Date: 20090313

Docket: A-165-08

Citation: 2009 FCA 81

CORAM: **DESJARDINS J.A.**
NADON J.A.
BLAIS J.A.

BETWEEN:

SERGIO ADRIAN BARON
MARIA FERNANDA RIQUELME

Appellants

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

Heard at Toronto, Ontario, on December 1, 2008.

Judgment delivered at Ottawa, Ontario, on March 13, 2009

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DESJARDINS J.A.

REASONS CONCURRING IN THE RESULT BY: BLAIS J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision of the Federal Court, 2008 FC 341, dated March 13, 2008, pursuant to which Madam Justice Dawson dismissed the appellants' judicial review application on the ground that it was moot. In so concluding, the learned Judge certified the following question:

> Where an applicant has filed an application for leave and judicial review challenging a refusal to defer removal pending a decision on an outstanding application for landing, and a stay of removal is granted so that the person is not removed from Canada, does the fact that a decision on the underlying application for landing remains outstanding at the date the

> Court considers the application for judicial review maintain a “live controversy” between the parties, or is the matter rendered moot by the passing of scheduled removal date?

[2] As the certified question makes clear, the appellants filed an application for leave to commence a judicial review following the refusal by an enforcement officer to defer their removal from Canada until a decision had been rendered with regard to a humanitarian and compassionate application (“H&C application”) made by them pursuant to section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”).

[3] Two issues arise in this appeal. The first one is the issue of mootness to which the certified question pertains. The second issue, which we need address only if we conclude that the judicial review application is not moot, concerns the reasonableness of the enforcement officer’s decision to refuse to defer the appellants’ removal from Canada.

[4] I now turn to the facts relevant to the disposition of the appeal.

THE FACTS

[5] The appellants are citizens of Argentina who entered Canada in April 2000 as visitors. In November 2000, shortly after their visas expired, they filed claims for refugee protection which were rejected by the Convention Refugee Determination Division of the Immigration and Refugee Board on May 30, 2002. As a result, the departure orders made against them when they filed their refugee claims became effective. On October 16, 2002, their application for leave to commence a judicial review application was dismissed by the Federal Court.

[6] On November 30, 2004, counsel for the appellants made an inquiry with regard to an H&C application which, according to counsel, had been submitted on behalf of the appellants in March 2003. The Case Processing Centre in Vegreville responded to this inquiry and advised counsel that it had no record of an H&C application having been filed on behalf of the appellants.

[7] In January 2006, warrants were issued against the appellants by reason of their failure to report for a pre-removal interview. The warrants were executed against them in March and July 2006, at which time they were again informed that there was no record of a pending H&C application made on their behalf.

[8] On September 5, 2006, the appellants filed an H&C application which was returned to them for insufficient funds. The application was resubmitted on December 8, 2006, this time with the proper funds. During that period, the appellants also filed a pre-removal risk assessment (a "PRRA") which was refused. As a result, the appellants were served with a direction to report for removal from Canada on January 18, 2007.

[9] The appellants having purchased airline tickets for themselves and their children for a return to Argentina on February 15, 2007, their removal was deferred to that date so as to allow them extra time to make necessary arrangements for their departure from Canada. I should point out here that the appellants have two Canadian-born children, Yan Sebastian who is 7 seven years and Zoe who is 4 years old (respectively 5 and 2 years old at the time of the enforcement officer's decision)..

[10] Notwithstanding the foregoing, on January 26, 2007, the appellants made a further request to have their removal deferred, i.e. that deferral be granted until such time as their H&C application had been decided. On January 29, 2007, the enforcement officer refused to defer their removal.

[11] This led the appellants to seek leave of the Federal Court to commence a judicial review application of the enforcement officer's decision. On February 9, 2007, O'Keefe J. stayed the appellants' removal from Canada until a decision had made on their judicial review application and on October 19, 2007, leave to pursue a judicial review was granted by the Federal Court.

[12] The appellants' judicial review application was heard by Dawson J. on January 17, 2008. She dismissed it on March 13, 2008. It is to that decision that I now turn.

DECISION OF THE FEDERAL COURT

[13] Dawson J. found the appellants' judicial review application to be moot. In her view, a decision on the merits of the application would not resolve any controversy between the parties. The substance of the learned Judge's reasoning appears from paragraphs 33 to 38 of her Reasons, which I reproduce:

> [33] The applicants are subject to a valid removal order and were directed to report for removal on January 18, 2007, on Air Canada flight #92. In order to issue the direction to report, the CBSA was first required to make a number of travel arrangements, including ensuring the availability of travel documents, an itinerary and airline tickets, and to notify the airline of its requirement to carry a foreign national from Canada.
>
> [34] The effect of the stay issued by the Court was to render those arrangements nugatory when the date scheduled for removal passed and the applicants remained in Canada.

