isenberg (Presiding Member)  
Air Vice-Marshal John Quaife AM (retd)

Appearances Mr Counihan by telephone  
CMDR Kerry Stephen (Retd) by telephone  
Ms J Callaghan, Directorate of Honours and Awards  
Mr M Jordan, Directorate of Honours and Awards  
Mr B Mitchell, Directorate of Honours and Awards

Hearing 3 October 2018 in Canberra

#### **DECISION**

On 17 October 2018 the Tribunal decided to affirm the decision under review.

#### **CATCHWORDS**

*DEFENCE AWARD – Australian Service Medal 1945-75 with Clasp 'MIDDLE EAST' – eligibility criteria – Report of Proceedings*

#### **LEGISLATION**

*Commonwealth of Australia Gazette (CAG) S336, Letters Patent for the Australian Service Medal dated 13 September 1988;*  
*CAG S80 Instrument of Declaration and Determination under the Australian Service Medal with Clasp 'MIDDLE EAST' Regulations - dated 19 May 2011*

## REASONS FOR DECISION

### Introduction

1. The Applicant, Mark Anthony Counihan seeks the award of an Australian Service Medal with Clasp 'MIDDLE EAST' (ASM with Clasp 'MIDDLE EAST') in recognition of his service in the Royal Australian Navy (RAN) in HMAS *Supply*. His application for the award was refused by the Directorate of Honours and Awards of the Department of Defence (Defence). Mr Counihan now seeks review of that decision by this Tribunal.

### Eligibility Criteria for the ASM with Clasp MIDDLE EAST

2. The Australian Service Medal (ASM) was instituted by Letters Patent on 13 September 1988<sup>1</sup>. The ASM is awarded to recognise military service in prescribed non-warlike military operations. The Schedule sets out the Regulations governing the award of the ASM (the Regulations). Regulation 3 states that the Governor-General, on the recommendation of a Minister, may declare a non-warlike operation in which members of the Defence Force were engaged on or after 14 February 1975, to be a prescribed operation. Regulation 4 of the Regulations specifies that the conditions for the award of the medal may be similarly determined.

3. On 19 May 2011<sup>2</sup>, an amending Declaration and Determination was issued which stated, relevantly, that for the purposes of Regulation 3:

...

*(v) participation in naval operations in the North West Indian Ocean deployments in the area north of 10° North and west of 75° East, that is, the Arabian Sea including the Gulf of Aden, Gulf of Oman and Persian Gulf during the period that commenced 1 September 1980 and ended on 31 July 1986.*

...

4. It was also determined, under Regulation 4, that the ASM with Clasp 'MIDDLE EAST' may be awarded to a member of the Australian Defence Force who rendered service as such a member while posted to or serving as a member of the Australian element for the *prescribed operation*, for a *prescribed period which was defined as, 30 days, or periods amounting in the aggregate to 30 days*<sup>3</sup>.

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<sup>1</sup> Commonwealth of Australia Gazette (CAG) S336, Letters Patent for the Australian Service Medal dated 13 September 1988.

<sup>2</sup> CAG S80 Instrument of Declaration and Determination under the Australian Service Medal with Clasp 'MIDDLE EAST' Regulations - dated 19 May 2011.

<sup>3</sup> Clause (c)(v)(1).

5. The Tribunal is required to undertake a merits review and is bound to apply the eligibility criteria which applied at the date of the decision under review.<sup>4</sup> In this case, the reviewable decision is the Defence decision of 10 March 2015.

### **Issue for the Tribunal**

6. Mr Counihan's only relevant service for ASM with Clasp 'MIDDLE EAST' was in HMAS *Supply* from June 1980 to November 1981. There was no dispute that Mr Counihan served in *Supply* for more than 30 days service during the relevant period.

7. At the hearing, Mr Counihan clarified that he was putting his claim on two bases. Firstly, he contended that *Supply* was in the prescribed Area of Operation (AO) for more than 30 days between August and December 1980 refuelling ships during the period of the Russian invasion of Afghanistan.

8. Secondly, he submitted, even if *Supply* was not in the AO for that period, 30 days is too long for recognition for service at that time in that AO. However, as was discussed at the hearing, and referred to above, the Tribunal is obliged to apply the eligibility criteria for the award in place at the time of the reviewable decision. Therefore, the Tribunal has no discretion as to the period of service in the relevant AO, and an applicant must have served 30 days in aggregate.

9. Consequently the only issue for the Tribunal was whether *Supply* was in the relevant AO for a period of 30 days.

### **Was HMAS Supply in the AO for a period of 30 days?**

10. In support of his Application for Review Mr Counihan provided a statement from Commander Kerry Stephen (Retd), who was *Supply's* Executive Officer (XO) during Mr Counihan's service in that ship. Commander Stephen also gave evidence by telephone at the hearing.

11. Mr Counihan and Commander Stephen's evidence was that *Supply* had just commenced a six month refit at Garden Island, but this was cancelled when the Russians invaded Afghanistan, and a Naval Task Force, including *Supply*, was deployed to the Middle East at a very short notice. *Supply* was on immediate call to replenish any allied warship involved in operations necessary to maintain stability in the crisis that had arisen following the Russian invasion of Afghanistan.

