

Date: 20070426

Docket: IMM-1358-07

Citation: 2007 FC 445

Montréal, Quebec, April 26, 2007

Present: The Honourable Mr. Justice E. Lagacé

BETWEEN:

TOVAR LOPEZ JAVIER

Applicant

and

**MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an interlocutory motion for a stay of the removal order issued against the applicant.

[2] This motion is accompanied by a motion for leave and judicial review of the decision dated March 27, 2007, by the enforcement officer, Goulnara Iskakova (the officer), of the Canada Border

Services Agency (CBSA), refusing to administratively stay the applicant's removal order pending a decision on his application for permanent residence submitted in Canada under subsection 25(1) of the *Immigration and Refugee Protection Act (IRPA)*.

THE FACTS

[3] Although the applicant maintains in his stay motion that he asked the enforcement officer to defer his removal during his interviews with her on April 3, 2007, the interview notes seem to indicate that no such request was made at that time. When the officer questioned him about his dependants, he stated that his spouse had a son, but it appears that the applicant has not adopted the child.

[4] When the officer informed him of her decision, the applicant asked if he could remain in Canada pending a decision on his application for permanent residence in Canada. He was then told that a stay of the removal order could not be granted because of his criminality.

[5] The applicant then stated that he was ready to comply with the removal and to go to the airport to purchase his airline ticket for Mexico, so that he could return to Canada if his application for permanent residence were granted without having to incur a debt for his removal from Canada.

[6] The applicant takes issue with the officer for refusing to stay his removal, failing to take into account his wife's sponsorship application and not considering the best interests of his wife's child. Last, he maintains that the removal order is seriously flawed, that he will suffer irreparable harm and that the balance of convenience favours issuing a stay order.

[7] For their part, the respondents maintain that the stay motion should be dismissed because it does not meet the criteria required for the Court to grant it.

THE LAW

[8] To assess the merits of the stay motion, the Court must determine whether the applicant meets the criteria laid down by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 6 Imm. L.R. (2d) 123, 86 N.R.302 (F.C.A.). Based on this case, the applicant must demonstrate that there is a serious issue to be tried on the application for judicial review, that he would suffer irreparable harm if he were deported to Mexico and that the balance of convenience lies in his favour.

[9] These three criteria must be met in order for the Court to grant a stay. If one of them is not met, a stay cannot be granted. Let us see if the applicant has satisfied these criteria.

NO SERIOUS ISSUE

[10] It is true that the applicant asked the officer if he could stay in Canada while awaiting a decision on his application for permanent residence submitted in Canada under subsection 25(2) of the IRPA. However, an administrative stay could not be granted because of his criminality, in particular.

[11] Unfortunately for the applicant, public policy does not automatically allow the spouse of a citizen or permanent resident in Canada to remain in Canada pending review of his or her application for permanent residence. This policy sets out exceptions, and the applicant falls under one of them because of his criminality, in particular, and because he submitted his application for permanent residence after the pre-removal interview that he attended.

[12] Accordingly, the applicant has not succeeded in convincing the Court that there is a serious issue in his criticisms of the enforcement officer.

[13] Moreover, if the applicant relies on the best interests of his wife's minor child in support of his stay motion today, it appears that he has not adopted this child, nor did he rely on these interests when requesting a stay from the officer.

[14] In short, the applicant has not raised a serious issue in either his application for judicial review or his stay motion.

ABSENCE OF IRREPARABLE HARM

[15] The applicant relies on the same risks as those he described in the PRRA application, which was rejected by the enforcement officer.

[16] It appears that he did not submit any convincing evidence to demonstrate irreparable harm. He had a PRRA but was unable to prove that he would be targeted if he were to return to Mexico.

[17] The applicant relies on the separation from his spouse and her son. However, it must be noted that he did not adopt this child although he has been close to him for as long as they have known each other. The case law has recognized that the destabilization or separation of a family does not constitute irreparable harm but is a natural result of the removal (*Thirunavukkarasu v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1075; *Celis v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1231; *Henriques v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 51, *Gray v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 42; *Morris v. M.C.I.*, IMM-301-97, January 24, 1997; *Khan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 1031; *Boquoi v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 983; *John v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 605).

[18] Moreover, the applicant did not raise the issue of the best interests of his wife's child at the interview with the officer; she cannot be criticized for not considering it.

[19] For these reasons, the applicant has not established that he would suffer irreparable harm if he were removed.

BALANCE OF CONVENIENCE

[20] Subsection 48(2) of the IRPA provides that a removal order must be enforced as soon as is reasonably practicable. This is the situation here; thus, the balance of convenience favours the respondents over the applicant.

CONCLUSION

[21] Unfortunately for the applicant, he has not satisfied any of the established criteria required to obtain a stay.

ORDER

THE COURT ORDERS that:

The motion to stay a removal order is dismissed.

“Maurice E. Lagacé”

Deputy Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1358-07

STYLE OF CAUSE: TOVAR LOPEZ JAVIER v. MINISTER OF SAFETY
AND EMERGENCY PREPAREDNESS ET AL.

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: April 23, 2007

**REASONS FOR ORDER
AND ORDER BY:** Mr. Justice Maurice E. Lagacé, Deputy Judge

DATED: April 26, 2007

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