COURT MARTIAL

Citation: *R. v. Allison,* 2024 CM 5013

Date: 20240620
Docket: 202401

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Civilian D.E. Allison, Applicant

- and -

His Majesty the King, Respondent

Before: Captain(N) C.J. Deschênes, C.M.J.

REASONS FOR A DECISION PERTAINING TO A PLEA IN BAR APPLICATION

(Orally)

I. Introduction

[1] The applicant, Mr Allison, a civilian, is currently living in Belgium with his spouse who is a Canadian Armed Forces (CAF) member posted to Europe since at least 2022. On or about 19 December 2022, the applicant was allegedly found asleep in his vehicle by the administrative police officer on duty. The Belgian Federal Police informed the National Military Representative of Canada of the situation by memorandum in January 2023, claiming that the applicant seemed impaired at the time; however, because the allegations do not constitute an offence under Belgian law, no charges would be laid against the applicant by the local authorities. In response to a letter sent on 31 March 2023 by the Office of the Judge Advocate General (AJAG) seeking the Belgian's support for the CAF to pursue a charge under the Canadian *Criminal Code*, the Belgian authorities stated that they would not interfere with the exercise of Canadian jurisdiction over the applicant.

[2] The applicant is now facing one charge pursuant to section 130 of the *National Defence Act* (*NDA*), for an act punishable under the *Criminal Code* alleging that he operated a conveyance while impaired in Casteau, Belgium. This charge was preferred by a representative of the Director of Military Prosecutions (DMP) in January 2024. The trial by Standing Court Martial is convened to commence on 9 September 2024 in Geilenkirchen, Germany.

[3] In May 2024, the applicant filed a notice of application for a plea in bar of trial, seeking an order terminating the proceedings. He alleged that this Court has no jurisdiction to try him. Considering both written and oral submissions of counsel, the issue to determine is whether the prosecution of the charge against the applicant in the military justice system is arbitrary and disproportionate, infringing section 7 of the *The Canadian Charter of Rights and Freedoms* (*Charter*).

II. Whether the prosecution of the charge against the applicant in the military justice system is arbitrary and disproportionate.

Background facts

[4] The following relevant facts supporting the application are not disputed. The applicant was charged by the military authorities on 26 July 2023. On 5 December 2023, the military prosecutor preferred a charge of impaired driving, but later withdrew the charge, and preferred a new charge. Around the same time, the applicant's counsel contacted the military prosecutor with a request that the charge be withdrawn, arguing that the prosecution of the applicant by military authorities violated his *Charter* rights. Counsel for the applicant also informed the prosecutor that, should the charge proceed, a *Wehmeier* application seeking a stay of proceedings would be filed. The parties participated in a telephone conference with the Acting Chief Military Judge on 25 January 2024 and set a trial date.

[5] On 7 May 2024, the prosecution notified Mr Allison's counsel that if he were to return to Canada, his case could be prosecuted by a civilian prosecution service. The DMP indicated its willingness to withdraw the charge against him if the case was to be taken up by another prosecution service, provided that the applicant returned to Canada and surrendered his passport upon his return.

[6] Approximately one week later, the applicant filed his notice of application. The next day, the prosecution wrote to Mr Allison's counsel to inquire whether Mr Allison intended to return to Canada, considering the mention in the notice of application that the applicant "intends to return to Canada if dealt with under the civilian justice system". Counsel for the applicant replied that this mention was "simply an expression of Mr Allison's intent to return to Canada if he is ever dealt with in the CJS [civilian justice system]". On 30 May 2024, the prosecution again wrote to the applicant's counsel reiterating their willingness to withdraw the charge in the military justice system in order for the case to proceed in the civilian justice system, assuming the appropriate civilian prosecution service were to take the file.

[7] At the hearing of this application, it was admitted that Mr Allison was a civilian dependant accompanying his spouse who is an officer posted to, and serving, outside Canada in Belgium with a CAF element. Counsel for the applicant also stated that Mr Allison will return to Canada with his family at the end of his spouse's posting, but that in the interim, the applicant only intended to return to Canada if dealt with under the civilian justice system.

