Federal Court Cour fédérale

Date: 20160601

Docket: IMM-2214-16

Citation: 2016 FC 609

Toronto, Ontario, June 1, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

LEONEL ROMEO AVILES MONTENEGRO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

UPON motion of the Applicant for an order staying the execution of a deportation order presently set for May 31 to Chile, based on a refusal to defer same**;**

AND UPON considering the evidence and the submissions contained in the motion records submitted by the Applicant and by the Respondent;

AND UPON hearing the oral submissions of counsel for the Applicant and for the Respondent;

AND UPON considering that a stay will only issue upon the Applicant convincing the Court that (i) there is the existence of a serious issue to be determined by the Court, (ii) irreparable harm will ensue, and (iii) the balance of convenience in issuing such order lies in his favour (*Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) [*Toth*]; *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311);

AND UPON acknowledging that the issuance of a stay is an extraordinary remedy wherein the Applicant needs to demonstrate "special and compelling circumstances" that would warrant "exceptional judicial intervention", and furthermore, that the discretion of officers to defer removal is very limited and subject to review on a standard of standard of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 66-67 [*Baron*]; *Wang v Canada (Minister of Citizenship & Immigration)*, 2001 FCT 148);

AND UPON considering the above-mentioned decision [the Decision] by a CBSA Inland Enforcement Officer [the Officer] to refuse to defer the Applicant's removal, dated May 28, 2016;

I am unable to find that the Applicant satisfies the above-mentioned tripartite stay test, based on application of the facts to the applicable law, as follows:

[1] The evidence before the Court was that the Applicant in this case has a lengthy immigration history in Canada, having arrived in January 1988. He also has a lengthy criminal history, including an impaired driving conviction, possession of Schedule I and II controlled substances and a 2006 assault.

[2] In addition, bail conditions were placed on the Applicant in 2013 after he was arrested and detained in August 2013 for domestic related charges. He remained in custody, initially on a provincial hold and then on an immigration hold until his release in December 2013, for which his bail conditions included no contact with Ms. Betel, and living with his brother (his bondsperson) at all times. His criminal charges were withdrawn in November 2014.

[3] On the question of a serious issue, the Applicant alleges that the Officer erred in placing undue emphasis on the fact that his sponsorship application had only been filed in April 2015 though he had been married to his spouse, a Canadian citizen, since 1997. In doing so, the Applicant argues that the Officer ignored the principal reason for which he was seeking a stay, namely to care for his spouse, Ms. Betel, who has multiple sclerosis and relies on his care. The Applicant contends that this undue emphasis was evidenced by the Officer addressing the sponsorship issue as the first item in the Decision.

[4] I disagree with the Applicant. First, I do not find any indication that the Officer placed undue emphasis or was otherwise erroneously selective in focusing on the spousal sponsorship to the exclusion of the spouse's medical condition. Both of these issues were raised by the Applicant in the deferral request, and both were duly, adequately, and reasonably addressed by the Officer. Specifically, the Applicant's requested relief in the deferral letter was to obtain enough time to allow for a Stage 1 determination regarding the spousal sponsorship application. It was thus thoroughly appropriate for the Officer to consider the unusual delay in the submission of the sponsorship application.

[5] Second, there was a dearth of evidence to support any of the grounds raised by the Applicant in the deferral request. The Applicant, for example, provided no documentary evidence of a spousal sponsorship application. In fact, the only independent evidence provided to establish Ms. Betel's existence was a copy of the data page of her Canadian passport and a short letter from a physician about her condition. At a minimum, one would have expected to see some kind of evidence from the spouse regarding the sponsorship process, particularly given the history of their domestic life as set out in the Decision.

[6] There was also no evidence provided from either Ms. Betel or from any other family members in support of the Applicant, either attesting to his caregiving or otherwise. For instance, from his two Canadian-born teenaged children, the Applicant only provided copies of their passport data pages with no accompanying evidence regarding any contact with them and/or testimony as to his care for their mother or the impact of his deportation on them.

