



Australian Government

Defence Honours and Awards Appeals Tribunal

Shepherd and the Department of Defence [2015] DHAAT 17 (19 April 2015)

File Number 2014/002

Re **Michael Warwick Shepherd**
APPLICANT

And **Department of Defence**
RESPONDENT

Tribunal Dr J. Harte (Presiding Member)
Air Commodore M. Lax OAM, CSM (Retd)

Hearing Date 22 January 2015 (Defence)
23 March 2015 (Mr Shepherd, Commander Anderson,
Commodore Scott RAN)

DECISION

On 19 April 2015 the Tribunal decided to affirm the decision of the Department of Defence that Mr Michael Warwick Shepherd is not eligible for the award of the Australian Service Medal with Clasp 'SPECIAL OPS'.

CATCHWORDS

DEFENCE AWARD – the Australian Service Medal with Clasp 'SPECIAL OPS'

LEGISLATION

Defence Act 1903 – ss110T, 110V(1)(a)(ii), 110VB(2)
Defence Force Regulations 1952 - reg 93C and Schd 3
Australian Service Medal Regulations 1988
Australian Service Medal Regulations 2001

REASONS FOR DECISION

Introduction

1. In August 2010, Mr Michael Warwick Shepherd (Mr Shepherd), a former member of the Royal Australian Navy (RAN), applied to the Directorate of Honours and Awards of the Department of Defence (the Directorate) to be awarded the Australian Service Medal with Clasp 'SPECIAL OPS' (ASM with Clasp 'SPECIAL OPS') in recognition of his service in HMAS *Onslow* during 1979. The Directorate refused his application.
2. Mr Shepherd then wrote to his local member, the Hon. Judy Moylan MP, who passed on his request to the Minister for Defence, the Hon. Stephen Smith MP. On 2 February 2011, Mr Shepherd received a response from the Parliamentary Secretary for Defence, Senator the Hon. David Feeney, advising him to write to the Chief of Navy (CN). On 21 February 2011, he sought support in writing from his former commanding officer, Commander Geoffrey Anderson RAN (Retd).
3. On 18 December 2011, Mr Shepherd applied to CN for recognition of his service on a submarine patrol that was conducted by HMAS *Onslow* between February and July 1979. CN replied on 14 March 2012 stating that he did not support Mr Shepherd's application as the patrol in question did not meet the medal criteria.
4. Mr Shepherd applied to the Tribunal on 14 January 2014 for a review of CN's decision not to recommend him for the ASM with Clasp 'SPECIAL OPS' for his service in HMAS *Onslow* in 1979.

The Tribunal's jurisdiction

5. There is no dispute that the Tribunal has jurisdiction to hear and determine Mr Shepherd's application for review (see ss 110V, 110VA and 110VB(2) of the *Defence Act 1903* and reg 93C of the *Defence Force Regulations 1952*). The role of the Tribunal is to determine whether the decision of the Defence Department is the correct or preferred decision having regard to the applicable law and the relevant facts.

Steps taken in the conduct of this review

6. On 6 February 2014, in accordance with the Tribunal's Procedural Rules, the Chair of the Tribunal wrote to the Secretary of the Department of Defence advising of Mr Shepherd's application for review and invited Defence to make submissions and provide the Tribunal with any material on which it sought to rely. Defence responded on 15 April 2014. Mr Shepherd was provided a copy of the Defence submission in a letter dated 29 April 2014. He responded on 8 May 2014.
7. During its preparation for this review, the Tribunal again wrote to CDF to confirm that he had made a decision not to declare Mr Shepherd's submarine patrol as a prescribed operation. It is CDF who has the sole responsibility for specifying which activities will be declared as prescribed operations for the purposes of

awarding the ASM with Clasp 'SPECIAL OPS'. The current CDF replied on 19 September 2014 that 'the decision [of Admiral Barrie¹] remains appropriate and that HMAS *Onslow* did not conduct any patrols or operations that met the eligibility criteria'.

