



Australian Government

Defence Honours and Awards Appeals Tribunal

Richardson and the Department of Defence [2021] DHAAT 11 (18 August 2021)

File Number	2020/022
Re	Mr Luke Richardson Applicant
And	Department of Defence Respondent
Tribunal	Ms Anne Trengove (Presiding Member) Mr David Ashley AM
Hearing Date	1 July 2021
Appearances	Mr Luke Richardson and Ms Vanessa Richardson (via videoconference) Ms Allison Augustine Directorate of Honours and Awards, Department of Defence (via conference telephone).

DECISION

On 18 August 2021 the Tribunal affirmed the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Luke Richardson is not eligible for the award of the Timor-Leste Solidarity Medal.

CATCHWORDS

FOREIGN AWARD – Timor-Leste Solidarity Medal – service less than the required period – whether service ‘extraordinary’ – no discretion.

LEGISLATION

*Defence Act 1903 – Part VIIIIC – Sections 110T, 110V(1), 110VB(2), 110VB(6).
Democratic Republic of Timor-Leste Decree Law 15/2009, promulgated 9 March 2009.*

REASONS FOR DECISION

Introduction

1. The applicant, Mr Luke Richardson seeks review of the decision of 1 April 2015 by the Hon Darren Chester, then Parliamentary Secretary to the Minister for Defence that he is not eligible for the award of Timor-Leste Solidarity Medal (TLSM) for his service in Timor-Leste on Operation ASTUTE from 26 May to 14 August 2006. This decision was in response to a representation made on Mr Richardson's behalf by the Hon Steven Ciobo, then Parliamentary Secretary to the Minister for Foreign Affairs, which included a letter from Mr Richardson setting out his case for the award.

2. Mr Richardson previously sought award of the TLSM by way of a 3 June 2011 application to the Assistant Defence Attaché, Australian Embassy Dili through the Directorate of Honours and Awards in the Department of Defence (the Directorate). This application was forwarded to the Office of the President of Timor-Leste for consideration as an 'extraordinary case' as provided for by the eligibility criteria for this foreign award. His application for the TLSM appears to have been rejected by the Government of Timor-Leste on or prior to 25 November 2011.

3. On 12 July 2020, Mr Richardson lodged an application for review of Minister Chester's decision with the Tribunal. The matter was initially listed for hearing on 19 February 2021 before a differently constituted Tribunal, however that hearing was postponed at the applicant's request.

4. The Directorate submits that the President of the Democratic Republic of Timor-Leste declined to award Mr Richardson the medal and there are no reasonable grounds for any reconsideration. It has determined that Mr Richardson is not eligible for the claimed award because he does not meet the eligibility criteria by serving the stipulated minimum number of days in Timor-Leste, within the specified operational area and during the requisite timeframe. Further, the Directorate submits there is no evidence that Mr Richardson's service meets the requirement of being an 'extraordinary case' which may otherwise allow grant of the award, despite the minimum period of service not being met.

5. Mr Richardson contends that there are extraordinary circumstances which apply to his 81 days service in Timor-Leste and that he should be awarded the TLSM. In short, he asks the Tribunal to make a recommendation, via the Minister, that the President of the Democratic Republic of Timor-Leste reconsider his application for the TLSM.

Tribunal jurisdiction

6. The TLSM is a foreign award. The term *foreign award* is defined in s110T of the Defence Act as *an honour or award given by a government of a foreign country, or by an international organisation*. In considering any application for review the Tribunal is bound by the relevant eligibility criteria for a particular honour or award: s110VB(6) of the *Defence Act 1903*. In that regard, the Tribunal has no discretion.

7. The Australian Government has never been the approving authority for the TLSM. However, the President of Timor-Leste included in his Decree that relevant authorities apply scrutiny to ensure that only members who satisfy the criteria are included.¹ All Australian nominations were to be ‘centralised, vetted and submitted’ for his consideration. In scrutinising applications, arguably Australian delegates had the power to make decisions in respect of applications.

8. The Tribunal was satisfied that the representation made on Mr Richardson’s behalf by the Hon Steven Ciobo constituted an application as required by s110V(1)(c) of the Act. The Tribunal was satisfied that Minister Chester’s letter of 1 April 2015 constitutes a refusal to recommend the award, thus satisfying the requirements of s110V(1)(a) and (b) of the Act and creating the *reviewable decision*.

Mr Richardson’s service history

9. Mr Richardson enlisted in the Australian Army on 17 February 2004 and transitioned to the Army Inactive Reserve on 15 July 2018. He served in the artillery.

