



Australian Government

Defence Honours and Awards Appeals Tribunal

Hulse and the Department of Defence re: Wilson – DHAAT 19 (29 October 2020)

File Number(s) 2018/036

Re: **Lieutenant Colonel George Hulse, OAM (Retd) on behalf of
Group Captain Roger Wilson, DFC (Retd)**
Applicant

And: **Department of Defence**
Respondent

Tribunal Mr Mark Sullivan, AO (Presiding Member)
Mr Graham Mowbray
Air Vice-Marshal John Quaiife, AM (Retd)

Hearing Dates 29 October 2019 (Directions)
8 October 2020

DECISION

On 29 October 2020 the Tribunal recommended to the Minister for Defence that the decision by the Chief of Air Force that Group Captain Wilson has been suitably recognised for his actions and that no further honours and awards would be appropriate, be affirmed.

CATCHWORDS

DEFENCE HONOUR – *Star of Gallantry - Medal for Gallantry – Distinguished Flying Cross - acts of gallantry – in action – hazardous circumstances*

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VA, 110VB(1)
Defence Honours and Awards Appeals Tribunal Procedural Rules 2011
Defence Regulation 2016 – Part 6, S35
Gallantry Decorations Regulations dated 4 February 1991
Legal Services Directions 2017

REASONS FOR DECISION

Introduction

1. The applicant, Lieutenant Colonel George Hulse (Retd) seeks review of a decision by the Chief of Air Force to not support the upgrade of Group Captain Roger Wilson's Distinguished Flying Cross (DFC) to a Star of Gallantry (SG) for his actions on 16 May 1968 as a Forward Air Controller (FAC) at the Battle of Fire Support Base (FSB) Coral in South Vietnam. Along with the DFC, Group Captain Wilson, then a Flight Lieutenant, and referred to as such throughout this report, was awarded the United States Silver Star for his gallantry.

2. On 28 June 2017, Lieutenant Colonel Hulse wrote to the Royal Australian Air Force seeking consideration for the upgrade. In a letter dated 2 November 2017, the Chief of Air Force, Air Marshal G.N. Davies, AO, CSC wrote to Lieutenant Colonel Hulse stating '*given that Flight Lieutenant Wilson's actions have been recognised by the award of both the DFC and the US Silver Star, I must conclude that he has been suitably recognised for his actions, and that no further honours and awards would be appropriate.*' On 22 June 2018, Lieutenant Colonel Hulse made application to appeal that decision and for a review of the eligibility of Flight Lieutenant Wilson for the SG.

Tribunal Jurisdiction and Decision under Review

3. Pursuant to s110VB(1) of the *Defence Act 1903* (the Act) the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for an honour or award in response to an application. Part 6 of the *Defence Regulation 2016* defines defence honours as being those awards set out in Section 35.

4. The Tribunal was satisfied that Lieutenant Colonel Hulse's request of 28 June 2017 constituted an application as required by s110V(1)(c) of the Act. The Tribunal was satisfied that the Chief of Air Force's response of 2 November 2017 constituted a refusal to recommend the award, thus satisfying the requirements of s110V(1)(a) and (b) of the Act and creating the *reviewable decision*.

5. The Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision in 2017, as required by s110VB(6) of the Act. In accordance with s110VB(1) of the Act, as the Applicant seeks a defence honour, the Tribunal does not have the power to affirm or set aside the decision but may make recommendations regarding the decision to the Minister for Defence.

Conduct of the review

6. In accordance with its *Procedural Rules 2011*, on 13 July 2018, the Tribunal wrote to the Secretary of the Department of Defence informing him of Lieutenant Colonel Hulse's application for review. The Tribunal requested a merits-based assessment of Flight Lieutenant Wilson's actions against the eligibility criteria for the SG and a report on the material questions of fact and reasons for the decision to not support Lieutenant Colonel Hulse's original application. The Tribunal also requested that the Secretary provide copies of documentation relied upon in reaching the decision and any other relevant documents.

7. On 21 February 2019, the Directorate of Honours and Awards in the Department of Defence responded with an Air Force submission that was provided on behalf of Defence.¹ The submission indicated that Air Force had reviewed the original decision to determine any failure of process. The requested merits-based review of Flight Lieutenant Wilson's actions had not been conducted.² The Air Force submission noted that Flight Lieutenant Wilson's DFC nomination was for actions on 8 May 1968. Air Force has taken the position that this date was likely to be incorrect and that the recommendation was really written to recognise Flight Lieutenant Wilson's actions on 16 May 1968. Despite the absence of any merits-based review, the Air Force submission concluded that *the DFC was specifically for an act or acts of valour or courage during flying operations and was the most suitable award to recognise Wilson's actions*. No assessment was conducted or provided of Flight Lieutenant Wilson's actions against the eligibility criteria for the SG.

