



Australian Government

Defence Honours and Awards Appeals Tribunal

McPherson and the Department of Defence [2020] DHAAT 12 (3 July 2020)

File Number(s) 2019/023

Re **Mr Paul McPherson, MG**
Applicant

And **Department of Defence**
Respondent

Tribunal Brigadier M. Bornholt, AM (Retd) (Presiding Member)
Rear Admiral J. Goldrick, AO, CSC, RAN (Retd)
Air Vice Marshal A. Quaiife, AM (Retd)

Hearing Date 23 June 2020

DECISION

On 3 July 2020 the Tribunal decided to recommend to the Minister for Defence Personnel that the decision by the Chief of Army to not recommend the award of the Victoria Cross for Australia to Mr Paul McPherson, MG for his actions on 12 September 2013 in Char Chineh, Uruzgan, Afghanistan be affirmed.

CATCHWORDS

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

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VA, 110VB(1)
Defence Regulation 2016 – Part 6, S35, Defence Honours,
Commonwealth of Australia Gazette No. S25 – Victoria Cross Regulations and
Gallantry Decoration Regulations dated 4 February 1991

REASONS FOR DECISION

Introduction

1. The applicant, Mr Paul McPherson, MG seeks review of a decision by the Chief of Army to not support the retrospective award of the Victoria Cross for Australia (the Victoria Cross) for his actions on 12 September 2013 in Char Chineh, Uruzgan, Afghanistan. Mr McPherson had received the Medal for Gallantry for acts of gallantry in hazardous circumstances as part of 2nd Special Air Service Squadron of the Special Operations Task Group on Operation SLIPPER on 12 September 2013. On 6 December 2017 he made representation through his Federal Member, the Hon Peter Dutton, MP to have the Medal for Gallantry reviewed and upgraded to the Victoria Cross.¹

2. The representation was passed to the Minister for Defence Personnel who, acting on advice from the Chief of Army,² advised Mr Dutton that the Chief of Army had determined that no merits review of the action would be conducted and that if Mr McPherson did not accept this decision, he should make application to the Tribunal for independent review.³ On 15 October 2019 Mr McPherson made application for review of the decision, seeking that he be awarded the Victoria Cross.⁴

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 set out in Section 35. Included in the defence honours at Item 1 is the Victoria Cross for Australia.

4. The Tribunal was satisfied that Mr McPherson's representation dated 6 December 2017 to his Federal Member seeking a review of his Medal for Gallantry and upgrade to a Victoria Cross constituted an application as required by s110V(1)(c) of the Act. The Tribunal was satisfied that the Chief of Army's Ministerial Submission to the Minister for Defence Personnel dated 21 May 2018 indicating that he did not support the retrospective award of the Victoria Cross constituted a refusal

¹ Undated e-mail from Mr McPherson to the Hon Peter Dutton, MP – Folio #21

² Ministerial Submission from Chief of Army to Minister for Defence Personnel dated 21 May 2018 – Folio #24

³ Letter from Minister for Defence Personnel to the Hon Peter Dutton, MP dated 20 June 2018 – Folio #26

⁴ Application for Review of Decision dated 15 October 2019 – Folio #1

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 2018, 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.

Conduct of the review

6. In accordance with its Procedural Rules, on 24 October 2019 the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr McPherson's application for review.⁵ The Tribunal requested a merits-based assessment of Mr McPherson's actions against the eligibility criteria for the Victoria Cross and a report on the material questions of fact and reasons for the decision to not support the 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 28 February 2020, the Directorate of Honours and Awards in the Department of Defence (the Directorate) provided a submission on behalf of Defence.⁶ The submission indicated that there was no evidence of maladministration and no compelling new evidence and 'as these thresholds were not met, a merit review of Mr McPherson's service has not been conducted'. The submission concluded that 'in accordance with Chief of Defence Force (CDF) requirements, if there is neither maladministration nor compelling new evidence then the Commander's decision at the time is upheld'.

8. The Defence submission was forwarded to Mr McPherson for comment which he subsequently provided.⁷ The Tribunal met on 21 February 2020 and confirmed the scope of the review, the decision under review and jurisdiction. The Tribunal noted that any evidence relating to the matter such as after-action reports was likely to contain classified and/or protected material and accordingly, it sought that any such material be redacted and declassified.

