



Australian Government

Defence Honours and Awards Appeals Tribunal

Johnson and the Department of Defence [2018] DHAAT 16 (6 September 2018)

File Number 2017/08

Re **Mr Peter Ian Johnson**
Applicant

And **Department of Defence**
Respondent

Tribunal Mr Mark Sullivan, AO (Presiding Member)
Air Vice-Marshal A. John Quaife AM (Retd)
Ms Josephine Lumb

Hearing Date 27 April 2018

DECISION

On 6 September 2018 the Tribunal decided to recommend to the Minister that:

- a. the decision by the Chief of Air Force not to recommend Mr Peter Johnson for the award of the Air Force Medal be affirmed; and
- b. the Minister recommend to the Governor-General that Mr Peter Johnson be awarded the Conspicuous Service Medal for meritorious achievement and devotion to duty in non-warlike situations.

CATCHWORDS

DEFENCE HONOUR – Air Force Medal – Conspicuous Service Medal – eligibility criteria – whether applicant’s service should be recognised.

LEGISLATION

Defence Act 1903 - ss 110VB(1), 110VB(6)

Defence Amendment Regulations (No.1) 2010 - Schedule 3 Part 2

Commonwealth of Australia Gazette No. S108 dated 7 May 1990 (Letters Patent and Regulations for the Conspicuous Service Medal)

REASONS FOR DECISION

Introduction

1. The Applicant, Mr Peter Ian Johnson seeks the Conspicuous Service Medal (CSM), being, in his view, the modern Australian equivalent of the Air Force Medal (AFM) which was discontinued in 1993.

2. Mr Johnson enlisted in the Royal Australian Air Force on 27 June 1966 and served until 4 July 1986, when he discharged with the rank of Warrant Officer. Mr Johnson's service included active service in Vietnam with No 9 Squadron from September 1970 to September 1971. After this service, he was posted to No 5 Squadron, a helicopter squadron based at RAAF Fairbairn, Canberra.

3. Mr Johnson asserts that he was nominated for an AFM in 1972 in recognition of his service with No 5 Squadron. Due to a policy decision taken by the Whitlam government in December 1972 not to nominate ADF members for Imperial honours, Mr Johnson's AFM nomination was not progressed. He made an application to Defence on 30 May 2014 seeking a determination as to his eligibility for "*the AFM or its replacement*".

4. In a letter dated 11 October 2017, the Chief of Air Force, Air Marshal Gavin Davies AO CSC advised Mr Johnson that he was not eligible for the AFM. The Chief of Air Force's letter did not address the issue of Mr Johnson's eligibility for the CSM.

5. Mr Johnson formally sought review of the Chief of Air Force's decision by the Tribunal in an Application for Review dated 25 October 2017.¹

What does Mr Johnson seek?

6. In his application to Defence dated 30 May 2014, Mr Johnson states that he seeks a determination of his "eligibility for qualification for the AFM *or its replacement* [emphasis added]".

7. In his Application for Review to the Tribunal, Mr Johnson states that the Honour he seeks is the "*Air Force Medal (AFM) (Modern equivalent: Conspicuous Service Medal)*".

8. In a letter to the Tribunal dated 27 July 2018 Mr Johnson reiterates that in seeking review of his eligibility for the AFM he additionally seeks review of his eligibility for the CSM, stating that:

¹ Application for Review of Decision by Mr Johnson – 25 October 2017.

“As was mentioned at my Tribunal hearing in Canberra on the 27th April 2018, the Tribunal Chair stated that the issue under investigation was for my request for the recommendation for the Air Force Medal (AFM) which is no longer part of the Australian Awards, but could be replaced by an apparent equivalent Australian Award in the Conspicuous Service Medal (CSM). The issue was NOT for subsequent recommendations for the Medal of the Order of Australia...

.....

the CSM is the award I seek.”²

9. On the basis of the above, the Tribunal considered that Mr Johnson’s application encompasses a request for determination of both his eligibility for the AFM or alternatively the CSM.