8. The Tribunal conducted a hearing on 22 January 2015 at which Defence appeared in person. Present were:

Commodore Peter Scott, Director General Submarine Capability

Commander Tom Phillips, Deputy Director Submarines - Warfare

Lieutenant Commander Alan Clark, SO2 Special Programs - Navy

As Mr Shepherd could not be present, a summary of the discussion was sent to him for comment on 28 January 2015. Mr Shepherd responded by e-mail the same day, stating 'If our combined submission is not believed by the Tribunal Members, whether they have documentary evidence or not, leaves me in a position of quiet discomfort when they were not actually on board our submarine at the time and that we were definitely within [REDACTED] Territorial Waters operating a confidential surveillance patrol...'²

9. A full hearing was held on 23 March in Perth, attended by Mr Shepherd in person and with Mr Shepherd's previous commanding officer, Commander Geoff Anderson RAN (Retd) and Commodore Peter Scott RAN (representing Defence) appearing by telephone. Mr Shepherd also was able to question both Commander Anderson and Commodore Scott.

Mr Shepherd's Service

10. Mr Shepherd had previous service with the Royal Navy as a submariner and in the Royal New Zealand Navy as a special duties officer. He enlisted in the Royal Australian Navy Reserve (RANR) on 17 February 1976 and served on continuous full time service until 5 September 1977. On 6 September 1977, he enlisted in the Permanent Naval Force. After joining the RAN, Mr Shepherd initially served in the escort maintenance ship HMAS *Stalwart* before transferring to the submarine force. Pertinent to his claim, Mr Shepherd served as the Sonar Officer in HMAS *Onslow* between 12 June 1978 and 30 July 1979. He served in the RAN until 8 May 1981 when he left to take up a commercial opportunity in Western Australia.

¹ Admiral Chris Barrie AC, the CDF in 1998 when the original decisions were made about who would be eligible for the ASM with Clasp 'SPECIAL OPS'.

² During the hearing on 23 March, the Tribunal took the opportunity to explain to Mr Shepherd that it had not, in fact, come to any definite conclusions at that point and that the summary provided to him was simply a summary of what was said in the meeting with Defence.

ASM Medal Regulations and Eligibility Criteria

11. The Australian Service Medal was instituted by Letters Patent on 13 September 1988 for the purpose of ‘accord[ing] recognition to members of the Defence Force and certain other persons who render service in certain non-warlike operations’.³ The Regulations set out the general requirements for the ASM and state:

The Governor-General on the recommendation of the Minister may declare a non-warlike operation, in which members of the Defence Force are or have been on or after 14 February 1975, engaged, to be a prescribed operation for the purposes of these Regulations.

12. Since 1988, a number of Clasps have been declared by the Governor-General, including the Clasp ‘SPECIAL OPS’.

ASM with Clasp ‘SPECIAL OPS’ Eligibility Criteria

13. The ASM with Clasp ‘SPECIAL OPS’ was established in 1997 following discussions between the 1993/94 Committee of Inquiry into Defence and Defence Related Awards (CIDA) and the then CDF. The discussions were based on a submission made to CIDA that certain aspects of submarine service warranted special recognition with a unique medal. In considering the matter, the CDF recognised that there were broader issues involved than just submarine service and recommended to the Government that a Special Operations Clasp be established for the ASM. In March 1996, CDF provided advice to the Minister and sought approval:

... for special Australian Defence Force activities of a sensitive and hazardous nature (being non-warlike operations) to be prescribed operations for the purposes of the award of the Australian Service Medal with Clasp ‘SPECIAL OPS’.

The Minister agreed with the proposal but the words ‘of a sensitive and hazardous nature’ did not carry forward into the subsequent Regulations.

14. The most recent Declaration and Determination for the ASM with Clasp ‘SPECIAL OPS’ were made under the Regulations by the Governor-General effective from 8 June 2001 and set out in the *Commonwealth of Australia Gazette* S 230 of 29 June 2001. Previous Declarations and Determinations were revoked. These new Regulations came into effect on 8 June 2001. In Declaration 1 (b), the Governor-General declared that:

... each special Australian Defence Force activity (being non-warlike operations) occurring on or after 14 February 1975 as is specified by the Chief of the Defence Force for the purposes of this declaration to be a prescribed operation for the purposes of those Regulations.

Furthermore, Determination 1(c) (ii) in part states that:

... the Medal may be awarded to a person who rendered service as part of the Australian element of the prescribed operation which is not

³*Commonwealth of Australia Gazette*, S 336, 2 November 1988.

less than the minimum qualifying period specified by the Chief of the Defence (sic) in relation to the operation ...

15. In accordance with the ASM Regulations, the CDF has the sole responsibility to specify which activities will be declared as prescribed operations for the purposes of awarding the Clasp 'SPECIAL OPS'. Only ADF members assigned to that prescribed operation, as declared by the CDF, and who fulfil the minimum qualifying period are eligible for the award. In considering an award of the ASM with Clasp 'SPECIAL OPS', the normal 30 days eligibility period may be waived and an alternative minimum qualifying period substituted at the discretion of CDF.