9. The Tribunal also decided that as any potential witnesses at hearing would be protected and the matter was sensitive due to ongoing operations in Afghanistan, the hearing would be conducted in private. The hearing was listed to be held in Canberra

⁵ Tribunal letter to the Secretary of Defence DHAAT/OUT/2019/310 dated 11 December 2019 – Folio #12

⁶ Directorate of Honours and Awards letter to the Tribunal DH&A OUT/2020/0010 dated 17 March 2020 – Folio #14

⁷ Response to 'ADF Report' by Mr McPherson, undated – Folio #41

on 23 June 2020 and, due to pandemic travel restrictions, the hearing was conducted by telephone conference. Mr McPherson gave evidence by telephone and the Nominating Officer for the original honour attended and gave evidence in person. The Patrol Commander from the action also gave evidence by telephone. The Respondent was represented at the hearing by the Director of Honours and Awards in the Department of Defence, Ms Cole. Wing Commander Braun from Joint Operations Command also attended and gave evidence regarding the processing of honours nominations.

The Victoria Cross for Australia

10. The Victoria Cross for Australia was established by Letters Patent on 15 January 1991 to be:

'the highest decoration for according recognition to persons who, in the presence of the enemy, perform acts of the most conspicuous gallantry, or daring or pre-eminent acts of valour or self-sacrifice or display extreme devotion to duty'.⁸

11. The honour is governed by Regulations set out in the Schedule:

...

Conditions for award of the decoration

3. *The decoration shall only be awarded for the most conspicuous gallantry, or a daring or pre-eminent act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy.*

4. *Each decoration may be awarded posthumously.*

...

12. Since the establishment of the Victoria Cross for Australia in 1991, the medal has been awarded four times:

- a. 2 September 2008 - Trooper Mark Donaldson who rescued an interpreter under heavy enemy fire in Uruzgan province in Afghanistan;
- b. 11 June 2010 – Corporal Ben Roberts-Smith who charged and destroyed two enemy machine gun positions in Shah Wali Kot in Afghanistan;
- c. 1 November 2012 – Corporal Dan Keighran who on numerous occasions deliberately exposed himself to enemy fire before drawing fire away from an injured colleague in Uruzgan province in Afghanistan; and

⁸ Commonwealth of Australia Gazette No. S25 – Victoria Cross Regulations– dated 4 February 1991

- d. 22 June 2013 - Corporal Cameron Baird who repeatedly charged enemy positions and in so doing, drew fire away from his colleagues in Uruzgan province in Afghanistan. Corporal Baird was killed during the action and the medal was awarded posthumously.

Gallantry Decorations

13. The Star of Gallantry, the Medal for Gallantry 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'.⁹

14. 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.*

4. *Each decoration may be awarded posthumously.*

...

15. The Star of Gallantry is the second highest military gallantry award in the Australian Honours System. It has been awarded nine times since 1991. The Medal for Gallantry 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.

Processing of Nominations for Gallantry

16. Chapter 7 of the Defence Honours and Awards Manual provides policy and guidance on the nomination and processing procedures for gallantry decorations.¹⁰ The manual identifies the authority for the approval of decorations as *Commonwealth of Australia Gazette No. S25* of 4 February 1991 – Letters Patent and Regulations. The guidance includes advice that nominations are to be assessed on merit with strict attention paid to the criteria for the award and that there is to be no cascade effect in nominations.

⁹ *Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations* - dated 4 February 1991

¹⁰ *Defence Honours and Awards Manual (DHAM) Volume 1 Edition 1*

17. Whilst the administration of nominations is divided into immediate, priority and periodic categories, the approval process is clear and consistent. A nomination for a gallantry award is made from the unit through the operational chain-of-command to the Australian Operational Joint Force Commander who makes a recommendation to the Chief of Joint Operations (CJOPS). If the CJOPS is satisfied with the recommendation he will pass it to the CDF to endorse the recommendation and forward to the Minister, for the Minister's recommendation to the Governor-General (for gallantry awards) or to the Sovereign (for the Victoria Cross). The Directorate's role in the process is the preparation of supporting documentation and facilitation of the nomination through the CDF and Minister.

18. The guidance states that 'at any point in the chain-of-command, a nomination may be upgraded, downgraded, rejected or remain intact'.

