



Australian Government

Defence Honours and Awards Appeals Tribunal

P and the Department of Defence [2014] DHAAT 27 (4 July 2014)

File number 2012/007

Re **Soldier P**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr J. Jones AM (Chair)
Ms C. Heazlewood
Vice Admiral D. Chalmers AO (Retd)
Mr K. Woods CSC, OAM

Hearing Dates 9 April 2014 and 11 April 2014

DECISION

On 4 July 2014 the Tribunal decided to recommend to the Minister that the decision to award the Commendation for Gallantry to Soldier J for his actions in Afghanistan on 22 August 2009 be affirmed.

CATCHWORDS

DEFENCE HONOUR – Defence honour - Medal for Gallantry – Commendation for Gallantry – other acts of gallantry – in action – hazardous circumstances – worthy of recognition.

LEGISLATION

Defence Act 1903 - ss 110V(1), 110VA 110VB(1)
Gallantry Decorations Regulations 1991
Defence Force Regulations 1952 – Reg 93B

REASONS FOR DECISION

Introduction

1. On 16 February 2012 Soldier P requested that the Tribunal review the refusal by the Chief of Joint Operations (CJOPS) of the Department of Defence to recommend Soldier J for a Medal for Gallantry (MG) for his service in Afghanistan in 2009.¹
2. Soldier P submitted a recommendation for the MG for Soldier J in November 2009 to the headquarters of Special Operations Task Group (SOTG), the unit in which they were both serving. On 26 January 2011, Soldier P became aware that soldier J had been awarded a Commendation for Gallantry (CG) in the Australia Day awards which were announced on that day.
3. In a letter received on or about 21 November 2011, Soldier P wrote to Headquarters, Joint Operations Command (HQJOC) requesting that the decision made at that headquarters to downgrade an award to Soldier J from the MG to the CG be revoked and substituted with the originally recommended MG.
4. On 21 December 2011 the Deputy Chief of Joint Operations (DCJOPS) responded to Soldier P's request stating that he did not support the revocation or the substitution of the award of the CG.

Jurisdiction

5. Pursuant to s110VB(1) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision properly made to the Tribunal, relating to an application for a defence honour. The term reviewable decision is defined in s110V(1) and includes a decision made by a person within the Defence Force to refuse to recommend a person for a defence honour. Any decision must be made in response to an application.
6. Section 110VA provides that an application for review can only be made by the person who made the application for the defence honour. In this matter Soldier P applied to the Tribunal to have the decision by CJOPS recommending that Soldier J be awarded CG, reviewed. To establish whether Soldier P was the person who made the application for the defence honour to be awarded to Soldier J, the Tribunal must analyse the process that resulted in Soldier J being awarded the CG.
7. Soldier P recommended that Soldier J, a member of his Company be awarded a MG in or about November 2009 following an operation in Afghanistan. This recommendation was supported by the chain of command and forwarded to HQJOC. The chain of command in the operational theatre consisted of Soldier P's immediate superior, the Commanding Officer of SOTG, who endorsed the recommendation and the Commander Joint Task Force 633 (CJTF633) where it was also endorsed.
8. Once the recommendation was received by HQJOC it was submitted for consideration by the HQJOC Operational Honours and Awards Board (the Board) at their meeting on 22 April 2010. The Board considered the recommendation and decided that Soldier J would

¹ Names of members with protected identity status have been redacted by the Tribunal.

be recommended for the CG. On Australia Day 2011 the Governor-General announced the award of the CG to Soldier J.

9. The issue for the Tribunal to address is whether Soldier P is the person who made the application that resulted in Soldier J being awarded the CG, and if he is that person, when was the application made. Section 110VA simply refers to the person who made the application which resulted in a decision, having the power to seek review by the Tribunal. It could be argued that the person who made that application was the CJTF633 because it was the endorsed application that was sent to HQJOC for the Board to consider.

10. The Tribunal considered correspondence, the Explanatory Memorandum and the Second Reading Speech in relation to the amendment of the Defence Act setting up the Tribunal, to ascertain whether the person who made the original recommendation was the person who made the application for the defence honour². In a letter dated 25 March 2009 the Parliamentary Secretary for Defence Support wrote that the Tribunal was intended to have the power to review a decision concerning the nomination for a defence honour. A person whose application recommending a defence honour was refused, had the right to apply for review of that decision.

11. Given the above information the Tribunal prefers to interpret s110VA so that the person who made the application for the defence honour, is the person who made the original recommendation for the defence honour because this interpretation accords with the explanation of the Parliamentary Secretary in his letter of 25 March 2009. It also means that the person most familiar with the merits of the application has the power to request review if he or she believes an incorrect decision has been made. The Tribunal is satisfied that it was intended that a person in Soldier P's position have the right to request review by this Tribunal. Soldier P submitted his application that Soldier J be awarded the MG in or about November 2009.

12. Regulation 93B of the *Defence Force Regulations 1952* defines a *defence honour* as being those honours set out in Part 1 of Schedule 3. Included in the defence honours set out in Part 1 is the MG and the CG. Therefore the Tribunal has jurisdiction to review the decision to recommend that Soldier J be awarded the CG.

Steps taken in the conduct of the Review

13. In accordance with the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011 (No.1)*, on 7 June 2012, the Tribunal wrote to the Secretary of the Department of Defence informing him of Soldier P's application for review and requesting that he provide a report. On 13 June 2012, responses were received by the Tribunal Secretariat from HQJOC and the Directorate of Honours and Awards which were inconsistent with the requirements of the Tribunal Procedural Rules. Soon after this occurred, Soldier P asked that the review be postponed for a period of time. This was agreed to by the Tribunal.

14. In July 2013, the Tribunal Secretariat made contact with Soldier P asking if he wished for the matter to proceed, which he later confirmed that he did. The Tribunal again wrote to the Secretary on 7 August 2013, seeking further information, and a report in accordance with

² Section 15AB(1)(a) *Acts Interpretation Act 1901*

the Tribunal Procedural Rules. The Chair's letter also included a letter from MAJGEN Cantwell (ret'd), the former CJTF 633, in support of Soldier P's application.

15. On 17 September 2013, the Directorate provided the Tribunal with a report on behalf of the Secretary. A copy of the report of the Directorate was forwarded to Soldier P for comment. Soldier P provided a response to the Tribunal in writing on 30 October 2013.

16. Following its initial consideration the Tribunal requested Defence to provide information to assist in the Tribunal's deliberations as well as making available specified members and former members of the Board. The information requested relating to Soldier J's case was:

- a. The complete record of all recommendations for Medals of Gallantry for service on Operation SLIPPER since 2008, showing all recorded considerations and all decisions made along the chain of command; and
- b. The complete record of all recommendations for gallantry and distinguished service awards submitted by Soldier P for service on Operation SLIPPER, showing all recorded considerations and all decisions made along the chain of command.

17. The Tribunal received a response to the request for information on 31 March 2014. This material was forwarded to Soldier P for comment in two tranches on 4 and 11 April 2014. Soldier P provided his comment on 6 May 2014, and further material on 28 May 2014.

18. Hearings were held on 9 and 11 April 2014. Because of the sensitivity of the matters to be discussed at hearing, the Chair of the Tribunal directed that they be conducted in private.

19. At the 9 April hearing, Soldier C, Brigadier David Webster (ret'd) and Dr Peter Collins QC provided oral submissions in support of Soldier P, who also made oral submissions, and Ms Helen Gouzvaris (Director Honours and Awards), Brigadier Dianne Gallasch and Commodore Braddon Wheeler provided submissions on behalf of Defence. Defence advised the Tribunal prior to hearing that its nominated representatives could assist the Tribunal to gain an understanding of policies, practices and guidance that might influence Board considerations of recommendations of honours.

20. At the 11 April hearing, Soldier P provided further oral submissions and Lieutenant General Ash Power (CJOPS) and WO David Devlin (Warrant Officer Joint Operations) provided further oral submissions on behalf of Defence.

Background

21. Soldier J served in Afghanistan from July to November 2009 as a member of a commando team within a commando company which was commanded by Soldier P.

22. On 22 August 2009 Soldier J's platoon was conducting a fighting patrol in the Mirabad Valley when the leading elements of the platoon were engaged by the enemy from very short range with machine gun fire and rocket propelled grenades.

23. Following this engagement Soldier J's platoon commander, Soldier C, suggested to Soldier P that Soldier J be awarded the MG. Soldier C forwarded his account of what had occurred to Soldier P who drafted the citation and subsequently submitted it to HQ SOTG.

24. Soldier J's nomination for the MG was supported in turn by the commanding officer of SOTG, the chief of staff at the headquarters of the joint task force in Afghanistan (JTF633) and the commander of JTF633, Major General Cantwell, who forwarded the nomination to HQ JOC for consideration by the Board which met in April 2010 to consider recommendations for awards to be announced on Australia Day 2011. The Board decided to downgrade Soldier J's nomination to a CG which became the recommendation which was sent forward from CJOPS to the CDF and thence to the Governor-General.

Soldier P's Case

25. In his written submissions and in his verbal evidence to the Tribunal, Soldier P made the following arguments:

- a. The wording in the citation which was submitted to the Board was changed by the Board. In particular the words "in hazardous circumstances" were excised from the narrative précis and a number of wording changes were made in the full narrative. Soldier P believed that these changes had been made without adequate consultation with the nominating and recommending officers in the chain of command and that the changes contributed to the decision to downgrade the award.
- b. It is not reasonable that officers who might not have served on operations can override the recommendations of officers with experience in operations and more complete and detailed knowledge of the actions and circumstances which led to the nomination for an award being made.

26. At the hearing on 9 April 2014, Soldier P called Soldier C as a witness to the actions of Soldier J in the engagement on the 22 August 2009. Soldier C described the engagement which his platoon fought on that day and illustrated his description with a drawing of the terrain over which the battle took place.

27. Soldier C's evidence provided the following picture of events within the engagement: As the platoon manoeuvred to clear the enemy positions, Soldier J was directed to move with two other soldiers to high ground to provide fire support. When they had completed this move and began to bring effective fire to bear on a group of enemy which threatened the platoon, Soldier J and his colleagues were themselves engaged by heavy and sustained machine gun and rocket propelled grenade fire which forced them to withdraw from their position on the crest of the slope. After changing positions Soldier J moved back to a fire support position and again engaged the enemy with accurate fire thereby drawing enemy fire away from the rest of the platoon. In the course of the engagement Soldier J was driven off the slope four times and each time he made his way back to a fire support position and recommenced suppression of the enemy positions by fire, which finally allowed the platoon to clear the enemy positions. During the action, Soldier J also provided his platoon commander with accurate target indications and battlefield commentary on enemy movement.

28. The citation prepared by Soldier P referred to the engagement on 22 August 2009 when Soldier J's platoon was attacked by insurgents at very short range. The platoon was

subject to accurate machine-gun fire and rocket propelled grenades. Soldier J was directed to higher ground with two others in a fire support position. They identified six enemy in a position to threaten the platoon. Soldier J engaged the enemy with effective and precise fire. This drew heavy enemy fire onto Soldier J's position from another enemy position. Soldier J remained in his position and drew enemy fire away from the platoon. Soldier J was forced off the high ground on a number of occasions but returned to provide fire support and to attract enemy fire on at least four instances. Soldier P wrote that Soldier J showed little regard for his own safety and ensured that the platoon proceeded to clear the enemy positions without casualties. Soldier P described Soldier J's actions as *selfless actions and acts of gallantry in the face of heavy and sustained enemy fire and ensured the safety of his platoon.*

Arguments of Defence

29. The Defence submission to the Tribunal was provided by HQJOC. In the submission it is argued that:

- a. Changes to the narrative précis were made **after** the Board had decided to downgrade the recommendation. These changes were made in order to ensure that the wording satisfied the criteria which are set out in the Regulations for the level of award which the Board had decided was appropriate.
- b. Other changes to the narrative which had been received by HQJOC via the chain of command were minor and editorial in nature.
- c. The Board which considered and decided to downgrade the recommendation in respect of Soldier J was properly constituted and followed proper procedures and processes in accordance with relevant defence instructions.
- d. The Board which convened in April 2010 also decided to downgrade the recommended level of award to 12 other nominees as well as to Soldier J. Soldier J's nomination was the only nomination for the MG that was downgraded.
- e. In making those decisions the Board took into account:
 - (i) The details contained in each of the nominations and the supporting citations,
 - (ii) The criteria set out in the award regulations,
 - (iii) The need to ensure consistency across all the nominations, and
 - (iv) The knowledge, experience and professional judgement of the Board members.

The Gallantry Decorations

30. The *Gallantry Decorations Regulations 1991* (the Regulations), stipulate the following conditions for award of 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.

Considerations of the Tribunal

31. The criteria for the award of the MG and the CG require that the person commit ‘acts of gallantry in action’. The MG requires those acts of gallantry to be ‘in hazardous circumstances’, while the CG requires the acts of gallantry to be other acts ‘considered worthy of recognition’. So a person **shall** be awarded a MG if the person’s acts of gallantry in action occur in **hazardous circumstances**. The person **may** be awarded the CG if their **other** acts of gallantry in action are **considered worthy of recognition** – a fine distinction. In summary, the variable elements of the criteria for each of these two levels of gallantry decoration are the extent of the heroism or gallantry in the actions performed and the extent of peril or hazard in the prevailing circumstances.

32. The word ‘shall’ is usually interpreted in legislation to impose an obligation to exercise that power, whereas the word ‘may’ is generally interpreted as conferring a discretion on the decision maker. Thus, on the face of it, a MG must be awarded if the criteria are met. A CG may be awarded if the criteria are met.³ Whether ‘shall’ or ‘may’ are mandatory or discretionary will depend upon the context in which they are used and this will depend upon the purpose of the provision.

33. The purpose of the Regulation is to make award honours for gallantry to those who have displayed acts of gallantry in varying situations. The highest award, the Star of Gallantry (SG), requires the person to have displayed *acts of great heroism or conspicuous gallantry in action in circumstances of great peril*. The MG requires *acts of gallantry in action in hazardous circumstances*. Both of these provisions state that the award shall be given if the person’s acts meet these requirements. In contrast, the requirements for the CG appear to give a discretion. The award may be given if the person performs *other acts of gallantry in action which are considered worthy of recognition*.

34. After considering the context for awarding these three honours the Tribunal concluded that to give meaning to the words used in the Regulations, it must construe ‘shall’ as mandatory and ‘may’ as permissive. This means that if a person satisfies Reg3(1) and (2) they must be awarded either the SG or the MG. If the person satisfies Reg3(3) then the decision maker has a discretion to decide whether the person’s acts of gallantry are worthy of recognition.

35. The requirement to be ‘in action’ is included in the criteria for all gallantry decorations.

36. The Board recommended that Soldier J be awarded the CG which means that the Board decided that Soldier J had performed ‘other acts of gallantry in action which are considered worthy of recognition’.

37. The Tribunal gave consideration to the meanings of ‘acts of gallantry’, ‘in action’, ‘hazardous circumstances’ and ‘worthy of recognition’ and how they might be understood to distinguish between criteria applying to the third and fourth levels of decorations for gallantry. The Tribunal also considered what was meant by ‘other acts of gallantry’.

³ Pearce, D. C. & Geddes, R. C. *Statutory Interpretation in Australia*, Chatswood, N.S.W. LexisNexis Butterworths, 2006

38. The Tribunal was unable to find any definitions of the terms ‘acts of gallantry’, ‘hazardous circumstances’, ‘in action’ and ‘worthy of recognition’ in any defence regulation or statement of policy.

39. In its research the Tribunal reviewed documentation relating to the drafting of the Regulations. The Tribunal found a recommendation⁴ that ‘the redrafted Letters Patent and Regulations for the Australian Gallantry Awards’ should be amended in order to be consistent with the Australian Bravery Awards. In particular, in respect of the MG, the original words ‘in perilous circumstances’ should be changed to ‘in hazardous circumstances’ which was the wording used in the Regulations for the award of the Bravery Medal. The letter which presented this recommendation provided dictionary meanings of ‘hazardous’ and ‘perilous’. The definitions provided from Roget’s Thesaurus suggested ‘dangerous’, ‘fraught’, ‘treacherous’ and ‘risky’ as synonyms for both words as well as ‘hazardous’ for ‘perilous’ and vice versa. The definitions from the Macquarie Concise Dictionary suggested ‘full of or attended with peril; hazardous; dangerous’ for ‘perilous’ and ‘risk; exposure to danger of harm; a potential source of harm, injury, difficulty etc.’ for ‘hazardous’.

40. The Oxford Dictionary describes ‘gallantry’ as ‘*courageous behaviour, especially in battle*’ and ‘hazardous’ as ‘*risky or dangerous*’.

41. A simplistic consideration would conclude that there is at least some level of gallantry and risk associated with Soldier J’s actions as described in the evidence. However, the Tribunal has formed the view that there are degrees or shades within the meaning of the terms *acts of gallantry* and *hazardous circumstances*. These terms each have a general meaning which would provide a common understanding. However in this context they have particular meanings.

42. It is, in the Tribunal’s view, not the case that an act is either gallant or not. A gallant act can involve variation in the extent of the bravery exhibited so that it is reasonable to view one action as more gallant than another act. Further, the Tribunal believes that a significant component of this variation in the extent of gallantry results from variability in the extent of the risk to the actor in the circumstances in which the gallant acts are performed. The existence of hazard (hazardous circumstances) is not a simple question of yes or no. For a soldier in the Tactical Area of Responsibility (TAOR), every movement (of that soldier and of others) can be regarded as hazardous. A soldier operating in the TAOR in direct action against the enemy would be subject to a higher level of hazard.

43. The Tribunal therefore believes that it is appropriate and necessary for the decision maker to determine the extent of the gallantry of the acts performed and the extent of the hazardous nature of the circumstances in which the acts were performed when deciding which level of decoration should be awarded.

44. If ‘gallant’ and ‘hazardous’ are not absolute qualities – it is not the case that they simply do or do not apply - then it is essential that decision-makers determine a sufficient extent of gallantry and/or hazardous circumstance to decide on the appropriate level of award for the acts described to them. The Tribunal believes that study of previous and contemporaneous awards, concentrating primarily on the narrative citation provided with the recommendation and the level of decoration awarded, displays a set of values for the variable

⁴ HQADF Minute SPP1387/90 of 12 November 1990, ADF Awards for Gallantry in Action, DGSP Aspects, File DM/86/17391.

terms 'gallant' and 'hazardous' which help to make judgements in the application of the award criteria in the Regulations.

45. Accordingly the Tribunal has carefully considered awards made for service in the period 2009 to 2013 where the recommendation was for the MG. In that period 25 recommendations for the MG were presented to the Board of which 18 were recommended at that level by the Board and six were downgraded. One recommendation for the MG was upgraded to the SG and one recommendation for the CG was upgraded to the MG.

46. The study of the narrative component of other nominations has reinforced the Tribunal's view that the Board has developed an understanding of the term *hazardous circumstances* which it applies to considerations for the MG. As noted earlier there is a risk associated with simply being in an operational area. That risk is increased significantly when engagement with the enemy occurs. But that risk is present for everyone in the area and it could be said that the level of risk when engaged in direct action with the enemy provides a standard or norm for that situation. To satisfy the meaning of *hazardous circumstances* in the criteria for award of the MG the level of risk must be greater than the norm.

Findings of Fact

47. The Tribunal finds:
- a. The citation presented to the Board was substantially the same as that which Soldier P initially drafted and was consistent with Soldier C's oral evidence to the Tribunal.
 - b. Soldier J's platoon was attacked by a number of insurgents on 22 August 2009 and was subjected to accurate machine gun fire and rocket propelled grenades.
 - c. Soldier J moved to higher ground with two other members of his platoon to provide supporting fire to enable the rest of the platoon to move through a narrow exposed area.
 - d. Soldier J moved again to provide supporting fire to the remainder of the platoon on at least four occasions, each time exposing himself to the fire of the enemy.

Conclusions

48. The recommendation which was presented to the Board was that Soldier J should be awarded the MG and was supported at each level in the chain of command.

49. The first issue for the Tribunal is whether the actions of Soldier J on 22 August 2009 satisfy the requirements for the award of the MG.

50. If the requirements for the award of the MG are not satisfied, then the Tribunal must decide if the requirements for the award of the CG have been satisfied by the actions of Soldier J on 22 August 2009.

51. 'Action' is defined in the Oxford and the Macquarie Dictionaries, as military combat or a small battle. The definitions include a referral to fighting. The Tribunal finds that Soldier J's acts on 22 August 2009 occurred in action because insurgents with machine guns and rocket propelled grenades attacked his platoon when they were on patrol.

52. As noted above, the terms hazardous circumstances and acts of gallantry are imprecise terms that rely upon the context in which they are used to give them a more exact meaning. The MG is awarded for acts of gallantry in hazardous circumstances and the CG is awarded for other acts of gallantry which are considered worthy of recognition. That is, both medals are awarded for acts of gallantry. The distinguishing conditions are that the act must occur in hazardous circumstances or otherwise be an act which is worthy of recognition.

53. There is little doubt that according to the ordinary meaning of hazardous Soldier J's acts occurred in hazardous circumstances. However the Tribunal concludes that a particular meaning is given to the term 'hazardous circumstances' in the Regulations. That meaning takes into account the particular circumstances of a soldier in action and requires that the hazardous circumstances be relevant to a combat situation. The soldier must be exposed to greater danger than those around him and in spite of that danger perform an act of gallantry.

54. In Soldier J's case he was exposed to danger, as was the rest of his platoon. He exposed himself to that danger when, on at least four occasions, he drew fire on himself. The Tribunal is aware that it is the role of a soldier to protect other members of his platoon by drawing enemy fire. Soldier J's actions were gallant because he exposed himself to enemy fire on at least four occasions and the Tribunal finds that these were acts of gallantry.

55. The Tribunal finds that Soldier J was exposed to danger, as were all members of his platoon. He was exposed on higher ground and the other members were moving through an exposed narrow area. The Tribunal concludes that although Soldier J was exposed to danger that danger was not greater than the danger the rest of the platoon was exposed to. The Tribunal finds that the Soldier J's circumstances were dangerous but not hazardous circumstances as required by the Regulations.

56. Finally the Tribunal considered whether it should exercise the discretion in Reg3(3) in favour of Soldier J. Soldier J deliberately exposed himself to enemy fire on at least four occasions and this ultimately lead to a successful outcome for the platoon. There were no casualties although there were a few close calls. Soldier C believed that it was the actions of Soldier J that lead to this successful outcome. It is for this reason the Tribunal is of the opinion that Soldier J's acts of gallantry are worthy of recognition.

57. The Tribunal concludes:

- a. Soldier J performed acts of gallantry in action on 22 August 2009.
- b. Soldier J and his platoon were engaged in action with an enemy force.
- c. The circumstances in which Soldier J acted were dangerous but were not sufficiently hazardous as to satisfy the Tribunal that the criteria of 'in hazardous circumstances' has been met.

58. The actions of Soldier J in Afghanistan on 22 August 2009 do not satisfy the criteria for the award of the Medal for Gallantry. However Soldier J's actions in Afghanistan on 22 August 2009 do satisfy the criteria for the award of the Commendation for Gallantry.

DECISION OF THE TRIBUNAL

59. The Tribunal decided to recommend to the Minister that the decision to award the Commendation for Gallantry to Soldier J for his actions in Afghanistan on 22 August 2009 be affirmed.