10. The Tribunal noted in this context that both the AFM and the CSM are listed as “defence honours” in Section 35 of the *Defence Regulations 2016*, which sets out the defence honours in relation to which the Tribunal has jurisdiction under section 110VB of the *Defence Act 1903*.

Mr Johnson’s case

11. Mr Johnson submits that on 7 November 1972, he (then a Leading Aircraftsman) was recommended for the AFM by his Commanding Officer Wing Commander B.F.S. Nicholls, of 5 Squadron. The citation states:

1. LAC Johnson was posted to No 5 SQN wef 10 SEP 71 at the completion of an operational tour with No 9. Squadron in South VIETNAM.

2. LAC Johnson has taken part in a variety of flying tasks, during which he has shown complete devotion to duty and a disregard for his own safety when others have been in need of assistance.

3. Flying tasks in which LAC Johnson participated included aircraft recovery near GOROKA and LAKE KOPIAGO TPNG, local aircraft recovery near CANBERRA, flood rescue near TOWNSVILLE and a rescue of two lost bushwalkers near Corin Dam Australian Capital Territory. Throughout all these tasks Johnson has displayed a knowledge and coolness which enabled each mission to be successfully completed.

4. As an helicopter crewman LAC Johnson has won the respect of all who have come in contact with him. He at all times shows a professional approach to his flying and ground duties and he is an asset to the

² Letter from Mr Johnson to the Tribunal dated 27 July 2018.

Squadron. His devotion to duty, cheerfulness in adversity and general ability in all matters pertaining to his service appointment contribute to the morale of the Squadron and make him worthy of an Air Force Medal.

12. This recommendation was “strongly supported” by Group Captain C.G. Thomas, Officer Commanding RAAF Fairbairn, and further recommended by Air Vice Marshal W.E. Townsend, Air Officer Commanding.

13. In a letter dated 5 June 2018 Air Chief Marshal Sir Angus Houston AK, AFC (Retd) wrote in support of Mr Johnson’s application that:

I was posted to Number 5 Squadron in Canberra in July 1971 to fly Iroquois helicopters. I commenced flying on 26 July 1971 and completed my tour on 12 November 1974. I observed Peter Johnson’s performance as a crewman from the time of his arrival in the unit until the submission of a recommendation to honour him with the award of an Air Force Medal.

I remember a very impressive and most professional and dedicated crewman who stood out from his peers. Typical was his conduct and professionalism in the recovery of a crashed Iroquois from the side of a mountain in Papua New Guinea. I flew with him and another pilot on this mission on 5-6 October 1972. His performance to the success of the mission was crucial and his performance was exemplary.

I note the recommendation for an award to honour Peter Johnson was not progressed by the incoming Whitlam government on the basis of a policy to discontinue Imperial awards. I note this policy was reversed by the incoming Fraser government in 1975. Following this decision several Air Force people were recognised with Air Force Crosses or Medals. Indeed, I myself was awarded an Air Force Cross in 1979.

The failure to proceed with the recognition for Peter Johnson in 1973 was an injustice. Failure to redress this injustice now would reinforce that injustice to an individual who was always regarded as outstanding in his long and distinguished career in the Royal Australian Air Force. Accordingly, I strongly support a retrospective award of an Air Force Medal.³

14. In a letter to the Tribunal received on 6 August 2018 Mr Johnson reiterates his view that he has been:

“unfairly treated by the simple 'stroke of the pen' by the then PM Gough Whitlam ... I believe it is now up to the Tribunal to right this wrong and make good my valid claim for the original recommendation to proceed, albeit perhaps in the form of the apparent equivalent replacement for the AFM, in the Conspicuous Service Medal (CSM). To make good this award would also offer the Air Force the opportunity to be seen as recognising

³ Letter, Sir Angus Houston AK AFC to the Tribunal, 5 June 2018.

conspicuous service, particularly by the then lower ranked members of the RAAF”⁴

Defence (Air Force) position

15. In his letter dated 11 October 2017 (the reviewable decision)⁵, the Chief of Air Force states that:

“Air Force applies the assessment methodology adopted by the Defence Honours and Awards Appeals Tribunal for the Inquiry into Unresolved Recognition for Past Acts of Naval and Military Gallantry and Valour. That is, when determining whether an award should be considered, an assessment is undertaken to determine whether due process was followed in accordance with the policies and processes in place at the time.