8. The Defence submission was forwarded to Lieutenant Colonel Hulse for comment which he subsequently provided.³ A Directions Hearing was convened by the Tribunal 29 October 2019 to confirm Group Captain Wilson's awareness of both Lieutenant Colonel Hulse's application and of any implications that may arise. Lieutenant Colonel Hulse subsequently confirmed Group Captain Wilson's willingness to proceed.

9. Following the Tribunal's preference to hear the matter in person, a hearing was scheduled for early 2020. Travel restrictions arising from COVID-19 prevented the conduct of the scheduled hearing and, given the lengthy delay already experienced and ongoing travel restrictions, a video-based hearing was conducted on 8 October 2020. Lieutenant Colonel Hulse and Group Captain Wilson gave evidence via video-link. The Respondent was represented at the hearing by the Director of Honours and Awards of the Department of Defence, Ms Petrina Cole. Flight Lieutenant Simon Hall, Air

¹ AFHQ BO1616618, dated 21 February 2019

² At the hearing, Ms Petrina Cole, Director Honours and Awards of the Department of Defence, was quite specific in advising the Tribunal that no merits review had been conducted by Defence.

³ Letter from Lieutenant Colonel Hulse to the Tribunal dated 8 April 2019.

Force Headquarters, gave evidence regarding the Air Force position and the processing of honours nominations.

Gallantry Decorations

10. Prior to 1975, Australians were recognised through the British Imperial Award system. The DFC was awarded under the British system to officers and warrant officers for *exceptional valour, courage or devotion to duty whilst flying in active operations against the enemy*.⁴ The DFC is no longer awarded and is not a component of the Australian honours and awards system.

11. Under the Australian honours and awards system, the SG, the Medal for Gallantry (MG) and the Commendation for Gallantry were established as Gallantry Decorations by Letters Patent on 15 January 1991 for the purpose of:

'according recognition to members of the Defence Force and certain other persons who perform acts of gallantry in action'.⁵

12. The honours are governed by Regulations set out in the Schedule:

... ***Conditions for award of the decorations***

3. (1) *The Star of Gallantry shall be awarded only for acts of great heroism or conspicuous gallantry in action in circumstances of great peril.*

(2) *The Medal for Gallantry shall be awarded only for acts of gallantry in action in hazardous circumstances.*

(3) *The Commendation for Gallantry may be awarded for other acts of gallantry in action which are considered worthy of recognition.*

13. The SG is the second highest military gallantry award in the Australian Honours System. It has been awarded eight times since 1991. The MG is the third highest military gallantry award, more than 50 medals have been awarded since 1991. The Commendation for Gallantry ranks fourth and has also been awarded more than 50 times since 1991.

Flight Lieutenant Wilson's Service Record

14. Flight Lieutenant Roger Wilson joined the Royal Australian Air Force on 24 August 1961 as a tradesman but re-mustered as an aircrew cadet and was commissioned as an officer in December 1962. Wilson flew fighter aircraft with No. 78 Wing at Butterworth, Malaysia in 1965-67 during which time he completed two tours with No. 79 Squadron at Ubon, Thailand. From 9 April 1968 to 29 October 1968 he was posted as a Forward Air Controller (FAC) with the 19th Tactical Air Squadron, United States Air Force (USAF), South Vietnam. Flight Lieutenant Wilson was in the

⁴ Provisions of Royal Warrant for the Distinguished Flying Cross, as amended to 27 July 1968.

⁵ *Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations* - dated 4 February 1991

second of nine rotations of Australian fighter pilots who served as FACs with the USAF during the Vietnam War. Wilson, by then a Group Captain, retired from the Permanent Air Force in December 1987.

