Federal Court  Cour fédérale

Date: 20170303

Docket: IMM-829-17

Citation: 2017 FC 263

Vancouver, British Columbia, March 03, 2017

PRESENT: THE CHIEF JUSTICE

BETWEEN:

LEN VAN HEEST

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

I. Introduction

[1] In this Motion, Mr. Van Heest seeks an urgent stay of the execution of a Deportation Order that was issued against him after he was found to be inadmissible to Canada on the ground of serious criminality, pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection*

Act, SC 2001, c 27 [IRPA]. That Deportation Order was issued on January 2, 2008 and currently is scheduled to be executed on the morning of Monday, March 6, 2017.

[2] Mr. Van Heest requests that the stay be maintained until this Court makes a determination with respect to his application for leave and for judicial review of a decision of Gail Begley, an Inland Enforcement Officer with Canada Border Services Agency, in respect of his request for a deferral of his removal from Canada to the Netherlands. In that request, Mr. Van Heest sought to defer his removal to the Netherlands until a decision is made on his application for permanent residence based on humanitarian and compassionate [H&C] grounds, pursuant to s. 25 of the IRPA.

[3] In her decision [the Decision], Officer Begley refused to defer Mr. Van Heest's removal from Canada, on the basis that the reasons given in support of his request were not sufficiently compelling to warrant a deferral of his removal.

[4] Mr. Van Heest takes the position that the Decision is unreasonable, because it ignored important evidence that he had provided in support of his request. In addition, he asserts that he will suffer irreparable harm if he is removed to the Netherlands, largely because he will not be capable of accessing health care, housing, income and a social network in that country. There is also some suggestion in the documentation provided in support of this Motion that Mr. Van Heest's mental health may deteriorate, and that he may harm himself, if he is removed to the Netherlands. Mr. Van Heest further maintains that the balance of convenience supports the granting of the stay that he has requested.

[5] The Ministers counter that the Decision was reasonable, that Mr. Van Heest has not demonstrated that he will suffer irreparable harm if he is removed to the Netherlands, and that the balance of convenience supports the execution of the Deportation Order, particularly in view of Mr. Van Heest's lengthy criminal and immigration history.

[6] For the reasons that follow, this Motion will be dismissed.

II. Background

[7] Mr. Van Heest is a citizen of the Netherlands. He came to Canada as an infant with his parents in 1958. However, he never obtained citizenship in this country.

[8] At the age of sixteen, he was diagnosed with bi-polar affective disorder. Around that time, he also began to experiment with, and become dependent on, street drugs. A few years later, he began to abuse alcohol.

[9] Between 1976 and 2013, he was convicted of approximately 45 criminal charges. In his most recent request for permanent residence on H&C grounds, he stated that those offences were committed when he was in a manic stage of his illness.

[10] Mr. Van Heest was declared inadmissible on the ground of serious criminality due to his 2001 conviction for assault with a weapon, contrary to paragraph 267(a) of the *Criminal Code*, RSC 1985, c C-46.

[11] After he appealed the Deportation Order to the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, the IAD granted a four-year stay of his removal to the Netherlands, on H&C grounds. That stay was automatically cancelled pursuant to subsection

68(4) of the IRPA, after Mr. Van Heest was convicted of several additional offences in December 2012.

[12] However, since the end of the jail sentence that he received in respect of the latter convictions, Mr. Van Heest has managed to obtain three stays of his removal from Canada, from this Court. Those stays permitted him to remain in Canada until determinations could be made on (i) a previous application for permanent residence in Canada on H&C grounds, (ii) an application for judicial review in respect of the rejection of that H&C application, and (iii) an application for judicial review in respect of the rejection of his request for a deferral of his removal from Canada. Those stays expired after each of Mr. Van Heest's applications for judicial review was rejected by this Court.

III. Legal test

[13] To obtain a stay of removal from this Court, Mr. Van Heest must demonstrate the following three things: (i) his underlying application for judicial review in respect of the Decision raises a serious issue to be tried; (ii) there is a non-speculative, real risk that he will suffer irreparable harm if he is removed to the Netherlands; and (iii) the balance of convenience favours the granting of the stay: (*Toth v Canada (Minister of Employment and Immigration)*, (1988) 86 NR 302 (FCA), *Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, at paras 14-17; *Akyol v Canada (Minister of Citizenship and Immigration)*, 2003 FC 931 at para 7).

[14] With respect of the first prong of the test, when an applicant is seeking to review a refusal of a removals officer to exercise his or her discretion to defer removal, the applicant must

demonstrate a likelihood of success (*Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, at para 11 [*Wang*]; *Baron v Canada (The Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, at paras 66-67 and 74 [*Baron*]). In the context of the present Motion, that means a likelihood of demonstrating that the Decision was unreasonable.

