Federal Court  Cour fédérale

**Date: 20241219**

**Docket: IMM-7721-22**

**Citation: 2024 FC 2066**

**Toronto, Ontario, December 19, 2024**

**PRESENT: The Honourable Mr. Justice A. Grant**

**BETWEEN:**

**JAGODA DIMIKJ**
**SANJA DIMIKJ**
**SASA DIMIC**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] The Applicants were scheduled to be removed from Canada on August 18, 2022. On August 10, 2022, they submitted an application for permanent residence from within Canada, based on humanitarian and compassionate [H&C] grounds. On the same day, they submitted a request to defer their removal from Canada. An Inland Enforcement Officer with the Canada

Border Services Agency [CBSA] refused that request. This is the judicial review of that deferral decision.

## II. BACKGROUND

### A. *Facts*

[2] The Applicants are citizens of North Macedonia and naturalized citizens of Serbia. The Principal Applicant is Jagoda Dimikj. The Associate Applicants are her adult daughter, Sanja Dimikj, and her adult son, Sasa Dimic. Sasa came to Canada in 2017. Jagoda and Sanja followed the next year, in 2018. In 2019, the family submitted claims for refugee protection, which were not successful.

[3] As a result, a removal interview was scheduled, and on July 25, 2022, the Applicants were issued Directions to Report for their removal from Canada, which was scheduled to take place on August 18, 2022. As noted above, the Applicants then submitted their H&C application on August 10, 2022, together with the request to defer their removal.

[4] The request to defer was based primarily on two considerations: a) the ongoing psychological needs of Sanja; and b) the (recently) pending H&C application. While the submissions in support of the deferral request emphasize different factors in different places, the clearest statement of the actual request is as follows:

> Given the above facts, we hereby request CBSA to defer the Family's removal until their H&C application is determined. In the absence of this, we request a deferral of removal until Ms. Sanja completes her proposed psychological treatment.

[5] Sanja has experienced mental health challenges for many years. The deferral submissions provided by counsel contained the following description:

> Her mental health condition started to deteriorate in 2010 when she started hearing voices that were faint at the beginning. The constant fear of death and anxiety deteriorated her condition and led to helplessness. She is afraid of getting killed by Serbian paramilitaries and thugs. Whether her fear is real or not, the fact that she will have to go back to Serbia and North Macedonia is just worsening her health condition. She will not have access to some of her medications in Serbia or North Macedonia because they cannot afford it and some of the medications are unavailable there.

[6] Sanja has been diagnosed with schizoaffective disorder, bipolar type. She is under the care of a psychiatrist – Dr. Mohammed El-Saidi – and her treatment plan involves anti-psychotic medications and supportive therapy. Sanja regularly takes various medications, including Loxapine, Bromazepam, Olanzapine, and Abilify Maintena, which I mention here only because they are relevant to the Officer's deferral decision.

[7] The scheduling of the Applicants' removal interview triggered a significant psychological episode for Sanja that resulted in her hospitalization. As a result, her doctor altered her treatment plan and prescribed her a new medication, Haloperidol, in addition to the other medications that she was already taking.

[8] As will be discussed in more detail below, the Applicants' request to defer their removal was refused on August 12, 2022. The Applicants then brought a motion for a stay of removal, which was heard and granted on August 17, 2022.

[9] The Applicants' H&C application was refused in October 2023. They sought leave to have the decision judicially reviewed. On consent of the Minister, the H&C was sent back for redetermination. It was reconsidered and refused again in April 2024. The Applicants applied for leave and judicial review of the redetermination decision, which has been assigned Court file number IMM-7116-24. This Court's disposition on leave is pending, though on the day before the hearing into this matter, my colleague Justice Furlanetto issued a production order in respect of IMM-7116-24, indicating the likelihood that leave for judicial review will be granted.

B. *Decision under Review*

[10] As noted above, an Inland Enforcement Officer refused the Applicants' request to defer their removal by letter dated August 12, 2022. The Officer noted that the Applicants' request was based on their pending H&C application, Sanja's psychological needs, and on the risk of unemployment in North Macedonia and Serbia. After considering each of these grounds, the Officer concluded that deferring the execution of the removal order was not appropriate in the circumstances.

[11] The Officer noted that the existence of a pending H&C application does not automatically give rise to a statutory stay of removal or pose an impediment to removal. The Officer further noted that the Applicants' pending H&C would continue to be processed even after their scheduled removal from Canada, and that the decision on the H&C was neither imminent nor overdue.

[12] The Officer accepted that there would be some economic hardship as a result of the Applicants' removal, but found that, "the possibility or even likelihood of becoming unemployed upon removal to such a country does not constitute irreparable harm in the context of the enforcement of a validly issued removal order."

[13] Finally, the Officer determined that Sanja would be able to secure sufficient medical treatment following her removal from Canada. In coming to that conclusion, the Officer noted that Sanja's condition began in Serbia in 2010, and that she was treated by a physician in Belgrade who prescribed Leponex-Clozapine. The Officer found "this demonstrates that sufficient care and pharmacological treatment is available in Belgrade, Serbia."