What I can advise is that, on 19 December 1972, Mr Whitlam the then Prime Minister held a press conference announcing that there would be no recommendations made by his Government for the upcoming Honours list. The effect of the new Government policy meant Commonwealth agencies (ie Defence) were not able to nominate any members for Queens Birthday or any nominations for Imperial Honours from that date.

As the Whitlam decision was made late in 1972, Defence had already called for nominations for the 1973 Queens Birthday Honours list. The nomination on your file was raised as a result of this call. As a result of the Government decision to not make any recommendations for Imperial Honours, your nomination was unable to be progressed – there was simply no longer an Honours list for which to nominate.

Noting the Government’s policy in 1972 as detailed above, and that Air Force has found no evidence of maladministration, I have determined that no further action should be taken in regard to the nomination for an Air Force Medal.”

16. The reviewable decision does not address Mr Johnson’s request in his application to Defence to be considered for the modern equivalent “or replacement” of the AFM. At the hearing, Defence representatives confirmed that no consideration of Mr Johnson’s eligibility for the CSM had been conducted in the process of responding to his initial application to Defence.

17. Following the hearing, the issue of subsequent Air Force consideration of Mr Johnson’s eligibility for a CSM was addressed in a letter received by the Tribunal on 20 June 2018 from Air Commodore KG Dunn, AM, Chief of Staff – Air Force Headquarters.⁶

⁴ Letter, Mr Johnson to the Tribunal, 6 August 2018.

⁵ Letter, Chief of Air Force to Mr Johnson, 11 October 2017.

⁶ Letter, B1577329, Chief of Staff, Air Force Headquarters to the Tribunal, 20 June 2018.

18. In her letter, Air Commodore Dunn reiterated advice provided at the hearing that Air Force Headquarters had at that time recently been made aware of the existence of a number of hard-copy files relating to Honours over the period 1973-76, and had taken the question of Air Force consideration of CSM eligibility on notice pending review of those files.

19. Air Commodore Dunn advised that Air Force had subsequently reviewed the files in question and that:

“[i]t is clear that Mr Johnson’s original nomination for an AFM had been re-worked into a nomination for a Medal of the Order of Australia (AM) as part of the Queen’s Birthday 1975 (QB75) Honours List. Of note, the QB75 was the first Honours List available under the new system for Defence to submit nominations. At that time, Mr Johnson’s nomination was endorsed as the ‘first reserve’ for Air Force’s QB75 list. However, an ADF review that year into the quotas for Honours reduced the number of nominations across the board which resulted in the removal of all reserves and a number of nominations that had previously been endorsed. Accordingly, Mr Johnson’s nomination for recognition on the QB75 List was unsuccessful.

Mr Johnson’s nomination was submitted again as part of Air Force’s nominations for the Australia Day 1976 (AD76) Honours list. Mr Johnson’s nomination was assessed in competition against all other nominations that year and the decision of the Air Member Personnel was that his nomination was not competitive.

By way of additional context, the policy at this time was that there was no likelihood of the Australian Government recommending British Honours or Awards, except for operational bravery. For skill in the air, in isolated or continuous instances, the only way these actions could be recognised was through the award within the Order of Australia. At that time, the AM was the lowest level within the Order of Australia. The application for recognition of Mr Johnson was not for an act of bravery and there is no process to articulate a CSM to an AM.

Therefore, Air Force’s position is that Mr Johnson’s nomination was given due consideration in competition with the cohort that was assessed for both the QB75 and AD76 Honours List. On both occasions, his nomination was not successful. Any further review of these decisions will change that outcome and would be counter to the principles of procedural fairness.”⁷

⁷ Ibid.