> Whether the Court now decides that the decision of the enforcement officer was reasonable or not, the applicants have received the deferral that the officer refused. It is now an abstract question whether the enforcement officer ought to have deferred removal.
>
> [35] For the following reasons, I can see no practical effect on the rights of the parties if this case is decided on its merits. If the case is decided and dismissed, the stay will come to an end, the CBSA can make new removal arrangements, and the applicants can request deferral again. That same result will occur if the application is allowed on the same basis as in *Samaroo*, cited above. The validity of the removal order is not affected; the applicants remain subject to removal.
>
> [36] In either event, the parties will only have the benefit of the Court's view of the propriety of removal on stale-dated facts. However, the exercise of discretion to defer removal is very fact-based. There is no way of knowing whether, since the decision at issue was made, there have been intervening circumstances of risk, pregnancy, birth, illness, or the like. Further, the jurisprudence of the Court is to the effect that the length of time that a humanitarian and compassionate application has been outstanding is a relevant consideration when considering requests for deferral. In the present case, the applicants' humanitarian and compassionate application has now been outstanding for an additional 12 months. A decision on stale facts will be of little use to the parties if further removal arrangements are made.
>
> [37] Even if the application is allowed, remitted to a new officer for determination and updated information about the applicants' circumstances is obtained, the parties will be in the same position as if the Court had dismissed the application, either on the merits or on the basis of mootness, and new removal arrangements were made.
>
> [38] Thus, any decision on the merits of this application will not resolve any controversy between the parties. The application is therefore moot and, further, no useful purpose would be served by determining the application on its merits.
>
> [Emphasis added]

[14] Dawson J. then went on to deal with the respondent’s argument that the proper characterization of the controversy between the parties was whether the appellants ought to be removed before their H&C application was dealt with. In Dawson J.’s view, that characterization was in error. She explained her opinion as follows at paragraphs 44 and 45:

> [44] The officer is charged with the duty of effecting removal as soon as is "reasonably practicable." Equally, subsection 48(2) of the Act requires the subject of an enforceable removal order to leave Canada immediately. In the face of a looming removal date, the officer is presented with a series of facts that are said to warrant deferral at that point in time. The officer then decides whether the facts are such to render removal impracticable, and thus relieve the applicant of his or her obligation to leave immediately. For example, the officer may be asked to defer removal because a humanitarian and compassionate application has been outstanding for 18 months at the time of removal. The officer is not asked to consider, and does not consider, whether removal would be deferred if the application had instead been outstanding for 30 months.
>
> [45] For that reason, I find that the proper characterization of the dispute is whether an applicant should be removed, and is obliged to leave, on the scheduled removal date.
>
> [Emphasis added]

[15] Dawson J. also declined to exercise her discretion to decide the judicial review application. Although she was of the view that an adversarial relationship still existed between the parties, deciding the case on the merits would have, in her view, no practical effect or useful purpose with regard to the parties' rights.

[16] I should point out that Madam Justice Dawson's decision is only one of a number of recently-determined cases by the Federal Court where it has been held that a judicial review application of an enforcement officer's decision refusing to defer a person's removal from Canada is moot (see: *Higgins v. M.P.S.E.P.*, 2007 FC 377; *Solmaz v. M.P.S.E.P.*, 2007 FC 607; *Maruthalingam v. M.P.S.E.P.*, 2007 FC 823; *Vu v. Minister of Citizenship and Immigration*, 2007 FC 1109; *Madani v. M.P.S.E.P.*, 2007 FC 1168; *Adams v. M.P.S.E.P.*, 21 November 2007 (Court file IMM-4121-07) (F.C.); *Kovacs v. M.P.S.E.P.*, 2007 FC 1247; *Baron v. M.P.S.E.P.*, 2008 FC 341; *Islami v. M.P.S.E.P.*, 2008 FC 364; *Leung v. M.P.S.E.P.*, 17 April 2008 (Court file IMM-3712-

07) (F.C.); *Palka v. M.P.S.E.P.*, 2008 FC 342; *Lewis v. M.P.S.E.P.*, 2008 FC 719; and *Gumbura v. M.P.S.E.P.*, 2008 FC 833).

THE PARTIES' SUBMISSIONS

[17] The appellants submit that the Judge mischaracterized the nature of the dispute between the parties as being "whether an applicant should be removed, and is obliged to leave, on the scheduled removal date." Rather, the appellants contend that they had requested that their removal from Canada be deferred "pending a determination of their H&C application." Therefore, the dispute between the parties was not simply whether the appellants' removal should proceed or not on the scheduled removal date, but whether it should be deferred pending determination of the H&C application. The appellants submit that this controversy remained live at the time of the judicial review application hearing, and remains alive today, since the decision on the appellants' H&C application remains pending.

[18] In the alternative, the appellants submit that the Judge erred in declining to exercise her discretion, even if the judicial review application was moot. The appellants contend that the Judge erred in finding that there would be no practical effect on the rights of the parties if she decided the case.

