COURT MARTIAL

Citation: *R. v. Vezina,* 2014 CM 3003

Date: 20140222
Docket: 201264

Hearing

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Private A.L. Vezina, Respondent

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

REASONS FOR DECISION ON APPLICATION FOR CANCELLATION OF DIRECTION FOR RELEASE PENDING APPEAL

(Orally)

Introduction

[1] This application is brought by way of a written notice made by Counsel for Canadian Forces, the applicant for the purpose of these proceedings under section 248.1 of the *National Defence Act*.

[2] Counsel for Canadian Forces is seeking a decision by a military judge that a condition from the undertaking signed on 14 June 2013 by Private Vezina on her release by the military judge presiding at her court martial has been breached.

[3] If such decision is provided, then Counsel for Canadian Forces would like the military judge to cancel the direction that authorized Private Vezina to be released and direct that she be detained in custody.

[4] Private Vezina, the respondent in these proceedings, has brought a written notice seeking a decision from the presiding military judge at this hearing to stay the

proceedings pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms* (hereinafter the *Charter*) as a remedy to an alleged breach of her right under section 7 of the *Charter*. She is claiming that the set of facts supporting the application of the motion of applicant would shock the conscience of the community, including the military community, and is so detrimental to the proper administration of justice that it warrants judicial intervention by this court by a stay of the hearing for this application, as those facts being an issue to be considered falling under the residual category of rights under section 7 of the *Charter*.

Evidence

[5] As a matter of evidence, 12 witnesses were heard in the order of appearance: Corporal Riel, Sergeant Gagnon, Sergeant Houthuyzen, Corporal McDonald, Captain Fisher, Private Freeland, Ordinary Seaman Vickers, Constable Scott, Master Corporal Crowe, Major Willcott, Lieutenant-Colonel Brochu, and Lieutenant(N) Rettman; 21 exhibits were adduced by both parties in this trial; and the court took judicial notice of those facts and matters contained in Military Rule of Evidence 15.

Facts

[6] Further to her conviction on two charges for trafficking and the sentence passed by the Standing Court Martial on 14 June 2013, Private Vezina requested the presiding judge of that court martial to proceed with a Release Pending Appeal hearing. Following that hearing, a decision was made to release Private Vezina with conditions and an undertaking was issued at that time.

[7] On 15 June 2013, Private Vezina was arrested by Barrie police, more specifically Constable Scott, in the parking lot of a Howard Johnson's hotel. Constable Scott knew Private Vezina from a previous occurrence he had with her concerning her driver's license. At the moment of her arrest, she was driving while her license was suspended. The Constable put Private Vezina under arrest for driving while her license was suspended and according to a provision of the *Highway Traffic Act*, her vehicle was impounded. To that effect, the Constable made an inventory and found a half-opened folded piece of aluminum foil containing what he believed to be two small pieces of crack-cocaine. He saw also a spoon allegedly used from consuming crack-cocaine, considering the residue on it. He then arrested Private Vezina for possession of drugs and committed her to custody.

[8] On 25 June 2013, a recommendation for release of the Canadian Forces by the Commanding Officer of the Canadian Forces Health Services Training Centre was made.

[9] Around mid-August 2013, Private Vezina was released from civilian custody further to a confirmation that the alleged piece of crack-cocaine found in her vehicle on her arrest in June was confirmed as not being that substance. She then came back to her room on the base, room on CFB Borden, and in those times she had some exchanges

with her roommate Private Freeland and she had a beer offered by the latter. Between 9 and 24 September 2013, some documentation revealed that Private Vezina used alcohol and cocaine (see Exhibit 21). Between the period of September and December of 2013, Private Vezina went almost each week to the Huron Club or the H-Club and was seen there having a drink. On 23 November 2013, Private Vezina was seen playing drinking games involving alcohol in barracks while a party was going on.

[10] On 24 November 2013, Private Vezina went for lunch with Ordinary Seaman Vickers. She did not feel well at that time, came back to the barracks and it was found out by Ordinary Seaman Vickers that Private Vezina had an overdose of prescribed drugs. Then, Ordinary Seaman Vickers called 911. Firefighters from the firehall came right away. They were first to arrive at the barracks.

[11] Later some military police arrived, including Corporal McDonald and Sergeant Houthuyzen. Private Vezina was brought by medical services to the hospital. Because of wanting to find out about the cause of distress, the military police proceeded with a cursory search. Sergeant Houthuyzen entered in the room of Private Vezina and smelled some smell of what he thought was marijuana. He asked Corporal McDonald to secure the premises and he went to the Commanding Officer in order to get a search warrant from him for searching marijuana in Private Vezina's bed space and closet. He prepared an Information to Obtain (ITO) and an Affidavit and presented it to the Commanding Officer, Lieutenant-Colonel Brochu. Some discussion occurred with the Commanding Officer concerning this request and the search warrant was signed by the Commanding Officer.

[12] Sergeant Houthuyzen conducted the search and Corporal McDonald took pictures during that search. A bag with residue of marijuana was found in the jacket of article of Private Vezina; also a plastic bottle turned into a tool to smoke; a tubing with some residue of cocaine; syringes with cocaine or some residue of cocaine used; and some syringes not used were also found. Everything was sent for testing later and confirmed presence of marijuana and/or cocaine.

[13] On 27 November 2013, Major Willcott prepared a statutory declaration requesting a testing order from the Commanding Officer. The document was presented to the Commanding Officer and he signed it. Then Private Vezina provided a urine sample and later it was found out that she tested positive for marijuana.

[14] On 6 December 2013, while exiting Huron Club, Private Vezina was seen by the Military Police officer, Corporal McDonald. He thought that she was breaching her condition of her Release Pending Appeal and was not supposed to be present in a bar serving alcohol. The military police approached Private Vezina and asked her to follow him in order to discuss in a more private manner which she did. While they were walking, the military police told her that she was not supposed to be in a bar and it could be a breach of her condition of release. Corporal McDonald noticed a breath of alcohol coming from Private Vezina. She told the military police that it was not a condition, then he, the military police, checked with the dispatch. It was confirmed that

what she said was veridical, but also he confirmed other existing conditions and find out that she was not supposed to consume alcohol.

[15] Then, the military police asked Private Vezina if she consumed alcohol. She confirmed that she consumed one beer. Then she was put under arrest for breach of release conditions. Private Vezina wanted to give her coat to a friend, the military police said no and had her coat searched by a colleague who was also present; and the search was incidental to arrest for safety. The military police sat Private Vezina in the patrol vehicle and gave her her rights.

[16] Private Vezina was committed to custody by the military police. Three charges were laid by Major Willcott against Private Vezina; one for drunkenness and two others for failing to comply with a condition, and Private Vezina was maintained in custody by the Custody Review Officer, Major Willcott. She was brought before a military judge on 11 December 2013 for a Custody Review Hearing, and she was released with conditions further to that hearing.

[17] From 13 December 2013 to 16 January 2014 Private Vezina went through an inpatient treatment programme for addiction problems with drugs and alcohol. She did not complete the programme and came two weeks earlier further to a physical altercation.

[18] On 1 February 2014 Private Vezina failed to report to the military police guardhouse at 5 p.m. pursuant to her condition of release. She was contacted by a military police and she told him that she forgot to report because she was moving at that time. The military police said to her that he would report the breach, but would not proceed with her arrest.

[19] Finally, on 18 February 2014 the present hearing on Counsel for the Canadian Forces' current application took place.

Issues

[20] I have to make a number of decisions in consideration of this hearing. And, first I will talk about the nature of the hearing itself; two, I will address the *Charter* application; and further to that I will let you know if I will deal or not with the application for cancellation of the undertaking.

Nature of the hearing

[21] First the nature of the hearing. There are specific provisions for the hearing that must take place pursuant to the motion made by the applicant. There are specific provisions in the *NDA* and also in chapter 118 of the QR&O, and I would like to be clear that this hearing is not governed by the *Criminal Code* provisions. Sometimes, and it is normal, not having any model or specific directions, we are tempted by checking what it is done in accordance with the *Criminal Code* in such a situation.

[22] I would say that first it is not a bail hearing, per se, and I will apply the provisions of the *NDA* and the QR&O. I would say that article 118.22 of the QR&O must receive application. The procedures of this hearing are governed by all *National Defence Act* provisions and regulations applicable to a person tried by court martial with any necessary changes.

[23] This hearing has nothing to do with the guilt or innocence of Private Vezina, so I will still have to adapt, in that context, all applicable provisions of the *NDA* and the QR&O, but it is not, per se, a bail hearing.

[24] Also, according to subsection 179(2) of the *National Defence Act*, it is good to remind people that the military judge for this type of hearing "has the same powers, rights, and privileges […] as are vested in a superior court of criminal jurisdiction" for the due exercise of its jurisdiction for performing a judicial duty under the *National Defence Act* other than presiding at a court martial.

[25] So from my perspective, saying that, a *Charter* issue can be heard by a military judge in such a hearing when it is a matter going to the relevancy for the military judge to hear the application. It is always a matter of context. I think its relevancy is the main issue here. I found that this *Charter* application is very relevant because what it raises is the fact that this hearing shall take place or not.

Charter application

[26] Now, the *Charter* application. It was raised by Private Vezina through her counsel that the fact to proceed with this hearing constitutes a re-litigation of the matter previously decided by another military judge on 11 December 2013 concerning a Custody Review Hearing about her, and by proceeding with the present hearing, it would result in an abuse of process.

[27] As raised by Lieutenant-Commander Walden, as raised by the respondent, one of the main things in order to come to such a decision is to decide if the issue that was before the judge presiding at the Custody Review Hearing and the one before me for this application, be the same. So, is the issue the same as the one decided in the prior decision?

[28] From my perspective it is not. The issue to be determined by a military judge during a Custody Review Hearing was whether Private Vezina is to be retained in custody. The issue here to be determined by me in the present hearing is if the undertaking given by Private Vezina under section 248.5 of the *NDA* has been breached or is likely to be breached, and if yes, if I may cancel the direction issued further to Private Vezina's court martial that authorized her to be released, and direct that she be detained in custody or that she remains at liberty on her giving a new undertaking in accordance with section 248.5 of the *NDA*. So they are two different issues to decide.

[29] Now, is the use of the evidence allegedly gathered in violation of the *Charter* rights of Private Vezina and adduced by Counsel for the Canadian Forces in support of the presentation of the present application, constitute an abuse of process under section 7 of the *Charter*?

[30] For the purpose of my decision I would like to remind people about the conditions that were in the undertaking signed by Private Vezina on 14 June 2013:

(a) to remain under military authority;

(b) surrender herself into custody when directed to do so;

(c) keep the peace and be of good behaviour;

(d) abstain from the consumption or possession of alcohol or any intoxicating substances;

(e) not use, possess, or consume any non-medically prescribed restricted or prohibited drugs;

(f) attend any appointment given by a medical consultant; and

(g) to take inpatient substances abuse programme when authorized to do so by Canadian Forces authorities.

[31] From my perspective, having the authority to consider the *Charter* application brought by the respondent, I would say that I will proceed with the analysis, but only for the facts that are relevant to the determination to make. What I am saying here, basically, is those facts who are not relevant to decide this matter, will not be subject to the analysis. And I would like to list those facts that I consider being subject to a *Charter* analysis as requested by the respondent:

(a) the arrest and conviction of Private Vezina for driving while her license was suspended;

(b) the beer taken with Private Freeland;

(c) the use of alcohol and cocaine between 9 and 24 September 2013;

(d) the fact that Private Vezina went on a regular basis to Huron Club and being seen with alcohol in her hand;

(e) playing drinking, meaning having seen Private Vezina playing drinking games involving alcohol at the barracks during a party;

(f) the items found further to the search conducted in her room;

(g) the test for cause conducted on Private Vezina that came back positive for marihuana;

(h) the incriminating statement made by Private Vezina upon her arrest at her exit of the Huron Club and the crack pipe found on her further to a search incidental to her arrest; and

(i) the test for cause conducted on Private Vezina that came back positive for marihuana and cocaine.

[32] Among those facts I found that just some of them are subject to the *Charter* analysis and they are:

(a) items found further to the search conducted in her room;

(b) the two tests for cause;

(c) the incriminating statement made by Private Vezina upon her arrest, and

(d) the crack pipe found on her further to the search incidental to her arrest.

[33] Now, I will address the search in the room. Military police attended the situation in the barracks further to a 911 call, which is an emergency call. My understanding of the facts is that the military police were looking for anything in relation to the cause of the distress call received. So, at the time they arrived, they tried to understand what was going on and further to Private Vezina being transported to the hospital, they were in the same mode or in the same approach.

[34] For sure, the background of Private Vezina, including the condition of her release, and the strong smell of marihuana at the place and where it was coming from, put the military police in a different situation. Here there is an intervention of the State concerning a search and seizure and there was some expectation of privacy by Private Vezina concerning this matter.

[35] I come to the conclusion that sufficient evidence was submitted by Sergeant Houthuyzen to the Commanding Officer in order to get the search warrant. The evidence was credible and reliable to permit the Commanding Officer to find reasonable and probable grounds to believe that an offence of possession of marihuana had been committed and that evidence of that offence would be found at the specified time and place.

[36] In a way, the applicant proceeded with amplification through witnesses and covered the technical defects; such as, the items to be searched that were missing in the ITO and specifically in the search warrant for a search. And the affidavit contained a

clear reference to the items to be searched and the place to conduct that search was loud and clear.

[37] Concerning the other evidence gathered, I'm of the opinion that it would have been necessary for the military police to get another search warrant. Things were not discovered in plain view. In that way, those items were obtained in a manner that infringed the respondent's right to be secure against unreasonable seizures as specified in section 8 of the *Charter*.

[38] So just to be clear, bag of marihuana with residue has been validly seized and obtained in a manner that did not infringe the respondent's right under section 8, but for other items, the manner they were obtained infringed that right.

[39] Now, about the test for cause. I have to conclude that the purpose of that test was to check if Private Vezina's use of drugs was in accordance with the Canadian Forces Drug Control Programme involving prohibition of the use of drugs unless authorized. There was no abuse of physical authority by police or any other authority in order to get the sample, rather the chain of command just wanted to confirm the application of the policy in the circumstances. I would say that it was done with an employer perspective to prohibit the use of drugs in a military context.

[40] I found that there were sufficient grounds; the smell of marihuana and the baggie with a residue found in her coat, that support such a request. We have to remind ourselves that the context of the hearing. The evidence is not used for the determination of guilt or innocence but to establish if there is a breach of condition, which make the perspective different.

[41] There is a valid statutory authority for making that search under section 8 of the *Charter* and from my perspective the test for cause, the way it was conducted, and how the sample was obtained, was reasonable in the circumstances.

[42] Also, the valid statutory authority used for making the violation of the security right under section 7 of the *Charter*, the security right of Private Vezina under section 7 is consistent with principles of fundamental justice. It was a valid and justified measure of control considering the military context and also the background of the respondent. I would say that probably such use of a sample and result would not stand if it has been used for the determination of the guilt of Private Vezina in a disciplinary proceeding before a service tribunal.

[43] Now, about the statement and the crack pipe. From my perspective, the initial encounter by Corporal McDonald was not a detention. He approached Private Vezina in order to make some check with her. Once information was obtained on conditions and after he smelled Private Vezina's breath and concluded that she had consumed alcohol, he focussed on interrogation about consumption of alcohol, and at that point, I would say that Private Vezina was detained when he started to focus on that issue

[44] Further to the answer she was arrested and he gave her her rights, I will say that the way the statement was obtained, it was in violation of section 10(*b*) rights of Private Vezina, but there is no violation of subsection 10(*a*). However, I would say also that despite the statement, Corporal McDonald had sufficient grounds to arrest for breach of conditions. He smelled her breath of alcohol and knew, at that point, that she had breached one of her conditions, which is not consuming alcohol.

[45] Concerning the search of the coat incidental to the arrest, I would say that it is Private Vezina who brought the attention of the military police on her coat, which was unusual in the circumstances. And considering whether at the time, he questioned why she would do such a thing and told her that she cannot get rid of this like this. She was detained and it was the intent of the military police to transport her further to her arrest in the patrol car and the search was for the safety and appears to me that it was normal in the circumstances. So the search was legal and not abusive in the circumstances.

[46] Concerning the test for cause that came from that incident, I would say that I have the exact same comments that I previously made concerning the first test for cause made on 27 November 2013. There were sufficient grounds also on that matter for requesting and obtaining an order for testing Private Vezina and there were sufficient grounds for the Commanding Officer to issue such order.

[47] Now, what about the abuse of process? From my perspective, if I consider the two breaches, because I came to the conclusion that there were two breaches: one, considering other items seized on 24 November; and the statement made to the police by Private Vezina on 6 December, I consider that the actual proceedings are not oppressive or vexatious. I do not find that by adducing this evidence before me bring me to conclude that it does not make the hearing unfair. There is no cumulative effect as claimed by the respondent.

[48] From my perspective it does not violate the fundamental principles of justice underlying the community sense of fair play and decency. It does not undermine the integrity of the process, in fact, they are two separate incidents, and they are unrelated. And in some circumstances, the way the military police proceeded was in violation of the rights of Private Vezina, but does not make this hearing abusive. So it is my conclusion that the respondent has not proven on a balance of probabilities an abuse of process.

[49] Also, concerning the remedy sought by the respondent or the alternative remedy sought by the respondent to exclude the evidence in regard of the two violations, I would say that concerning the items seized, the seriousness of the breach is very low from my perspective. The search was not conducted in a wide manner, the police officer did what he had to do, search for a specific purpose and found those items while searching. He limited himself or confined himself to the location indicated in the search warrant.

[50] Concerning the statement made by Private Vezina, I would say that the seriousness of the breach is high. The statement was made to a person in authority and followed a very, very specific question that could incriminate her. I would also conclude, because I'm applying the test in *Grant* here, that the constitutional infringement is serious in both situations, and I am considering that the truth-seeking function of this hearing would be better served by the exclusion of both types of evidence. It is possible for Counsel for the Canadian Forces to establish its case without this evidence. It does not preclude Counsel for the Canadian Forces to proceed with this hearing. So the weighing process and the balancing of these concerns lead me to conclude that the evidence must be excluded for the purpose of this hearing.

[51] Items other than the baggie with residue of marihuana and the statement of Private Vezina made prior to her arrest on 6 December 2013 must be excluded for the purpose of this hearing. Having concluded that, then I will proceed with an analysis of the application made by the Counsel for the Canadian Forces.

Application for cancellation

[52] Just to situate everybody, the evidence I will consider for the purpose of this application is:

(a) the arrest and conviction of Private Vezina for driving while her license was suspended;

(b) the beer taken with Private Freeland in barracks;

(c) the use of alcohol and cocaine between 9 and 24 September 2013;

(d) the fact that Private Vezina went on a regular basis to Huron Club and was seen with alcohol in her hand;

(e) the fact that Private Vezina was playing drinking games involving alcohol at the barracks during a party;

(f) the baggie with residue of marihuana found further to the search conducted in her room;

(g) the first test for cause conducted on Private Vezina that came back positive for marihuana;

(h) the crack pipe found on her further to a search incidental to her arrest;

(i) the second test for cause conducted on Private Vezina that came back positive for marihuana and cocaine; and

(j) the inpatient programme for addiction problems. I will consider all this.

[53] It is my conclusion that Counsel for the Canadian Forces proved on a balance of probabilities that the following conditions in the undertaking signed by Private Vezina were breached:

(a) keep the peace and be of good behaviour;

(b) abstain from the consumption or possession of alcohol or any intoxicating substances; and

(c) not use, possess or consume any non-medically prescribed, restricted or prohibited drugs.

[54] Concerning the first condition, keep the peace and be of good behaviour, I considered the arrest and conviction of Private Vezina for driving while her license was suspended. Abstaining for the consumption of possession of alcohol or any intoxicating substances, all incidents in relation to consumption of alcohol have been considered, and not using non-medically prescribed restricted or prohibited drugs, all facts related specifically to drugs are considered for this breach of condition.

[55] Now, has cause been shown by Counsel for Canadian Forces to cancel the direction that authorized Private Vezina to be released and direct that she be detained in custody? I would agree with counsel that there is no indication about what criteria to apply in order to make such a decision. I would conclude, as it was suggested by the prosecution, that such determination shall be made pursuant to subsection 248.3(a). I would consider that it is a relevant provision in the context. We are talking about a release pending appeal here, and I think it is those criteria that must be considered in such context. I am not in a situation of a pre-trial detention. It is a different context and my intent is to apply this provision.

[56] It is my conclusion that Counsel for the Canadian Forces has proved on a balance of probabilities that Private Vezina's detention or imprisonment is necessary in the interest of the public or the Canadian Forces. The interest of the Canadian Forces as to whether or not imprisonment is necessary in the interest of the public is compelling as she is a member of the Canadian Forces; she is still moving in the world of the Canadian Forces, and in that respect, the interest of the Canadian Forces would favour her detention, according to the decision of *Wilcox v R*, 2009 CMAC 7.

[57] For sure, when I look at the criteria, the fact that Private Vezina will surrender herself into custody when directed to do so, I do not have any problems with that. I do not have and I do not think the applicant has proved on a balance of probabilities that she will not surrender herself into custody, and the facts are not supporting that.

[58] Then, the other criteria I have to deal with is if the Counsel for the Canadian Forces has proven on a balance of probabilities that Private Vezina's detention or imprisonment is necessary in the interest of the public or the Canadian Forces.

[59] What are the criteria establishing public interest? The case law of our country's appeal courts indicates that there are two criteria; namely, the safety and security of the public and public confidence in the justice system. And as I already mentioned in my previous decision concerning this matter during the hearing for Release Pending Appeal, I still give consideration to the decision of *Delisle* from the Quebec Court of Appeal, which confirmed the existence of those two sub-criteria.

[60] It is my conclusion that the evidence does not support that the safety and security of the public would be at stake. It is less than likely that others are in danger in any way in the presence of Private Vezina. The evidence disclosed personal problems of Private Vezina with using drugs and alcohol, but no interaction with the public; namely, her peers and roommates or any other person gravitating around her in relation with her personal problems.

[61] As to the public confidence in the military justice system, this issue, as I said before, is an issue that must be determined in the same manner as before any other court in Canada. As I mentioned, the decision must be shaped by reason and not by sentiment or passion, and the facts must be analyzed in light of the applicable law.

[62] In my opinion, Counsel for the Canadian Forces has proved on a balance of probabilities that a public well-informed about the legal process and, specifically, court martial proceedings and such proceedings concerning the application and about the circumstances of this case, is likely to lose confidence in the military justice system if the respondent is released in light of the information before this court.

[63] The evidence showed that Private Vezina had a constant disregard in order to respect her condition to abstain from using alcohol and drugs. She still has issues with addiction and no evidence of any real effort or some result in trying to get rid of the problem over the last nine months. There is no evidence of any hope for improvement on that matter in the close future. Her appeal will proceed soon on 7 March 2014.

[64] Considering what she has been through regarding the consumption of alcohol and the use of drugs, it is my conclusion that the public would consider that Private Vezina had her chance, and in a context where she did not take her opportunity to respect conditions imposed on her and in the manner she did not respect them, it would call for such a conclusion in that acting differently than to not direct her detention or to not direct that she be committed to custody would result in a loss of confidence, from my perspective, by the public and members of the Canadian Forces in the military justice system.

[65] I would conclude that the decision to keep Private Vezina in detention and ensure that she serves her sentence must prevail in the circumstances when it is weighed with her right to appeal potentially unjustified decisions. It is always a matter of balancing those two interests, and further to the evidence adduced before me in this

hearing I came to the conclusion that at this time the detention of Private Vezina must outweigh her right to appeal potentially unjustified decisions.

FOR THESE REASONS, THE COURT:

[66] **DECLARES** that the direction dated 14 June 2013 that authorized the respondent to be released is cancelled.

[67] **DIRECTS** that the respondent be detained in custody.

[68] **DIRECTS** that the Director of Military Prosecutions, in addition to the referral authority and the respondent’s Commanding Officer, shall cause the Court Martial Administrator and the Registry Office of the Court Martial Appeal Court in Ottawa to be informed of the outcome of this application.

Counsel:

Major E. Carrier, Canadian Military Prosecution Service
Counsel for the Canadian Forces

Lieutenant-Commander B.G. Walden, Directorate of Defence Counsel Services
Counsel for Private A.L. Vezina