Role of the Tribunal: merits review

20. The Tribunal is required under the *Defence Act 1903* (the Defence Act) to review a “reviewable decision” on the merits. In this case, the reviewable decision is that of the Chief of Air Force dated 11 October 2017.⁸

21. The facts, law and policy aspects of the decision are all considered afresh and a new decision is made.⁹ The Tribunal reviews the decision, and not the reasons for the decision. In doing so, there is no legal onus of proof, and there is no presumption that the original decision was correct.¹⁰ 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.

What eligibility criteria must the Tribunal apply?

22. In considering Mr Johnson’s review, the Tribunal is bound by the relevant eligibility criteria for the claimed honour(s) that governed the making of the decision under review – i.e. the Chief of Air Force’s letter dated 11 October 2017 in this case.¹¹ This statutory obligation is pivotal in this case, as it brings within the remit of the Tribunal the eligibility criteria attached to the CSM as at 11 October 2017. Eligibility criteria for the CSM, which was instituted in 1989, were clearly non-existent at the time of the historical decision not to proceed with the AFM nomination in 1972. They were however in force at the date of the reviewable decision in 2017.

23. In relation to the AFM, the Tribunal is likewise bound to consider the eligibility criteria for that honour as at 11 October 2017. This presents some practical difficulties for the Tribunal given that the AFM was discontinued in 1993. It follows that at the date of the reviewable decision in October 2017, no eligibility criteria for the discontinued honour were in existence. The Tribunal’s consideration of how best to address this issue in Mr Johnson’s case is set out below.

Tribunal’s obligation to consider an applicant for an Imperial honour that is no longer available

24. In light of the particular historical circumstances and chronology attached to Mr Johnson’s application, the Tribunal first turned to consider the issue of its obligation to consider an applicant for an Imperial honour that he can no longer receive due to its discontinuation.

⁸ Letter, Chief of Air Force to Mr Johnson, 11 October 2017.

⁹ Pearson, Linda, ‘Merit Review Tribunals’, in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68.

¹⁰ *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

¹¹ Section 110VB(6) of the *Defence Act 1903*.

25. Crucially, a decision was made in October 1992 by the then Government of Prime Minister Keating that Australia would no longer make recommendations for Imperial awards.¹² The AFM was subsequently discontinued as an Imperial award in 1993.

26. Section 110VB(1) of the Defence Act states that, if an application is properly made to the Tribunal for review of a reviewable decision made in relation to a 'defence honour', the Tribunal '*must* [emphasis added] review the decision'.

27. It is clear from the definition of the term 'defence honour' that it includes certain Imperial honours - including the AFM. There is nothing in Part VIIIC of the Defence Act, nor the Procedural Rules of the Tribunal that would prevent an application from being 'properly made' for a discontinued Imperial honour - as Mr Johnson has done in this case - even though it is no longer possible in practical terms for him to receive it.

28. Where an application has been properly made to the Tribunal for review of a 'reviewable decision' relating to a discontinued Imperial honour the Tribunal has a statutory obligation to review the reviewable decision in relation to that honour. As stated above, the Defence Act dictates that the eligibility criteria to be applied is that which governed the making of the reviewable decision.

29. However, in the particular circumstances of Mr Johnson's case the AFM had been discontinued for more than 20 years at the time of the Chief of Air Force's decision in 2017. Logic would dictate that there are, therefore, no relevant AFM eligibility criteria for the Tribunal to consider Mr Johnson's service against in this particular case. Further, even if there were eligibility criteria in place at the time of the reviewable decision, it would plainly be futile for the Tribunal to make a recommendation to the Minister in favour of the conferral of an honour which no longer exists. In any event, the Tribunal further noted that Mr Johnson has clearly indicated his understanding of the unavailability of the AFM and has confirmed that it is the CSM he seeks.

30. In these circumstances the Tribunal focussed its consideration on the question of whether Mr Johnson's service met the eligibility criteria for the CSM.

¹² Prime Minister of Australia Media Release 111/92 dated 5 October 1992.

Does Mr Johnson's service meet the eligibility criteria for the Conspicuous Service Medal?