15. Flight Lieutenant Wilson received the following honours, awards and badges for his service:

- Distinguished Flying Cross;
- Australian Active Service Medal 1945-1975 with Clasps 'VIETNAM', 'MALAYSIA' and 'THAILAND';
- Australian Service Medal 1945-1975 with Clasp 'SE ASIA';
- Defence Force Service Medal with First and Second Clasps;
- National Medal;
- Australian Defence Medal;
- Vietnam Medal;
- Republic of Vietnam Campaign Medal;
- Pingat Jasa Malaysia Medal;
- United States Silver Star for Gallantry;
- Unit Citation for Gallantry for Battle Coral and Balmoral;
- Returned from Active Service Badge;

Award of the Distinguished Flying Cross to Flight Lieutenant Wilson

15. Flight Lieutenant Wilson was awarded the DFC on 16 October 1969. His citation reads:

'In recognition of his gallantry in operations against an enemy force near the Fire Support Base Coral on 8th May, 1968 while serving with the United States Seventh Air Force in Vietnam.'

16. At the hearing, all parties confirmed that the date in his citation arises from an error in the award recommendation and that the award was intended for his gallantry on 16 May 1968.

Award of the US Silver Star to Flight Lieutenant Wilson

17. Flight Lieutenant Wilson was also awarded the United States Silver Star for gallantry in action on 16 May 1968. His Silver Star citation reads in part:

'... His precise and correct analysis of the situation, flying skill and professional composure, under intense ground fire blended together to successfully destroy overwhelming hostile forces and drive them away from beleaguered friendly positions.'

18. As a foreign award, the United States Silver Star is not awarded under the Australian honours and awards system, though permission is needed to wear this award together with Australian honours and awards. The Tribunal noted from a document included in Flight Lieutenant Wilson's service record that along with the Silver Star, he may have been recommended for the United States Air Medal for sustained activity with American forces during his Vietnam service.⁶

Flight Lieutenant Wilson's Actions on 16 May 1968

19. Flight Lieutenant Wilson's actions on 16 May 1968 are not in dispute. Flight Lieutenant Wilson gave evidence at the hearing and provided the Tribunal with his written account of his involvement in the operations at FSB Coral.

20. In synopsis, Flight Lieutenant Wilson was forward deployed to support the 1st Australian Task Force, operating from Phu Loi airstrip about seven minutes flying time away from FSB Coral. In the early hours of 16 May 1968, Flight Lieutenant Wilson and Major Anderson (USAF) were called to provide Forward Air Control in response to a major North Vietnamese Army assault against FSB Coral. Flight Lieutenant Wilson was in the rear seat of the small, two-place O-1 'Bird Dog' FAC aircraft. Both pilots were fully engaged in control tasks for three hours overhead the battle. Anderson and Wilson were aware, and had discussed that as well as being subject to enemy fire, they were sharing airspace with incoming supporting artillery and mortar rounds. They positioned their aircraft to the enemy side of the battle but remained concerned that their aircraft may be hit by mortar rounds passing through their altitude. The threat to the Australians on the ground was so intense and immediate that many of the strikes directed by the two FACs were at the absolute minimum distance from friendly positions.

21. After an intense three hours directing internal artillery, directing independent United States Army artillery, marking targets, controlling United States fighter aircraft and coordinating strikes with the ground elements, the men returned their aircraft to Phu Loi to refuel and re-arm. During their very quick refuelling and re-arming the men changed seats in the aircraft and Flight Lieutenant Wilson flew back to FSB Coral for a further time on station. Once again, the men returned to refuel and rearm at Phu Loi. Major Anderson helped with refuelling the aircraft and then sent Flight Lieutenant Wilson back to FSB Coral alone for the third and final mission. By this stage there was sufficient light that a second pilot was not required and the battle was drawing to its conclusion as North Vietnamese soldiers withdrew. After directing a further three formations of fighter aircraft onto enemy targets, Flight Lieutenant Wilson returned to Phu Loi, so exhausted that he fell asleep resting against the wheel of his aircraft as he was completing his post-flight paperwork.

⁶ Minute, Department of the Air Force, Headquarters Seventh Air Force, signed by Captain John E. Dunning USAF, Chief, Awards Branch, undated.

Lieutenant Colonel Hulse's Evidence

22. Lieutenant Colonel Hulse, then a junior Royal Australian Engineer officer, commanded the 1st Field Troop of the 1st Field Squadron on the ground at FSB Coral. He witnessed the FAC aircraft flying above the FSB and marvelled at the survival of the small aircraft as it circled amongst the incoming artillery. He also saw green enemy tracer rounds fired towards the aircraft and concluded that its survival was improbable. Lieutenant Colonel Hulse was not aware until many years later that one of the FACs in that aircraft was an Australian pilot.

