



Australian Government

Defence Honours and Awards Appeals Tribunal

Swan and the Department of Defence [2014] DHAAT 38 (20 November 2014)

File Number(s) 2013/036

Re **Captain Brian Lawrence Swan AM, RAN (Retd)**
Applicant

And **Department of Defence**
Respondent

Tribunal Professor D. Horner AM (Presiding Member)
Air Commodore M. Lax OAM, CSM (Retd)

Hearing Date 14 November 2014

DECISION

On 20 November 2014 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Captain Brian Lawrence Swan AM, RAN (Retd) is not eligible for the award of the Pingat Jasa Malaysia.

CATCHWORDS

FOREIGN AWARD – Pingat Jasa Malaysia

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VB(2)
Statutes of Pingat Jasa Malaysia

REASONS FOR DECISION

Introduction

1. The applicant, Captain Brian Lawrence Swan AM, RAN (Retd) (Captain Swan), a former member of the Royal Australian Navy, seeks review of a decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate), that he is not eligible for the Pingat Jasa Malaysia (PJM) award. Captain Swan lodged an application for the award of the PJM on 4 March 2005, which was rejected by the Directorate on 14 April 2005. Captain Swan wrote to the then Minister for Veterans' Affairs, the Hon Bruce Bilson MP, on 14 March 2006 and sought a further review. The Minister replied on 31 May 2006 that Captain Swan was not eligible.
2. Captain Swan sought a review of this decision in his application to the Tribunal on 11 April 2014.

Tribunal Jurisdiction

3. Pursuant to s110VB(2) of the *Defence Act 1903* (the Defence 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 a foreign award in response to an application. The role of the Tribunal is to determine whether the decision of the Directorate is the correct and preferred decision having regard to the applicable law and the relevant facts.

Steps taken in the conduct of the review

4. In accordance with its *Procedural Rules 2011*, on 8 May 2014, the Tribunal wrote to the Secretary of the Department of Defence informing him of Captain Swan's application for review and requesting that he provide a report. On 16 July 2014, the Directorate, on behalf of the Secretary, provided the Tribunal with a report. In that report, the Directorate confirmed its position that Captain Swan's service did not meet the eligibility criteria for the award he sought. On 31 July 2014 the Tribunal forwarded a copy of the report of the Directorate to Captain Swan for comment. On 7 August 2014 Captain Swan provided a written rebuttal.
5. The Tribunal met on 14 November 2014. During its meeting the Tribunal considered the material provided by Captain Swan and the Directorate. It also heard oral evidence from Captain Swan who agreed to be available by telephone that day.

The Pingat Jasa Malaysia

6. In 2004, the Government of Malaysia offered to confer a special medal of service to eligible current and former Australian servicemen and women in appreciation of their service in Malaysia with the Commonwealth Far East Strategic Reserve (FESR) from Independence to the end of Confrontation over the period 31 August 1957 to 12 August 1966. The eligibility period was set as service between 31 August 1957 and 31 December 1966. Eligibility criteria are specified in the

Statutes of Pingat Jasa Malaysia dated 3 March 2004. As the PJM is a foreign award, the Department of Defence acts on behalf of the Malaysian Government.

7. The *Statutes* provide the qualification criteria thus (spelling per the original):

This Medal can be awarded to any entity from the Peacekeeping Group (Armed Forces, Semi Armed Forces, Police and Security Civilian Staff) from the communion countries either man or woman whoever been service in Malay Peninsular or Malaysia for the period from 31 August 1957 to 12 August 1966, either on service with or attached to any of the Armed Forces or security organisation group which directly involve demonstrated endowed with service, sense of duty, chivalry and gallantry for 3 month or more; or who had served indirectly not less than 6 month or more in any security organisation during the time period; or throughout in the service despite yet to fulfil the period predetermined, killed, wounded, or disable due to performing tasks against the enemy and in upholding this country sovereignty in the stated period, can be considered to be awarded the Pingat Jasa Malaysia.