Mr McPherson's Service Record

19. Mr McPherson enlisted into the Australian Army on 2 December 1999 and spent the majority of his career in the Special Air Service Regiment. He was medically discharged from the Army on 17 December 2017. Mr McPherson has received the following honours and awards for his service:

- Medal for Gallantry;
- Australian Active Service Medal with Clasps 'EAST TIMOR', 'ICAT' and 'IRAQ 2003';
- Afghanistan Medal;
- Iraq Medal;
- Australian Service Medal with Clasps 'TIMOR-LESTE' and 'CT/SR';
- Humanitarian Overseas Service Medal with Clasp 'UKRAINE';
- Australian Defence Medal;
- United Nations Medal with Ribbon UNTAET;
- NATO Non Article 5 Medal with clasp - ISAF with multiple tour indicator 2;
- Unit Citation for Gallantry - 1 Squadron Special Air Service Regiment - Iraq 2003;
- Unit Citation for Gallantry - Combat Elements of Task Force 637 Afghanistan 2005 to 2006; and
- Meritorious Unit Citation - Task Force 66 (Special Ops Task Groups IV-XX);

Award of the Medal for Gallantry to Mr McPherson

20. The Defence submission records that during 2014, Mr McPherson was nominated for a Medal for Gallantry for his actions on 12 September 2013 in Afghanistan. The narrative for the award was submitted through Headquarters Joint

Task Force 633 to Headquarters Joint Operations Command (HQJOC). Some minor administrative amendments were made to the original document and these were cleared by the nominating officer before the narrative was considered by HQJOC Honours and Awards Board on 16 May 2014. The nomination was supported and subsequently endorsed by the Parliamentary Secretary for Defence. Mr McPherson was awarded the Medal for Gallantry on Australia Day 2015 for acts of gallantry in hazardous circumstances.

21. At the hearing, Defence confirmed that this process had been followed in the nomination of Mr McPherson for the Medal for Gallantry and the nomination level had not been altered through the process.

Alteration to the Narrative for the Medal for Gallantry

22. In December 2015 Mr McPherson requested that the narrative for the Medal for Gallantry be changed as he considered that it was not factual. Defence confirmed that the narrative for the award was subsequently altered in May 2017 at Mr McPherson's request to correct what he said were inaccuracies. The Director indicated that this was unprecedented and was done because Mr McPherson had indicated that if it were not, he would hand back his award. The Director said that despite the changes to the narrative, as there were no changes to the synopsis or citation, there was no requirement to re-gazette the award.

23. In November 2017, Mr McPherson made representation to his Federal Member indicating that the narrative for his award had been changed, but the level of the award was not re-examined. He said:

I saw my fair share of combat while in the SAS and believe the narrative well and truly stacks up to any of the four Victoria Cross's that were awarded during the Afghanistan campaign

Mr McPherson's Actions on 12 February 2013.

24. Together with Mr McPherson's application, and his proposed amendments to the citation, the Tribunal has reviewed a classified After-Action Report of the action on 12 September 2013. At the hearing, and noting that Mr McPherson had been involved in making amendments to the narrative for his award, it was agreed by Mr McPherson and the Respondent that the narrative, as amended, was a suitable description of the action upon which the Tribunal could conduct its merits review without requiring redaction or the consideration of classified material.

25. The description of the action as recorded in the narrative is:

On 12 September 2013, Patrol E1, consisting of five Australian and five Afghan soldiers, conducted a counter-leadership operation targeting a key insurgent commander in Char Chineh, Uruzgan. Trooper Paul McPherson was the patrol Joint Terminal Attack Controller.

After coming under heavy rifle and machine gun fire during insertion to an Afghan National Police checkpoint. Trooper McPherson and the Patrol Second-in-Command advanced across open ground under heavy automatic fire and conducted a break-in to the front gate of the checkpoint thereby allowing the rest of the Patrol to gain access. The Patrol was in constant contact with the enemy for a number of hours inside the checkpoint before patrolling into the hostile green zone after last light and securing another checkpoint that had also been in heavy contact with the enemy. Using very reliable intelligence, the Patrol then infiltrated more than two kilometres following the insurgent commander and seven other insurgents to another compound.

On making entry through a compound gate, the Patrol was again engaged with heavy and accurate rifle and machine gun fire from internal doorways and windows at extremely close quarters, pinning down patrol members in exposed positions. At this point, Trooper McPherson was shot through the personal radio on his chest and, on realising he had no cover from fire, seized the initiative and ran forward over 17 metres of open ground under intense and sustained fire, directly towards a machine gun position, assaulting to within one metre of the enemy and posting a grenade through the window. As he did so, he was shot in the left hand. The grenade blast, which killed the two insurgents in the enemy position, momentarily rendered Trooper McPherson unconscious, also causing fragmentation wounds to his left leg and right shoulder.