[14] The Officer also found that there was insufficient evidence to establish that psychiatric care is unavailable in Macedonia – and noted that the Applicants are naturalized citizens of Serbia, who would be able to reside there or travel there from Macedonia to seek treatment.

[15] Additionally, the Officer considered a letter from a pharmacist in Macedonia stating that two of Sanja's medications are unavailable in Macedonia, and that there are no suitable substitutions. However, the Officer found insufficient evidence that the medications in question are also unavailable in Serbia. Further, the Officer found that the letter did not address if the unavailability of the medication "is something that is temporary, if the medication was once available in Macedonia but is no longer available due to unforeseen supply circumstances, if there is an ability to secure the medication in the future, etc."

[16] The Officer also noted that no explanation was given for the reason as to why there are no available substitutes for Sanja's medications, and there was no explanation to outline "if there is a medication which performs similarly (as opposed to identically) as hers or if there is a generic offering of her prescription medication or if one may be available soon etc." Therefore, the Officer concluded, "the note lacks a fulsome explanation of the inability to offer the two listed medications and lacks indication that there is inadequate pharmacological treatment available for schizophrenia in Macedonia."

[17] Finally, the Officer suggested that the family may be able to bring with them a sufficient stock of the medications not available in Macedonia, while she gets acclimated and secures psychiatric care in Macedonia.

## III. ISSUES

[18] The Applicants submit that the sole issue arising on this application is whether the Enforcement Officer erred in refusing the Applicants' request to defer their removal.

[19] The Respondent submits that, before any consideration of the substance of the Officer's decision, this matter ought to be dismissed because it is moot. In the alternative, the Respondent argues that the deferral decision was reasonable.

[20] As a result of the above, this matter raises the following issues:

a) Is this matter moot?

b) If the matter is moot, should the Court exercise its discretion to hear it regardless?

c) Was the Officer's decision reasonable?

[21] Of course, the Court will only consider the third issue if the matter is either not moot, or if the Court exercises its discretion to hear the matter, notwithstanding its mootness.

## IV. LEGAL FRAMEWORK

[22] Section 48 of the IRPA governs removal orders. Subsection 48(1) states that a removal order is enforceable if it has come into force and is not stayed. Subsection 48(2) stipulates that if a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible. I emphasize the latter part of this phrase, because it was introduced as an amendment to s.48(2) in 2012. Prior to this amendment, the provision required removal orders to be enforced as soon as was "reasonably practicable." This prior language is not relevant to this application, except that I note that both the Applicants (in their deferral submissions) and the Officer (in the decision) refer to this previous language.

[23] The CBSA has an obligation to enforce removal orders as soon as possible. However, enforcement officers do retain some discretion to defer a removal, while continuing to enforce a removal order as soon as possible.

[24] The deferral of removal is therefore a temporary measure intended to alleviate exceptional circumstances, and is not an avenue for more permanent relief. This Court has found on several occasions that the existence of a pending H&C application is not, on its own, sufficient to defer a removal order, unless it is based on a threat to personal safety*: Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 49, 51

[*Baron*]; *Sorubarani v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 382 at para 24; *Neves v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 575 at paras 18-19. In *Baron*, the Federal Court of Appeal stated that the circumstances that may warrant a deferral are "where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment": *Baron* at para 51.

## V. STANDARD OF REVIEW

[25] The parties do not dispute that the appropriate standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16, 23, 25 [*Vavilov*].

[26] In conducting a reasonableness review, a court "must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). It is a deferential standard, but remains a robust form of review and is not a "rubber-stamping" process or a means of sheltering administrative decision-makers from accountability (*Vavilov* at para 13).

## VI. ANALYSIS

### A. *Is this matter moot?*

[27] The test for determining mootness was established in *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 [*Borowski*]. In *Borowski*, the Supreme Court held that courts may decline to hear a matter when, "the decision of the court will not have the effect of resolving some controversy which affects or may affects the rights of the parties."

[28] In some respects, this matter is similar to the situation considered by the Federal Court of Appeal in *Baron*. As in this case, the decision at issue in *Baron* was a request to defer removal pending the outcome of a recently submitted H&C application. On judicial review of the refusal to defer, the Federal Court found that the matter was moot because the removal date had passed.

[29] The Court of Appeal disagreed, noting that the determination of mootness depends on a proper characterization of the controversy that exists between the parties: *Baron* at para 29. Put somewhat differently, the question of mootness in this context will not turn on the mere passing of the removal date, but on "the passing of events in respect to which the applicant was seeking a deferral of his removal" (*Baron* at para 37).