Positions of parties

[8] The applicant claimed that this court martial does not have jurisdiction to try him because the conditions established in *Wehmeier* are not met. He contended that military jurisdiction over civilians might be exercised only if it is "absolutely necessary to protect them against foreign laws" or in the interests of the civilian themselves. In this case, the prosecution of the applicant is arbitrary because it is not necessary to protect him from foreign penal jurisdiction since the allegations do not constitute an offence under Belgium law. Thus, the prosecution of the applicant lacks any connection with Parliament's objectives in subjecting civilians to the Code of Service Discipline (CSD). Counsel for the applicant further argued that Mr Allison does not need to return to Canada unless dealt with under the civilian justice system, and that it is on the military to send him to Canada for a trial by a Canadian court of criminal jurisdiction if that is what the CAF requires. Since the prosecution of the applicant in the military justice system is not "absolutely necessary to protect him against foreign laws", none of the conditions set out in *Wehmeier* are met. The situation would have been different had Belgium authorities not declined to exercise its jurisdiction. The applicant also questioned why consultation between DMP and Canadian local authorities did not take place to seek a transfer of the file, which is contrary to DMP policy.

[9] He also submitted that the prosecution of the applicant in the military justice system has a disproportionate effect relative to the state's interest in the proceeding because the applicant loses procedural rights such as the right to a jury trial, the option of the Crown to proceed by summary conviction, and the right to the full range of *Criminal Code* sentencing options if found guilty. Consequently, the prosecution of the applicant by the military justice system is arbitrary and breaches his section 7 *Charter* rights. A stay of proceedings is the appropriate remedy to impose in the circumstances.

[10] The respondent conceded that the right to liberty of the applicant is at stake in this case therefore the proceedings brought against Mr Allison must be in accordance with the principles of fundamental justice. The respondent also conceded that the presence of one of the conditions endorsed by the Court Martial Appeal Court of Canada (CMAC) in *R. v. Wehmeier*, 2014 CMAC 5 is required for DMP to exercise jurisdiction over civilian dependants and is very much the crux of the issue of the plea in bar application. The respondent argued that in this case, while there is, in theory, concurrent jurisdiction between Belgium and Canada and between the military justice system and the civilian justice system, the military justice system is the only one currently capable of exercising jurisdiction because the Belgian authorities has ceded jurisdiction to Canada. Additionally, the civilian Crown cannot exercise jurisdiction over Mr Allison while he remains abroad, and his province of residence is unknown.

The military justice system consequently has jurisdiction to ensure that in situations such as this, Canada retains jurisdiction, so dependants remain subject to some laws at all times. The respondent further contended that it would be in the best interest of the applicant that a court martial tries this matter because both the applicant and his spouse are living abroad. His return to Canada to answer for the charge before a court of criminal jurisdiction would disrupt him and his family's life. Therefore, the exercise of military jurisdiction over the applicant is not arbitrary because it is absolutely essential or in the best interest of the accused. Finally, he argued that while this Court is bound by the CMAC decision in *Wehmeier,* the factual circumstances of that case are readily distinguishable from the one at bar.

Applicable law or test

[11] Section 7 of the *Charter* guarantees that: "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." It is a principle of fundamental justice that laws must not be arbitrary. In *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 2 S.C.R. 134, the Supreme Court of Canada (SCC) held that government action must accord with principles of fundamental justice protected under section 7 and that applying a law in a manner that is arbitrary and disproportionate in its effects does not accord with these principles. A law is arbitrary if it bears no connection with its objectives. The onus of showing lack of connection in this sense rests with the claimant.

[12] In the case at bar, the applicant contented that proceedings against him before this Court are arbitrary because they have no connection with the objectives which Parliament had when it enacted the provisions making certain civilians subject to the CSD. Reviewing the contentious *NDA* provisions, paragraph 60(1)(f) provides that "a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active serviced in any place", is subject to the Code of Service Discipline. Paragraph 61(1)(c) specifies that "a person accompanies a unit or other element of the Canadian Forces that is on service or active service if the person is a dependant outside Canada of an officer or non-commissioned member serving beyond Canada with that unit or other element".

[13] These provisions were the subject of discussion in an appeal before the CMAC. In *R. v. Wehmeier*, 2014 CMAC 5, at paragraph 54, the CMAC accepted that the proper test in the context of a section 7 *Charter* application for the exercise of military jurisdiction over a civilian accompanying the forces outside of Canada, was founded on Parliament's intent, as established by the then-CMJ, in a related court martial decision, *R. v. Wehmeier*, 2012 CM 1006 (*Wehmeier 2)*:

> [54] As noted earlier in these reasons, in *Wehmeier 2* the Chief Military Judge found that Parliament's objective in enacting paragraphs 60(1)*(f)* and 61(1)*(b)* of the *NDA* was that Canada retain primary jurisdiction over CF members and the persons who accompany them in order to protect their interests and have them tried according to our law and not according to foreign penal law. The provisions subjecting civilians to the

> CSD were intended to limit the jurisdiction of military courts such that jurisdiction would only be exercised if it was "absolutely essential or in the interests of the civilians themselves that they do so": *Wehmeier 2* at paragraph 24. [Emphasis added.]