After regaining consciousness. Trooper McPherson moved back across open ground to his original position in anticipation of breaking contact, however heavy rifle fire resumed from yet another enemy position. Trooper McPherson made the decision to again cross the open ground towards the enemy position under heavy fire and post a second grenade. The blast silenced the enemy fire and allowed the Patrol to successfully break contact and evacuate their wounded. In this moment. Trooper McPherson gave no thought to his own safety but displayed courage under fire and selfless devotion to his fellow soldiers.

During the assault, two other members of the Patrol were wounded by rifle fire and fragmentation blasts. It was later confirmed that a number of insurgent leaders, including the targeted individual, were killed during the

operation, which disrupted a concerted insurgent campaign against local Afghan security forces.

Trooper McPherson's courage and selfless actions, repeatedly engaging a well-fortified and tenacious enemy while under heavy fire, protected the lives of his Australian and Afghan comrades, and resulted in mission success. His selfless acts of gallantry, demonstrating complete disregard for his own safety in the face of a determined enemy, were of the highest order and in keeping with the finest traditions of the Special Operations Task Group, the Australian Army and the Australian Defence Force.

26. The synopsis of the narrative stated:

Trooper McPherson displayed acts of gallantry during a significant engagement at extremely close quarters with the enemy. His courage and selfless devotion to his comrades saved lives, as he repeatedly manoeuvred to engage the enemy while under heavy fire with disregard for his own safety. His gallantry in the face of a tenacious enemy was of the highest order and in keeping with the finest traditions [of] the Australian Army and the Australian Defence Force.

Mr McPherson's Evidence at Hearing

27. Mr McPherson said at the hearing that he met the eligibility criteria for the Victoria Cross. He said that the situation he found himself in was the most daring operation the Special Air Service Regiment had ever been involved in, by inserting into a major operation a five-man patrol, virtually unsupported and required to conduct a targeting operation. He said this was important because the patrol found themselves on their own in the middle of 300 enemy fighters. He said that proportionally it was the most perilous operation that any Special Air Service element had ever found itself in during the Iraq and Afghanistan wars.

28. He said that he was worthy of the Victoria Cross because:

we found ourselves in a confined space, at close range, facing off against an enemy force in larger numbers, in better positions and with superior weapon systems

29. He said that after initially engaging the enemy he was:

shot through the radio on his chest and then got up and ran directly into an enemy machine gun position whilst being engaged by machine gun and rifle fire. I got within one metre of the enemy and as I was posting a grenade I was shot through the hand and knocked unconscious. I then returned under fire to

my original position, and then repeated that action. In my opinion I think if I hadn't have done this, we would not have regained the initiative as the rest of the patrol were pinned down by enemy fire at ranges from 1 to 20 metres and couldn't move. Their fire was ineffective. I think that if I hadn't got up and done this, it was only a matter of time before someone was hit and it then would have been very hard to get anyone out.

30. Mr McPherson emphasised that the situation was confused and that there was significant obscuration and the enemy were difficult to see unless they became silhouetted.

31. Mr McPherson said that he believed his actions covered pre-eminent valour and conspicuous gallantry in the presence of the enemy. He said that getting up and running directly into machine gun fire was in his opinion a definite pre-eminent act of daring or valour. He said that he had never heard of that happening in his time in the Regiment.

32. Mr McPherson acknowledged that his training had played a part in him reacting the way he did and he thought that he was in the best position to do something at the time.

33. In response to whether he considered his actions 'heroic', he said that any of the others put in his position would probably have done the same thing. He said that he didn't think there 'was heroic on the battlefield – you were just doing your job'.

Witness Evidence at Hearing

34. **The Patrol Commander.** The Tribunal heard evidence at the hearing from the senior non-commissioned officer who commanded the patrol on 12 September 2013. Due to the protected nature of his employment, he will not be named in this report. He said that he did not disagree that the situation the patrol was in was dangerous and the enemy fire was intense. He did not however agree that Mr McPherson 'charged straight into the machine gun fire'.

35. The Patrol Commander said that three other patrol members were receiving fire and that he and Mr McPherson were not receiving accurate fire. He said that in his view Mr McPherson 'manoeuvred' to the window from a 90-degree angle and that at no stage did he see him charge through or be threatened by machine gun fire whilst in the process of posting the grenade.

36. He said that the sequence of the grenade posting and Mr McPherson being knocked unconscious was not quite correct. He said that members of the patrol were aware that Mr McPherson was moving to post the first grenade and they covered him as he moved forward. They then observed him post the grenade and then move back

to his original position. He said that the sequence Mr McPherson described was not as he recalled it, particularly as it related to when Mr McPherson was knocked unconscious, where and for how long. He said that after Mr McPherson had posted the first grenade he moved back to his original position and then indicated that he intended to 'do it again'. The Patrol Commander said that he then told Mr McPherson to do it again and that was when he remembered him being knocked unconscious.