[19] With respect to the decision challenged by the judicial review application, the appellants submit that this Court should find that the enforcement officer erred in refusing to defer their removal pending the determination of their outstanding H&C application. They submit that a very

long time has passed since they first attempted to file an H&C application and that the best interests of their Canadian children militate in favour of a deferral.

[20] The respondent submits, as the appellants do, that the judicial review application is not moot. He argues that the correct characterization of the controversy between the parties is whether the appellants should be removed prior to the happening of a particular event, i.e. prior to the determination of their pending H&C application. It is then not the passing of the scheduled removal date which renders the judicial review application moot, but the happening of the event. The respondent disagrees with the Judge's conclusion that a determination on the merits of the application would be of little use to the parties, and argues that a decision on the merits of the enforcement officer's decision would provide a real remedy to the parties. Furthermore, the respondent submits that the mootness determination yields an inequitable outcome, since all stay motions where a stay of removal is granted will pre-judge the outcome of the leave and judicial review application, essentially turning stay motions into judicial review applications on short notice and often on a deficient record. The respondent contends that it could not have been intended for the application of the tri-part test to have this effect (see: *Manitoba (A.G.) v. Metropolitan Stores (MPS) Ltd.*, [1987] 1 S.C.R. 110; *Toth v. Canada (M.E.I.)* (1988), 86 N.R. 302 (F.C.A.); *R.J.R. MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311).

[21] With respect to the merits of the application, the respondent submits that the enforcement officer did not err in refusing to defer removal until a decision had been made on the appellants'

pending H&C application. The respondent argues that in light of section 48 of the Act, the Minister was bound to execute the removal order as soon as reasonably practicable.

[22] Finally, the respondent says that the enforcement officer considered all of the appellants' circumstances, including the best interests of their children.

THE ISSUES

[23] The questions which we must determine in the present appeal are the following:

1. Did the Applications Judge err in law by dismissing the judicial review application for mootness and by refusing to exercise her discretion to hear the case?
2. If the answer to the first question is in the affirmative, did the enforcement officer make a reviewable error in refusing to defer the appellants' removal from Canada pending the determination of their outstanding H&C application?

ANALYSIS

A. Standard of Review

[24] There is no dispute between the parties that the appropriate standard of review with respect to the mootness issue is the correctness standard. I agree (See: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

[25] With respect to the enforcement officer's decision refusing to defer the appellants' removal from Canada, I cannot see how it can be disputed that the applicable standard is that of reasonableness (See: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190).

B. Did the Applications Judge Err in Law by Dismissing the Judicial Review Application for Mootness and by Refusing to Exercise her Discretion to Hear the Case?

[26] Both the appellants and the respondent submit that the Judge erred in law in dismissing the application for judicial review on the basis that it was moot. They argue that a live controversy continues to exist between them and that it is not the passing of the scheduled date of removal, i.e. February 15, 2007, which renders the application moot. In their view, although put forward in slightly different terms, it is the rendering of a decision on the appellants' H&C application that would render the judicial review moot.

[27] I have come to the conclusion that a live controversy still exists between the parties and that, as a result, the appellants' judicial review application is not moot.

[28] To begin with, it is important to make clear what the appellants were seeking when they requested deferral of their removal from Canada on February 15, 2007. As the enforcement officer says in her decision, the appellants' request was put forward on the grounds that they had an outstanding H&C application [which the appellants say they had attempted to file in March 2003] and that it was in the best interest of their Canadian-born children that removal be deferred until the H&C application had been dealt with. In other words, the appellants were not simply asking that

they not be removed on February 15, 2007, but that their removal not take place until the determination of their H&C application.

[29] I agree entirely with the parties that the determination of the mootness issue depends on the proper characterization of the controversy that exists between them. In this regard, the parties implicitly concede that if the characterization of the dispute as found by the Judge, i.e. "whether an applicant should be removed, and is obliged to leave, on the scheduled removal date" (paragraph 45 of her Reasons), is correct, then the judicial review application is moot. However, they submit that the proper characterization is whether the appellants should be removed prior to the determination of their H&C application. At paragraph 33 of his Memorandum of Fact and Law, the respondent formulates his submission as follows:

> 33. The correct characterization of the controversy, however, is whether an applicant should be removed *prior to the happening of a particular event*, such as prior to the determination of a pending H & C application. It is then not the passing of the removal date which renders the judicial review application moot, but the happening of the event. This characterization of whether removal is reasonably practicable prior to the happening of the event is entirely consistent with the enforcement officer's mandate under section 48 of the *IRPA* to execute a removal order as soon as reasonably practicable. It is this characterization of the controversy that the Applications Judge should have adopted, and erred in failing to do so.

[30] Since the appellants' H&C application had not been dealt with at the time of the hearing before the learned Applications Judge [and I am not aware of any determination having been made since Dawson J. rendered her decision], the parties take the position that the controversy still exists between them and thus that the matter is not moot.

