

Federal Court



Cour fédérale

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**DATE : May 29, 2015**

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**SUBJECT / OBJET :**

Court File No. / N° du dossier de la Cour: **IMM-2380-15**

Between / Entre: **OLEKSANDR LOGACHOV**

Enclosed is a true copy of the Order.

Vous trouverez ci-joint une copie conforme de l'ordonnance.

**COMMENTS / REMARQUES :**

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Federal Court



Cour fédérale

**Date: 20150529****Docket: IMM-2380-15****Ottawa, Ontario, May 29, 2015****PRESENT: The Honourable Mr. Justice Fothergill****BETWEEN:****OLEKSANDR LOGACHOV****Applicant****and****THE MINISTER OF PUBLIC SAFETY  
AND EMERGENCY PREPAREDNESS****Respondent****ORDER**

**UPON** the motion of Oleksandr Logachov [the Applicant] dated May 22, 2015 for an order staying his removal to Ukraine pending determination by this Court of his application for leave and for judicial review of a refusal by an officer [the Officer] of the Canadian Border Services Agency [CBSA] to defer his removal from Canada;

**AND UPON** reading the materials filed and hearing counsel for both parties on May 27, 2015, in Toronto, Ontario;

**AND CONSIDERING** the following:

The Applicant is a citizen of Ukraine. He formerly resided in the city of Kharkiv. He arrived in Canada on March 17, 2014 and made a claim for refugee protection at the port of entry.

The Applicant's refugee claim was refused by the Refugee Protection Division of the Immigration and Refugee Board [the Board] on November 7, 2014. On December 3, 2014, he applied for leave and for judicial review of the Board's decision. The application was denied by this Court on March 4, 2015. The Applicant was served with a "Direction to Report" by the CBSA on April 24, 2015, and his removal is currently scheduled to take place on May 31, 2015.

On May 7, 2015, the Applicant submitted a request to the Enforcement and Intelligence Operations Division of the CBSA to defer his removal until August, 2015. The Applicant is a mechanic with a particular skill in the service and repair of large diesel engines. He sought deferral on the ground of irreparable financial harm to himself and his customers due to outstanding contractual obligations. There is also an underlying medical condition affecting his back.

In addition, the Applicant expressed fear that he will be conscripted into the Ukrainian army upon his return, having received a conscription notice at his Ukrainian address in March, 2015. The Applicant formerly served in the Ukrainian army and

achieved the rank of lieutenant. He says that those with previous military experience are in high demand due to the ongoing conflict between Ukraine and Russia.

The deferral request was rejected by the Officer on May 21, 2015. The Officer also determined that the Applicant is not eligible for a Pre-Removal Risk Assessment [PRRA] in accordance with s 112(2)(b.1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 because his claim for refugee protection was dismissed within the past twelve months.

A stay of removal is extraordinary equitable relief. The tripartite test in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA) [*Toth*], requires that there be a serious issue to be tried, that the Applicant suffer irreparable harm by reason of his deportation, and that the balance of convenience favour the Applicant. The test is conjunctive, and so each branch of the *Toth* test must be met.

The test for establishing a serious issue to be tried is generally low. The issue must be neither frivolous nor vexatious. However, where the CBSA has refused to defer removal, the test is more onerous. The Court must closely examine the merits of the underlying application, and conclude that the Applicant has put forward “quite a strong case” (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 67 [*Baron*]; *Wang v Canada (Citizenship and Immigration)*, 2001 FCT 148). This is because the issuance of a stay is tantamount to granting the relief sought in the underlying application for leave and for judicial review, namely a deferral of removal.

The Applicant identifies the following serious issues regarding the Officer's refusal to defer removal: (a) the Officer found that the Applicant has no right to work in Canada, notwithstanding that a deferral of the removal order would confer this right; (b) the Officer found that many countries in the world impose mandatory military service, but this does not mean that those who are unwilling to serve will be punished or persecuted; however, in this case the Applicant has personally received a conscription notice and the documentary evidence submitted in support of his deferral request confirms that those who refuse to serve are treated harshly; and (c) the Officer's finding that parts of Ukraine are not stable, but "the majority of the country is not under rebel control" is incomprehensible, given that the Applicant expressed fear of Ukrainian authorities and not "rebels."

Of the three issues advanced by the Applicant, I regard those pertaining to the risk that we will face should he be returned to Ukraine and conscripted into the army, or resist conscription as a conscientious objector, to be the most serious. In *Canada (Minister of Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286, the Federal Court of Appeal said the following regarding a deferral officer's limited jurisdiction to consider the risk faced by a failed refugee claimant who is to be removed from Canada:

In *Baron* (at para. 51), Justice Nadon indicated the kinds of new risk that an enforcement officer may consider when deciding whether to defer a removal. Paraphrasing Justice Pelletier, then of the Federal Court, in *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 (CanLII), 2001 FCT 148, [2001] 3 F.C. 682, also a case dealing with a request to an enforcement officer for a deferral pending the determination of an H&C application, Justice Nadon said:

In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.

The risk identified by the Applicant in support of his request for deferral was not evaluated by the Board because it arose as a result of circumstances that emerged following the Board's decision. It is therefore new. I note the Officer's conclusion that the Applicant is not currently eligible for a PRRA, and I accept that the Officer's role was not to conduct an "adjunct PRRA". Nevertheless, I am satisfied that the Applicant has presented "quite a strong case" that the Officer's finding that there was "no evidence" to show that the Applicant will be personally subject to inhumane treatment was unreasonable.

There is no dispute that the Applicant is currently in receipt of a conscription notice. Despite having previously served in the Ukrainian army, he describes himself as a pacifist. His skills as an auto mechanic with a specialty in the service and repair of large diesel engines, coupled with his previous military experience, make it very likely that the Ukrainian authorities will enforce the conscription notice against him. Given the current conflict between Ukraine and Russian, I am satisfied that the Applicant has demonstrated

a real probability that unavoidable, irreparable harm will result if a stay is not granted (*Janssen Inc. v Abbvie Corp.*, 2014 FCA 112 at para 24).

A stay of removal will be for a limited period of time, only until this Court decides the Applicant's application for leave and for judicial review. It is possible that during that period the situation in Ukraine will improve sufficiently to permit the Applicant to be safely returned to his country of origin. The Applicant has not shown a pattern of non-compliance with Canadian law, nor is he a danger to the Canadian public. I am therefore satisfied that the balance of convenience in this case favours the Applicant.

**THIS COURT ORDERS** that the motion for a stay of removal is allowed pending this Court's determination of the Applicant's application for leave and for judicial review.

"Simon Fothergill"

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Judge