37. The Patrol Commander said that Mr McPherson's evidence that no one was able to move within the compound was incorrect. In his view the patrol was able to manoeuvre and suppress the enemy and that when Mr McPherson became unresponsive to his calls, he moved to him and discovered he had recovered consciousness but was wounded. He said it was at that time that he decided the patrol should break contact and withdraw as he had people injured but not incapacitated. He said that he did not deny that Mr McPherson did something quite brave but the way that Mr McPherson remembered it may have been affected by the fact he was unconscious for a period of time.

38. The Patrol Commander indicated that when the patrol returned to their base, he decided that he should 'write Paul up' for recognition. He said he did not do this in isolation but had consulted with his Troop Commander and other members of the patrol. He said that his view was that Mr McPherson's actions warranted the award of the Commendation for Gallantry, however his Troop Commander thought it was more appropriate that he receive the Medal for Gallantry as the action occurred in hazardous circumstances. He also stated that in consultation with the remainder of the patrol (those who had not been wounded and evacuated for treatment) he had written the After-Action Report describing the action in its entirety. A copy of that report was made available to the Tribunal.

39. In response to questions from the Tribunal, the Patrol Commander stated that he was of the view that the action involved peril but they were not in the most perilous of situations. He described being in multiple perilous situations on previous operations and pointed out that it was not reasonable to compare them as each circumstance was different.

40. The Patrol Commander did not consider that any stage in the action was the patrol under threat of annihilation. He acknowledged that the fire fight was intense and that the enemy were able to bring significant amounts of fire to bear, but his patrol was equally able to suppress and manoeuvre and they were winning the fire fight. He stated that the enemy machine gun was no longer firing at the time Mr McPherson posted the second grenade. He said that the patrol had multiple options and he had decided to break contact whilst his patrol was intact and that the break was established with relative ease.

41. After hearing the Patrol Commander's evidence, Mr McPherson said that he did not resign from his position and that the account he had given was 'as I remember it'.

42. **The Nominating Officer.** The Nominating Officer for the award of the Medal for Gallantry and Mr McPherson's Commanding Officer when the action occurred attended the hearing and gave evidence. Due to the protected nature of his employment, he will not be named in this report.

43. The Nominating Officer said that he had had two tours of Afghanistan, one as a Company Commander in 2008 and again in 2013 as the Task Group Commander. He said that the mission he approved which resulted in the subject action was not a direct action but rather a surveillance and reconnaissance mission. The intent of the mission was to gather information and gain clarity on locations. He acknowledged that the situation developed on the ground and resulted in an intense contact but he did not consider that the action was unprecedented as asserted by Mr McPherson.

44. He said that the action was commanded by the Squadron Commander and, whilst the action was developing, he had regular contact with the Squadron Commander but not with a view to giving direction or influencing the outcome.

45. Afterwards the Nominating Officer said he discussed the action with the Squadron Commander but was not involved in the actual review of the patrol. He said he was not advised or consulted about immediate recognition for individuals at the time and the nomination for recognition was raised at the end of the tour through the chain of command when he put out a request for nominations. He said that through discussions it was established that 'Paul had done really good work that night', so when the nomination came up through the Squadron, he was not surprised that the commanders closest to the action had seen fit to nominate Mr McPherson for a gallantry award. He said when the narrative came up, based upon his discussions with the Squadron Commander, he was satisfied that the narrative 'aligned with the Medal for Gallantry'.

46. He said that on receipt of the nomination and others which had been provided for recognition of other individuals, he and his Executive Officer and the Regimental Sergeant Major reviewed the nominations using the respective Regulations and guidance to inform their consideration. He said there was no discussion about the level of award being inappropriate. All agreed that the Medal for Gallantry was appropriate and that was what went forward. He said that he submitted a number of distinguished service nominations and two gallantry nominations as a result of this end of tour consideration. He said one of the gallantry nominations was for a Commendation for Gallantry which had been held over from the previous rotation. This nomination and Mr McPherson's Medal for Gallantry were approved in the 2015 Australia Day honours list.

47. The Nominating Officer said that he submitted the nominations to the Joint Task Force headquarters and was not consulted again on any of the nominations. He said that he learnt of the award of the Medal for Gallantry to Mr McPherson when the Australia Day honours were announced in 2015.