[31] In my view, the parties have properly characterized the nature of the controversy which exists between them. I find support for this view in the Reasons given by Strayer D.J. in *Amsterdam v. M.C.I.*, 2008 FC 244, where he dismissed an application for judicial review of the decision of an enforcement officer who had refused to defer the applicant's removal from Canada. Although Strayer J. was of the view that on the facts before him, the judicial review application was moot, he nonetheless exercised his discretion to decide the application on its merits.

[32] In *Amsterdam, supra*, the applicant was scheduled to be removed from Canada on June 6, 2007. On May 31 of that year, he sought a deferral of his removal so as to allow him to attend a Family Court conference scheduled for July 31, 2007, and to see a medical specialist with whom he had an appointment on September 27, 2007. Notwithstanding this information, the enforcement officer advised the applicant on June 4, 2007, that it would not be appropriate to defer his removal from Canada.

[33] On June 5, 2007, the applicant filed an application for leave and for judicial review and he applied for a stay of removal, which was successful. Leave to commence a judicial review application was subsequently granted and the application on its merits was heard by Strayer J. on February 12, 2008.

[34] As I indicated earlier, Strayer J. believed that the application was moot. At paragraph 11 of his Reasons, he said the following:

> [11] I am satisfied that the judicial review of the Enforcement Officer's refusal to defer removal is moot due to a stay having been issued by this Court to permit the

> Applicant's presence in Canada for two events which have long since passed, the very events for which delay was refused in the decision under review. The evidence put before the Court was that it was necessary that the Applicant remain in Toronto to be present at a Family Court Case Conference in the Ontario Superior Court set for July 31, 2007 and for an appointment with a specialist which, by the date of the stay hearing, had been fixed for September 27, 2007.
>
> [Emphasis added]

[35] As I also indicated earlier, Strayer J. then went on, notwithstanding his view on the mootness issue, to deal with the merits of the application. After concluding that the enforcement officer's decision was not unreasonable, he dealt with a request by the applicant that he certify a question very similar to the one certified in this appeal. The question read as follows:

> Where an applicant has filed an application for leave and judicial review of a decision not to defer the implementation of a Removal Order outstanding against him or her, does the fact that the applicants' removal is subsequently halted by operation of a stay Order issued by this Court render the underlying judicial review application moot?

[36] Strayer J. was of the view that the above question ought not to be certified. In so concluding, he gave the following explanation at paragraph 15 of his Reasons:

> [15] Nevertheless, I am not prepared to certify such a question. In the first place if I did, and an appeal were taken, an answer to this question would not be determinative of this case because I have determined that the judicial review should also be dismissed on its merits apart from being moot. Secondly, with respect I do not think it is a serious question requiring an answer. There seems to be a wide measure of consensus in this Court, indicated in the cases cited above, that such a question should be answered in the affirmative. I find it hard to see how it could be otherwise: if the complaint in the judicial review is that the Enforcement Officer did not defer removal until the occurrence of some event which the Applicant considered justified the deferral, and as a result of a stay granted by this Court that event has in the meantime occurred. In such circumstances there can be no practical effect of a judicial review decision.
>
> [Emphasis added]

[37] As I understand Strayer J.'s Reasons, it is the passing of the events in respect to which the applicant was seeking a deferral of his removal, i.e. a Family Court conference and a medical appointment, which rendered the judicial review application moot. In those circumstances, as Strayer J. says above, "… there can be no practical effect of a judicial review decision". I cannot but agree with that statement in light of the facts before the learned Judge. It is clear, however, that Strayer J. did not conclude that the application before him was moot simply because the removal date had come and gone, which is the position adopted by the Applications Judge.

[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.

[39] I will briefly examine what effect a decision on the merits of the appellants' judicial review application might have. Prior to such a determination, the appellants could not be removed by reason of the stay granted by O'Keefe J. However, different consequences will follow, depending on the determination of the application.

[40] Should this Court decide the judicial review in favour of the appellants, the matter would then be remitted to an enforcement officer for redetermination in the light of the Court's Reasons. On redetermination, the enforcement officer might grant the request for deferral until the H&C application has been dealt with. As a result of such a determination, the appellants would not be removed until a negative decision, if that be the case, had been rendered on their H&C application. On the other hand, the enforcement officer might again refuse to defer removal and the appellants might challenge that decision by way of a new judicial review application.

[41] Should the Court dismiss the judicial review application on its merits, the stay order would no longer be in effect and a new removal date would most likely be scheduled. While it is true that the appellants could once again ask the enforcement officer for a deferral, new facts, in my view, would have to be put forward, failing which the likely scenario is that the enforcement officer would dismiss the request for deferral. It is also possible that absent new facts, the appellants would not seek a deferral and would leave Canada.

[42] I might add that should the appellants, in the absence of additional material facts, seek a deferral which results in a refusal by the enforcement officer, and should the appellants, in those circumstances, seek to obtain leave to commence a judicial review application and to obtain a stay of removal, it would certainly be open to the Federal Court to take the view that the appellants' proceedings constitute an abuse of process and deal with those proceedings accordingly.