31. The CSM was created on 18 October 1989 to provide recognition to members of the Australian Defence Force and certain other persons for:

*meritorious achievement or devotion to duty in non-warlike situations*¹³

32. Mr Johnson solely relies upon his service while posted to No 5 Squadron as justifying CSM recognition. It is not disputed that his relevant experience during this time constitutes duty in a 'non-warlike situation'. The issue for the Tribunal is whether his actions during that period amount to *meritorious achievement or devotion to duty*.

33. Noting that the Regulations do not define what amounts to 'meritorious achievement' or 'devotion to duty', the Tribunal turned to consider whether the available evidence supported a finding that Mr Johnson's service was sufficiently meritorious so as to come within the eligibility criteria for the CSM.

34. The Tribunal considered the original citation and in particular the following statements:

"LAC Johnson has taken part in a variety of flying tasks, during which he has shown complete devotion to duty and a disregard for his own safety when others have been in need of assistance"

"[Mr Johnson's] devotion to duty, cheerfulness in adversity and general ability in all matters pertaining to his service appointment contribute to the morale of the Squadron and make him worthy of an Air Force Medal"

35. The Tribunal noted that the 1972 nomination was supported by three senior officers in Mr Johnson's chain of command – having been made by his Commanding Officer Wing Commander B.F.S Nicholls; "*strongly supported*" by Group Captain C.G. Thomas, Officer Commanding RAAF Fairbairn, and further recommended by Air Vice Marshal W.E. Townsend, Air Officer Commanding. The Tribunal considered that the original citation provided contemporaneous evidence of the meritorious nature of Mr Johnson's service in 1972.

36. The Tribunal further considered that the letter from Air Chief Marshal Sir Angus Houston dated 5 June 2018 provided contemporary evidence in support of the meritorious nature of Mr Johnson's service in 1972.

¹³ Commonwealth of Australia Gazette No S108, 7 May 1990, *Letters Patent and Regulations for the Australian Conspicuous Service Decorations*.

37. The Tribunal considered the Defence (Air Force) position as set out in the Chief of Air Force's letter dated 11 October 2017 and confirmed by the Defence Representatives at the hearing, i.e. that because due process was followed in accordance with the policies and processes in place at the time and in the absence of any maladministration, no further action should be taken in regard to Mr Johnson's nomination for an AFM.

38. The Tribunal does not dispute the Air Force position that due process was followed and that maladministration was absent in relation to the decision in 1972 not to proceed with Mr Johnson's AFM nomination. This cannot, however, be the determinative consideration in this matter, given that the Tribunal has a statutory obligation to conduct a merits review of Mr Johnson's service against the eligibility criteria for the CSM that governed the making of the reviewable decision in 2017.

39. Nor does the fact that Mr Johnson was subsequently (and unsuccessfully) twice nominated for a Medal of the Order of Australia (AM) have any direct relevance to the Tribunal's consideration of Mr Johnson's application for review to it. The AM forms part of an entirely separate awards process over which the Defence Honours and Awards Appeals Tribunal has no jurisdiction. The subsequent AM nominations are in the Tribunal's view only relevant to the extent that they support a contention that Mr Johnson's service was viewed as meritorious by the Air Force at the time.

40. The Tribunal has material before it supporting the contention that Mr Johnson's service with 5 Squadron in 1972 met the CSM eligibility criteria of *meritorious achievement or devotion to duty*. No material contradicting the meritorious nature of Mr Johnson's service was put to the Tribunal. The Tribunal notes that Mr Johnson presented as a credible applicant both at hearing and in all previous and subsequent interactions with the Tribunal and commends him for his patience and professionalism throughout what has been a protracted process.

41. For the reasons set out in paragraphs 31 to 40 above, the Tribunal was reasonably satisfied that Mr Johnson's service with 5 Squadron met the eligibility criteria for the CSM.

DECISION

42. The Tribunal decided to recommend to the Minister that:

- a. the decision by the Chief of Air Force not to recommend Mr Peter Johnson for the award of the Air Force Medal be affirmed; and

b. the Minister recommend to the Governor-General that Mr Peter Johnson be awarded the Conspicuous Service Medal for meritorious achievement and devotion to duty in non-warlike situations.