10. Mr Richardson’s operational service entry within his service record shows that he served on Operation ASTUTE within the specified area of operations from 26 May 2006 until 14 August 2006, being a total of 81 days.²

11. For his service, Mr Richardson has been awarded the:

- Australian Active Service Medal with Clasp ‘ICAT’;
- Afghanistan Medal;
- Australian Service Medal with Clasp ‘TIMOR-LESTE’;
- Australian Defence Medal;
- NATO Non-Article 5 Medal with Clasp ‘ICAT’;
- Returned from Active Service Badge;
- Army Combat Badge.

Eligibility Criteria for the Timor-Leste Solidarity Medal

12. On 21 August 2008 the Government of the Democratic Republic of Timor-Leste through the Office of the President established a campaign medal known as Timor-Leste Solidarity Medal (TLSM). This was offered to Australia and other participating nations to recognise foreign police and military members for their contribution to the peace and stability of Timor-Leste’s emerging democracy. Australia’s contribution included Operation ASTUTE.

13. The Government of the Democratic Republic of Timor-Leste set the eligibility criteria, and also provided guidance over time to expand on those criteria. The background to the criteria and guidance is set out in full in the attachment at Annexure A.

¹ Democratic Republic of Timor-Leste Decree of Law 15/2009, promulgated 9 March 2009.

² ADO Service Record, Luke Philip Patrick Richardson, 8488894.

14. The following is a compilation of the eligibility criteria and the associated guidance by the President, namely:
- a. having served a minimum 180 days continuous or accrued service in East Timor from 1 May 2006;³ or
 - b. nominations will be considered for personnel that have served a minimum of 120 days from 1 May 2006;⁴ or
 - c. nominations will be considered for personnel who have served with a start date in May or June 2006 for a period of at least 90 days;⁵ or
 - d. the President of the Republic may consider extraordinary cases outside the above time-periods. Applications for extraordinary cases must be endorsed and submitted through the Directorate of Honours and Awards, to be considered and approved by the President of the Republic. However, service may still only count from 1 May 2006.⁶
15. Relevantly, what might be suitable justification for 'extraordinary consideration' is:
- a. a member who is returned to Australia early because of injuries sustained on operations in Timor-Leste; or
 - b. a member who is returned to Australia for compassionate reasons, but each compassionate circumstance would be considered on its individual merit.⁷
16. Relevantly, what would not normally be considered suitable justification for 'extraordinary consideration', is:
- a. a member, or members, returned to Australia because their mission has been completed - this would generally apply across all qualifying service periods (90, 120 and 180 days) and would be applied consistently even if members missed only one day of qualifying service; or
 - b. a member who completed an intended 'short-term' mission regardless of the qualifying service period the member was operating in; or
 - c. a member who is returned to Australia for career management reasons (posting, promotion, courses); or
 - d. a member who is returned to Australia for personal reasons (i.e. the member asks to be returned to Australia).⁸

³ Democratic Republic of Timor-Leste Decree of Law 15/2009, promulgated 9 March 2009 Article 3 Clause 2(a).

⁴ Ibid, Clause 2(b).

⁵ Ibid Clause 2(c).

⁶ Information DEFGRAM 766/2012 Paragraph 2, 5 November 2012.

⁷ Minute, Assistant Defence Attaché, Australian Embassy Dili, dated 25 November 2011.

⁸ Ibid.

17. The Directorate has only been an administrator for this foreign award, which can only be approved by the Government of Timor-Leste even though, as noted above, Australian authorities were granted the authority to apply scrutiny in administering the awards and submitting applications to the Government of Timor-Leste for final approval.

18. The TLSM is awarded in addition to the Australian Service Medal with Clasp 'TIMOR-LESTE' which is issued by the Australian Government to recognise service in Timor-Leste as part of Operation ASTUTE.

Procedure for applying for the TLSM

19. It was the Directorate that was responsible for submitting nominal lists and applications based on the eligibility criteria, inclusive of those applications considered to be 'extraordinary'.

20. Nominations were forwarded through the Assistant Defence Attaché of the Australian Embassy in Dili to the Office of the President of Timor-Leste for consideration of approval for the medal. All approvals were notified by Presidential Decree. Notification of non-approval from the Office of the President of Timor-Leste or guidance about the qualifying criteria was provided through written advice to the Attaché.

21. In DEFGRAM No 766/2012 issued on 5 November 2012, the Department of Defence stated that it had been advised that *'the award of the TLSM will cease at the end of 2012 and no further applications would be considered in 2013 or beyond'*.⁹ The Directorate required all outstanding applications for the TLSM to be submitted by 16 November 2012 to submit to the Government of Timor-Leste prior to the cut-off date.¹⁰ (The DEFGRAM then expired on 5 February 2013).