[43] I am therefore of the view that should this Court dispose of the judicial review application on its merits, it cannot be said that the parties would be in the same position as if the Court had dismissed the application for mootness. I would also add that mootness does not necessarily follow because a decision on the merits will not entirely settle the debate between the parties.

[44] A final comment on this issue. In *Borowski v. Canada (A.G.)*, [1989] 1 S.C.R. 342, at paragraphs 29 to 42, the Supreme Court identified three factors that a court should consider in deciding whether or not to exercise its discretion to hear the merits of an action or an application for judicial review which it finds to be moot: (1) the existence of an adversarial relationship between the parties; (2) the concern for judicial economy; and (3) the need for the court not to intrude into the legislative sphere.

[45] In the present matter, it is undisputed that there remains an adversarial relationship between the parties with respect to the execution of a removal order prior to the determination of an H&C application. With respect to judicial economy, a decision from this Court on whether or not a pending H&C application and the interests of Canadian-born children in that specific context warrant a deferral of removal will certainly provide guidance to parties in future cases as well as to the parties in this appeal. Furthermore, these cases are of a recurring nature, in that the dismissal of a judicial review application for mootness means that the case will be returned to the enforcement officer to set a new date for removal, which will likely trigger a new request for deferral of removal and potentially a new application for a stay of removal. Lastly, a decision on the merits of the application will clearly not intrude into the legislative scheme.

[46] Bearing in mind the factors identified by the Supreme Court in *Borowski, supra*, had I been of the view that the application was moot, I would have had no hesitation in deciding that this Court ought to deal with the merits of the application.

[47] I now turn to the second issue.

C. Did the Enforcement Officer Err in Refusing to Defer the Appellants' Removal from Canada Pending a Determination of Their Outstanding H&C Application?

[48] In dealing with the enforcement officer's discretion to defer removal pursuant to section 48 of the Act, it is important to keep in mind the wording of that provision, which is as follows:

48. (1) A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as soon as is reasonably practicable.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.
[Emphasis added]	[Non souligné dans l'original]

Thus, where a removal order is enforceable, any person subject thereto must leave the country and the enforcement officer is bound to enforce the order "as soon as is reasonably practicable".

[49] It is trite law that an enforcement officer's discretion to defer removal is limited. I expressed that opinion in *Simoes v. Canada (M.C.I.)*, [2000] F.C.J. No. 936 (T.D.) (QL), 7 Imm.L.R. (3d) 141, at paragraph 12:

> [12] In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and pending H & C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system. For instance, in this case, the removal of the Applicant scheduled for May 10, 2000 was deferred due to medical reasons, and was rescheduled for May 31, 2000. Furthermore, in my view, it was within the removal officer's discretion to defer removal until the Applicant's eight-year old child terminated her school year.

[50] I further opined that the mere existence of an H&C application did not constitute a bar to the execution of a valid removal order. With respect to the presence of Canadian-born children, I took the view that an enforcement officer was not required to undertake a substantive review of the children's best interests before executing a removal order.

[51] Subsequent to my decision in *Simoes, supra*, my colleague Pelletier J.A., then a member of the Federal Court Trial Division, had occasion in *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682 (F.C.), in the context of a motion to stay the execution of a removal order, to address the issue of an enforcement officer's discretion to defer a removal. After a careful and thorough review of the relevant statutory provisions and jurisprudence pertaining thereto, Mr. Justice Pelletier circumscribed the boundaries of an enforcement officer's discretion to defer. In Reasons which I find myself unable to improve, he made the following points:

- There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
- The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.
- 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.
- Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.

I agree entirely with Mr. Justice Pelletier's statement of the law.

[52] With these principles in mind, I now turn to the enforcement officer's decision.

[53] It is clear from the enforcement officer's decision that she considered all of the relevant facts which were before her. First, she addressed the fact that the appellants had a pending H&C application. She correctly noted that the filing of such an application, at a late stage in the removal process, was not *per se* an impediment to removal. She remarked that the appellants had been informed in 2004 that no H&C application had been filed by them, contrary to what they apparently believed, and that they waited until 2006 to make their application. As a result, she was of the view that deferral on that ground was not warranted.

[54] The enforcement officer then turned her attention to the best interests of the children. She was of the view that if the children left Canada with their parents, "any kind of emotional disturbance the children may suffer due to their removal from Canada will likely be one of a temporary nature". She also noted that the children were young and that they could easily adapt to a new environment. She also noted that no evidence had been adduced that the children could not enrol in an English medium school where they could learn English as a first or second language. Lastly, she indicated that since both parents would be present in the children's lives in Argentina and that the appellants' parents also lived in Argentina, the children would have adequate emotional support and an existing support base in their new country.

[55] The enforcement officer concluded her decision by making it clear that had there been a true impediment to removal or if a decision on the H&C application had been imminent, she would have granted a deferral.