12. CMDR Stephen considered that the definition of AO in the Determination reflected a decision made by the Navy Office which totally ignored the actual facts about *Supply's* operations during the deployment; they were actually deployed in the Arabian Sea for three to

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<sup>4</sup> Defence Act 1903: s 110VB(6)

four months, with absences only for refuelling etc. Commander Stephen considered that it is irrelevant whether the ship was a few miles south of 10 degrees North, if Royal Navy or RAN ships had to be refuelled, the ship was participating in "prescribed naval operations." *Supply*, he said, was in a state of continuous readiness for replenishment operations throughout the deployment to the Arabian Sea.

13. Commander Stephen said that when they arrived in Colombo prior to starting naval operations it was planned that throughout the deployment *Supply* would replenish fuel in Dubai, whenever required, as this was the closest refuelling facility available. *Supply* was due to sail from Colombo to Dubai, through the Arabian Sea and the AO, to replenish fuel stocks onboard. However, information was received that the Russians would be hostile to such a move. *Supply* remained at sea in the vicinity of Sri Lanka for 3 days and was directed to carry out a "race course" or "figure of eight" track of about 80 to 100 miles on an East/West course which was "very close to 10 degrees North". This occurred while the Navy Office "rethought" the decision to refuel in Dubai.

14. He said that this replenishment was a continuous commitment which required the crew to be at immediate notice, notwithstanding whether it was North or South of 10 degrees North. Mr Counihan said that, at one stage, they were closed up for action stations for several days due to being in close quarters with the Russians who threatened them with attack. Mr Counihan and Commander Stephen both observed that from September to December 1980 the crew had almost no leave, and yet high morale was maintained.

15. Defence relied on the evidence of Mr Brett Mitchell, a military historian. Mr Mitchell prepared an analysis of the Report of Proceedings (ROP) for *Supply* for each month from September 1980 to the end of December 1980, recording the ship's movements against the prescribed AO. The ROPs provide information about the ship's movements, dates and times of events. Mr Mitchell's analysis was to the effect that *Supply* only entered the prescribed AO for a period of 16 days from 20 October 1980 to 4 November 1980.

16. Mr Mitchell said that he did not rely on the ROPs alone. He said he had consulted *Supply*'s navigation logs which recorded the ship's position every six hours and therefore provided much more information than the ROPs alone. Mr Mitchell said he was previously employed in the Sea Power Centre, Navy's autonomous research centre.<sup>5</sup> It was in that capacity that he had researched *Supply*'s log some time ago.

17. Mr Counihan thought *Supply* was in the AO for more than 30 days. He acknowledged that Defence had calculated that *Supply* was only in the AO for 16 days. He said that the ROPs did not reflect all the time spent in the AO. He said he had been told by former navigators that, in those days, paper charts were used and once a route was plotted using pencil, it was rubbed out and the charts re-used. What was officially recorded in the ROPs did not tell the whole story.

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<sup>5</sup> <http://www.navy.gov.au/spc/>

18. Mr Mitchell was confident that the logs would reflect this course adjustment, and we accept that *Supply* for about three days may have been in and out of the AO. Although this may have been taken into account in Mr Mitchell's calculations, an additional three days still leaves a considerable shortfall in the required number of days.

19. By way of background to the ASM with Clasp 'MIDDLE EAST', Mr Mitchell said that in 1999 the government had initiated a review of anomalies in respect of awards for South East Asian service. It was outside the Terms of Reference to consider North West Indian Ocean deployments, but, in about 2001, that area was separately considered in consultation with "Navy" with a view to amending the Determination to include service in the North West Indian Ocean.

20. Mr Mitchell noted that Commander Stephen observed that the definition of the AO in fact describes a very small area indeed. Mr Mitchell said that he was aware Navy had considered a wider option, including down to the Equator, but had rejected that definition. He said that, as he understood it, the "general feeling" was that ships in the task force would fall within the eligibility criteria. He was unable to speculate whether, even if this broader definition advocated by Commander Stephen had been adopted, *Supply* would have been within the AO for 30 days.

21. Mr Counihan observed that a [named] Leading Seaman had received "medals for his deployment". Mr Counihan told the Tribunal that the Leading Seaman had served at the same time he was in *Supply*, but was otherwise unaware of the details of his service. As was discussed at the hearing, it is not for the Tribunal to enquire as to the entitlement or otherwise of other persons to a similar award. The Tribunal notes that the ASM Clasp 'MIDDLE EAST' may be awarded for service that is *in aggregate* 30 days.

22. The Tribunal undertook its own analysis of the ROP for *Supply* from September 1980 to the end of December 1980. Although the ROP did not contain the detail which might have been available in the ship's logs, the Tribunal was satisfied that *Supply* did not serve in the prescribed area for a period of 30 days. Even allowing for periods during the "race track" or "figure of eight" manoeuvres were undertaken the Tribunal was not satisfied that this would increase the number of days in the AO to 30 days.

23. As has been observed above the Tribunal has no discretion and must apply the eligibility criteria. We note Mr Mitchell's evidence about the evolution of the eligibility criteria, which, having regard to his field of expertise, the Tribunal accepts.

24. For the reasons given above, the Tribunal could not be satisfied that HMAS *Supply* served in the prescribed area for a period of 30 days. It follows that Mr Counihan is therefore not eligible for the ASM with Clasp 'MIDDLE EAST'.

## **DECISION**

25. The Tribunal decided to affirm the decision under review.