Mr Richardson's application rejected by President of Timor-Leste

22. While no record of the correspondence could be found, Mr Richardson appears to have approached the Directorate concerning applying for the medal in early 2011. The Directorate provided assistance by letter of 9 May 2011 which set out that his application should include the nature of his individual contribution and any documentation in support, which might include any supporting endorsement by his Commanding Officer. Mr Richardson provided reasons in an application received by the Directorate on 3 June 2011. In his application, he set out that he was applying under the 'extraordinary case' clause. He stated that when he arrived, the country was unstable with rogue elements and various dangers. He said he rendered medical assistance whilst pursuing rebels. He also set out the harsh living conditions, where he and his fellow soldiers survived on bare essentials only.

23. Under cover of a letter sent in August 2011, Mr P Clarke, then Director of Honours and Awards, wrote to Lieutenant Colonel RJ Morley, Assistant Defence Attaché to the Australian Embassy in Dili. Enclosed were 28 applications, including Mr Richardson's.¹¹ The letter states that the applying members sought assessment under the 'extraordinary case' criterion. Mr Clarke outlined that:

⁹ DEFGRAM No 766/2012 issued 5 November 2012 Folio 43 Also See also DEFGRAM NO 410/2009, issued 7 July 2009.

¹⁰ Ibid.

¹¹ Letter, DH&A A/F8165630, no date listed.

‘it was not known what is deemed to be considered appropriate consideration under this clause so DH&A have requested members to submit as much information as possible and supporting evidence to justify their claim.’¹²

24. The applications were submitted to the President of Timor-Leste for his consideration and the Directorate asked to be notified as to the outcome. The Directorate did not therefore endorse Mr Richardson’s application, nor those of the other 27 applicants, but was a conduit for their formal consideration by the President. The Tribunal observes that, contrary to the decree, no ‘scrutiny’ was in fact applied to the applications.

25. Lieutenant Colonel Morley responded to the Directorate on 25 November 2011 via a Minute headed *‘Timor-Leste Solidarity Medal: Waiver and Special Consideration Requests Rejected by Timor-Leste President’*, advising of rejected submissions. While some submissions were returned with explanation or follow-up points, none of the submissions referred to in the minute were approved by the President, including the submission made on behalf of Mr Richardson and 27 others. The Minute specifically responded to some of those applications but not Mr Richardson’s. Therefore, it is not clear on exactly what grounds Mr Richardson’s application was refused.

26. The Minute of 25 November 2011 went onto include further guidance as to what might and might not be suitable justification for ‘extraordinary consideration’, which the Tribunal has included at paragraphs 15 and 16 above.

Mr Richardson’s submissions

27. Mr Richardson provided submissions and gave oral evidence at hearing to supplement his original application of 3 June 2011. After the hearing, Mr Richardson provided a further submission received by the Tribunal on 12 July 2021, in clarification of issues raised at hearing.

28. Mr Richardson readily concedes he does not have the minimum of 90 days service in Timor-Leste during the specified period. He accepts that he has only 81 days service and that his nine days of leave outside of the specified area do not count. He also accepts that he was not returned early due to injury or compassionate reasons.

29. He further accepts that his application of August 2011, forwarded under Mr Clarke’s letter to the President of Timor-Leste, did not result in him being granted a medal. Mr Richardson states that after 25 November 2011 he did not receive any written or verbal advice from the Directorate as to the success or otherwise of his application. He states he presumed he was unsuccessful as he never received the medal, which prompted his approach via Ministerial channels in 2015 and this appeal to the Tribunal.

30. He stated that in his case there are extraordinary considerations as to why he should be awarded the TLSM. His submissions, both written and at hearing, focus on the particular conditions of his service in Timor-Leste.

¹² Ibid.

Mr Richardson's service in Timor-Leste

31. Despite not being a qualified infantry rifleman, during Operation ASTUTE Mr Richardson was assigned to 'Golf' Company, the 3rd Battalion of the Royal Australian Regiment (3 RAR), which was also known as Battlegroup Faithful. Golf Company was an artillery battery, re-roled for infantry operations for Operation ASTUTE. The other companies that made up the strength of 3 RAR were infantry companies manned by qualified infantry riflemen. There were some 600-700 personnel during the first response making up those four companies. According to Mr Richardson, Golf Company performed more of an infantry role than that for which members of his company were actually qualified, and they were less prepared and qualified on weapons than the other companies. But, according to him, they were asked to assume the same level of risk.

