



Australian Government

Defence Honours and Awards Appeals Tribunal

Publicover and the Department of Defence [2019] DHAAT 07 (4 July 2019)

File Number 2019/002

Re **Major Douglas Bruce Publicover, Royal Canadian Air Force**
Applicant

And **Department of Defence**
Respondent

Tribunal Ms Naida Isenberg (Presiding Member)
Mr David Ashley AM

Hearing Date 14 June 2019

Appearances Major Publicover (by telephone)

Ms J Callaghan & Ms A Augustine,
Directorate of Honours and Awards, Department of Defence.

DECISION

On 4 July 2019, the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Major Douglas Bruce Publicover is not eligible for the award of the Afghanistan Medal.

CATCHWORDS

DEFENCE AWARD – Afghanistan Medal – eligibility criteria - exchange officer – complaint of inconsistency - change of criteria over time.

LEGISLATION

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

Defence Regulation 2016.

Commonwealth of Australia Gazette No. S422, dated 22 October 2004, *Afghanistan Medal Regulations and Letters Patent*.

Commonwealth of Australia Gazette No. S125, dated 6 July 2005, *Afghanistan Medal Regulations – Instrument of Determination*.

Commonwealth of Australia Gazette No. S46, dated 7 April 2010, *Afghanistan Medal Regulations - Declaration and Determination*.

Commonwealth of Australia Gazette No. S30, dated 3 March 2011, *Afghanistan Medal Regulations - Declaration and Determination*.

Commonwealth of Australia Gazette No. S26, dated 12 February 2013, *Afghanistan Medal Regulations - Declaration and Determination*.

Commonwealth of Australia Gazette No. G01531, dated 10 September 2014, *Afghanistan Medal Regulations Instrument*.

Commonwealth of Australia Gazette No. G00562, dated 21 April 2015, *Afghanistan Medal Regulations Instrument*.

REASONS FOR DECISION

Decision under review

1. The Applicant, Major Douglas Bruce Publicover, seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate), dated 10 March 2018, that he is not eligible for the award of the Afghanistan Medal. Pursuant to s 110VB of the *Defence Act 1903* (the Act) the Applicant sought review of that decision in his application to the Tribunal dated 22 January 2019. There was no issue as to jurisdiction.

Background

2. Major Publicover is a current serving officer with the Royal Canadian Air Force who, from June 2009 until June 2012 was an exchange officer (serving as a Flight Lieutenant) with the Royal Australian Air Force with No. 10 Squadron at Edinburgh, South Australia.

3. During his exchange, Major Publicover was deployed to Afghanistan with No. 10 Squadron on Operation SLIPPER for two periods:

- 6 October 2010 to 5 November 2010 and;
- 14 December 2011 to 14 March 2012

Eligibility criteria for the award of the Afghanistan Medal

4. The Afghanistan Medal was instituted by Her Majesty The Queen by Letters Patent on 30 September 2004 *for the purpose of according recognition to members of the Australian Defence Force and certain other persons who render service in operations in Afghanistan and support operations in surrounding areas.* (emphasis added).

5. The eligibility criteria for awarding the Afghanistan Medal are set out in the Commonwealth of Australia Gazette No. S422, *Afghanistan Medal Regulations* – dated 22 October 2004 (the Regulations) which provides:

5. Conditions for award of Medal

- (1) The Medal may be awarded for service in the operational area of Afghanistan in connection with a prescribed operation.
- (2) The persons to whom the Medal may be awarded are:
 - (a) Persons who served in a prescribed operation as members of the Defence Force; and
 - (b) Persons included in a class of persons determined by the Minister for the purposes of this regulation.
- (3) The other conditions for the award of the Medal are the conditions determined by the Governor-General on the recommendation of the Minister.
- (4) The Medal may only be awarded to a person who fulfils the conditions for the award of the Medal.

6. Although there have been a number of iterations of other eligibility criteria for the Afghanistan Medal made pursuant to Reg 5(3), under s 110VB(6) of the Act, the Tribunal is obliged to apply the eligibility criteria at the date of the decision under review, that is the Directorate's decision of 10 March 2018. Those additional criteria are contained in the *Afghanistan Medal Instrument* - dated 13 April 2015 which states:

7. Conditions

(1) For subsection 5(3) of the Afghanistan Medal Regulations, the following conditions are determined for the award of the medal:

- (a) A person must have given service on deployment during the period of the Afghanistan Operation; and
- (b) A person must have given service on 30 days, during one or more such deployments, whether or not the service continued throughout the whole day and whether or not the 30 days were continuous; and
- (c) A person must have given the service while assignment for duty (however described) on one or more operations that comprise the Afghanistan Operation; and
- (d) A person must have given the service as an ADF member; and
- (e) A person must not have been awarded, nor be eligible to be awarded, an Iraq Medal in relation to the same service on a deployment during which the service is given; and
- (f) A person must have given service that involves the performance of Operational Duties; and
- (g) No other period of service can have been completed.

7. The Respondent accepted that the Applicant met all the necessary relevant criteria except that his service was not given as an ADF member - see clause 7(d).

Submissions

8. In accordance with the Tribunal's Procedural Rules, on 31 January 2019, the Tribunal wrote to the Secretary of the Department of Defence informing him of the Applicant's application for review and requesting that he provide a report. On 29 March 2019, the Directorate on behalf of the Secretary provided the Tribunal with a report, a copy of which was forwarded to the Applicant for comment. The Applicant provided a written response to the Tribunal dated 22 January 2019. Both parties have the material upon which the Tribunal has relied.