23. Lieutenant Colonel Hulse is of the view that the weapons effects brought to bear under the direction of the FACs had a critical effect on the outcome of the battle. He described weapons being targeted under FAC control onto enemy positions extremely close to the position of friendly soldiers, and the outcome associated with Flight Lieutenant Wilson's actions as being '*significant in assisting the ground troops to fight their way out of a potentially disastrous situation*'. At the hearing, Lieutenant Colonel Hulse described the weapons effect delivered under FAC direction as '*extraordinary*' and exceptional in his experience, both before and after the event. He felt that the intensity and accuracy of air-delivered firepower was '*the tipping point that saved us*'.

24. Lieutenant Colonel Hulse has noted that of the thirty-six Australian fighter pilots who served as FACs in Vietnam, fifteen were awarded the DFC, two were awarded the Distinguished Service Order and six were Mentioned in Despatches. Given the number of DFCs awarded to FACs, Lieutenant Colonel Hulse has formed the view that Wilson's actions exceeded those of many who also received the award and that he should be recognised by a higher award.

25. At the hearing, Lieutenant Colonel Hulse told the Tribunal that he is of the opinion that Flight Lieutenant Wilson's actions '*far exceeded acts of great heroism or conspicuous gallantry in action in circumstances of great peril – times three*'. He does not believe that Flight Lieutenant Wilson has been recognised sufficiently. Lieutenant Colonel Hulse has based his assessment of great heroism on his belief that Flight Lieutenant Wilson deliberately placed his life in danger by '*going above and beyond what was required of him*' to make sure that he '*got his job done*'. He described 'great peril' as '*knowing that you are about to be shot*'. He believes the SG is the most appropriate recognition of what Flight Lieutenant Wilson did on that day.

Group Captain Wilson's Evidence at Hearing

26. Group Captain Wilson gave the Tribunal a detailed description of events and described the role of the FAC in controlling and deconflicting fighter aircraft from artillery fire. He also submitted his written account of the events. He described the requirement to visually confirm that attacking aircraft were correctly aligned with targets as close as twenty-five metres from friendly troops on the ground. He expressed

the view that while Major Anderson and himself may have been able to create a larger safety margin by standing off at a greater distance or by climbing to a higher altitude, that requirement to clear the attacking aircraft obliged the men to remain in close proximity to where weapons were impacting around the FSB. Group Captain Wilson also told the Tribunal that he felt it was the expectation of his command chain that, notwithstanding the danger, he would get in close and do the job. Group Captain Wilson also told the Tribunal that as a FAC instructor, his advice to subordinates would have been consistent with this expectation. He would tell them if they faced a similar situation *'they would have to stick their neck out. If there are people on the ground depending on them for their survival, they have to stick their neck out'*.

27. Group Captain Wilson told the Tribunal that he felt his DFC was well-earned but had never held the view that his actions were worthy of higher recognition. He said he had not looked closely at the Australian honours system, but was pleased that *'someone from Coral'* had finally appreciated the contribution of Forward Air Control.

28. He described feeling at the time that Coral was an absolute debacle and the deployment of supporting FAC was poorly planned. On the morning of the 16th he recalls discussing with Major Anderson that, regardless of the ad hoc planning and *'absolutely appalling organisation'*, they were just going to have to *'get in here and do it'* as heavy weapons were clearly required to clear the hundreds of enemy troops that they could see advancing towards FSB Coral.

29. Group Captain Wilson described loitering overhead the impact point of incoming artillery and their aircraft being buffeted from time to time. They were quite aware they were operating in an area where they could have been killed and he regarded their survival as a matter of luck. He said that they were fully aware that they could die that morning but persisted under the *'big sky theory'* – essentially acknowledging that although the worst *could* happen, they preferred to believe that the worst would *not* happen.

30. In considering the threat they faced, Group Captain Wilson said that the greatest danger was not anti-aircraft fire from the enemy but being hit by artillery. Knowing where artillery was firing from and knowing the impact point gave the FACs some awareness of the trajectory of artillery rounds that did allow them a margin of safety. He said that remaining directly above the impact point should have provided some safety from rounds incoming from external firing points but this did not apply to mortar rounds that were being fired virtually straight up from FSB Coral in order to fall at about 100 metres range from the firing point. He described being forced at times by smoke and the general confusion in the target area to position their aircraft closer to the artillery than preferred, in order to maintain visual contact with targets.

31. Group Captain Wilson told the Tribunal that he saw nothing in his Vietnam experience that came anywhere close to matching the intensity of action, the amount of firepower under his direction, and the hostility of enemy reaction that he experienced at FSB Coral on 16 May 1968. He described a conversation between himself and Major Anderson at the time, acknowledging that there was a fair chance they would ‘take a hit here from something’ but accepting that they would ‘just have to chance it’, noting ‘if we chicken out there would be a lot of dead people on the ground’.