[15] The discretion of a removals officer to defer the removal of a person subject to an enforceable removal order is very limited and does not extend to conducting a "mini-H&C assessment" (*Baron*, above; *Wang*, above, at para. 48; *Simoes v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 936, at paras 11 and 12). Rather, the officer's discretion is restricted to deferring the timing of a removal, having regard to special or compelling circumstances, such as illness, other impediments to travel, or a pending decision on an application for permanent residence on H&C grounds that was brought on a timely basis (*Baron*, above, at paras 49-51; *Duran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 738, at para 21).

IV. Assessment

A. *Serious issue to be tried*

[16] It is not necessary for me to address this prong of the test because I have determined that Mr. Van Heest has not established a non-speculative, real risk that he will suffer irreparable harm if he is removed to the Netherlands. In addition, I have found that the balance of convenience lies with the Ministers being able to enforce the Deportation Order, which has now been outstanding for over nine years.

B. *Irreparable harm*

[17] Mr. Van Heest largely relies on the fact that previous decisions of this Court have found that he is likely to suffer irreparable harm due to the likelihood that he will encounter barriers in accessing health care, housing, income and a social network.

[18] However, those previous decisions of the Court were taken in 2014 and 2015. Since that time, Justice O'Reilly, who granted a stay to Mr. Van Heest in 2015, has had an opportunity to revisit Mr. Van Heest's situation. Specifically, just a few weeks ago, Justice O'Reilly dealt with a challenge by Mr. Van Heest of a refusal by a removals officer to defer his removal from Canada in December 2015 (*Van Heest v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 42 [*Van Heest*]).

[19] In his decision, Justice O'Reilly found that the evidence before the removals officer reasonably showed that Mr. Van Heest was no longer reliant on his Canadian support network, that he was living independently, is no longer taking medication, and has much less need of medical care. Moreover, the evidence demonstrated that he has some modest financial resources that will ensure that he will not be homeless upon his arrival in the Netherlands (*Van Heest*, above, at para 11).

[20] The evidence adduced on this Motion is consistent with that which was before Justice O'Reilly.

[21] Mr. Van Heest currently lives in Courtenay, British Columbia, where he states he relies on a support network that includes his mother, whom he sees approximately once per week, and Mr. John Leevers, a retired Adult Forensic Outreach Worker. It appears that, at least as recently

as 2014, Dean Meyerhoff, who is a Forensic Case Worker, was also an important part of Mr. Van Heest's local support network.

[22] It is common ground between the parties that Mr. Van Heest is no longer taking any medication or seeing any doctors. During the hearing of this Motion, his counsel also acknowledged that it can be inferred from the fact that he has not committed any offences since 2012, that his mental condition has stabilized. Although this also appears to have been true in 2014 and 2015, when this Court issued stays of his removal to the Netherlands, Mr. Van Heest's period of stability has now been longer. Mr. Van Heest's stable medical condition was confirmed by Mr. Meyerhoff in October 2014.

[23] The most recent medical evidence before the Court is an assessment dated April 22, 2014 by Dr. Mark Tapper, who was a Consulting Psychiatrist at the Nanaimo Regional Clinic prior to his recent retirement. In that assessment, he stated the following: "[Mr. Van Heest] is doing very well. His bi-polar disorder is under control. He is abstinent from alcohol. Despite the stresses in his life he trusts Dean [Meyerhoff] and John [Leevers] enough to get the support he needs from them to deal with these stresses without any major deterioration in his mental state or behaviour." Although Dr. Tapper proceeded to recognize that Mr. Van Heest would likely be removed to the Netherlands "sooner or later," he did not opine on how such removal would affect his mental condition.

[24] It is also very relevant that, whereas Mr. Van Heest refused to cooperate with his removal in 2015, he is now cooperating in that regard. Among other things, he signed a new travel document application and has stated that if he is required to go to the Netherlands, he will do so.

[25] In addition, I consider it to be very significant that Mr. Van Heest has declined assistance offered by Officer Begley. Specifically, when asked by her whether he would like her to contact his family in the Netherlands, as she previously did, to make arrangements for him to stay upon his arrival, Mr. Van Heest stated that he does not require assistance and that his brother in North Vancouver, Daniel Van Heest, can help to make arrangements for him. Among other things, this suggests that Mr. Van Heest is confident in his ability to make arrangements for himself.

[26] In his most recent request for permanent residence on H&C grounds, dated June 10, 2016, Mr. Van Heest stated that he does not dispute that the Netherlands is comparable to Canada in the social services that it provides. However, he expressed his belief that he will have difficulty navigating the many bureaucratic processes there, including in respect of housing, financial support and, most particularly, medical services.

[27] With respect to medical services, the fact that he is no longer taking medication and has now had a stable condition for several years diminishes the significance of any barriers that he may face to accessing such services or medication in the Netherlands.