8. The Australian Government has set guidelines based on the *Statutes* and these have been agreed by the Malaysian Government. These are published on the Defence Honours and Awards website¹ and state:

- The PJM will be awarded to Australian Defence personnel, who served in the prescribed areas from 31 August 1957 to 12 August 1966, or to 9 August 1965 for service in Singapore (the point at which it separated from the Federation of Malaysia);
- Service until 31 December 1966 will also qualify for those personnel who were posted to Malaysia for service prior to 12 August 1966, but failed to qualify for the medal before that date; and
- Awards will also be made to those whose service was cut short as a result of death or injury as a result of service in these areas.
- The Department of Defence will receive applications, verify the service and eligibility and facilitate the approval to wear the award in accordance with guidelines for foreign awards.

9. One other criteria relating to the army is not relevant to Captain Swan's service or claim.

Qualifying Periods for the PJM

10. In December 2004, the then Minister Assisting, the Hon De-Anne Kelly, MP agreed to the qualifying criteria as set by the Malaysian Government. Consequently, there are two categories of eligibility that will be assessed by the Department of Defence for the PJM. These relate to either direct support or indirect support. The qualifying period for the medal is 90 days for those personnel posted to units in direct support of operations in the prescribed areas. Those posted to units in indirect support are required to serve for 180 days in the prescribed areas.

¹ www.defence.gov.au/medals under the Foreign Awards tab.

11. The prescribed operational areas of Malaysia and Singapore:

...is the landmass of East Malaysia (that is: the States of Sabah and Sarawak on the Island of Borneo), the Malay Peninsula and the Island of Singapore extending to 12 nautical miles seaward from the coast of these areas.

12. For members who were outside the prescribed operational areas, but who served in an indirect support of operations in Malaysia require 180 days or more service to qualify. The secondary role appropriate to naval service is:

... seagoing service with HMA Ships patrolling outside of the operational area whilst allotted to the Commonwealth Far East Strategic Reserve.

13. Qualifying periods described above may be aggregated.

Captain Swan's Service Record

14. Defence records of Captain Swan's service show that he enlisted in the Permanent Naval Forces as a naval rating on 1 July 1956 and served in HMAS *Melbourne* from 11 July 1960 to 27 December 1962. On 22 September 1965 he was commissioned and continued to serve on a variety of navy postings until he transferred to the Naval Reserves on 30 June 1991. Following completion of his reserve service, he retired on 7 August 2000.

15. For his service, Captain Swan has the following awards:

Member of the Order of Australia (Military Division),
Australian Active Service Medal 1945-75 with Clasp 'VIETNAM',
Australian Service Medal 1945-75 with Clasps 'PNG' and 'FESR',
Vietnam Logistic and Support Medal,
Defence Force Service Medal with 3rd Clasp,
National Medal with 1st Clasp,
Australian Defence Medal,
Flag Officers Commendation, and
Returned from Active Service Badge.

Captain Swan's Submission

16. In his written submission, Captain Swan claims that he served in HMAS *Melbourne* from July 1960 to December 1962 during which time he completed two periods of operational service in the FESR. He further states that the Department of Veterans' Affairs advised him that his periods of operational service with the FESR were from 24 March 1961 to 17 April 1961 (25 days inclusive) and again from 28 February 1962 to 16 March 1962 (17 days inclusive), giving him a total of 42 days² service. This qualified him for the Australian Service Medal with Clasp 'FESR' which he was awarded.

² Captain Swan has stated 41 days.

17. In April 2005 when he first applied for the PJM, he believed he ‘had served and transited the immediate and adjacent areas required for the award’ passing the required 90 days eligibility period. He stated after a correction, the Directorate allowed him only 78.5 days made up from 16 days primary service and 125 days secondary service. He was advised by the Directorate that he required 90 days primary or 180 secondary service to become eligible.³ In his response to the Defence report, dated 7 August 2014, Captain Swan accepts that he has 16 primary and 125 secondary days.

18. Furthermore, in his written response to the Defence report, Captain Swan stated that a request should be made to the Malaysian Government to enable him to be awarded the PJM in accordance with the fact that ‘the Malaysian Government also reserves the right to make awards of its own choosing outside of these criteria’.