[7] As for the medical evidence to support the Applicant's claim that he needed to stay to care for his spouse, this too was lacking. There was the aforementioned short letter regarding Ms. Betel's health but it makes no reference to the Applicant by name. In light of the absence of evidence about Ms. Betel and the Applicant's relationship with her more generally, there was actually very little before the Officer that connected Ms. Betel to the Applicant at all.

[8] Applicant's counsel stated at the hearing that the lack of any supporting evidence was, in great part, due to the fact that there was insufficient time to obtain any such supporting evidence.

[9] It should be noted, however, that the medical letter was obtained on April 4, 2016, over a month before the Applicant received his May 6, 2016 notice regarding the May 31, 2016 deportation, and over five weeks before he submitted the deferral request that gave rise to this stay motion.

[10] In short, the Applicant has not met the serious issue threshold, particularly in the context of the exceptional circumstances enunciated in *Baron*.

[11] As per the *Toth* test summarized above, failing to satisfy the serious issue component is, in and of itself, fatal to the stay application. I will nonetheless address irreparable harm, the second prong of the test.

[12] The risk that must be considered in a deferral request is that of death, extreme sanction or inhumane treatment. The Officer found that this threshold of risk was not met. The irreparable harm analysis has been extended in certain stay cases to considering the impact on family members where the evidence clearly provides such justification. Yet obtaining such a result does not result simply from the Applicant's word alone. The Federal Court of Appeal has held that to "establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight" (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31; see also *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 15-16).

[13] Simply put, there was no such evidence in this matter. Rather, it was replete with assumptions, speculations, hypotheticals, and arguable assertions, which carry no weight when unsupported by evidence. I would note that even if the Court had evidence that the Applicant is still married to his alleged spouse, given the scant documentation on record attesting to her health and/or his caregiving duties, the consequences of his deportation do not reach beyond the usual hardships of separation. As Justice Rennie (then of this Court) held in *Kelly v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 906 at paras 4 and 5:

> [4] Turning to the issue of irreparable harm, an enforcement officer is not an H&C Officer, and he is accordingly under a very limited duty to consider the best interests of the applicant's common law Canadian spouse. Here, it is compellingly argued that the collateral or consequential impact of the removal of the applicant on her Canadian common-law spouse's ability to live independently and continue to care for himself while he confronts significant medical challenges constitutes irreparable harm.
>
> [5] While irreparable harm must be personal to the applicants, the courts look beyond the applicant to the interests of the Canadian born children and spouses who would remain: *Tesoro v. Canada (M.C.I.)* 2005 FCA 148 at 34. The jurisprudence does not confine the analysis of irreparable harm to the applicant alone. However, the ensuing consequences rarely reach beyond the usual hardships, loss and sorrow associated with deportation. Viewing the matter through the lens of the common law spouse, the fact that he may, and I emphasize the speculative and prospective nature of the possibility, have to rely on nurses, home care, or some form of assisted living by reason of the removal of his partner does not constitute irreparable harm. It is a challenge faced daily by thousands of other Canadians. While difficult, it does not constitute special circumstances as discussed by the Court in *Baron* and *Simoes*.

[14] Finally, I would note that the Applicant does not come to this Court with "clean hands" (*Baron* at para 65), including the fact that he submitted a selective portrait of his life in Canada, omitting key facts with respect to his immigration, criminal, and spousal history, all

accompanied by a glaring lack of supporting evidence. This decision rests as much on what was excluded from the record as what was included.

ORDER

THIS COURT ORDERS that:

1. This motion for a stay of deportation is dismissed.

2. The style of cause has been amended from that which was contained in the originating motion materials, which had provided an incorrect name of the Minister concerned.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2214-16
STYLE OF CAUSE:	LEONEL ROMEO AVILES MONTENEGRO V THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 30, 2016
ORDER AND REASONS:	DINER J.
DATED:	MAY 31, 2016

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