16. The Clasp 'SPECIAL OPS' was not established to be a 'default' award for personnel who do not qualify for an ASM under the normal conditions that relate to a declared operation. Additionally, it is not awarded with the Australian Active Service Medal or for 'warlike' service.

Recognition of ADF Service by awarding the ASM with Clasp 'SPECIAL OPS'

17. Since its inception, over 1600 ASMs with Clasp 'SPECIAL OPS' have been awarded.⁴ These include awards for the following special activities:

- Prescribed submarine operations (ongoing);
- Explosive device demolition operations (ongoing);
- Operation SPITFIRE; East Timor (1999); and
- RAAF evacuation of New Zealand Embassy personnel from Tehran (1979).

In each case, the CDF determined, in accordance with the Regulations, that the above mentioned operations were non-warlike and involved special activities that were both sensitive and hazardous in nature.

The Arguments of Mr Shepherd

18. Mr Shepherd claims that a patrol conducted by HMAS *Onslow* in the first half of 1979 should be classed as an operation eligible for the award of the ASM with Clasp 'SPECIAL OPS'. He bases his claim on a number of assertions that the operation was classified and in his mind, hazardous. His claims include (*inter alia*):

- *Onslow* was advised to make preparations for a surveillance patrol;
- Fleet HQ published details that this was to be a 'training patrol'. This was completely false information;
- The CO briefed certain officers that 'it would be a six week patrol... four weeks at the destination... none of the rest of the crew was made aware of the details;
- The submarine was stored for war;

⁴Directorate of Honours and Awards correspondence to the Tribunal Secretariat, 20 February 2013.

- Portable surveillance equipment was installed and two Radio Special ratings from Defence Intelligence embarked, one of whom was a linguist;
- The sonar team, including himself, undertook refresher training ... on the noise signatures of [REDACTED] warships;
- Pendant numbers on the submarine's fin structure were removed;
- A black curtain was rigged around the chart table so that uniformed personnel could not follow current and future position;
- The submarine headed to a designated patrol area off the port of [REDACTED];
- Whilst in this somewhat hazardous location on our fourth week the submarine experienced an electrical failure ... and had to withdraw.

19. Mr Shepherd concluded that 'my personal thoughts throughout the entire patrol related to what would have happened had we been detected by the local military forces?'

20. He also stated that he had developed chronic PTSD and that his psychiatrist has informed him that 'a portion of my diagnoses can be attributed to that particular patrol in the submarine service'.

21. At the hearing, Mr Shepherd related his service history and in particular the time he spent on RAN submarines. He stated that he only did the one patrol and that he was not seeking DVA veteran's entitlements as he already had the DVA Gold Card. He reiterated that he believed the patrol that *Onslow* conducted in 1979 met the eligibility criteria for the ASM with Clasp 'SPECIAL OPS' and that all he was seeking was recognition for what he and his shipmates had done.

Commander Anderson's Statement in Support

22. Mr Shepherd contacted his then Commanding Officer, Commander Geoff Anderson RAN (Retd) to provide a supporting statement. Commander Anderson provided a submission to CN on 21 February 2011 and appeared before the Tribunal by telephone. Commander Anderson raised a number of points in support of Mr Shepherd's claim for the ASM with Clasp 'SPECIAL OPS'. These include (*inter alia*):

- There was a direction from the Fleet Commander to carry out a mission 'with the objective to monitor the extent of the [REDACTED] build up to their forces in [REDACTED]';
- They stored for war – loaded real torpedoes;
- They took on board special surveillance equipment;
- They embarked linguists and specialist radio operators;
- He understood that ... significant intelligence was obtained;
- *Onslow* observed radio silence for the duration of the patrol;
- The Sonar Officer (Mr Shepherd) personally suffered PTSD as a result of this patrol.

23. At the hearing, Commander Anderson was most forthcoming about the patrol in question. He stated that notwithstanding the fact that he himself had only undertaken one patrol, he knew that all patrols carried war torpedoes and that 'stored for war' meant packed with sufficient victuals, spares and supplies to last for several weeks. He stated that he submitted a full report after the patrol and that it was a confidential document.