48. The Nominating Officer said that having heard the evidence at hearing and having read the subsequent material, he remained of the view that the Medal for Gallantry was appropriate. He said that his view was that the commanders closest to the action were the best ones to tell the story as they had a good holistic view of the action itself. He said that from what he read in the narrative at the time, and now, and having reviewed the Regulations, he was still satisfied that the Medal for Gallantry was the appropriate level of award.

Defence Submissions

49. On 28 February 2020, the Director of Honours and Awards in the Department of Defence provided a submission, on behalf of Defence.¹¹ The Defence submission did not contain a merits review and concluded that:

*Mr McPherson has presented no evidence to support this claim [that his actions are comparable to the actions of other VC recipients]. It can be reasonably assumed that Mr McPherson has based his claim on reading of the various citations involved. As it is a requirement of the nomination process to keep the narrative to a single page it is unrealistic to try to compare his actions against the actions of others when the full details of those actions are not known.*¹²

50. As previously stated, the submission indicated that there was no evidence of maladministration and no compelling new evidence, therefore ‘in accordance with CDF requirements then the Commander’s decision at the time is upheld’.

51. Defence made no new submissions at the hearing other than to confirm the process undertaken by the HQJOC Honours Board and that the nomination had been reviewed ‘at level’ and not altered. Defence stated that it was not aware whether higher or lower levels of award were considered by the Board but they did endorse the Medal for Gallantry for Mr McPherson.

52. Defence also explained the process it undertook to alter the narrative for Mr McPherson’s Medal for Gallantry in 2017 and said that there was no discussion about reconsideration of the level of award as the nomination had been at level

¹¹ Directorate of Honours and Awards letter to the Tribunal DH&A OUT/2020/0010 dated 17 March 2020 – Folio #14

¹² Ibid. – Folio #19

throughout the nomination process. Defence said that because the citation and synopsis did not change there was no requirement to re-gazette the award.

Tribunal Consideration

53. **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.¹³ 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 decision-maker. In making its decision, the Tribunal considers afresh the relevant facts, law and policy.¹⁴ 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.¹⁵ The Tribunal is bound to make what it regards as the ‘correct and preferable’ decision.

54. **The Issue.** There is no dispute that Mr McPherson was nominated for the Medal for Gallantry and that it was considered by his operational chain-of-command and subsequently approved. Whilst the narrative was subsequently amended, the alterations in the view of the Tribunal do not materially change the description of the action but rather make it more complete. The issue for the Tribunal is whether or not Mr McPherson’s actions meet the eligibility criteria for the Victoria Cross.

55. **The Action.** The description of the action as detailed in the narrative is not in dispute. The narrative is supported by the redacted After-Action report.¹⁶ The action is further elaborated on by the oral evidence of Mr McPherson and the Patrol Commander.

56. Whilst the details of the action are generally agreed, the Tribunal noted that there were differences of opinion regarding the sequence of Mr McPherson’s actions. It is inherent to gallantry awards that they must be validated by external evidence. The Tribunal was therefore reasonably satisfied that where doubt existed or there were inconsistencies, it preferred the Patrol Commander’s account as, in the words of his Commanding Officer, he had ‘an holistic view of the action’ and was an eye witness. Furthermore, given that Mr McPherson was unconscious for a period of time during the action it is possible that his recollection is imperfect. In any event, the Tribunal did not accord any particular weight to the sequence of the action.

¹³ *Council of Australian Tribunals Practice Manual* dated 7 April 2006 p.1.3.1.2.

¹⁴ Pearson, Linda, “Merit Review Tribunals”, in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68.

¹⁵ *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

¹⁶ After Action Report 12 September 2013 – Folio #54

57. **The Defence Submission and Evidence.** The Tribunal noted that the Defence submission indicated that it had not conducted a merits review. However, during the hearing, the Director Honours and Awards indicated that Defence had reviewed the action against the eligibility criteria for the Victoria Cross, although this was caveated with the view that it was not an ‘assessment’, and that it was in response to the ‘original decision’.

58. It seemed to the Tribunal that some manner of review must have been conducted when the decision to amend the narrative for the Medal for Gallantry had been made, but there was no evidence before the Tribunal as to whether this was done or not. Indeed by not completing a thorough review when the amendment was done, it appears that Defence inserted Mr McPherson’s own suggestion that he was ‘momentarily rendered unconscious’ in the act of posting the first grenade when this was not in the original narrative or the After-Action report and is not supported by the eye witness evidence.

59. Notwithstanding the Defence view that there was no maladministration or compelling new evidence which would cause it to conduct a merits view, the Tribunal is bound by legislation to ignore such constraints and conduct a review of Mr McPherson’s actions.