[30] In *Baron*, as in this case, the applicant's H&C application was the "event" underpinning the deferral request. Because in *Baron*, no decision had been made on the H&C application, it followed that the event had not passed and, consequently, that the matter was not moot. Justice Nadon found in this regard (at para 38):

> Thus, in my view, since the event which the appellants invoke in seeking a deferral has not occurred, I cannot see how it can be said that there is no existing controversy between the parties and that no practical effect can result from a decision on the judicial review. While the specific timing of the removal arrangements which had been made prior to the issuance of the stay by O'Keefe J. is no longer valid, this does not, in my respectful view, render the issues raised in the judicial review application moot. The concrete or real controversy between the parties, i.e. the execution of the removal order prior to the determination of the appellants' H&C application, remains alive.

[31] This brings us to the key difference between this case and *Baron*, which is that the Applicants in this matter *have* received a final decision on their H&C application. I acknowledge

that the Applicants disagree with this decision, and have sought judicial review of it. However, the fact remains that they have now received the decision for which they sought the deferral. It is notable that the Applicants did not request a deferral pending their H&C decision *and* any final judicial remedy that may be available to them following that H&C determination.

[32] To be clear, it is no criticism of the Applicants that they did not include any potential judicial remedies in their deferral request. First, such a request would amount to a lengthy potential deferral that may be outside the scope of a deferral officer's discretion. Second, and more importantly, any subsequent judicial proceedings (for example, the Applicant's current judicial review application in respect of their H&C application) could anchor a separate request for deferral and stay proceedings.

[33] In any event, I find that the event the Applicants invoked in seeking a deferral has now occurred. To reiterate language from *Borowski*, any decision that this Court could provide would have no effect on the controversy between the parties, which was whether the Applicant's removal should have been deferred pending a decision on their H&C application.

[34] As a result, I find that this matter is moot.

B. *Should the matter be heard despite the fact that it is moot?*

[35] A court may exercise its discretion to address a moot issue if the circumstances warrant. In *Borowski*, the Supreme Court identified a non-exhaustive set of factors to help inform the decision as to whether to hear a matter, notwithstanding its mootness. These factors are:

- The continued existence of an adversarial context,
- The concern for judicial economy,
- The court's law-making role.

[36] In considering these factors, I have concluded that this matter should not be heard on its merits. In arriving at this conclusion, I accept that there remains a larger adversarial context between the parties. In separate proceedings, the Applicants are challenging the denial of their H&C application; they remain without status in Canada, and their presence in the country is precarious. The Minister continues to have a duty to enforce removal orders.

[37] This being said, the other factors weigh more strongly in favour of not hearing this matter. This is primarily because the Applicants now have other options to obtain the relief they seek. If CBSA resumes removal proceedings, the Applicants may seek a further deferral of their removal. They may seek a stay of removal from this Court, either on the basis of a renewed deferral request, or on the basis of their application for judicial review in IMM-7116-24. Given the production order issued in that matter, and the length of time that has passed since the Applicants submitted their H&C application, I would expect their prospects of obtaining a deferral are significantly stronger now than they were in 2022.

[38] The Applicants argue that this matter should be heard, because it may be instructive for a new enforcement officer to know if the original deferral decision was reasonable. While this may be true in a theoretical sense, I am not convinced that any pronouncements on the merits of this application would be practically helpful at this point. Recall that the initial deferral decision was made in August 2022 - that is, over 28 months ago. As noted above, since that time, a decision

has been issued on their H&C application. I trust there will also be updates on Sanja's mental health condition and the availability of care in the Applicants' countries of citizenship. All of this being the case, I do not believe that it is either consistent with concerns over judicial economy, or in the interests of justice to pronounce on a decision that is no longer relevant to current circumstances.

[39] As a result of the above, I decline to consider this matter on its merits.

## VII. FINAL OBSERVATIONS

[40] As Justice Mactavish noted in *Varatharasa v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 393, I reiterate here that the Applicants are not without recourse. In fact, the outcome of this matter has no bearing on their options for seeking further relief from removal. If removal proceedings are resumed, the Applicants may bring a further deferral request. In so doing, it will be open to them to point to the status of the IMM-7116-24 matter, and to provide the officer with updated information regarding Sanja's mental health.

[41] If the evidence suggests that adequate mental health care would not be available to Sanja, it will be incumbent on the new officer to determine whether her immediate removal would constitute the kinds of risks that would warrant a deferral: *Baron* at para 51. Included in those risks is that of "inhumane treatment," which may be particularly relevant.

## VIII. CONCLUSION

[42] For the reasons set out above, this application for judicial review will be dismissed.

Neither party proposed a question for certification, and I agree that none arises.

**JUDGMENT in IMM-7721-22**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is dismissed.

2. No question is certified for appeal.

"Angus G. Grant"
Judge

**FEDERAL COURT**

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| **DOCKET:** | IMM-7721-22 |
| **STYLE OF CAUSE:** | JAGODA DIMIKJ, SANJA DIMIKJ AND SASA DIMIC v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
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| **DATED:** | DECEMBER 19, 2024 |

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| | |
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