Defence Submission

32. The Defence submission provided to the Tribunal stated that Air Force had ‘reviewed the original decision to determine if there was any failure in process’. The review only focussed on ‘the policies and procedures in place’. A merits-based assessment was not conducted, but the submission concluded that:

‘... CAF’s decision of the 3 November 2017 remains appropriate. The DFC was specifically for an act or acts of valour or courage during flying operations and was the most suitable award to recognise Wilson’s actions.’

33. At the hearing, Flight Lieutenant Hall described the Defence view of the DFC being the second highest award for valour and gallantry in the Imperial system to the Victoria Cross. He acknowledged the Imperial Distinguished Service Order (DSO) as a higher award but described this as being more a command and leadership award and possibly more aligned with the Distinguished Service Cross within the Australian awards system. For that reason, Defence regarded the DFC as a ‘really high award’ and the most appropriate for Flight Lieutenant Wilson’s actions.

34. Ms Cole outlined how the Defence policy regarding ‘double medalling’ could lead to the circumstance where Defence would initiate the cancellation of Group Captain Wilson’s DFC following his acceptance of any honour recommended as a consequence of Lieutenant Colonel Hulse’s application. Ms Cole said that Group Captain Wilson would likely be permitted to retain the actual DFC medal as a memento. Ms Cole also stated that Defence holds no authority, and no action would be taken, with respect to Group Captain Wilson’s US Silver Star.

Tribunal Consideration

35. **General.** The Tribunal is required to review decisions ‘on the merits’ and this requires an examination of the merits of the matter in dispute rather than the lawfulness of the decision under review.⁷ The merits review necessitates consideration of the evidence and accordingly, the Tribunal conducts an independent review, with values, expertise, methods and procedures of its own, and not those of the original

⁷ *Council of Australian Tribunals Practice Manual* dated 7 April 2006 p.1.3.1.2.

decision-maker. In making its decision, the Tribunal considers afresh the relevant facts, law and policy.⁸ 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.⁹ The Tribunal is bound to make what it regards as the ‘correct or preferable’ decision.

36. **The Action.** Both Lieutenant Colonel Hulse and Group Captain Wilson emphasised the scale of the action and the desperate and deadly circumstances faced by the 1st Australian Task Force at FSB Coral. Lieutenant Colonel Hulse has stressed in his application and in evidence given at the hearing, the criticality of the weapons effects brought to bear under FAC direction. Lieutenant Colonel Hulse has stated that Flight Lieutenant Wilson ‘... *provided a critical combat platform that significantly assisted in avoiding a potentially catastrophic tactical situation*’. FSB Coral was very nearly over-run by determined North Vietnamese Army soldiers attacking in a force that significantly out-numbered the defenders. Lieutenant Colonel Hulse believes Flight Lieutenant Wilson’s actions went a long way to saving his life and the lives of his fellow soldiers at FSB Coral. While the air-delivered firepower was awesome in its magnitude, accuracy - and in its impact on a large enemy force in very close proximity to Australian soldiers, the Tribunal did not consider the significance of the battle, nor the impact of air power to necessarily be determining factors. Would Flight Lieutenant Wilson’s actions be considered less gallant if the weapons effects under his control had been less effective?

37. The Tribunal’s attention was taken by Flight Lieutenant Wilson’s observation that far more could have been brought to bear. From his position overhead FSB Coral, Flight Lieutenant Wilson could clearly see United States Air Force combat aircraft on alert at the nearby base at Bien Hoa that could have been requested in support. In a written submission that he provided at the hearing, Flight Lieutenant Wilson recorded his frustration with the poor planning of the 1st Australian Task Force deployment to FSB Coral on 12 May 1968, in particular the failure to integrate air power. Wilson believes the poor integration of air power arose from the absence of any similar capabilities extant within the Royal Australian Air Force at that time. Wilson is of the view that this absence limited Australian training opportunities and hence understanding within the leadership of the 1st Australian Task Force. He described a naivety evident in the flawed belief that the Task Force could manage the threat from within its own resources. The Tribunal considered that it may be the case that Flight Lieutenant Wilson and Major Anderson’s exceptional skills in controlling a variety of supporting fires overcame the poor planning and provided a key element that turned imminent catastrophe into success.