Gallantry Assessment

60. The Tribunal turned to an assessment of whether or not Mr McPherson’s actions on 12 September 2013 were in fact, gallant. Noting that the Regulations do not define gallantry and 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.

61. **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; heroic bravery’;¹⁷ and ‘courageous behaviour, especially in battle’;¹⁸ 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.¹⁹ Again this

¹⁷ The Macquarie Dictionary on-line accessed 20 October 2017.

¹⁸ The Oxford Dictionary on-line accessed 20 October 2017.

¹⁹ <http://medals.nzdf.mil.nz/category/d/index.html>.

is largely unhelpful in defining gallantry in the context of the Australian Honours and Awards system.

62. 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.

63. 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.

64. **Was Mr McPherson Gallant?** The Tribunal considered that Mr McPherson’s actions on 12 September 2013 were gallant. In particular, the Tribunal considered that he displayed initiative and an additional element of courage and fearlessness when he manoeuvred forward to post a grenade under fire. The Tribunal noted that he did this twice despite being wounded. The Tribunal formed the view that his actions were also an instinctive reaction reflecting his training and were done at great individual risk.

The Victoria Cross for Australia

65. Having found that Mr McPherson’s actions were gallant, the Tribunal turned to consider whether or not his actions met the eligibility criteria for the award he seeks – the Victoria Cross.

66. **Was Mr McPherson In the Presence of the Enemy?** Relying on the After-Action report, the evidence and the narrative, there is no dispute that Mr McPherson’s actions were in the presence of the enemy.

67. **Did Mr McPherson Perform Acts of the Most Conspicuous Gallantry?** The Tribunal has determined that Mr McPherson’s actions were gallant. However, the test of whether or not the actions were conspicuous and then, most conspicuous, is a high bar. The Tribunal noted that the Patrol Commander who had been involved in other previous actions had formed an immediate opinion that the action warranted commendation. He also gave evidence that, in his view, the actions of Mr McPherson were ‘brave’. As the Commander on the ground, and the only witness to give evidence, there is no suggestion that the actions were in his view conspicuous.

68. The Tribunal analysed the narrative and also formed the view that the action could not be described as conspicuous. Whilst Mr McPherson may have had ‘no thought to his own safety’ and ‘displayed courage under fire’, the Tribunal could not be satisfied that this constituted conspicuous gallantry. The Tribunal also noted that the Patrol Commander had indicated that the patrol during the engagement were able to suppress and manoeuvre and were not pinned down as suggested by Mr McPherson. He also indicated that the patrol was winning the fire fight. The Tribunal was therefore reasonably satisfied that Mr McPherson’s actions did not change the outcome of the engagement.

69. There was also doubt in the Tribunal’s mind about whether or not Mr McPherson had actually been under direct enemy fire when he went forward or whether, as the Patrol Commander claimed, he had manoeuvred forward from an angle whilst the patrol suppressed the objective. The Tribunal also noted that the Patrol Commander gave evidence that enemy machine gun fire was not present during the second grenade posting and the narrative indicates the second posting involved heavy rifle fire.

70. Additionally, the Tribunal noted the Nominating Officer’s evidence that although aware of the action following discussions with the Mission Commander, he did not consider the action warranted immediate recognition for gallantry. Whilst the Tribunal acknowledges that Mr McPherson’s view was that his actions were performed in the most perilous situation ever encountered by a modern-day Special Forces patrol, the evidence of the chain-of-command does not support this view.

71. Having considered the evidence and noting the inconsistencies and elements of doubt regarding the action, the Tribunal therefore finds that Mr McPherson’s gallantry on 12 September 2013 was not conspicuous.

72. **Daring or Pre-eminent Acts of Valour.** In *Hanuszewicz and the Department of Defence re: Cameron*²⁰ the Tribunal considered that to be ‘pre-eminent’, the act should surpass other comparable acts of valour and to be daring in these circumstances, the action should be bold and have an element of audacity.

73. The Tribunal considered that whilst the act of manoeuvring forward to post a grenade in the presence of the enemy demonstrated courage under fire, it was an action consistent with Mr McPherson’s role as a trooper in the Special Air Service Regiment and was a drill which he was trained to perform and had presumably done multiple times in training. Mr McPherson was, in the Tribunal’s view, doing what was expected of him or any other trained trooper placed into similar circumstances.

