

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130131

Docket: A-39-13

Citation: 2013 FCA 18

Present: STRATAS J.A.

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

YVES LEBON

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 31, 2013.

REASONS FOR ORDER BY:

STRATAS J.A.

Federal Court of Appeal



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REASONS FOR ORDER

STRATAS J.A.

[1] The Minister seeks to stay part of a Federal Court judgment that has been appealed to this Court: 2012 FC 1500. For the following reasons, the stay will be granted and the appeal will be expedited.

A. Background

[2] For over four years, Mr. LeBon has been in prison in the United States. He is serving a ten year sentence for possession with intent to distribute cocaine and improper entry to the United States.

[3] Soon after he began serving his sentence, Mr. LeBon requested transfer to a Canadian prison under the *International Transfer of Offenders Act*, S.C. 2004, c. 21.

[4] The appellant Minister refused the request to transfer. This Court quashed the Minister's refusal and returned the matter to the Minister for re-decision: *LeBon v. Canada*, 2012 FCA 132, rev'g 2011 FC 1018.

[5] On June 22, 2012, the Minister again refused the request to transfer.

[6] On December 20, 2012, the Federal Court quashed this refusal. The Federal Court also issued certain mandatory directions in paragraphs 2 and 3 of its judgment:

- The Minister must accept the request to transfer; and
- By February 3, 2013, the Minister must confirm to Mr. LeBon that all reasonable steps have been taken for his prompt transfer to a correctional facility in Canada.

[7] The Minister has appealed to this Court.

[8] In this motion, the Minister seeks a stay of the Federal Court's mandatory directions pending this Court's determination of the appeal.

B. Analysis

[9] To stay the mandatory directions in the Federal Court's judgment, the Minister must satisfy the Court that there is a serious issue to be determined, the Minister will suffer irreparable harm if the stay is denied, and the balance of convenience favours granting the stay: *RJR-MacDonald Inc v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at page 334.

[10] The threshold for seriousness is "a low one" and "liberal": *RJR-Macdonald, supra* at page 337; *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 at page 358, *per* La Forest J. (dissenting, with apparent concurrence on this point from the majority). The moving party need only show that it is "neither vexatious nor frivolous": *RJR-Macdonald, supra* at page 337.

[11] The Federal Court's reasons suggest that the Minister's re-decision was utterly unsustainable. Further, the Federal Court made some clear factual findings and did not identify evidence to the contrary. In this Court, the Minister's notice of appeal challenges the legality of the mandatory directions. At this time, it cannot be said this is a frivolous and vexatious ground. The notice of appeal adds that the mandatory directions were made despite "factual issues in dispute," without elaborating further. This lack of specificity is of concern. Overall, at this time, based on the record filed before me, I cannot conclude that the Minister's appeal is frivolous or vexatious.

[12] On the issue of irreparable harm, if this Court does not grant the stay Mr. LeBon will be transferred to a Canadian prison. Once transferred, he cannot be returned. As a result, the Minister's appeal will be moot.

[13] The prospect of a moot appeal will not always result in a finding of irreparable harm: *United States Steel Corporation et al. v. Canada (Attorney General)*, 2010 FCA 200 at paragraph 17. But here we are dealing with an Act aimed at important public security purposes. If the Minister prevails in this appeal – and, as I have already held, at this time this possibility cannot be ruled out – those important public security purposes will be harmed if a stay is not granted. There is no remedy for that harm. Therefore, irreparable harm has been established.

[14] On the issue of the balance of convenience, I find that it lies narrowly in the Minister's favour because of these public interest considerations. The public interest is "very important" and "weigh[s] heavily": *143471 Canada Inc., supra* at page 383; *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 at paragraph 9.

[15] I acknowledge and place weight on Mr. LeBon's individual interests in returning to Canada: among other things, greater proximity to his family, better relations with his spouse, improvement in his emotional and physical welfare and that of his spouse, better prospects of rehabilitation and reintegration, and better treatment for health problems. The granting of a stay will perpetuate these harms, ongoing for four and a half years, a short while further.

[16] I note that while efforts were made to expedite matters in the previous Federal Court proceedings, none were made in the previous proceedings concerning this matter in this Court. Further, in this appeal, there is no evidence of any attempt by Mr. LeBon to prompt the Minister to move quickly following the Federal Court's judgment.

[17] I also observe that if there are actually no "facts in dispute," if the Minister's re-decision was indeed utterly unsustainable as the Federal Court suggests, if the Minister's re-decision was indeed made in callous defiance of this Court's earlier decision as Mr. LeBon suggests, Mr. LeBon may have other recourses to attempt to redress the harm done to him.

[18] In light of the foregoing, the stay order shall be made.

[19] Under Rule 53, this Court can attach terms to the granting of relief. Although Mr. LeBon has not asked for this appeal to be expedited, I shall order that this appeal be expedited in order to minimize any harm caused to Mr. LeBon's interests by the stay. In a direction, issued concurrently, this Court has invited the parties to provide submissions concerning the schedule, which will culminate in an appeal hearing in late February. A scheduling order will then issue.

C. Disposition

[20] Therefore, paragraphs 2 and 3 of the Federal Court's judgment (the mandatory directions) are stayed until final judgment of this Court. The appeal shall proceed on an expedited schedule.

[21] Mr. LeBon seeks a higher level of costs in his favour. In the circumstances of this case, costs of this motion shall be in the cause.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-39-13

STYLE OF CAUSE: Minister of Public Safety and
Emergency Preparedness v. Yves
LeBon

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Stratas J.A.

DATED: January 31, 2013

WRITTEN REPRESENTATIONS BY:

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