

Federal Court



Cour fédérale

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SUBJECT / OBJET :

Court File No.: IMM-8163-11

Between: ARKADIY KHODOV v. MPSEP

Enclosed is the **Order of The Honourable Mr. Justice O'Keefe dated November 17, 2011.**

COMMENTS / REMARQUES :

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Federal Court



Cour fédérale

Date: 20111117

Docket: IMM-8163-11

Toronto, Ontario, November 17, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ARKADIY KHODOV

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

ORDER

UPON MOTION by the applicant for an order staying his removal from Canada to Russia which is scheduled to take place on November 20, 2011;

AND UPON noting that the applicant is a citizen of Russia who arrived in Canada on December 9, 2007. The applicant is married to a Canadian citizen;

AND UPON noting that the applicant made a refugee claim which was denied in January 2011. The applicant's application for leave and for judicial review of this decision was denied in

April 2011 for failure to file an application record. In June 2011 the applicant filed a PRRA application which was denied in October 2011. As well, in October 2011, the applicant's Spousal Sponsorship Application was received and is presently under review;

AND UPON noting that the In Canada Spousal Sponsorship Application will be refused if the applicant is removed from Canada and an "Out of Canada Spousal Sponsorship" will have to be filed. The evidence indicates that should the applicant be removed the applicant's spouse will not be in a financial position to sponsor him as she is currently on sick leave as a result of injuries received in a car accident;

AND UPON noting that the applicant's request for a deferral of his removal has been denied;

AND UPON noting the documentary evidence and other material filed for this motion;

AND UPON hearing counsel for the parties;

AND UPON noting that in order to obtain a stay, the applicant must meet all three branches of the tri-partite test set out in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) at page 305:

This Court, as well as other appellate courts have adopted the test for an interim injunction enunciated by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396...As stated by Kerans J.A. in the *Black* case *supra*:

The tri-partite test of *Cyanamid* required, for the granting of such an order, that the applicant demonstrate, firstly, that he has raised a serious issue to be tried; secondly, that he would suffer irreparable harm if no order was granted; and thirdly that the balance of convenience considering the total situation of both parties favours the order.

AND UPON being satisfied that the applicant has raised serious issues to be tried, namely, did the officer misunderstand that the applicant was seeking a stay of removal so as to allow his outstanding In Canada Spousal Sponsorship to be processed and not denied because he was no longer in Canada as required? As well, did the officer appreciate that the applicant's spouse would not have the financial ability, due to her decreased earning capacity, to make a spousal application for her husband from outside Canada, if he was removed, and that such an application would add significant time to the sponsorship process?

AND UPON being satisfied that irreparable harm is made out as the applicant and his wife would be separated for a much longer period of time (see *Guo v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1256);

AND UPON being satisfied that the balance of convenience favours the applicant. He is not a threat to society and can be removed from Canada if his application is not successful;

AND UPON being satisfied that the facts of this case amount to "special circumstances" as used by the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraph 51, *Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paragraph 43. The same reasoning even

applied in *Shase v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1257.

THIS COURT ORDERS that the removal of the applicant from Canada to Russia is deferred until leave is denied in his application for leave and for judicial review and if leave is granted then his removal is deferred until his judicial review application is dealt with by the Court.

“John A. O’Keefe”

Judge

HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the NOV 17 2011 day of NOV 17 2011 A.D. 20 NOV 17 2011 stated this day of NOV 17 2011 20

SHIRLEY ACIRO
REGISTRY OFFICER
AGENT DU GREFFE