

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140128

Docket: A-315-13

Citation: 2014 FCA 19

Present: STRATAS J.A.

BETWEEN:

NOE GAMA SANCHEZ

Appellant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 28, 2014.

REASONS FOR ORDER BY:

STRATAS J.A.

Federal Court of Appeal



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REASONS FOR ORDER

STRATAS J.A.

[1] The appellant seeks an order staying this appeal until the Supreme Court has rendered judgment in *Hernandez Febles v. Canada (Minister of Citizenship and Immigration)* (SCC No. 35215).

[2] The Supreme Court will hear oral argument in *Febles* on March 25, 2014. *Febles* is on appeal from this Court: 2012 FCA 324.

[3] The appellant submits, correctly, that in the decision under appeal (2013 FC 913), the Federal Court interpreted and applied this Court's decision in *Febles*. On appeal, this Court will follow *Febles* unless the appellant can show that *Febles* is "manifestly wrong" in accordance with *Miller v. Canada (Attorney General)*, 2002 FCA 370. That is a high standard to meet.

[4] In light of that, the appellant submits that this Court should stay this appeal until the Supreme Court releases its decision in *Febles*. The appellant warns that if this Court dismisses this appeal relying upon its decision in *Febles*, soon afterward the Supreme Court might reverse *Febles*. In those circumstances, the appellant would be prejudiced.

[5] The respondent points to the potentially lengthy delay that might result if the appeal is stayed. He adds that the public interest lies strongly in favour of the prompt determination of immigration proceedings, citing sections 72-74 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[6] With laudable candour, the appellant concedes that if this Court stays the appeal, there will be delay, indeed perhaps significant delay. The appellant concedes that the Supreme Court might take several months after March 2014 to consider its decision. But nevertheless he urges that this Court stay the appeal because of the "strong nexus" between his appeal in this Court and *Febles*.

[7] The appellant has correctly identified the controlling authority in this motion: this Court's decision in *Mylan Pharmaceuticals ULC v. AstraZeneca Canada Inc.*, 2011 FCA 312 at paragraphs 5-14.

[8] In *Mylan*, the Court observed that the test to be applied in this motion is whether it is in the interests of justice to stay the appeal. The rather demanding three-fold test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 does not apply, as this Court is not being asked to stay another body's order or to suspend the operation of a legislative provision.

[9] The facts in *Mylan, supra* are similar to those here – a pending appeal in the Supreme Court that might affect a pending appeal in this Court.

[10] The Court in *Mylan* refused the stay. It noted that the Supreme Court often takes more than six months to render a decision and there are instances where it has taken much longer. Weighing the evidence before it, and noting the possibility of a very long delay, the stay was refused in *Mylan*.

[11] As in *Mylan*, I observe that granting the stay in this case might result in a very long delay, a delay that would prejudice the public interest in the prompt determination of immigration proceedings. As the respondent notes, this is underscored by sections 72-74 of the Act.

[12] Also as in *Mylan*, I note that the Supreme Court's power to remand matters back to this Court substantially mitigates or eliminates the potential prejudice to the appellant: see subsection 43(1.1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and see discussion of this power in *Mylan* at paragraph 24. On a motion under subsection 43(1.1), the Supreme Court has the power to "order any further proceedings that would be just in the circumstances." One such proceeding is a remand

of the matter back to this Court to consider the application of the Supreme Court's decision in *Febles* to the appellant's case.

[13] If this Court has dismissed the appeal but the Supreme Court has not yet rendered its decision in *Febles*, the appellant can take the precautionary step of filing a motion with the Supreme Court seeking an order under subsection 43(1.1) of the *Supreme Court Act*. This would keep the appellant in the litigation stream, allowing him potentially to take advantage of any change in the law wrought by the Supreme Court in *Febles*: on this, see *Yeager v. Day*, 2013 FCA 258.

[14] Accordingly, in my view, the appellant has reasonable means available to protect himself if this Court dismisses his appeal and the Supreme Court later reverses this Court's decision in *Febles*.

[15] The appellant has not identified any other prejudice he will suffer if this appeal goes forward.

[16] Accordingly, based on the record before the Court and for the foregoing reasons, I find that the interests of justice are against staying this appeal. Despite the appellant's able submissions, the motion will be dismissed.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-315-13

STYLE OF CAUSE: NOE GAMA SANCHEZ v. THE
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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: STRATAS J.A.

DATED: JANUARY 28, 2014

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