²⁰ *Hanuszewicz and the Department of Defence re: Cameron* [2019] DHAAT 08 (23 May 2019), p. 29, para. 113

The Tribunal also noted that the Patrol Commander had indicated that on both occasions when Mr McPherson went forward, the patrol was able to provide suppressive fire support to him.

74. The Tribunal acknowledges that Mr McPherson was wounded whilst performing the grenade post but does not consider this makes the action daring or pre-eminent. The Tribunal was not persuaded that Mr McPherson's actions could be considered to be daring or pre-eminent acts of valour.

75. **Self-sacrifice or Extreme Devotion to Duty.** Mr McPherson's actions clearly cannot be considered to have resulted in self-sacrifice. Whilst the narrative describes his actions as selfless and that he displayed selfless devotion to duty, there is no evidence that this devotion could be described as extreme. Indeed, in his own words, he was 'doing his job'. In the Tribunal's view, Mr McPherson was bravely doing his duty and what he was trained to do, albeit in hazardous conditions. This performance of his duties in the view of the Tribunal could not reasonably be considered as extreme devotion to duty.

76. **Finding in Relation to Eligibility for the Victoria Cross for Australia.** The Tribunal finds that Mr McPherson performed acts of gallantry during a significant engagement at close quarters with the enemy on 12 September 2013. He displayed selflessness and devotion to duty when he twice manoeuvred to engage the enemy while under heavy fire and wounded. He displayed courage under fire but his actions do not meet the eligibility criteria for the Victoria Cross.

Eligibility for Gallantry Awards

77. The Tribunal acknowledges that Mr McPherson's application was for the Victoria Cross and that he was awarded the Medal for Gallantry for acts of gallantry in hazardous circumstances. For completeness, the Tribunal also reviewed his actions against the eligibility criteria for the Star of Gallantry. To be eligible for this award, Mr McPherson would need to have performed acts of great heroism or conspicuous gallantry in action in circumstances of great peril.

78. In *Hanuszewicz*,²¹ the Tribunal considered that 'circumstances of great peril' are likely to occur when both the individual and the group are threatened to such an extent that there is a distinct probability that the group will be overwhelmed by the enemy.

79. The Tribunal notes that Mr McPherson considered the operation to be perilous, however the Patrol Commander was ambivalent in this regard. He indicated that the patrol was under extreme pressure, but at no time did he consider that they

²¹ Ibid. p. 30, para. 118

were threatened to the extent of annihilation. He indicated that the patrol was winning the fire fight and whilst he did have casualties, they were not incapacitated. Relying on the Patrol Commander's evidence and the evidence of the Nominating Officer, the Tribunal did not consider that the risk to the entire patrol was extreme or that failure to act as Mr McPherson did would have resulted in an ultimately adverse outcome. Accordingly, the Tribunal could not be reasonably satisfied that the action took place in circumstances of great peril. The Tribunal finds that the action was conducted in a hazardous situation.

80. The Tribunal has already established that Mr McPherson's gallantry could not be considered to be conspicuous. During the hearing the Tribunal asked Mr McPherson if he considered his actions to be heroic. His response was that any of the others put in his position would probably have done the same thing as he did and that he didn't think there was 'heroic' [sic] on the battlefield – 'you were just doing your job'. The Tribunal also noted that neither the Patrol Commander or the Nominating Officer gave any indication that they thought the actions could be considered to be heroic.

81. For the reasons given above, the Tribunal finds that Mr McPherson's gallantry on 12 September 2013 was not conspicuous or heroic and was not performed in circumstances of great peril - he therefore is not eligible for the Star of Gallantry.

The Medal for Gallantry

82. The Tribunal has found that Mr McPherson performed acts of gallantry in action on 12 September 2013 and that this gallantry has performed in hazardous circumstances. Accordingly, he meets the eligibility criteria for the award he received – the Medal for Gallantry.

Conclusion

83. The Tribunal finds that Mr McPherson performed an act of gallantry in action in hazardous circumstances on 12 September 2013 in Afghanistan during an intense fire fight at close quarters. Whilst he claims that his actions met the threshold for the award of the Victoria Cross and that higher recognition should have been accorded to him, the Tribunal does not agree. The Tribunal finds that Mr McPherson's actions were gallant but do not meet the eligibility criteria for the Victoria Cross for Australia.

TRIBUNAL DECISION

84. The Tribunal decided to recommend to the Minister for Defence Personnel that the decision by the Chief of Army to not recommend the award of the Victoria Cross for Australia to Mr Paul McPherson, MG for his actions on 12 September 2013 in Char Chineh, Uruzgan, Afghanistan be affirmed.