⁸ Pearson, Linda, “Merit Review Tribunals”, in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68.

⁹ *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

38. Lieutenant Colonel Hulse marvelled at the persistence of the FAC aircraft circling within the fall of shot of friendly artillery. At the time he felt there was no way that the aircraft could possibly avoid being hit. Flight Lieutenant Wilson told the Tribunal that he and Major Anderson recognised and respected the threat posed by the artillery. Wilson also described how the difficulty of providing clearances to attacking aircraft for the release of weapons and the accuracy required in directing fire at minimum safe distances from friendly troops, demanded the FAC remain close to overhead. He described the counter-intuitive conclusion that maintaining a position overhead the impact point should afford separation from incoming artillery rounds. Less predictable, and uncontrolled, mortar fire also presented a significant danger as the near-vertical trajectory of the fire meant that mortar rounds were passing through the altitude of the FAC aircraft. Offsetting the FAC aircraft in the direction of the enemy went some way towards providing separation from mortar fire. In dealing with their exposure to the threat from friendly fire, Major Anderson and Flight Lieutenant Wilson maintained a deliberate, disciplined and commendable adherence to their training.

39. The Tribunal formed the view that the weapons effects brought to bear under FAC direction were both awesome and stunning in impact. Even though Flight Lieutenant Wilson felt that much more could have been applied, the intensity, accuracy and effect of FAC directed firepower lifted the defensive fire of the beleaguered task force to a level well beyond previous Australian experience. The naivety of the Australian Task Force and the poor integration of air power had a limiting effect on the conduct of the battle. The Tribunal could accept that Flight Lieutenant Wilson's actions occurred in a less than brilliantly conceived and executed operation, and this served to accentuate the criticality of his role, but to what extent does this circumstance impact an assessment of his gallantry?

40. Although they were operating at a significantly elevated level of capability, the expectations of Flight Lieutenant Wilson's USAF command chain were that the FAC task would be completed in the manner that it was. The circumstances of the battle at FSB Coral on the 16 May 1968 conspired to make the execution of the job intense and very challenging, however, by maintaining an operating altitude of 1000 to 1500 feet and manoeuvring to minimise exposure of the aircraft to incoming artillery, Flight Lieutenant Wilson did what was expected of him, was highly effective, and survived hazardous circumstances.

41. **The Issue.** There is no dispute regarding Flight Lieutenant Wilson's actions on the morning of 16 May 1968. There is also no dispute that Flight Lieutenant Wilson's actions were gallant. The issue for the Tribunal is whether or not Flight Lieutenant Wilson's actions met the eligibility criteria for the SG.

42. **The Defence Submission.** The Tribunal noted that Defence had not conducted a merits-based review with respect to the criteria of the Australian Honours and Awards system despite being specifically requested to do so in the Tribunal’s letter to the Secretary of 13 July 2018. Defence’s failure to provide a merits-based assessment of Flight Lieutenant Wilson’s actions against the relevant criteria is a breach of its statutory obligations both as a model litigant under the *Legal Service Directions 2017*¹⁰ and under the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011*.¹¹

43. Rule 14 requires the Defence Secretary to ‘use his ... best endeavours to assist the Tribunal in relation to the review.’ Rule 7 requires the report from Secretary to include its ‘findings on material questions of fact’. Defence’s one-and-a-half-page written submission in this matter, while mentioning the criteria for the SG, made no attempt to consider their possible application to Flight Lieutenant Wilson’s actions. It is beyond dispute that such a submission is of no assistance to the Tribunal in conducting the review. As the Tribunal has previously noted, being a model litigant requires Defence to properly address the merits of the application before it and to abide by the Procedural Rules.¹²

44. The Tribunal has expressed concern on a number of occasions about Defence’s failure to assist the Tribunal in accordance with its statutory obligations – see for example *Treadwell and the Department of Defence re: Doolan*¹³ and *Hulse and the Department of Defence re: Jensen*.¹⁴ The Tribunal values the expertise and experience of Defence and regrets that this has not been provided, contrary to its legal responsibilities. Unfortunately, Defence’s written submission was of no assistance to the Tribunal in this matter.

Gallantry Assessment

45. The Tribunal turned to an assessment of gallantry. Noting that the Regulations do not define gallantry and that Defence has no policy or guidance to assist in defining the concept, the Tribunal has developed a position which it has used for several years to assist in this regard.