[14] It is trite to say that Canada cannot unitarily choose to exercise its criminal jurisdiction over its citizens overseas. There must generally be an international treaty in place that would allow Canada to enforce its criminal law extra-territoriality. In that context, Canada, as a member of the North Atlantic Treaty Organization (NATO), is a signatory to the NATO Status of Forces Agreement, commonly referred to as the SOFA, which was ratified and has been in force in Canada since 1953. The agreement was deemed necessary by NATO countries following the Second World War, "[c]onsidering that the forces of one Party may be sent, by arrangement, to serve in the territory of another Party", at the preamble of the NATO SOFA. As per its title, the agreement was designed to address jurisdictional matters for both the receiving and the sending States. It provides, amongst other things, for the exercise of criminal jurisdiction by the authorities of the receiving State over members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State. It provides also, that when the State, having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. "The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other state considers such waiver to be of particular importance", Article VII, paragraph 3.c. The NATO SOFA therefore permits the exercise of criminal jurisdiction by the sending State (Canada) over dependents of CAF members within the receiving State (Belgium) when the conditions are met, for example when the receiving State consents to it.

[15] It falls within prosecutorial discretion "[. . .] to initiate, continue or cease prosecutions independently. The law respects this discretion by mandating that courts cannot and should not interfere with prosecutorial discretion, providing it is exercised in good faith and in the interests of justice." (*R. v. Wehmeier*, 2014 CMAC 5 at paragraph 26). Recommending other forums or transferring cases to another prosecutorial organization is also part of the exercise of prosecutorial discretion. When they do make those decisions however, prosecutors must ensure that their conduct does not contravene '"fundamental notions of justice and thus undermines the integrity of the judicial process'" (*R. v. Nixon, 2011 SCC 34* at paragraph 36 citing *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paragraph 73). Otherwise, such conduct could amount to an abuse of process.

[16] That said, prosecutorial decisions made in good faith may nevertheless result in a *Charter* breach. In the case at bar, the applicant contends that this is the case; he claimed that proceedings against him before this Court are arbitrary because they have no connection with the objectives which Parliament had when it enacted the provisions making certain civilians subject to the CSD. In the application of section 273 of the *NDA*, which grants competence to Canadian civilian courts of criminal jurisdiction over a person subject to the CSD who allegedly commit any act that would constitute an

offence while outside Canada, he suggested that he would return to Canada "if dealt with under the civilian justice system."

Analysis

[17] At the outset, I need to clarify that the issue is not whether the military has jurisdiction over the applicant. It does. It was admitted that the applicant is a "dependant outside Canada of an officer or non-commissioned member serving beyond Canada with that unit or other element", and is therefore "a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces, as per or see *NDA* paragraphs 60(1)(f) and 61(1)(c). The applicant is thus subject to the CSD and considered a dependant for the application of the NATO SOFA.

[18] The issue is rather whether the exercise of its concurrent jurisdiction by the military justice system over the applicant is arbitrary and disproportionate, infringing his section 7 rights of the *Charter.* In order to determine the issue at hand, I have to consider the circumstances specific to this case. Indeed, "[e]ach case stands to be decided on its own facts", *Wehmeier* at paragraph 62. Otherwise, the test developed by the CMAC would be unnecessary, as ignoring the facts of the case would ultimately lead to the inextricable conclusion that every time the CAF were to exercise jurisdiction over a civilian accompanying the force, it would engage into a *Charter* breach of the accused's rights. The CMAC stated clearly that its decision in *Wehmeier* "should not be taken as saying that all prosecutions of civilians before the military courts necessarily result in a breach of their rights under s. 7 of the *Charter*."