[56] In making their submission that the enforcement officer made reviewable errors, the appellants make the following points.

[57] With respect to the best interests of the children, they state that the officer ought to have deferred their removal pending the determination of their H&C application so as to fulfill Canada's obligations under the *Convention on the Rights of the Child*. In my view, this argument is without merit. The enforcement officer considered the children's best interests and concluded that no serious practical impediment existed to prevent removal of their parents to Argentina. The fact that the appellants intend to take their children with them to Argentina and that the children might not be able to return until their parents regularize their status in Canada or until they become adults is not, in my view, an impediment to the removal of the parents. The jurisprudence of this Court has made it clear that illegal immigrants cannot avoid the execution of a valid removal order simply because they are the parents of Canadian-born children (see: *Legault v. M.C.I*, 2002 FCA 125, para. 12; see also with respect to international law: *Baker, supra*; *Langner v. M.E.I.*, [1995] F.C.J. No. 469 (C.A.) (QL)). I might add that the officer went further than required in her consideration of the children's best interests. As I stated in *Simoes, supra*, an enforcement officer has no obligation to substantially review the children's best interest before executing a removal order. I believe that Pelletier J.A.'s Reasons in *Wang, supra,* support this view.

[58] With respect to their pending H&C application, the appellants submit that the enforcement officer erred in failing to have regard to the special circumstances surrounding their application.

They say that the issue was not whether they had submitted an application in 2003 or 2004, but rather that they had attempted, through their former attorney, to submit such an application in March 2003, adding that for reasons unknown to them, the application had never been received in Vegreville. They also say that it is only in 2006 that they became aware of the fact that their March 2003 application had never been received. The appellants further point out that a new delay occurred when a second application in September 2006 was returned to them by reason of insufficient funds, which application they resubmitted in early December 2006. It is for these reasons, the appellants submit, that their attorneys requested that their H&C application be expedited because of almost a four year delay due to no fault on their part.

[59] Thus, in the appellants' submission, the enforcement officer asked herself the wrong question when she focussed her attention on whether the "original" H&C application had been submitted in 2003 or 2004, and on the fact that their second application had been filed late in the day.

[60] In my view, these arguments cannot succeed. First, I have not been persuaded that the enforcement officer made a reviewable error in her review and consideration of the evidence. What the appellants are asking us, in effect, is to reassess the evidence so as to reach a different conclusion. In my view, that is not open to us. Second, in the light of the principles enunciated in both *Simoes, supra* and *Wang, supra*, I fail to see on what ground this Court could interfere with the enforcement officer's decision.

[61] I therefore conclude that the enforcement officer's decision to refuse deferral of the appellants' removal from Canada was reasonable and that the decision must stand.

[62] This is sufficient to dispose of the appeal. However, before concluding, I feel compelled to make a few additional remarks.

[63] It is important to note that in concluding that a deferral was not warranted in the circumstances before her, the enforcement officer emphasized the fact that the appellants had failed to report for their pre-removal interviews of January 21, 2006. The enforcement officer also emphasized the fact that it had been necessary to issue warrants against the appellants, which were executed in March and July of 2006. She could also have emphasized the fact that the appellants, in order to delay their removal scheduled for January 18, 2007, had undertaken to leave the country with their children on February 15, 2007, which undertaking they failed to respect. The enforcement officer could have also considered relevant the fact that the departure orders made against the appellants at the time they filed their refugee claims had become effective on May 30, 2002.

[64] Events of this type, i.e. where persons fail to comply with the requirements of the Act or act in a way so as to prevent the enforcement thereof, should always be high on the list of relevant factors considered by an enforcement officer. It is worth repeating what this Court said at paragraph 19 of its Reasons in *Legault, supra*. Although the issue before the Court in *Legault, supra*, pertained to the exercise of discretion in the context of an H&C application, the words of Décary J.A. are entirely apposite to the exercise of discretion by an enforcement officer:

> [19] In short, the *Immigration Act* and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorised to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.
>
> [Emphasis added]

[65] Thus, if the conduct of the person seeking a deferral of his or her removal either discredits him or creates a precedent which encourages others to act in a similar way, it is entirely open to the enforcement officer to take those facts into consideration in determining whether deferral ought to be granted. Neither enforcement officers nor the courts, for that matter, should encourage or reward persons who do not have “clean hands”.