46. **What is Gallantry?** The Tribunal noted that all the gallantry decorations accord recognition for individuals ‘who perform acts of gallantry in action’. Whilst ‘in action’ is a relatively straight forward concept, ‘gallantry’ is an abstract term, which is not defined in the Regulations. Various dictionary definitions such as ‘dashing courage;

¹⁰ *Legal Services Directions 2017* made under section 55ZF of the *Judiciary Act 1903* Appendix B.

¹¹ *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011* made under the *Defence Act 1903*.

¹² *Treadwell and the Department of Defence re: Doolan* [2020] DHAAT 3 (20 February 2020).

¹³ *Ibid.*

¹⁴ *Hulse and the Department of Defence re: Jensen* [2020] DHAAT 15 (27 August 2020).

heroic bravery’;¹⁵ and ‘courageous behaviour, especially in battle’;¹⁶ are largely circuitous and unhelpful. Some countries have attempted to differentiate between ‘bravery’ and ‘gallantry’; defining the latter as recognition of military personnel who carry out acts which put their lives at risk while involved in operational service, whilst ‘bravery’ is defined as saving or attempting to save the life of another person in the course of which they place their own life at risk.¹⁷ Again this is largely unhelpful in defining gallantry in the context of the Australian Honours and Awards system.

47. The Tribunal considered that there is an expectation that all soldiers in battle conducting themselves in accordance with their training, will be acting bravely. The Tribunal considered that gallantry requires a higher standard of conduct than bravery and usually a special and additional element of courage, fearlessness, daring or heroism will have been demonstrated. What amounts to an ‘act of gallantry’, necessarily varies according to the individual circumstances of each action, and depends on many factors, including the level of threat, the person’s training, role and responsibility, the risk to the individual and/or the group, and the consequences of undertaking, or not undertaking, the particular act.

48. The Tribunal considered that the concept of gallantry is greater than collective or individual acts of bravery and above and beyond what was expected of an individual or group who were bravely doing what they were trained to do or expected to do as part of a role, rank or responsibility.

49. As both parties agree that Flight Lieutenant Wilson’s actions were gallant, the Tribunal turned to consider whether or not his actions met the eligibility criteria for the award sought by Lieutenant Colonel Hulse – the SG.

Star of Gallantry

50. **Was Flight Lieutenant Wilson acting in Circumstances of Great Peril?** The Tribunal was in no doubt that the circumstances in which Flight Lieutenant Wilson and Major Anderson flew FAC missions above FSB Coral were hazardous. Flight Lieutenant Wilson described their acknowledged fear from being exposed to friendly artillery and less predictable mortar fire. However, the Tribunal took the view that although the magnitude of the battle was of the highest order and the threat to ground forces was almost overwhelming, the fact that the FAC missions were successfully flown in such circumstances; were flown in accordance with training and standard practice; and moreover were expected to be flown in the manner that they were, meant that the circumstances were more correctly described as being ‘hazardous’ rather than ‘of great peril’.

¹⁵ The Macquarie Dictionary on-line accessed 20 October 2017.

¹⁶ The Oxford Dictionary on-line accessed 20 October 2017.

¹⁷ <http://medals.nzdf.mil.nz/category/d/index.html>.

51. **Did Flight Lieutenant Wilson Perform Acts of Great Heroism or Conspicuous Gallantry?** As Flight Lieutenant Wilson performed his duties as a FAC in accordance with his training and in the manner expected of him by his chain of command, the Tribunal formed the view that his actions could not be described as being of great heroism. The Tribunal does agree that Flight Lieutenant Wilson's actions were gallant. However, the test of whether or not the actions were conspicuous remains difficult. Whilst Flight Lieutenant Wilson displayed courage under fire, the Tribunal could not be satisfied that this constituted conspicuous gallantry. The Tribunal noted the professionalism with which Major Anderson and Flight Lieutenant Wilson recognised their danger and sought to minimise the risk by flying either directly overhead the impact area of friendly artillery or offset towards the enemy. By their strong and remarkable discipline to proven FAC procedures, they survived extended exposure in hazardous circumstances with no injury to themselves or damage to their aircraft.

52. **Finding in Relation to Eligibility for the Star of Gallantry.** The Tribunal finds that Flight Lieutenant Wilson displayed gallantry throughout the prolonged engagement at FSB Coral on 16 May 1968. He displayed devotion to duty when he executed his role as FAC, by night, in very complex circumstances. He executed a most difficult control mission to exacting standards whilst under fire and at all times with the awareness that his actions would likely be critical to the outcome on the ground; but his actions do not meet the eligibility criteria for the SG.