[19] Considering the circumstances of this case, I find that the applicant failed to demonstrate that the prosecution of his case by the miliary is arbitrary. The prosecution of the applicant before a court martial is indeed absolutely essential because there is currently no other jurisdiction that can exercise competence over this case. In particular, when Belgian police complied with Article VII of the NATO SOFA, they informed the Canadian authorities of the allegations against the applicant. They also informed that the allegations did not constitute an offence. They later communicated to the AJAG that they would not interfere with a prosecution of the applicant by a Canadian court. As Belgian authorities would not prosecute the case and was supportive of a Canadian prosecution, charges were laid and later preferred. The absence of jurisdiction of the Belgian authorities over the matter, and the subsequent prosecution by the DMP, does not render the proceedings arbitrary. The legal test, that the service exercises jurisdiction over civilian only when it is absolutely essential or in the best interests of the civilian themselves that they do so, indicates a dual purpose of the intent of Parliament: to ensure that civilians accompanying the forces were subject to some laws, which is imbedded in the criterion that relates to the exercise of jurisdiction when "absolutely essential", as to prevent impunity; and to protect civilians from prosecution under foreign law, which relates to the prosecution by the service to be in the best interests of the civilians themselves. I find that the nuance added to the test by the applicant, that jurisdiction would only be exercised if it was "absolutely essential to

protect them against foreign laws" distorts the intent of Parliament that provides for the subjection of civilians to the CSD in certain circumstances.

[20] The views expressed by the Associate Minister of National Defence, the Honorable Mr Campney, on February 11, 1954 (see: House of Commons Debates, 22nd Parliament, 1st Sess, Vol. 2, (11 February 1954) at 2009 (Hon. Ralph Campney)), relied upon to find that the purpose and objective of paragraphs 60(1)*(f)* and 61(1)*(b)* of the *NDA* were, notably, to ensure that persons accompanying the CAF would be subject to some law at all times, are revealing. They were first expressed in the context of the requirement for the service to exercise its jurisdiction over civilians overseas when there is failed state, and no justice system is in place to try these civilians. The Honorable Mr Campney, however, later mentioned that it was "desirable" that dependants who are living abroad be subject to the CSD because "under arrangements that Canada has made with the governments of certain countries, [the dependents] may thereby be wholly or partially exempted from the criminal jurisdiction of the courts of those countries." It was clear then, that the intent was to prevent a void of jurisdiction over these civilians accompanying the forces overseas, regardless of whether they are exempted from the receiving State's jurisdiction, or whether the receiving State could not, or did not want, to exercise its jurisdiction over them.

[21] This interpretation is consistent with paragraph 130(1)(b) of the *NDA* which recognises that "[a]n act or omission[. . .]that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament, is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2). [My emphasis.] Parliament intended therefore that military court's jurisdiction should be asserted regardless of whether the impugned act constitutes an offence in the receiving State or not. The allegations forming the basis of the charge against the applicant do constitute, if proven, an offence under the *Criminal Code*. Service tribunals do serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the CSD.

[22] In this regard, it was not disputed that within Canada, ordinary criminal courts, by virtue of the *NDA* would continue to be supreme and have the power to supplant the jurisdiction of service courts. Section 273 of the *NDA* somewhat strikes a balance in providing civilian courts with jurisdiction over persons subject to the CSD who allegedly committed an offence overseas. The issue with the applicant's claim that the prosecution should be conducted before a civilian court of criminal jurisdiction pursuant to this section, is that he does not address the feasibility of applying section 273 to try this matter. Indeed, section 273 provides that "a civil court having jurisdiction in respect of such an offence in the place in Canada where that person is found", [My emphasis.] which means that this section does not grant jurisdiction to a civilian court while the accused is out of the country. The applicant's personal situation, currently living abroad, and the position he has adopted, render this option infeasible. A mere statement of an intent to return "if he is ever dealt with in the civilian justice system" will not

suffice to convince this Court that his *Charter* rights are violated. Furthermore, the province where the applicant usually resides is unknown. He has been silent on the date, or even the year, his spouse's posting out of Europe is scheduled for their return to Canada. Without a charge being preferred and tried before a court martial, the applicant would not have to respond to the allegations. It is thus absolutely essential that the applicant be tried by a service tribunal. In sum, considering the circumstances of this case, I find that the exercise of jurisdiction by this court martial over the applicant is not arbitrary because it is absolutely essential.

[23] The applicant's situation was contemplated in the decision of *R. v. Wehmeier*, 2012 CM 1007 (*Wehmeier 3).* When he considered Parliament's intent, the then-CMJ concluded his reasons at paragraph 42 that the DMP "may have had legitimate reasons to continue to proceed under the Code of Service Discipline" [My emphasis.] as a result of "a refusal of civilian authorities to exercise jurisdiction despite the public interest to proceed with the charges and a reasonable prospect of conviction." It was therefore also the interpretation of the court martial in that decision that the exercise of military jurisdiction over a civilian would be for a legitimate purpose if the Crown in Canada would not or could not proceed with a charge. The CMJ also wrote in *Wehmeier 2*, applying the test, that civilians not be tried by service tribunals unless it is absolutely essential, that "[s]uch necessity, for example, would require that a civilian accompanying the Forces be tried abroad by a service tribunal because[. . .]if he or she is a dependant who will continue to live abroad with his or her service spouse. [Emphasis added.]

[24] I conclude that the prosecution of Mr Allison in the military justice system is not arbitrary because there is a connection with Parliament's objectives in subjecting him to the CSD. I come to this conclusion, particularly considering that the relevant circumstances of the *Wehmeier* case vastly differ from those in the case at bar. Mr Wehmeier was employed as a peer educator at a third location decompression center operated by the CAF in Germany. He was in Germany living in a local hotel for a very brief period. He was repatriated to Canada a few days after the alleged infractions were committed. He was in Canada when charges were laid and when they were preferred by DMP. The civilian justice system was in a position to exercise jurisdiction over him. He sought a transfer of his file, but the DMP refused. The CMAC found that the prosecution of Mr Wehmeier in the military justice system was arbitrary because it lacked any connection with Parliament's objectives, particularly "[g]iven that the respondent was repatriated to Canada within 5 days after the occurrence of the alleged offences", *Wehmeier* at paragraph 55.

[25] Although I found that the prosecution of Mr Allison by the military justice system is not arbitrary, and that as a result, my analysis would be complete, I will make a short comment on the second element with respect to the contention that the proceedings would have a disproportionate effect on the applicant, in that he would be losing substantial procedural rights if tried by a court martial. I do not agree. The offence he faces is indeed a hybrid offence, in that the Crown could decide to proceed by summary conviction or indictable offence. Considering the nature of the offence and

the allegations, it would be highly unlikely, and even unusual, that this matter would give rise to a right to be tried by a jury because it would likely proceed by summary conviction. There is no loss of right to a jury trial in the circumstances. As for the claim that the applicant would be losing both the benefit of a summary conviction and of "the full range of *Criminal Code* sentencing options if found guilty because they are not available under the CSD", section 320.19 provides for a minimum punishment of a fine of $1,000 for a first offence, for both modes of trial. Consequently, less severe sentencing options would not be available to the applicant for this particular charge. The minimum punishment imposed by the *Criminal Code* is binding on this Court by virtue of section 130 of the *NDA*. Therefore, "the full range of *Criminal Code* sentencing options" is not available to the applicant if he was to be tried by a court of criminal jurisdiction.

[26] Lastly, the *NDA* has been modified since *Wehmeier* was decided in 2013. The law now offers to military judges the option to order an absolute discharge, when of course the law does not impose a minimum punishment for the offence. I do therefore believe that it is in the best interests of the applicant that the military exercises its jurisdiction over him for this charge. In addition to receiving the services of counsel at Crowns' expense, he will not have to be separated from his family and incur the costs of an overseas trip and a stay back to Canada to face a trial before a court of criminal jurisdiction.

[27] In sum, if DMP does not exercise its prosecutorial jurisdiction over the applicant, no one will. The applicant's demands that the charge by dropped by the DMP, and that he will subject himself to civilian jurisdiction by returning to Canada if it decides to take over this matter, sounds more like a catch me if you can situation. There is no rationale, and the authority questionable, for the CAF to incur expenses to fund the applicant's return to Canada so he can face a trial before a criminal jurisdiction, particularly when a court martial was duly convened to hear this matter, and when his province of origin remains unknown, information that the applicant was not willing to share. The allegations, if proven, constitute an offence pursuant to the *Criminal Code*, an offence committed in Belgium, where the applicant still resides as a result of his spouse's service as a CAF member overseas.

IV. Conclusion

[28] I find that the exercise of jurisdiction to the applicant is not arbitrary because it is essential and in the best interest of the accused. The applicant has failed to meet his burden.

[29] This does not mean that I believe the applicant to be guilty of anything. It solely means that I find this court martial to have jurisdiction over him to hear the evidence against him.

FOR THESE REASONS, THE COURT:

[30] **DISMISSES** the application.

Counsel:

Lieutenant-Commander P.D. Desbiens and Commander B.G. Walden, Defence Counsel Services, Counsel for Mr D.E. Allison, applicant

Lieutenant-Commander J.M. Besner and Lieutenant-Colonel K. Lacharité for the Director of Military Prosecutions, respondent