[66] One last remark. In her discussion of the mischief which might arise as a result of the view that applications such as the one before us in this appeal are moot by reason of the passing of the scheduled removal date, Madam Justice Dawson made a number of highly relevant remarks. One of these remarks is found at paragraph 65 of her Reasons, where she says:

> [65] Further, the potential for abuse will be mitigated significantly by the Court's continued discipline when considering stay requests and, where a stay is granted, by careful consideration by the CBSA, before new removal arrangements are made, of the serious issue identified by the Court. It should be remembered that, for a stay to be granted, the Court will have identified at least one issue that carries with it the likelihood of success on the

> underlying application. It is not enough for the Court to simply find that an issue is not frivolous or vexatious. (See: *Wang*, cited above). […]
>
> [Emphasis added]

These comments take me back to Pelletier J.A.'s Reasons in *Wang*, *supra*, where he dismissed the motion before him for a stay of removal because the applicant had not satisfied him that the underlying application raised a serious issue. This conclusion was the result of his view that on such a motion, in determining the "serious issue" prong of the tripartite test enunciated in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 (and adopted by this Court for the purposes of determining applications for a stay of removal in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.), [1988] F.C.J. No. 587), the Judge ought to "go further and closely examine the merits of the underlying application" (paragraph 10 of his Reasons). In other words, the Judge should take a hard look at the issue raised in the underlying application.

[67] While I agree entirely with my colleague's approach to the "serious issue" prong of the tripartite test in the context of a motion to stay a removal order, I would add the following. In determining whether a serious issue exists so as to warrant the granting of a stay of removal, the Judge hearing the motion should clearly have in mind, first of all, that the discretion to defer the removal of a person subject to an enforceable removal order is limited, as explained in *Simoes*, *supra*, and, particularly, in *Wang*, *supra*. Second, the Judge should also have in mind that the

standard of review of an enforcement officer's decision is that of reasonableness. Thus, for an applicant to succeed on a judicial review challenge of such a decision, he or she must be able to put forward quite a strong case. In my view, the appellants herein clearly did not have such a case to put forward.

[68] Had O'Keefe J. turned his mind to the limited nature of the enforcement officer's discretion and to the applicable standard of review, he would not have concluded that the judicial review application raised a serious issue and, hence, would not have granted a stay.

[69] It is also clear, in my respectful opinion, that there was no basis for him to conclude that irreparable harm would occur if the removal order was not stayed. As this Court and the Federal Court have constantly repeated, one of the unfortunate consequences of a removal order is hardship and disruption of family life. However, that clearly does not constitute irreparable harm. To paraphrase the words of Pelletier J.A. found at paragraph 88 of his Reasons in *Wang*, *supra*, family hardship is the unfortunate result of a removal order which can be remedied by readmission if the H&C application is successful. Further, the fact that the appellants' children might have to pursue their education in Spanish, because of their parents' removal to Argentina, clearly does not constitute irreparable harm.

[70] As a result, I would dismiss the appeal and I would answer the certified question as follows:

> Because the underlying application for landing remains outstanding at the date the Court considers the application for judicial review, there remains a "live controversy" between the parties and, as a result, the matter is not rendered moot by the passing of the scheduled removal date.

"M. Nadon"

J.A.

"I concur.
Alice Desjardins J.A."

BLAIS J.A. (Reasons concurring in the result)

[71] I have read the reasons of my colleague, Nadon J.A., and I respectfully disagree in part.

[72] I will rely on the facts as presented by the Federal Court judge, Justice Dawson, and my colleague in lieu of reproducing them here.

[73] With respect to my colleague's analysis of the enforcement officer's refusal to defer the appellants' removal, I agree. The determination made by the enforcement officer was well within her narrow discretion, was well reasoned and was within the parameters of previous statements of this Court and the Court below.

[74] With respect to my colleague's strong statement regarding the granting of a stay on the basis that the pending judicial review of the enforcement officer's refusal constituted a serious issue, I firmly agree with both my colleague and with Justice Dawson. Recently, claimants have entered into an abusive cycle of deferral requests, judicial review applications and stay of removal applications. This abusive cycle can be mitigated if judges considering stay applications properly determine whether a serious issue exists by reviewing the judicial review application for at least one issue with a probability of success. The judicial review underlying the application for a stay of removal in this case reveals little probability of success considering the enforcement officer's discretion and the ample support she cites in her reasons. The decision granting the appellants' stay has caused them to remain in Canada for an additional two years, allowing for their children to

become more settled and for adaptation to be more difficult should the appellants and their children to return to Argentina.

[75] With respect, I must disagree with my colleague's conclusion in regards to the certified question of mootness.

[76] The parties argue, and my colleague agrees, that the characterization of the root controversy of the judicial review involves whether the appellants should be removed prior to the determination of their pending humanitarian and compassionate (H&C) application.

[77] While it is true that the bases of the appellants' deferral request were the best interest of their children and the determination of their H&C application, the decision for review in this case is whether the enforcement officer properly refused to defer the appellants' removal in January, 2007. It is not whether the enforcement officer properly determined that the removal would at no time take place before the determination of the H&C application. This is clear from the enforcement officer's notes to file, where she wrote:

> In conclusion, this officer realizes that she has limited discretion to defer removal. She would do so if there is [*sic*] an impediment to removal or if a decision was imminent on the H&C application. However, this is not the case.

