OUTER HOUSE, COURT OF SESSION

[2022] CSOH 91

P749/21

OPINION OF LADY CARMICHAEL

in Petition of

THOMAS ANDREW WAINWRIGHT

Petitioner

for

Judicial Review

Petitioner: Lazarowicz; Drummond Miller LLP
Respondent: Byrne; SGLD

14 December 2022

Introduction

[1] The petitioner, Mr Wainwright, is a British citizen who was brought up and educated in France. He lived in France from 1994 to 2017. In March 2017 he appeared for trial in Glasgow High Court on an indictment arising from a fatal road accident on Mull on 28 October 2015. Following the close of evidence in the trial he pleaded guilty to failing to provide specimens of breath contrary to section 7(6) of the Road Traffic Act. The jury convicted him of contravening section 1 of the same Act. The conduct included a number of aggravating factors, including intoxication, and driving a high performance vehicle at high speed. He had a previous conviction from France for driving while unfit through drink

or drugs. The sentencing judge imposed a sentence of imprisonment for 12 years to run from 21 March 2017.

[2] On 25 January 2018 Mr Wainwright applied to the respondents, the Scottish Ministers, to be transferred to the French prison authorities under the Repatriation of Prisoners Act 1984 ("the 1984 Act"). He made an application as permitted by rule 121(2)(a) of the Prisoner and Young Offender Institutions (Scotland) Rules 2011/331. The Scottish Ministers ("the Ministers") considered his request. They issued a certificate in the terms specified in Article 4 of the European Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union ("the Framework Decision"). They sent the certificate to the French authorities.

[3] On 7 August 2019 the Tribunal de Grande Instance of Grasse made an "order ruling in the matter of approval of the proposition of a sentence for transnational execution of a custodial sentence" ("*ordonnance statuant en matière d'homologation de proposition de peine pour execution transfrontalière de peine privative de liberté*"). The court approved the request, but authorised the reduction of the sentence to one of imprisonment for 10 years. That is the maximum sentence for the analogous offence in France. The order of the French court was intimated to the Ministers by letter dated 23 September 2019. On 17 June 2020 the Ministers refused Mr Wainwright's request to be transferred to France to serve the remainder of his sentence. Mr Wainwright brought a petition for judicial review of that decision. The Ministers agreed to consider a submission and supporting evidence in relation to the application, and to make a fresh decision, and the judicial review proceedings came to an end on that basis.

[4] On 22 June 2021 the Ministers again refused the application. Mr Wainwright challenges that decision in these proceedings. After Mr Wainwright brought this petition, the Ministers withdrew the certificate they had previously issued under Article 4 of the Framework Decision. Mr Wainwright has never challenged the decision to withdraw the certificate.

Arguments

[5] Mr Wainwright argued that at the time they made their decision, the Ministers were required to act in a manner which was consistent with the provisions of the Framework Decision and to give effect to its provisions and policy objectives. Even if they were not, they required to make their decision in a manner consistent with the intentions of Parliament when it enacted the 1984 Act. They should have made their decision in a reasonable and proportionate manner, taking into account all relevant factors and giving them due weight. There was no indication in their decision that they did any of those things. They had not been entitled to give the reduction in sentence in the executing state the weight that they had done. They had also proceeded erroneously on the basis that Mr Wainwright's chances of returning to live in France after serving his sentence were much higher than they were.

[6] The petition included notice of an argument based on the Council of Europe's Convention on the Transfer of Sentenced Persons 1983. Mr Wainwright did not insist on that argument. He is not a person to whom the Convention applies, because he is not a national of the administering state (France): Convention, Article 3(1)(a).

[7] The Ministers argued that they had a pure and unfettered discretion under section 1 of the 1984 Act. Its exercise was only open to review on *Wednesbury* grounds. It was for

the Ministers to determine what were relevant considerations and what weight to attach to them. The decision letter provided adequate reasons and did not disclose any error of law. In any event, reduction would serve no practical purpose. There could in the future be no transfer under the Framework Decision. The certificate had been withdrawn. There could be no new approach to the French authorities under the Framework Decision after the end of the transition period.

