

Federal Court



Cour fédérale

Date: 20250415

Docket: IMM-13349-23

Citation: 2025 FC 696

Ottawa, Ontario, April 15, 2025

PRESENT: Madam Justice Pallotta

BETWEEN:

MARJORIE NYANHEMWA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant, Marjorie Nyanhemwa, seeks judicial review of an officer's decision that denied a request to defer her removal from Canada to Zimbabwe.

[2] Ms. Nyanhemwa alleges that the officer's decision was unreasonable. The respondent alleges that this application should be dismissed because it is moot.

[3] For the reasons below, I dismiss this application because it is moot, and I decline to decide its merits.

[4] Ms. Nyanhemwa came to Canada in 2014. In 2017, she sought Canada's protection as a refugee. Her claim for protection was refused, the appeal was dismissed, and this Court denied leave to review the appeal decision. Ms. Nyanhemwa received a negative Pre-Removal Risk Assessment in February 2023. In March 2023, she applied for permanent residence from within Canada, based on humanitarian and compassionate (H&C) grounds.

[5] The Canada Border Services Agency (CBSA) scheduled Ms. Nyanhemwa's removal for November 2, 2023. Ms. Nyanhemwa submitted a request to defer removal pending a decision on her H&C application based on what she alleged to be exceptionally compelling personal circumstances, including serious physical and psychological health concerns, and considerations regarding her rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11 [Charter]*. Before receiving a decision, and expecting that the decision would be negative, Ms. Nyanhemwa commenced this application for judicial review. A CBSA officer refused the deferral request a few days later, on October 26, 2023 (Decision).

[6] Ms. Nyanhemwa brought a motion to stay her removal; however, she abandoned the motion before it was heard. This was because CBSA had cancelled Ms. Nyanhemwa's removal "due to interim measures" by the United Nations Human Rights Committee (UNHRC), relating to whether removing her would cause Canada to breach its obligations under international law.

Removal has not been rescheduled, and there is no evidence that removal will be rescheduled soon.

[7] Ms. Nyanhemwa argues that the Decision was unreasonable. She alleges the officer committed multiple errors in assessing her request to defer removal, including by undertaking an improper refugee analysis pursuant to section 97 of *Immigration and Refugee Protection Act*, SC 2001, c 27 and failing to engage with her *Charter* arguments.

[8] The respondent submits that this application for judicial review is moot, and the Court should not hear it.

[9] In *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 [Borowski], the Supreme Court of Canada set out a two-part test for deciding whether to dismiss a proceeding for mootness. The first part asks whether there is a live controversy between the parties. If there is no live controversy, the Court must decide whether to exercise its discretion to hear the matter.

[10] Ms. Nyanhemwa submits that a live controversy remains because she sought a deferral of her removal pending the outcome of her H&C application, and a decision on her H&C application remains outstanding. Like the circumstances in *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 [Baron], the controversy between the parties has not been resolved: *Baron* at para 38.

[11] The respondent submits that in view of the decision made November 1, 2023 to cancel removal, the officer's deferral Decision no longer has effect and the substratum of this proceeding to review it has disappeared. The respondent states *Baron* is distinguishable because in that case, the Minister intended to effect removal but was prevented from taking steps due to a Court-ordered stay. In Ms. Nyanhemwa's case there is no stay, and the circumstances of this case are akin to *Canada (Public Safety and Emergency Preparedness) v Allen*, 2019 FC 932, where the applicant's subsequent arrest overtook a previous order for his release from detention.

[12] Whether a live controversy exists is a case-specific inquiry. I agree with the respondent that the live controversy between the parties has been extinguished. The officer's Decision was based on circumstances that existed in 2023, but that have been superseded by subsequent events. *Baron* is distinguishable. The Minister is not prohibited from effecting Ms. Nyanhemwa's removal, but has taken no steps to do so since the November 2023 removal date was cancelled due to the UNHCR's interim measures. There is no indication of any step taken to reinitiate the removal process, and Ms. Nyanhemwa has not brought a fresh motion to stay removal.

[13] If the Minister reinitiates the removal process, and if Ms. Nyanhemwa requests a deferral of the rescheduled removal, the decision to grant or refuse that request will be based on her circumstances at the time. By then, there may be a decision on the H&C application. A decision on judicial review to uphold or set aside the Decision that refused to defer the removal scheduled in November 2023 is unlikely to impact a decision to grant or refuse a future deferral request.

[14] On the basis of my findings above, the first part of the *Borowski* test is met.

[15] In determining whether to exercise discretion to hear a moot application, the Court will consider: (i) whether there is an adversarial context between the parties; (ii) the concern for judicial economy; and (iii) the Court's proper adjudicative function and whether hearing the application may intrude into the role of the legislative branch: *Borowski* at 358, 360, 362.

[16] Ms. Nyanhemwa states she is asking for a deferral of removal until her H&C application is decided. If her proceeding before the UNHCR is rejected, she will likely receive a direction to report for removal. An adversarial context continues to exist and will persist until the H&C application is decided.

[17] I am not satisfied that the Court should exercise discretion, under the second part of the *Borowski* test, to hear this application. The adversarial context no longer exists because the respondent is not seeking to remove Ms. Nyanhemwa, and the Court has no information about the timing or likely outcome of a decision on her UNHCR proceeding. I see no practical purpose that would warrant the use of judicial resources, particularly when it is not clear that the Court's reasons would assist in deciding any future deferral request. As the respondent points out, Ms. Nyanhemwa is already benefitting from a deferral and faces no imminent prospect of removal.

[18] For similar reasons, deciding this application would exceed the Court's proper role. As the respondent points out, the notice of application for leave and judicial review (ALJR) seeks an

order compelling the officer to render a decision on the 2023 deferral request, which is clearly unnecessary, and alternatively, an order setting aside the Decision and remitting the matter to a different officer for redetermination. However, there is nothing to redetermine. A future deferral decision, if the need for one arises, would be based on a new request and, quite likely, different considerations. The ALJR does not seek an order preventing Ms. Nyanhemwa's removal pending a decision on her H&C application and such relief would not be granted.

[19] For these reasons, the application is dismissed. There is no question to certify.

JUDGMENT IN IMM-13349-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question for certification.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-13349-23

STYLE OF CAUSE: MARJORIE NYANHEMWA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 5, 2024

JUDGMENT AND REASONS: PALLOTTA J.

DATED: APRIL 15, 2025

APPEARANCES:

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