Eligibility for Other Gallantry Awards

53. The Tribunal acknowledges that Lieutenant Colonel Hulse's application was for Flight Lieutenant Wilson to be awarded the SG. However, the requirement for the Tribunal to review decisions 'on the merits' demands that Flight Lieutenant Wilson's actions be reviewed against the eligibility criteria for all Australian gallantry honours.

54. The Tribunal has found that Flight Lieutenant Wilson performed acts of gallantry in action on 16 May 1968 and that his gallantry was demonstrated in hazardous circumstances. Accordingly, Flight Lieutenant Wilson meets the eligibility criteria for the MG.

55. Having concluded that Flight Lieutenant Wilson's actions met the criteria for the MG, and acknowledging the policy in respect of 'double medalling', the Tribunal then proceeded to consider whether it should make a recommendation to award the MG, and, if so, make a corresponding recommendation that Flight Lieutenant Wilson's DFC be cancelled. In doing so, the Tribunal considered Section 110VB(1)(b) of the Act, which allows the Tribunal, in undertaking its merits review, to make any recommendations to the Minister that it considers appropriate. The Tribunal also

considered that in the course of its merits review it must make a decision that is legally correct, but if more than one decision is open, it must reach the preferable decision.

56. The Imperial System of Honours and Awards had exclusive application in Australia until 1975, when the Australian system of honours and awards was created. The two systems operated in parallel until 1992, when the Australian Government decided that it would no longer make recommendations for Imperial honours and awards.

57. The Tribunal observed that the MG is awarded for 'acts of gallantry in action in hazardous circumstances', whereas the DFC was awarded for an act or acts of 'exceptional valour, courage or devotion to duty performed whilst flying in active operations against the enemy'. While the awards are not equivalent, in that the eligibility criteria are different, the Tribunal also observed that the MG is a 'third level' gallantry decoration in the Australian system, subordinate only to the Victoria Cross for Australia and the SG, and that the DFC was also a 'third level' gallantry decoration available to Air Force officers under the Imperial system of honours and awards, subordinate only to the Imperial Victoria Cross and the DSO. The Tribunal acknowledged submissions from both the applicant and the respondent that the DSO was rarely awarded to junior officers.¹⁸

58. The Tribunal observed that notwithstanding the difference in the eligibility criteria, both the Australian and Imperial suites of gallantry decorations were four-tier suites with the Victoria Cross at the head of both suites. Noting the similar structure of the two systems, both created to recognise gallantry, the Tribunal considered that it is probable, as has occurred in the case of Flight Lieutenant Wilson, that a comprehensive examination of the actions that led to the award of an Imperial gallantry honour will result in a finding that those actions meet the criteria for an Australian gallantry honour at the same level.

59. The Tribunal observed that following the creation of the Australian suite of gallantry decorations in 1991, acts of gallantry already recognised through the Imperial system continued to be acknowledged by Australia in that manner. The government did not seek to 'replace' previously conferred Imperial honours with Australian honours at that time. Nor, in the Tribunal's view, did the government intend to create an avenue to do so in 2010, with the statutory establishment of the Tribunal.

60. Given these considerations, the Tribunal concluded that while Flight Lieutenant Wilson's actions on 16 May 1968 meet the criteria for the MG, it would not be preferable to recommend to the Minister that his DFC, in effect, be replaced by the award of the MG. The Tribunal concluded that the preferable decision would be for Flight Lieutenant Wilson to retain his DFC, an award held in considerable esteem,

¹⁸ Two DSOs were awarded to Australian FACs. Both recipients were of Wing Commander rank.

together with the United States Silver Star, approved for wear by the Australian Government, as an appropriate means of recognition for his valour, courage, devotion to duty and gallantry.

Conclusion

61. The Tribunal finds that Flight Lieutenant Wilson performed acts of gallantry in action in hazardous circumstances on 16 May 1968 in Vietnam. Whilst Lieutenant Colonel Hulse claims that Flight Lieutenant Wilson's actions met the threshold for the award of the Star of Gallantry and that higher recognition should have been accorded to him, the Tribunal does not agree. The Tribunal finds that Flight Lieutenant Wilson's actions were gallant but do not meet the eligibility criteria for the Star of Gallantry.

TRIBUNAL DECISION

62. The Tribunal recommends to the Minister for Defence that the decision by the Chief of Air Force that Group Captain Wilson has been suitably recognised for his actions and that no further honours and awards would be appropriate, be affirmed.