32. He explained at hearing about the conditions which he and his fellow soldiers in Golf Company experienced. In short, he said the initial days of Operation ASTUTE were some of the hardest of the entire operation. Upon arrival in Dili it was clear to him from blood stains and bullet holes that people had been killed prior to his arrival. The police headquarters in Dili had been attacked, killing several police officers. He and other soldiers immediately set out to do important work securing the airport and then parliament house. They worked day and night. He said he was aware that there were about 600 Timorese soldiers who were threatening to overthrow the government. He and his fellow soldiers tried to disarm the local police and keep the peace under very difficult and potentially risky and threatening circumstances.

33. Mr Richardson acknowledges that his service was 'on a par' with others in Golf Company but claims that the service of his company was more worthy of recognition than that of the other three Companies during the first response which, by nature of their training, were in his view better prepared to respond to threatening situations. He states that those in Golf Company served under extremely difficult circumstances and as such they should all have their service recognised as being 'extraordinary'.

34. In short, Mr Richardson contends that there are extraordinary circumstances which apply to his 81 days service in Timor-Leste and he should be awarded the TLSM. He asks the Tribunal to make a recommendation that the Government of Timor-Leste reconsider his application for the TLSM.

Defence submission

35. Defence submitted that the decision and reasons of Minister Chester to refuse Mr Richardson the TLSM on the basis that his service does not fulfil the eligibility criteria were correct. Defence further submitted that his earlier application was correctly rejected by the Government of the Timor-Leste on 25 November 2011. Defence confirmed there is no record of him being approved under Presidential Decree for the TLSM at any time.

36. Defence further submitted that Mr Richardson's service in Timor-Leste does not satisfy any of the criteria for the medal and that his circumstances of service, whilst arduous and which put him in a potentially threatening environment, did not reveal any circumstances which would put his service in the 'extraordinary' category.

37. At hearing, Ms Augustine pointed to the range of reasons for rejections set out in the minute of 25 November 2011, which were said to be lacking detail as to dates served or individual justification as to how a member's contribution might be worthy of 'extraordinary consideration'. Ms Augustine stated that, to her, the same observation could be made of Mr Richardson's service.

38. It is acknowledged there was no record of any communication with Mr Richardson in Directorate records around 25 November 2011. There was an understanding that a number of applicants were telephoned around this time as to the fate of their respective applications but no records were kept of those communications. Ms Augustine accepts on behalf of the Directorate that this was poor business practice, likely due to a large number of applications and responses. (It would appear from Mr Richardson's evidence that he did not receive any form of communication from the Directorate).

39. Defence submitted that Mr Richardson's application had been considered and correctly rejected by the Government of Timor-Leste in 2011, and that there are now no grounds to put forward any further application on his behalf via the Directorate or for the Tribunal to make such a recommendation in favour of the award.

40. Defence also referred to DEFGRAM No 766/2012 issued on 5 November 2012, and stated at hearing that from an administrative point of view Defence had since effectively 'closed off' applications to the foreign government.¹³

Finding – Mr Richardson is not eligible for the TLSM

41. The Tribunal carefully considered all of the material and submissions put before it. It found that Mr Richardson does not have the minimum of 90 days service in Timor-Leste during the specified time and that he was not returned early due to injury or compassionate reasons.

42. The Tribunal further found that his 2011 application was rejected by the Government of Timor-Leste. There is no evidence that his application had been approved by the Government of Timor-Leste in 2011 or at any time before or after. It is not known on what basis his application was rejected by the Government of Timor-Leste as the Minute does not detail his particular case. However, the Tribunal notes that applications were similarly rejected on the basis where no individual justification was put forward for an applicant's service to fall within the 'extraordinary category'.

43. The Tribunal accepts Mr Richardson's account of the conditions in the first response mission in Timor-Leste. The Tribunal accepts that his service was not without threat or risk. His account in terms of privations and arduous living conditions were considered entirely accurate by the Tribunal. However, the Tribunal finds that his experiences were not a significant departure from the conditions faced by those in the first response mission. On his own evidence, his experiences were very similar to his fellow soldiers in Golf Company. Further, while accepting Mr Richardson's evidence regarding their training, the Tribunal finds that the conditions faced by Golf Company were likely not materially different from the other three companies.

¹³ The Tribunal notes that no advice from the Timor-Leste Government has been provided in support of the Defence policy.

44. In these circumstances there was nothing in the evidence of Mr Richardson that the Tribunal could point to as being ‘extraordinary’, that is, something which separated his service from the rest of his Company or infantry soldiers in the other Companies in location at the relevant time. In short, there was no extraordinary action or event to elevate his experience above those commonly experienced by other Australian soldiers. In fact, it would seem his experiences were unfortunately all too ordinarily experienced by other members of the Battlegroup.

