Defence Force Discipline Appeal Tribunal

Private R Army v Chief of Army [2021] ADFDAT 2

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| File number: | DFDAT 2 of 2021 |
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| Judgment of: | **LOGAN J - President** |
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| Date of judgment: | 27 August 2021 |
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| Number of paragraphs: | 3 |
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| Date of hearing: | 27 August 2021 |
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| Counsel for the Appellant: | The appellant did not appear |
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| Counsel for the Respondent: | The respondent did not appear |
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| Solicitor for the Commonwealth: | Australian Government Solicitor |

ORDERS

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|  | | DFDAT 2 of 2021 |
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| BETWEEN: | PRIVATE R ARMY  Appellant | |
| AND: | CHIEF OF ARMY  Respondent | |

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| order made by: | LOGAN J |
| DATE OF ORDER: | 27 AUGUST 2021 |

THE TRIBUNAL ORDERS THAT:

1. In relation of the proceedings of the Tribunal at this siting, and until the sitting at which the appeal hearing is listed, and subject to any further order, the Tribunal makes the orders in Annexure A.

**ANNEXURE A**

Pursuant to s 18 of the Defence Force Discipline Appeals Act 1955 and the Tribunal’s implied power, the Tribunal orders that:

***Non-publication and non-disclosure orders***

1. There be no publication or disclosure of the name of the **Appellant**, or any personnel who serve, or have served, in a unit under the command of Special Operations Command (**SOCOMD**), in relation to these proceedings, other than to the following **authorised persons**:

a. the members of the Defence Force Discipline Appeal **Tribunal** by whom the appeal is to be heard

b. staff and officers of the Tribunal whose involvement is necessary for the conduct of these proceedings

c. persons whose presence is necessary for the recording and transcript of these proceedings

d. the parties and their legal representatives (including counsel and counsel’s clerks) and the staff and officers of the Directorate of the Defence Counsel Services and the Office of the Director of Military Prosecutions

e. legal representatives of the Commonwealth and instructing officers

f. witnesses required to attend these proceedings (including a support person for a witness),

g. a support person for the Appellant, and

h. representatives of SOCOMD.

2. There be no disclosure, by publication or otherwise, of information that identifies or tends to identify the Appellant, or any personnel who serve, or who have served, in a unit under the command of SOCOMD, in relation to these proceedings, except to authorised persons.

3. There be no publication or disclosure of information (including capabilities, tactics, techniques, processes, strategies, training, procedures and operations) concerning SOCOMD, in relation to these proceedings, except to authorised persons.

***Pseudonym orders***

4. The Appellant be referred to in relation to these proceedings, at any public hearing in these proceedings or in any documents produced for the proceedings on unsecure electronic systems, transmitted on such systems or otherwise available to the public, by the pseudonym ‘PTE R’.

5. Any personnel who serve, or have served, in a unit under the command of SOCOMD and are involved in these proceedings, whether as witnesses in the proceedings or in any other capacity, be referred to in relation to these proceedings, at any public hearing in these proceedings or in any documents produced for the proceedings on unsecure electronic systems, transmitted on such systems or otherwise available to the public, by pseudonyms agreed by the parties and approved by the Tribunal.

***Transcript, appeal book and other documents***

6. Any part of the transcript of the proceedings, exhibits tendered in the proceedings, or other documents filed with the Tribunal in relation to the proceedings, which identify or tend to identify the applicant or other personnel who serve or have served in a unit under the command of SOCOMD, or information concerning that command (see order 3 above), be disclosed only to authorised persons.

7. If a person not identified in order 1 as an authorised person requests the **Registrar** of the Tribunal to provide a copy of any part of the transcript, exhibits tendered or other document filed in relation to the proceedings:

a. the Registrar will notify the Commonwealth and provide the Commonwealth with a copy of the requested document

b. within 21 days of receipt of the requested document, the Commonwealth will provide the Registrar with an edited version of the requested document, from which any part referred to in order 6 above has been redacted or removed (**the edited document**)

c. the edited document may be made available to any person upon request

d. a person may seek leave to be heard in respect of edits made to the edited document, and

e. if the Tribunal grants such leave, or considers that edits made by the Commonwealth to the transcript are inappropriate, the Court will give the Commonwealth and the parties an opportunity to be heard before any version of the document other than the edited document is disclosed to any person who is not an authorised person.

***Tribunal decision***

8. The question of what orders, if any, are to be made in respect of an opportunity for the Commonwealth and the parties to make submissions in relation to the publication of an unredacted version of the Tribunal’s reasons in respect of the substantive application and any consequential appeal, be reserved to the Tribunal as constituted for the hearing at which those proceedings are listed for hearing (**Appeal Hearing**).

***Further matters***

9. Application may be made to vary any part or all of these orders on the giving of 48 hours’ notice to the Commonwealth and the parties, or such shorter time as the Tribunal considers appropriate in the circumstances.

10. Orders 1 to 3 do not prevent the disclosure of information for the purposes of any further review, appeal or subsequent administrative action by ADF or Department of Defence personnel.

11. For the avoidance of doubt, nothing in these orders shall be taken to prevent or restrict the Commonwealth, its officers and agents (including its legal representatives and instructing officers) from using or disclosing any information or documents in accordance with its practices and functions, including taking any steps in these or related proceedings.

12. Where the Commonwealth is to be given notice of any matter under these orders, notice may be given in the first instance to the Australian Government Solicitor using the following contact details:

AGS file ref: 21004879

Attn: Nathan Sinnathurai

Senior Lawyer

Australian Government Solicitor

T 02 6253 7512

nathan.sinnathurai@ags.gov.au

13. The question as to the continuance of these orders be reserved to the Tribunal as constituted for the Appeal Hearing.

REASONS FOR DECISION

(REVISED FROM TRANSCRIPT)

LOGAN J:

1. Having regard to the affidavit of Garth Gould made on 19 August 2021 and filed in the Defence Force Discipline Appeal Tribunal (Tribunal) and to the submissions both oral and in writing made on behalf of the Commonwealth by the Australian Government solicitor and to the draft minutes of order, I am satisfied that, as revised in the manner discussed in the course of submissions, the Tribunal does have, including by implication, power to make the orders in the form revised, and I make those orders.
2. I do so because I consider that there is a public interest which has been evidenced in the suppression of the name of the applicant. Further, there may be an additional public interest depending on the need, if any, to refer to particular methods of training or deployments to restrict publication on those subjects as well, although it seems inherently likely, firstly, that that would be a question for the Tribunal as constituted for the appeal hearing and, in any event, as far as one can tell from such material as filed in the Tribunal already, it seems an unlikely prospect that it would be necessary to go into such detail, but one should not anticipate.
3. For these reasons the orders will be as per the amended draft.

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| I certify that the preceding three (3) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan. |

Associate:

Dated: 18 October 2021