24. When asked, he stated that 'we weren't in any form of danger' and that the use of a black curtain around the navigation table was 'usual'. Commander Anderson was unable to answer questions regarding other patrols by way of comparison because he had only undertaken the one patrol.

The Arguments of the Department of Defence

25. Defence stated in their submission that as Mr Shepherd's application for the ASM with Clasp 'SPECIAL OPS' had not been recommended by the decision maker, CDF, he was not eligible. Defence advised that in 1998 (when the ASM with Clasp 'SPECIAL OPS' was created), the then CDF, Admiral Barrie, considered all the eligible submarine operations dating back to 1975. Defence referred to Defence Force Memorandum PE 97-41331 which lists these operations, but due to the classification of this document, neither the Tribunal nor Mr Shepherd was able to view it.

26. At the hearing with Mr Shepherd, Commodore Scott stated that because of the classification, he was unable to comment on the criteria for the submariner's ASM with Clasp 'SPECIAL OPS', but he assured the hearing that HMAS *Onslow*'s patrol in 1979 did not meet those criteria.

27. When asked about the review process, Commodore Scott stated that the list agreed by Admiral Barrie was again thoroughly reviewed in 2007 and that the Navy was confident that it 'had taken every step to ... actively pursue the best outcome in regards to conditions of service for our people'.

28. When questioned by Mr Shepherd about the apparent lack of documentation (including intelligence reports), Commodore Scott stated that the fact that no documentation could be found regarding HMAS *Onslow*'s patrol in 1979 was indicative that the patrol did not meet the ASM with Clasp 'SPECIAL OPS' criteria. Commodore Scott stated that had the patrol been sufficient to credit *Onslow* as eligible, the documentation would have been kept.

TRIBUNAL'S CONSIDERATION

29. The Tribunal's consideration focused on the CDF's deliberations regarding the eligibility criteria of the ASM with Clasp 'SPECIAL OPS', the type of patrol conducted by HMAS *Onslow* in 1979 and whether that patrol was of such a nature as to deserve recognition.

30. There is no dispute regarding Mr Shepherd's service with the RAN or that he undertook a patrol in the first half of 1979 as Sonar Officer on HMAS *Onslow*. What is in dispute is the question of whether that patrol was of a sufficient nature to be deserving of the ASM with Clasp 'SPECIAL OPS'.

31. The Tribunal first sought to confirm that CDF had indeed made a deliberation regarding HMAS *Onslow* and that access to the Defence Force Memorandum PE 97-41331 be granted. CDF wrote to the Tribunal Chair on 19 September 2014 advising him that 'I am confident the decision remains appropriate and that HMAS *Onslow* did not conduct any operations that met the eligibility criteria'. He further stated that the document PE 97-41331 'cannot be provided to you in an un-redacted state' because it is a compartmented document.

32. The Tribunal next sought access to HMAS *Onslow*'s Reports of Proceedings (ROPs) and any other reports from patrols conducted between January and July 1979. The Tribunal found that such records are held by the Navy's Sea Power Centre in Canberra. The Tribunal was granted permission to view the extant records which were the ROPs. Unfortunately, there were no other reports or records on file. The Tribunal found that the only operational patrol conducted by HMAS *Onslow* was between 24 April and 19 May 1979, for a total of 26 days. No further details were recorded.

33. The fact that submarine patrols by their very nature are sensitive and usually highly classified made determining what HMAS *Onslow* did between April and May 1979 impossible in the absence of access to a contemporary post-operation report. The Tribunal could only rely on Commodore Scott's evidence that the patrol in question did not meet the eligibility criteria for the ASM with Clasp 'SPECIAL OPS' and that two very thorough reviews were conducted in 1998 and again in 2007 to ensure that submarine patrols that met the criteria were properly recognised.

34. The Tribunal finds that, despite an extensive search by both Defence and Tribunal staff, Commander Anderson's post-operation report has most likely been destroyed along with other material regarding submarine operations considered by the RAN to be routine and of no historical value. The Tribunal accepts that this is common Departmental practice and that a post-operation report is unlikely to be found. Without further evidence of exactly what *Onslow* did and if deemed sufficient, given further consideration by CDF, the Tribunal was unable to consider the matter further. The Tribunal can only accept the Navy's consideration of the matter as thorough over two reviews and accept the recommendation made to CDF.

DECISION

35. The Tribunal has decided to affirm the decision of the Department of Defence that Mr Michael Warwick Shepherd is not eligible for the award of the Australian Service Medal with Clasp 'SPECIAL OPS'.