45. In making this finding, we do not take anything away from the very commendable service of Mr Richardson and those who served with him, particularly in Golf Company during that first response.

46. The fact that Mr Richardson nearly served the 90 day minimum for the medal was an insufficient consideration. The Presidential guidance stated that for those who served one day less than the 90, 120 and 180 days, this would not ‘normally be suitable justification for ‘extraordinary consideration’’. Mr Richardson fell nine days short.

47. The Tribunal is bound by the eligibility criteria and Presidential guidance as set out paragraphs 14 to 16. There is no broad discretion to award the TLSM when the circumstances are ‘close to’, but do not fall within, the stated exceptions. This is particularly so when the criteria and guidance are set by a foreign government.

48. Mr Richardson’s service in Timor-Leste does not meet either the minimum 90 day service requirement nor the exceptions in the qualifying criteria and Presidential guidance for the TLSM as set by the Government of Timor-Leste.

49. For these reasons, despite the respected contribution of Mr Richardson in Timor-Leste, we have decided to not recommend to the President of the Democratic Republic of Timor-Leste, via the Minister, that he should be awarded the TLSM.

50. Nevertheless, we acknowledge Mr Richardson’s significant commitment and contribution through his service in Timor-Leste, as well as his service generally with the Australian Army, which includes operational service in Afghanistan, and has been recognised by the Australian Government with a number of campaign awards, including the Australian Service Medal with Clasp ‘TIMOR-LESTE’.

DECISION

51. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Luke Richardson is not eligible for the award of the Timor-Leste Solidarity Medal.

ANNEXURE A

Timor-Leste Solidarity Medal - Eligibility Criteria

The letter of offer of then President Jose Ramos-Horta of 21 August 2008 sets out the qualifying criteria for the TLSM relevantly below:

... "The criteria for qualification for this award is 180 days continuous or accrued service in Timor-Leste for uniformed service personnel (Police and Military) that have served on a mandated mission to assist with Peace and Stability operations. The start date for qualification is 1 May 2006 and only time served after this date will be included. There will be three categories considered for qualification for this medal, each of which will need to be submitted in separate lists. The first list is to include all service personnel serving over 180 days who will automatically qualify for the medal. The second classification is for those who served with a start date in May or June 2006 for a period of no less than 90 days.

Special exception will be given to those personnel who served during the first response mission and they will be considered case by case. The final list is for all other personnel that have served a minimum 120 days to be considered for recognition on a case by case basis."...¹⁴

In November 2008, the Australian Government accepted the offer of the TLSM from the President of the Democratic Republic of Timor-Leste.

The terms of letter of offer, as accepted became Decree Law, promulgated on 9 March 2009 by President of the Democratic Republic of Timor-Leste.¹⁵

Prior to August 2011, the President of the Republic arguably broadened the eligibility criteria to include consideration of 'extraordinary cases'. Relevantly,

"The President of the Republic may consider extraordinary cases outside the above time-periods. Applications for extraordinary cases must be endorsed and submitted through the Directorate of Honours and Awards, to be considered and approved by the President of the Republic. However, service may still only count from 1 May 2006."¹⁶

Presidential Guidance

Through a minute from the Australian Defence Attache in Dili, on 25 November 2011, the President of the Democratic Republic provided guidance as to what would and would not be 'extraordinary consideration'. Relevantly, what might be suitable justification for 'extraordinary consideration':

¹⁴ Democratic Republic of Timor-Leste, letter of offer, 21 August 2008.

¹⁵ Democratic Republic of Timor-Leste Decree Law 15/2009, promulgated 9 March 2009

¹⁶ Letter from Mr P Clarke, Director Honours and Awards to Lieutenant Colonel R Morley of the Australian Embassy of August 2011.

“A member who is returned to Australia early because of injuries sustained on operations in East Timor.

A member who is returned to Australia for compassionate reasons, but each compassionate circumstance would be considered on its individual merit.”¹⁷

Relevantly, what would not normally be considered suitable justification for 'extraordinary consideration:

“A member, or members, returned to Australia because their mission has been completed this would generally apply across all qualifying service periods (90, 120 and 180 days) and would be applied consistently even if members missed only one day of qualifying service.

A member who completed an intended 'short-term' mission regardless of the qualifying service period the member was operating in...”

A member who is returned to Australia for career management reasons (posting, promotion, courses)

A member who is returned to Australia for personal reasons (i.e. the member asks to be returned to Australia).”¹⁸

¹⁷ Minute, Assistant Defence Attaché, Australian Embassy Dili, dated 25 November 2011.

¹⁸ Ibid.