9. In support of his application, Major Publicover provided copies of photographs of three individual service personnel from three countries, who have all served as foreign exchange airmen with the RAAF. There was no dispute that the service personnel in the photographs from the Royal Air Force and the Royal Canadian Air Force have both been awarded the Australian Afghanistan Medal as well as their own countries' Afghanistan awards. The third photograph shows a US Navy pilot with the ribbon of the Afghanistan Medal (as well as the Australian Overseas Service Medal, Border Protection and the Australian Active Service Medal with Clasp ICAT). The Respondent's position was that the Afghanistan Medal had been issued in error as this award is specifically for members of the *Australian Defence Force*.

10. In his response to the Defence report, Major Publicover wrote that he did not challenge the criteria for awarding of the medal, rather, he challenged the inconsistency with which the criteria apparently had been applied to foreign service members.

11. At the hearing the Applicant told the Tribunal that colleagues from the United Kingdom and the United States who served at the same time had been issued with the Afghanistan Medal, whereas he and his (Canadian) predecessor both did not. In contrast, another Canadian who served at another base did receive the award for his Afghanistan deployment.

Issue for the Tribunal

12. As there was no dispute that the Applicant served in the relevant operational area for the requisite period of time, the only issues for the Tribunal therefore were:

- Did the Applicant serve as a “member of the Defence Force”, per Regulation 2(a)?, or
- Was the Applicant a person included in a class of persons determined by the Minister for the purposes of the regulation, per Regulation 2(b)?, or
- Did the Applicant give the service as an ADF member, per clause 7(d)?

Did the Applicant serve as a “member of the Defence Force”?

13. “Defence Force” is defined in the Regulations to mean the Defence Force constituted under the Act. The Tribunal was satisfied that this referred to members of the Australian Defence Force.

14. The Tribunal consulted the Defence Instructions (Air Force) in relation to the Air Force Personnel Exchange Program in force at the time of the Applicant’s service with the RAAF and Memoranda of Understanding between the ADF and the Canadian Forces. While that material noted that Canadian seconded personnel were to function fully as personnel of the RAAF units to which they were assigned and perform tasks as directed by RAAF personnel, that did not, in the Tribunal’s view, make a Canadian exchange officer a “member of the Defence Force” for the purposes of the Afghanistan Medal.

15. Consequently, the Applicant did not meet this criterion.

Was the Applicant a person included in a class of persons determined by the Minister for the purposes of the Regulation?

16. As an alternative to Regulation 5(2)(a), the Tribunal considered whether the Applicant might be in a in a class of persons determined by the Minister for the purposes of the Regulation. The Respondent informed the Tribunal that no determination has been made by the Minister in relation to foreign exchange officers, nor, indeed, at all. The Tribunal made its own inquiries and confirmed that this was the case.

17. Consequently, the Applicant did not meet this criterion.

Did the Applicant give the service as an ADF member?

18. Clause 7(d) of the 2015 Instrument identifies that a person may be eligible for the Afghanistan Medal if the person gave the service as an ADF member. “ADF Member is defined to mean a member of the Defence Force, and “Defence Force” is in turn defined as “the Defence Force constituted under Part III, Division I of the *Defence Act 1903*”.

19. For the reasons discussed at paragraph 15 above, the Applicant did not meet this criterion.

Conclusion in relation to the Application for Review

20. As the Applicant was not a member of the Australian Defence Force, he was unable to meet this essential criterion for the award of the Afghanistan Medal.

Other observations

21. For completeness the Tribunal, noted that the Applicant had been the subject of an earlier application for the Afghanistan Medal. Following Major Publicover’s return from Afghanistan in November 2010, Wing Commander Jansen, then Commanding Officer of 10 Squadron, applied to have Major Publicover’s Afghanistan’s service recognised. In a letter dated (only) February 2011, the Director, Honours and Awards informed Wing Commander Jansen that Major Publicover was not eligible for the Afghanistan Medal.

22. The Determinations in place at that time set out the requirements to be met to be awarded the Afghanistan Medal. Both the 2010 and 2011 Determinations repeated the requirements for service as a member of the ADF or a member of a class of persons determined by the Minister. As discussed above, the Applicant did not meet either of those criteria. Further, all of the Determinations in relation to the Afghanistan Medal have this requirement.

23. While not directly under review in the present proceedings, the Tribunal nonetheless considered that any Application for Review with respect to the previous application on his behalf would also fail.

24. That the Applicant, as an exchange officer did not appear to have met the eligibility criteria *at any time* suggests that the award to any foreign personnel in similar circumstances may have been in error, as the Respondent conceded. The Tribunal makes no further observations in this regard, nor comments upon any course of action Defence may choose to adopt in relation to those matters.

Australian Operational Service Medal – Border Protection

25. At the hearing, the Respondent took the opportunity to inform the Applicant, that while the Afghanistan Medal was for service by Australian personnel only, the Australian Operational Service Medal – Border Protection Regulations have recently been amended to enable foreign force service members to be issued that award. The Applicant was informed by the Respondent’s representatives that he can expect to receive that award shortly.

DECISION

26. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Major Douglas Bruce Publicover is not eligible for the award of the Afghanistan Medal.