[78] It is of no consequence to determine whether the enforcement officer properly refused the request to defer in January, 2007 since that removal date has passed. In addition, the circumstances will have changed such that the enforcement officer's conclusions may no longer be pertinent to the facts as they now stand. In my view, Justice Dawson was correct in characterizing the dispute as

whether the appellants should have been required to leave on the scheduled removal date. Further, since the granting of a stay has allowed the appellants to receive the deferral that the enforcement officer refused, the review of the enforcement officer's decision will not change the factual consequence.

[79] The parties argue that the controversy is whether the appellants should be removed prior to the determination of the H&C application. However, this was not the question before the enforcement officer. In fact, the conclusion of the enforcement officer regarding the lack of imminence of a determination on the H&C application makes it clear that her decision was temporally based.

[80] By virtue of section 48(2) of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 29 (IRPA), once a "removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable." I agree with my colleague that jurisprudence is conclusive that the enforcement officer's discretion is limited. However, ultimately an enforcement officer is intended to do nothing more than enforce a removal order. While enforcement officers are granted the discretion to fix new removal dates, they are not intended to defer removal to an indeterminate date. On the facts before us, the date of the decision on the H&C application was unknown and unlikely to be imminent, and thus, the enforcement officer was being asked to delay removal indeterminately. An indeterminate deferral was simply not within the enforcement officer's powers. (my emphasis)

[81] Over the years, the duties of enforcement officers have not changed, and yet, the bases upon which applicants rely to obtain deferrals have dramatically increased. I am of the view that the scope of the enforcement officer's discretion cannot be changed by virtue of the requests made. An enforcement officer's role is not to assess the best interests of the children or the probability of success of any application. An enforcement officer's role should remain limited and deferral should be contemplated in very limited circumstances.

[82] The legislation has not, to my knowledge, provided a new step to claimants who desire yet another assessment of their circumstances. Claimants already have the refugee application process, the pre-removal risk assessment (PRRA) process and the H&C application in addition to judicial reviews of those processes and the stay before removal.

[83] In this case, it appears that the claimants want to open yet another avenue of review by asking the enforcement officer to reassess information that has already been examined by administrative tribunals and that was the subject of judicial review. For the enforcement officer to comply with this request for reassessment would be akin to the enforcement officer making a quasi-judicial order without the benefit of hearing from opposing counsel. It's time to stop this abusive cycle.

[84] To further illustrate why the question before Justice Dawson was moot, consider the following hypothetical situation: if Justice O'Keefe had not granted the stay, and the appellants had been removed to Argentina, the judicial review before Justice Dawson would still have proceeded.

Seeing as the appellants had already been removed on the scheduled removal date, Justice Dawson would likely still determine that the issue was moot, for the decision regarding the specified date had passed. But, if instead of making a finding of mootness, Justice Dawson found that the enforcement officer had made an error in not deferring the removal date, what would be the result? Would the appellants be permitted to return to Canada just for a second removal date to be set to have them removed? Would they request yet another deferral from a second enforcement officer? The possibility risks nonsense.

[85] The more likely consequence is that the appellants would wait in Argentina for a determination of their H&C application and, if the application is successful, would be readmitted.

[86] Under subsection 11(1) of the IRPA, a foreign national wishing to establish permanent resident status must apply for a visa before entering Canada. The IRPA makes it clear that H&C applications are intended to be used only as exceptions to this requirement. H&C applications are meant to allow for an application to be processed from within Canada where the Minister considers that humanitarian and compassionate grounds make this exemption justified:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger —

that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.
(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.	(2) Le statut ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

[87] H&C applications are not intended to obstruct a valid removal order. Where a PRRA has revealed that the applicants are not at risk if they are returned, then the applicants are intended to make future requests for permanent residence from their home country.

[88] In the appellants' case, the H&C application is still pending. It is my view that this still does not prevent their removal. Removing the appellants will not cause irreparable harm to them or their Canadian-born children. Should a new removal date be scheduled, the appellants are likely to ask the enforcement officer for a deferral. I believe my colleague's indication that new facts would need to be put forward to support such a request is optimistic. These appellants have continued to raise the same arguments throughout their dealings with immigration officials in Canada and the likelihood that they will continue to raise these arguments, or versions thereof consistent with the passing of time, is high.

[89] Therefore, I would dismiss this appeal with costs and answer the certified question as follows:

The removal date having passed, the determination of the reasonableness of the enforcement officer's refusal to defer the removal date in January 2007 is without consequence and therefore the matter is rendered moot.

"Pierre Blais"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-165-08
STYLE OF CAUSE:	SERGIO ADRIAN BARON and MARIELA FERNANDA RIQUELME v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	December 1, 2008
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	DESJARDINS J.A.
REASONS CONCURRING IN THE RESULT BY:	BLAIS J.A.
DATED:	March 13, 2009

APPEARANCES:

D. Clifford Luyt	FOR THE APPELLANTS
Amina Riaz Maria Burgos Manuel Mendelzon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

D. Clifford Luyt, Barrister and Solicitor Toronto, ON	FOR THE APPELLANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT