Federal Court  Cour fédérale

Date: 20251031

Docket: IMM-12434-23

Citation: 2025 FC 1759

Ottawa, Ontario, October 31, 2025

PRESENT: Mr. Justice Pentney

BETWEEN:

THUSYANTHAN SUTHAKAR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Thusyanthan Suthakar is a citizen of Sri Lanka. He seeks judicial review of the Canada Border Services Agency's (CBSA) decision denying his request for an administrative deferral of his removal.

[2] The Applicant arrived in Canada in September 2005 as a permanent resident. In September 2014, he was convicted of assault with a weapon and sexual assault. He was

consequently issued a deportation order for serious criminality pursuant to s. 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [*IRPA*] on October 21, 2015.

[3] In March 2016, the Applicant submitted a Pre-Removal Risk Assessment (PRRA) application and in August 2016, he submitted an application for permanent residence from within Canada on humanitarian and compassionate grounds (H&C). The Applicant's PRRA and H&C applications were considered concurrently, and both were denied on August 22, 2018.

[4] The Applicant sought judicial review of both the PRRA and H&C decisions. Justice Zinn dismissed the PRRA judicial review in February 2022: 2022 FC 262. The H&C Application was re-opened and again refused in March 2023. Following the refusal on reconsideration, Justice Fuhrer granted the judicial review in August 2024: 2024 FC 1285.

[5] On September 26, 2023, the Applicant was served with a Direction to Report for removal on October 14, 2023. The same day, the Applicant requested a deferral of removal on two grounds: (1) a pending personal injury tort claim for compensation and damages as a result of a motor vehicle accent in 2021, which he argued would pay for necessary medical treatments if he were returned to Sri Lanka, and (2) that he was medically unfit to fly as a result of his injuries from the 2021 accident.

[6] The Applicant's request for an administrative deferral of his removal was denied on October 11, 2023. The Enforcement Officer (Officer) found insufficient evidence that the Applicant was unfit to fly, and that he could not receive medical treatment in Sri Lanka. The

Officer also noted that there was no reference to any legislation that required the Applicant to be physically present in Canada in order to obtain insurance benefits or pursue his tort claim. Based on these findings, the Officer refused to defer the Applicant's removal.

[7] The Applicant then filed an Application for Leave and for Judicial Review of the deferral decision and sought a stay of his removal. The Applicant's removal was stayed by Order of Justice Heneghan on October 12, 2023. Leave was subsequently granted, which brings us to the matter before the Court.

[8] At the hearing of this application, I raised the question of whether the matter was moot, considering that the deferral decision was made on October 11, 2023, regarding a removal that was set for October 14, 2024, but the removal did not occur because a stay was granted. The parties provided initial submissions, and I invited them to make further submissions on mootness following the hearing, which are discussed in more detail below.

[9] For the reasons that follow, I am dismissing this application because it is moot and there is no overriding public interest in determining the legal issues raised by this matter.

I. The law on mootness

[10] The Supreme Court of Canada decision in *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 [*Borowski*] established the test for mootness. This involves two questions: (i) is there still a "live controversy" between the parties, or is the matter merely a hypothetical or abstract question? A key factor here is whether the decision of the Court

will have a practical effect of resolving some controversy which affects or may affect the rights of the parties. If the matter is moot, a second question arises: (ii) should the court exercise its discretion to hear the case, even though there is no longer any live controversy between the parties?

A. *Is the application moot?*

[11] In some instances, judicial review of a deferral decision has been found to be moot because the event for which the deferral was requested has passed. An example of this is where a deferral was requested so that minor children could finish their school year, or so that the claimants could receive a decision on their PRRA or H&C request, and this occurs before the application for judicial review of the deferral decision is heard: *Dimikj v. Canada (Citizenship and Immigration)*, 2024 FC 2066; *Adesemowo v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 249. That is not exactly the situation here, because there is no clear event for which the deferral was requested that has since passed. The Applicant's alleged injuries are long-lasting, and his tort claim remained outstanding as of the date of the hearing. However, that does not put an end to the mootness inquiry.

[12] The question in this case is whether the decision on the application would, or could, have any impact on the rights of the parties, in light of the passage of so much time since the original removal date and the grounds for the Applicant's deferral request. This involves a realistic appraisal of whether a decision on this application would have an impact on any potential future removal, given the uncertainty about the outcome of the H&C reconsideration, as well as the

need for updated information about the Applicant's medical condition and the status of his tort claim in the Ontario court.

[13] The Applicant argues that there is still a live controversy between the parties and that a decision in this matter will have a practical impact on his rights, because the Respondent has indicated it still wishes to remove him. For his part, the Applicant continues to resist removal based on his medical condition and fitness to fly.

[14] The Respondent submits that the matter is now moot, because there is no basis to believe that the medical facts that formed the basis for the 2023 medical reports remain wholly unchanged. As the Respondent points out, the Applicant could justifiably complain if it sought to remove him based on stale-dated information without giving him an opportunity to submit more recent evidence. Moreover, according to the Respondent, the Court would not find it reasonable for the Respondent to find the Applicant fit to fly in 2025 based on a medical opinion provided in 2023. In addition, the Respondent points out that the Applicant's deferral was based, in part, on his tort claim in Ontario, and in 2023 his lawyer in that matter indicated that the claim would be resolved in 1-2 years. That time has now elapsed. Finally, the Respondent notes that the Applicant's H&C reconsideration is closer to resolution than it was in 2023, and this is a relevant consideration in assessing whether to remove him.

[15] Having examined the matter closely, I am persuaded that the application before the Court has now become moot. A decision on the review of the deferral decision made in October 2023 will have no practical impact on any future removal of the Applicant, and whether he will be

subject to removal in the future is entirely unclear. To state the obvious, if the Applicant's H&C redetermination application is successful, he will be granted permanent residence and the imminent prospect of removal will vanish. If it is not successful, and he is given a Direction to Report, the Applicant will have a new opportunity to provide updated medical information to justify his claim that he is unfit to fly, and he can provide further information about the status of his tort claim, if it has not been resolved by then.

[16] On this point, it bears repeating that the decision under review relates to a deferral request submitted in October 2023, based on two primary considerations: the Applicant's medical condition and his pending tort action. While the evidence demonstrates that the Applicant's medical situation involves a chronic, or at least long-term, condition, there is no indication that further treatment or subsequent medical developments could not have changed his situation in a material respect. The Respondent frankly conceded that it would not be reasonable to seek to remove the Applicant based on medical information that is now two years old. Similarly, if the Applicant's tort claim has been resolved, it will no longer be a factor; if it has not reached its conclusion, the Applicant will have an opportunity to submit updated information to explain how it is relevant to the timing of his removal.

[17] For these reasons, I am satisfied that the application is moot.

B. *There is no overriding consideration in favour of hearing the matter*

[18] In *Borowski*, the Supreme Court of Canada set out a number of factors that are relevant in considering whether to exercise the discretion to hear a matter, even though it is moot. These

factors include: (i) the absence or presence of an adversarial context; (ii) whether scarce judicial resources should be devoted to deciding the matter; and (iii) whether the court would be exceeding its proper role by making law in the abstract, a task which is usually reserved to Parliament: see *Hakizimana v. Canada (Public Safety and Emergency Preparedness)*, 2022 FCA 33 at para 20.

[19] In this case, there is still an adversarial context, but I am not persuaded that it would be a wise use of judicial resources to consider the application on its merits, in particular given that the Applicant seeks a ruling on a general question, which veers dangerously close to deciding a matter in the abstract.

[20] The Applicant acknowledged that the matter may be found moot in light of the passage of time, but nevertheless argued that the Court should deal with the merits of the application because a decision would inform any future enforcement officer considering the Applicant's situation. As a matter of judicial economy, the Applicant argues that a ruling now may forestall future claims. In addition, the Applicant submitted that there is a wider public interest in dealing with the issues raised in this case. The Applicant explains his argument as follows:

> Finally, in terms of the Court's law making role, as noted by the respondent, there is a paucity of Federal Court jurisprudence that speaks to the reasonableness of a removal officer's determination in relation to a 'fit to fly' assessment when the officer has before them an assessment as to whether an applicant is fit to fly made by a general practitioner based on a paper review, versus the assessment of whether an applicant is fit to fly made by a specialist based on an in-person assessment of the applicant.
> A determination on this application will assist in supporting the proper application of the law for future deferral assessments in the face of competing medical reports. As set out by the Federal Court in *Nshimyumuremyi*, "the criterion relevant to the Court's law

> making role should encompass the role of the Court in ensuring the proper application of the law, which is particularly important in the domain of public law." (citing *Nshimyumuremyi v. Canada (Citizenship and Immigration)*, 2024 FC 1352 at para 38 [*Nshimyumuremyi*]).

[21] The Applicant therefore argues that the three *Borowski* factors militate in favour of the judicial review being decided, and urges the Court to exercise the discretion to determine the matter on its merits.

[22] The Respondent submits that judicial economy would not be served by dealing with the application on its merits, because any ruling based on evidence from October 2023 would be out-dated when it comes to a future removal based on updated information. Furthermore, the Respondent contends that it is not clear that there would be any jurisprudential value in a judicial pronouncement on a fitness to fly assessment done in relation to medical evidence that is out-dated. The Respondent argues that this situation presents no reason to exercise the discretion to decide the matter on its merits.

[23] I have already found that there remains an adversarial context. In examining the other two factors, however, I am not persuaded that it is appropriate to exercise the discretion to determine this matter even though it is moot. As I noted earlier whether the Applicant will be subject to removal at some future date is unknown. What is known, however, is that any such removal could only occur after the Applicant has an opportunity to submit a new deferral request and updated information regarding the timing and feasibility of his removal. The Applicant has not persuaded me that a ruling on the present application would provide useful guidance in the

context of a future removal based on different evidence. Judicial economy favours not determining this matter on its merits.

[24] As for the argument that a decision would provide useful general guidance on the proper application of the law, I am not satisfied that this case is the proper vehicle for such a pronouncement. The Applicant's judicial review rests on its very specific facts, and evidence about the process for completing medical fitness to fly assessments, its use by officers, or the proper approach to weighing competing medical reports is not part of the record before the Court. Even if such a evidence had been advanced, it is not clear to me that it would be appropriate to make sweeping pronouncements about the legality or reasonableness of decisions made on deferral requests, given their intensely fact-based nature.

[25] Officers are granted wide jurisdiction to consider the timing of removal, and the factors that can influence their exercise of discretion are too numerous to name. The general legal framework is well-known, and it is not clear that a ruling on the questions raised in the Applicant's submissions on mootness would be as determinative as he asserts. I am not persuaded that the decision in *Nshimyumuremyi* is applicable here, because it involved a very different factual scenario and legal issues.

[26] For all of these reasons, I find the application is moot and will not exercise my discretion to determine it on its merits. The application is, therefore, dismissed.

JUDGMENT in IMM-12434-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed because it is moot.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-12434-23
STYLE OF CAUSE:	THUSYANTHAN SUTHAKAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 5, 2025
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	OCTOBER 31, 2025

APPEARANCES:

DAVID ORMAN	FOR THE APPLICANT
STEPHEN JARVIS	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ORMAN IMMIGRATION LAW BARRISTER & SOLICITOR TORONTO, ONTARIO	FOR THE APPLICANT
ATTORNEY GENERAL OF CANADA TORONTO, ONTARIO	FOR THE RESPONDENT