[28] Mr. Van Heest's ability to make arrangements to address his needs in the Netherlands will also be facilitated by the fact that, according to evidence in his Application Record, "[e]very Dutchman can speak – at least some- English." This is apparently particularly true of doctors and pharmacologists. That evidence also states that Dutch nationals are entitled to social benefits, including housing, although it will take a period of time to access them if arrangements are not made in advance.

[29] Mr. Van Heest's counsel further maintains that although his medical condition has stabilized, there is a real risk that it could take a turn for the worse if he is removed from his current environment and support network here in Canada. However, Mr. Van Heest himself did not provide a recent affidavit in this regard. In an affidavit dated October 27, 2014, he simply stated that the thought of living in the Netherlands with his uncle and his daughters "does nothing to calm my anxiety about leaving Canada."

[30] According to his mother, if he is removed from Canada, "the worst part for both of us will be the separation from each other", because they depend on each other for companionship.

[31] According to Mr. Leevers, Mr. Van Heest's mental health has been stable for three years, and that period of stability is due to the support that he currently has in Courtenay and his contact with his mother. Although Mr. Leevers added that Mr. Van Heest has stated more than once that he would kill himself if he is returned to the Netherlands, he did not indicate when those statements were made. I note also that Mr. Leevers is not a medical doctor.

[32] According to an e-mail written by Mr. Meyerhoff in October 2014, Mr. Van Heest's mental and emotional stability are "fragile and could be effected [*sic*] by his being sent to a place that is completely foreign to him" (emphasis added). In my view, this is not non-speculative evidence demonstrating a real risk that his mental and emotional stability will deteriorate.

[33] In addition to the foregoing, Officer Begley has offered to assist Mr. Van Heest with respect to various matters. This includes the contacts with his family that I have discussed above, as well as a package of information that will assist Mr. Van Heest to obtain housing and social

services, and other resources that can assist him upon his arrival at Schiphol International Airport.

[34] In summary, based on all of the foregoing, I find that Mr. Van Heest has not demonstrated that he will face a non-speculative, real risk of suffering irreparable harm if he is removed to the Netherlands on March 6, 2017.

C. *Balance of Convenience*

[35] The focus of this prong of the test for a stay of removal is upon "which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, at para 62 [*RJR*]). In addition, other factors may be taken into consideration in determining where the balance lies (*RJR*, above, at para 63).

[36] Where a public authority is enforcing validly enacted legislation, the burden on that authority in the balance of convenience analysis is less than the burden on a private litigant. In brief, once it has been demonstrated that the public authority is proposing to take action pursuant to validly enacted legislation, "the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action" (*RJR*, above, at para 71).

[37] This is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control (*Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, at para 22).

[38] In the present circumstances, Mr. Van Heest is subject to a validly issued Deportation Order.

[39] Pursuant to subsection 48(2) of the IRPA, such orders must be enforced "as soon as possible."

[40] Although the removals officers have some limited discretion with respect to the timing of the enforcement of such orders, Mr. Van Heest has demonstrated that his real interest lies in remaining in Canada permanently. Collectively, the stays that he has obtained have permitted him to avoid the operation of the Deportation Order for more than nine years now. During that period, Mr. Van Heest has sought and been denied permanent residence in Canada on H&C grounds. He has also continued to commit criminal offences, although I recognize that his last offence was in respect of conduct that occurred in 2012. Nevertheless, this factor weighs against him in the balance of convenience assessment.

[41] In September 2014, he requested a one-month deferral of removal so that he could spend more time with his mother and get his affairs in order. He has now had well over three years to do so.

[42] According to Officer Begley, she was informed by the department of Immigration, Refugee, Citizenship Canada that the current processing time for an H&C application is approximately 34 months, depending on various factors such as verification of information provided, responses to any questions or concerns, and whether an application is complete.

[43] In December 2015, Mr. Van Heest refused to cooperate with his removal, notwithstanding the validity of his Deportation Order. The factor must also count against him in the balance of convenience assessment.

[44] In addition, it was discovered in 2015 that Mr. Van Heest had breached a condition of his stay pertaining to the location of his residence. Once again, this factor counts against him in the balance of convenience assessment.

[45] On the positive side for Mr. Van Heest, I recognize that he may suffer a level of inconvenience and difficulty in settling into life in the Netherlands that is greater than that which is typically associated with a person's removal from Canada. However, he appears to have done very little to minimize such inconvenience and difficulty, by taking proactive steps to make advance arrangements for his needs in the Netherlands.

[46] Having regard to all of the foregoing, I find that the balance of convenience lies with the enforcement of the Deportation Order on Monday, March 6, 2017. Stated differently, Mr. Van Heest has not demonstrated that the balance of convenience lies in his favour and in support of the stay of his removal that he has requested.

V. Conclusions

[47] For the above reasons, this motion is dismissed.

ORDER

THIS COURT ORDERS that this motion is dismissed.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-829-17
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