The law

[8] Section 1 of the 1984 Act provides:

> "(1) Subject to the following provisions of this section, where –
>
> (a) the United Kingdom is a party to international arrangements providing for the transfer between the United Kingdom and a country or territory outside the British Islands of persons to whom subsection (7) below applies, and
> (b) the relevant Minister and the appropriate authority of that country or territory have each agreed to the transfer under those arrangements of a particular person (in this Act referred to as '*the prisoner*'), and
> (c) in a case in which the terms of those agreements provide for the prisoner to be transferred only with his consent, the prisoner's consent has been given
>
> the relevant Minister shall issue a warrant providing for the transfer of the prisoner into or out of the United Kingdom.
>
> (2) The relevant Minister shall not issue a warrant under this section, and, if he has issued one, shall revoke it, in any case where after the duty under subsection (1) above has arisen and before the transfer in question takes place circumstances arise, or are brought to the relevant Minister's attention, which in his opinion make it inappropriate that the transfer should take place."

There is no dispute that Mr Wainwright is a person to whom subsection (7) applies.

Section 8(2A)(b) provides:

> "(2A) In this Act –
>
> (b) references to a country or territory being a party to international arrangements include references to the country or territory being required to comply with provisions of a Framework Decision of the Council of the European Union (and references to international arrangements are to be construed accordingly."

[9] Section 7A of the European Union (Withdrawal) Act 2018 makes provision for the domestic recognition and enforcement of the Withdrawal Agreement. The Framework Decision is not incorporated into domestic law by section 3 of the 2018 Act. It is excluded because it is EU legislation which has effect or is to have effect by virtue of section 7A: section 3(2)(a)(bi). The relevant provision of the Withdrawal Agreement is Article 62(1)(f) which provides:

> "1. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts shall apply as follows:
> (f) Council Framework Decision 2008/909/JHA shall apply:
> (i) in respect of judgments received before the end of the transition period by the competent authority of the executing State, or by an authority of the executing State with no competence to recognise and enforce a judgment, but which transmits the judgment *ex officio* to the competent authority for execution;"

In this case there is no dispute that the executing state received the judgment before the end of the transition period. Where the parties are at odds, so far as the practical effect of reduction is concerned, is as to the effect of the Ministers' withdrawal of the certificate after the end of the transition period.

[10] Recital 9 of the Framework Decision reads:

> "Enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority

> of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State."

[11] Article 3.1 provides that it is the purpose of the Framework Decision to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce it. The Framework Decision provides a procedural structure. The issuing state may forward a judgment together with a certificate in a prescribed form to another Member State which satisfies certain criteria. There is scope for consultation between the issuing state and the proposed executing state: Article 4. Article 5 imposes certain procedural requirements regarding forwarding the judgment and certificate. Article 8 provides:

> "1. The competent authority of the executing State shall recognise a judgment which has been forwarded in accordance with Article 4 and following the procedure under Article 5, and shall forthwith take all the necessary measures for the enforcement of the sentence, unless it decides to invoke one of the grounds for non-recognition and non-enforcement provided for in Article 9.
>
> 2. Where the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law. The adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State."

Article 13 provides that as long as the enforcement of the sentence in the executing State has not begun, the issuing State may withdraw the certificate from that State, giving reasons upon doing so. Upon withdrawal of the certificate, the executing State shall no longer enforce the sentence.

The decision of 22 June 2021

[12] The decision is in these terms:

"The Scottish Ministers have considered your request to transfer, and taking into account your further submissions, have refused your request.

I have provided below the reasons for this decision.

- The considerable reduction in sentence that you would receive from the French authorities when your sentence is 'adapted' on transfer to align with French sentencing laws;
- The enforcement of the sentence in France would mean that you would be considered for release earlier than you would have been if you were serving your sentence in Scotland. Therefore, the enforcement of the sentence in France would not fulfil the objectives of the Scottish Court. Further, in the Trial Judge Report, the Sheriff stated in passing sentence that it was designed to act as a deterrent to others;
- As a British citizen, should you be transferred to France, upon your release at the earlier date in France, you are entitled to return to the UK the following day;
- As per your own submissions you may be able to return to France once you have completed serving your sentence in Scotland, although it may be more challenging, it is not impossible;
- In your submissions, you claim that a refusal to permit you to transfer to France is a disproportionate interference with your Article 8(1) ECHR rights. The Scottish Prison Service (SPS) considers that you will still be able to maintain contact with your family and friends while in custody of the SPS, albeit through different means than you would prefer through correspondence, physical and virtual visits and by telephone. The SPS recognises the importance of family support, which is why a variety of means to maintain contact with family and friends is in place; and
- The SPS considers in this case that the substantial reduction in the sentence that you would receive, outweighs the personal advantage you might gain from being rehabilitated in France.

I am sorry this is not the outcome you had hoped for."

Decision

Failure to take into account the terms and policy objectives of the 1984 Act and the Framework Decision

[13] Mr Wainwright's argument was that the primary policy objective of the 1984 Act was the obviously humane and desirable one of enabling persons sentenced for crimes committed abroad to serve out their sentences within their own society, which, irrespective of the length of sentence, will almost always mitigate the rigour of the punishment inflicted: *R* v *Secretary of State for the Home Department ex parte Read* [1989] AC 1014, at page 1048. Counsel invited me to look at a speech by the Parliamentary Under-Secretary of State for Home Affairs, HL Deb 21 December 1983 vol 446 cc 751-78, under reference to *Pepper* v *Hart* [1993] AC 593. Lord Elton said:

> "The Government believe that the aims of this Bill will command wide support, not only in your Lordships' House, but also in another place and indeed in the country at large. The humanitarian arguments in favour of the voluntary repatriation of prisoners are largely self-evident. A person who is imprisoned in a country which is not his own suffers considerably more from his imprisonment than do fellow prisoners who are natives of that country. Foreign prison conditions may be harsher than those in this country, and foreign practices and foreign languages can aggravate them very significantly. If countries can come to arrangements which enable such prisoners to be transferred to their home countries to serve their sentences there, then the requirements of criminal justice in the country where an offender has been convicted can be met without subjecting the offender to hardships not justified by his crime or intended by the legislation under which he was sentenced.
> …
> [The Bill] provides general enabling powers so that the Government will be able in due course not only to ratify [the Council of Europe Convention], but also to conclude such other agreements as may be necessary to effect the transfer of prisoners."

The policy objectives of the Framework Decision were similar: Recital (9).

[14] This chapter of argument was, in substance, a "reasons" challenge. The complaint was that the decision letter did not indicate that the Scottish Ministers had considered the

terms and policy objectives of the 1984 Act and the Framework Decision. The Scottish Ministers had not taken those relevant considerations into account or had not given them sufficient weight. It was clear that the "drift" of both instruments was that there would have to be strong reasons why a request for transfer should be refused.

[15] The Scottish Ministers argued that it was for them to determine what were relevant considerations, and that, in any event, the decision letter disclosed that they had taken into account the considerations identified by Mr Wainwright.

[16] Section 1 of the 1984 Act requires the Ministers to issue a warrant for transfer where there is an agreement between the Ministers and the other country involved. The Minister can revoke a warrant at any point until transfer takes place if they become aware of circumstances which in their opinion make it inappropriate that the transfer should take place. The statute does not require them to reach an agreement. They appear to have an unqualified discretion so far as deciding to agree is concerned. Section 1(2) provides a broad discretion as to not making, or revoking, a warrant even where agreement has previously been reached, but the Ministers have ceased to agree. There is no specification as to what considerations should be taken into account in determining whether to agree, or in determining to cease to agree, and, therefore, to revoke, or not to grant, a warrant.

[17] Widely drawn powers may not require a decision maker to have regard to any particular considerations: *Axa General Insurance Ltd and others* v *HM Advocate and others* [2011] UKSC 46, at paragraph 143. When a statute does not expressly or impliedly identify considerations that must be taken into account as a matter of legal obligation, it may be difficult to challenge a decision on the basis that a particular, potentially relevant, consideration has been left out of account. There may, however be matters so obviously material to a decision that anything short of direct consideration of them would not be in

accordance with the intention of a statute: *In re Findlay* [1985] AC 318 at 333-4; *R (on the application of Hurst)* v *Coroner for Northern District London* [2007] 2 AC 189 at paragraphs, 57, 58, 79; both citing *CREEDNZ Inc* v *Governor General* [1981] 1 NZLR 172, at page 183.

[18] The humanitarian benefits to a prisoner of transfer, and whether a transfer will facilitate his social rehabilitation, are clearly potentially relevant considerations in the context of the 1984 Act. Rehabilitation is one of the purposes which may be addressed in and served by a sentence imposed by the court. That is recognised in the *Principles and purposes of sentencing* guideline issued by the Scottish Sentencing Council, at paragraphs 4 and 5, to which counsel referred. It is for the judge to determine the purposes of sentencing that are appropriate to the particular case. Those may include rehabilitation of the offender, but also, for example, protection of the public, punishment, giving the offender the opportunity to make amends, and expressing society's disapproval of the offending behaviour.

[19] When the Ministers made their decision in Mr Wainwright's case, they were doing so in the context of a particular international arrangement, the Framework Decision. Recital 9 refers to matters that the issuing authority should take into account with a view to satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person. Those matters include the person's attachment to the executing State, and whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State. The Framework Decision promotes transfer where that purpose will be served, rather than where it will not be served.

[20] The Ministers must consider whether transfer to another state for execution of the sentence serves the purpose of rehabilitation, because transfer, if it is to happen, should

serve that purpose. It does not follow that that the rehabilitation of the prisoner is the only relevant factor, or the decisive factor, or that the Ministers require to give it particular weight in making a decision that there should be no transfer. There is nothing in the Framework Decision to support that contention. The 1984 Act places no limit on the matters that may be taken into account in determining that a warrant for transfer out should not take place, even after there has been agreement at an earlier stage. If the Ministers cease to agree that transfer should take place, that is the end of the matter, subject to *Wednesbury* reasonableness. Article 13 of the Framework Decision is entirely consistent with the ability of the issuing state to withdraw the certificate.

[21] As I have already indicated, counsel focused on the reasons given by the Ministers. Reasons must deal with the substantial questions in issue in an intelligible way. They must leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations taken into account in reaching it: *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345, page 348. They may be stated briefly, and the degree of detail required will depend on the nature of the issues for decision. They must not give rise to substantial doubt as to whether a decision-maker erred in law, for example by failing to reach a rational decision on relevant grounds, but such an adverse inference will not readily be drawn. They need not refer to every material consideration. A reasons challenge will succeed only if the party aggrieved can demonstrate that he has been substantially prejudiced by the failure to provide an adequately reasoned decision: *South Bucks DC* v *Porter (No 2)* [2004] 1WLR 1953, paragraph 36. It is important to maintain a sense of proportion when considering the duty to give reasons, and not to impose on decision-makers a burden which is unreasonable having regard to the purpose intended to be served: *Uprichard* v *Scottish Ministers* 2013 SC (UKSC) 219, paragraph 48.

[22] The informed reader in this case would be aware of the representations offered by Mr Wainwright, and read the Ministers' decision letter in its proper context, as responding to those representations. Those representations included a section headed "The applicant's life in France" referring to annexed affidavits. They included information about Mr Wainwright's family and life in France. There is a further reference to his private and family life at paragraph 17 of the representations. Under a heading "Purposes of sentencing", there is a submission that the Ministers had in their first decision misdirected themselves by leaving out of account the purpose of rehabilitation and the humanitarian arguments in favour of transfer.

[23] The Ministers' decision, although concise, engages directly with the matters of Mr Wainwright's family life and the advantage to him of being rehabilitated in France. Those are the subject matter of the final two bullet points in the decision letter. It is not, as counsel submitted, necessary for the reasons to mention, in terms, Mr Wainwright's "attachment to [France], whether he consider[ed] it the place of family, linguistic, cultural, social or economic or other links to [France]". It is clear from the submissions to the Ministers that it was Mr Wainwright's position in his application to them that he had links of that character to France. It is not necessary for the reasons to explain in greater detail what assessment the Ministers made of Mr Wainwright's submission concerning his life in France, or the impact that refusal would have on his opportunities for rehabilitation.

[24] The Ministers accepted that there would be an advantage to Mr Wainwright in being rehabilitated in France. They accepted that he had family and friends with whom it was desirable that he should maintain contact. Those acceptances are explicit in their decision. The Ministers pointed to means by which Mr Wainwright might maintain contact with his relatives. While accepting that there would be an advantage to Mr Wainwright in being

rehabilitated in France, they considered that there were factors which outweighed that advantage. The decision letter leaves no doubt as to what those factors were. The central consideration was the reduction in sentence that would result from the adaptation of the sentence by the French authorities. That reduction would not fulfil the objectives of the sentencing court, including the sentencing purpose of deterrence.

[25] It is correct to say, as counsel did, that the possibility that the executing state may adapt a sentence downwards in order not to exceed the maximum sentence for an analogous offence available in that state is one inherent in the scheme of the Framework Decision. It does not follow that the Ministers required to accept that the sentence should be adapted and proceed with the transfer. That the sentence to be served would be shorter than that imposed by the sentencing judge, and that release would be earlier than if the sentence were served in Scotland were factors that the Ministers were entitled to take into account. They were entitled to take into account the purposes of sentencing identified and articulated by the sentencing judge. In this case, one of those was deterrence.

[26] Counsel suggested that the Ministers were not entitled to characterise the reduction in sentence from 12 years to 10 years as "considerable" or "substantial". That is wrong. A reduction of one sixth in a sentence of 12 years is one which can rationally be described using those terms.

[27] The Ministers were correct to observe that a result of the adapted sentence would be the potential for Mr Wainwright to come to the United Kingdom, at liberty, at a point before the expiry of the sentence imposed by the High Court, and entitled to take that into account.

[28] I am not satisfied that the Ministers acted unlawfully by failing to have regard to any relevant consideration so far as Mr Wainwright's rehabilitation in France is concerned, or the humanitarian considerations generally served by transfer. They were entitled to take

into account the factors that they considered outweighed the advantages to Mr Wainwright of being rehabilitated in France.

Misdirection as to the prospect that Mr Wainwright would be able to return to France after serving his sentence in Scotland

[29] Mr Wainwright's submission to the Ministers included the following:

> "It is believed that the applicant will be unable to return to France upon the expiry of his sentence should he not be transferred in line with this application. An opinion was sought from a French lawyer and thew [sic] translation of which is attached hereto at ANNEX 9".

Annex 9 was an email dated 4 May 2020 from a French lawyer, M Matteo Bonaglia, who wrote:

> "It is important to distinguish between the following:
>
> - Applying for naturalisation in order to obtain French citizenship: you must have lived in France for more than five years, and have the centre of your material interests (notably professional) and your family ties in France. You must also speak French and have a minimum of knowledge of the country. As it stands, it seems difficult to me to make such an application from Scotland, at least as long as you are serving your sentence there. While this application could have been successful while you were living in France, it could now prove to be very difficult to complete due to your conviction …
> - Applying for a residence permit: this is a document issued by the French authorities which authorises you to reside in France. EU citizens wishing to reside in France for more than three months must apply for a residence permit. This application could also prove difficult (but not impossible) to complete due to your conviction on the one hand and Brexit on the other. It seems that as of 31 December 2020, UK citizens are considered to be citizens of a country outside the European Union."

[30] Counsel submitted in the first place that the Ministers had referred to Mr Wainwright's return to France being "more challenging" though not "impossible", whereas M Bonaglia had used the words "very difficult" or "difficult". There is no

substance to that criticism. The Ministers correctly summarised the substance of M Bonaglia's advice. Return to France would be challenging, but not impossible.

[31] Second, he submitted that the Ministers ought to have taken into account that matters had changed since M Bonaglia's advice, because the transition period had passed. The Ministers knew that, but gave no indication as to whether they considered that had altered matters so far as Mr Wainwright's prospects of return to France were concerned. Mr Wainwright produced a later opinion from M Bonaglia. It is common ground that it was not before the Ministers and that they could not have taken it into account when making their decision.

[32] The likelihood or otherwise of Mr Wainwright's obtaining permission to enter or remain in France was a matter that he relied on in his submissions to the Ministers. It raises issues of French law and immigration practice. Mr Wainwright placed evidence, in the form of M Bonaglia's advice, before the Ministers. They were entitled to proceed on the basis of what was in it. The Ministers would have understood that the end of the transition period would not have made the processes described by M Bonaglia easier. In the absence of evidence about the effect of the end of the transition period, there is no reason why they should have been expected to speculate to any particular effect about how, and to what extent, things might have changed since M Bonaglia's advice. That is particularly so where the advice dated 4 May 2020 explicitly referred to the end of the transition period.

Decision

[33] For all of those reasons I refuse the petition.

[34] Having done so, I do not require to determine the other point raised by the Ministers, namely whether reduction of the decision would serve a practical purpose. The Framework

Decision continues to apply in respect of judgments received before the end of the transition period by the competent authority of the executing State. Mr Wainwright argued that because the judgment had been received by the French authorities before the end of the transition period, the Framework Decision continued to have effect in relation to his case. The withdrawal of the certificate did not withdraw the judgment from the consideration of the French authorities. The Ministers submitted that the effect of the certificate was to bring the matter to an end so far as the procedure under the Framework Decision was concerned.

[35] As the point is not material, I express my opinion briefly. I reject the analysis offered by Mr Wainwright. The effect of withdrawing a certificate under Article 13 is that the executing state shall no longer enforce the sentence. Although Article 13 refers to the certificate, rather than the judgment, the result of withdrawing the certificate is to withdraw the application for recognition and enforcement of the sentence, with the result that the sentence cannot then be enforced by the executing state.