19. At interview Captain Swan reiterated his claim to have completed two periods of operational service in the FESR. The dates he quoted coincided with the dates as recorded in his service records. He explained to the Tribunal that in his opinion, the Directorate only calculated ship’s sailing as point to point, whereas HMAS *Melbourne* as an aircraft carrier did not just sail point to point. Aircraft carriers had to sail into wind to launch and recover aircraft, so she often turned about. Her track was never in a straight line. This he stated meant that the ship could have entered the operational area at other times when this may not have been officially recorded. He stated that he would ‘have liked to see a map of the actual track’ for those operational periods.

The Directorate’s Submission

20. In its written submission to the Tribunal, the Directorate noted that Captain Swan served in HMAS *Melbourne* as a rating between 11 July 1960 and 27 December 1962. After an audit of PJM awards in conjunction with records of HMA ship movements, the Directorate corrected a previous error in Captain Swan’s service record and allowed him 16 primary days and 125 secondary days (halved making 62.5) in the FESR. This they stated equates to 78.5 days. To qualify for the PJM, a member must have served for 90 days in direct support or 180 days in indirect support of operations in the prescribed areas. Captain Swan did not complete the required 90 days in direct support or 180 days in indirect support in the prescribed operational areas, so he has no entitlement to the PJM.

Conclusion

21. The Tribunal carefully considered all the material before it and considered the eligibility criteria for the PJM.

22. There is no dispute about Captain Swan’s service record or that he served in HMAS *Melbourne* between 11 July 1960 and 27 December 1962. The Tribunal

³ For aggregation purposes in this case, secondary service is halved, hence the calculation of $16 + 125/2 = 78.5$ days. The Australian Government guidelines, agreed by the Malaysian Government, describe the conditions for primary and secondary service, including that service in the primary area and half the service in the secondary area can be aggregated to meet the requirement of 90 days primary service.

accepts that Captain Swan completed two periods of operational service aboard HMAS *Melbourne* between 11 July 1960 and 27 December 1962.

23. The requirements to be met to be awarded the PJM are set out in the *Statutes* which have been agreed between the Malaysian and Australian Governments. Qualifying periods have also been agreed. For Captain Swan to be eligible for the PJM, he is required to have served for 90 days in direct support or 180 days in indirect support in the prescribed operational areas. In addition, for secondary support to be considered, the ship has to have been 'allotted to the Commonwealth Far East Strategic Reserve'. This allotment starts when the ship enters the operational area, not when it first sails.

24. After initially claiming he served for 41 primary days and combining this with his 125 days secondary service, Captain Swan believed he met the eligibility criteria for the PJM. The Tribunal noted that Captain Swan used the Department of Veterans' Affairs FESR service dates to justify why he believed he met the qualifying service criteria. However, the DVA criteria are not applicable to those of the PJM. The PJM qualifying criteria are set by the Malaysian Government and have been agreed by Defence and the Department of Prime Minister and Cabinet. Therefore, the Tribunal did not consider Captain Swan's operational FESR service dates derived from the Department of Veterans' Affairs.

25. At interview, Captain Swan stated that aircraft carriers such as HMAS *Melbourne* do not sail in a straight line and that manoeuvres may have meant HMAS *Melbourne* could have spent more time in the operational area than officially credited. In the absence of any evidence to support this claim, the Tribunal could only base its decision upon the dates in the official records and the ship's log. Navy records⁴ show that during the periods in question, HMAS *Melbourne* had 16 primary days and 125 secondary days in the FESR.

26. The Tribunal finds that Captain Swan is required to have served for 90 days in the FESR but that he only served for 78.5 days in the FESR.

27. For the reasons stated above, the Tribunal found that Captain Swan is not eligible for the Pingat Jasa Malaysia.

DECISION

28. The Tribunal has decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Captain Brian Lawrence Swan AM, RAN (Retd) is not eligible for the award of the Pingat Jasa Malaysia.

⁴ HMAS *Melbourne* ship's log – November 1959 to February 1963 provided in the Defence submission.