Federal Court  Cour fédérale

Date: 20190730

Docket: IMM-3701-18

Citation: 2019 FC 1018

Ottawa, Ontario, July 30, 2019

PRESENT: Madam Justice Walker

BETWEEN:

YEMARIA SHERNA TONEY
CLEVAL TIMARA JONESIA TONEY

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Ms Yemaria Sherna Toney and Ms Cleval Timara Jonesia Toney, seek judicial review of a decision (Decision) of an enforcement officer of the Canada Border Services Agency (CBSA) refusing their request for a deferral of their removal to St. Vincent & the Grenadines. The application for judicial review is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] For the reasons that follow, the application will be allowed.

I. Background

[3] Ms Yemaria Toney is the Principal Applicant in this application. She first came to Canada in 2001 with her infant daughter, Cleval. They returned to St. Vincent briefly in 2006 and re-entered Canada on December 22, 2006 as temporary residents.

[4] The Applicants filed a refugee claim on the basis of domestic abuse in St. Vincent on November 21, 2007. The claim was refused by the Refugee Protection Division (RPD) on August 19, 2009 and the Applicants' application for leave and judicial review of the RPD decision was denied on February 3, 2010.

[5] On March 8, 2010, the Applicants' Pre-Removal Risk Assessment (PRRA) application was denied. In April 2010, the Applicants were informed of the negative PRRA decision and that they were required to leave Canada.

[6] The Applicants failed to appear at their scheduled pre-removal interview with CBSA on June 3, 2010 and warrants for their arrest were issued.

[7] In March 2016, the Principal Applicant retained an immigration consultant to assist in regularizing her status in Canada. The Principal Applicant and the consultant prepared an application for permanent residence on humanitarian and compassionate (H&C) grounds but the application was not filed.

[8] On April 15, 2017, the Principal Applicant married her husband, Douglas Patterson, who is also from St. Vincent. Mr. Patterson was found to be a Convention refugee in 2004.

[9] In August 2017, the Principal Applicant retained a second consultant to prepare and file her H&C application. Despite the second consultant's assurances, the H&C application was not filed.

[10] In November 2017, Cleval was arrested for shoplifting. The Applicants came to the attention of CBSA and were arrested on the outstanding 2010 warrants. They were released subject to certain reporting conditions.

[11] On March 28, 2018, the Principal Applicant attended an interview with CBSA. The second consultant completed a Client Information Form on behalf of the Principal Applicant, indicating on the form that the H&C application had been submitted when, in fact, it had not.

[12] The Principal Applicant has alleged negligence on the part of the consultants hired by her in 2016 and 2017. Her application record includes letters sent by her current counsel to each of the consultants in question. Prior to the hearing of this matter, the Principal Applicant formally withdrew her allegations of incompetence and negligence against the first immigration consultant.

[13] In June 2018, the Principal Applicant and Mr. Patterson retained a third consultant, Mr. Sikhram Ramkissoon. On June 11, 2018, Mr. Ramkissoon filed an application for permanent

residence on behalf of Mr. Patterson on the basis of his Convention refugee status (2018 Application). The Applicants were included as dependents in the application. On June 25, 2018, a letter requesting his intervention was sent to the Minister of Citizenship and Immigration setting out the background to the 2018 Application and the issues the Principal Applicant encountered in attempting to file her H&C application. A copy of the letter was forwarded to the Respondent on July 4, 2018.

[14] A Direction to Report was issued to the Applicants on July 18, 2018 for removal to St. Vincent on August 4, 2018. The Applicants immediately requested a deferral of their removal. The denial of that request is the Decision at issue in this application.

[15] On August 2, 2018, the Applicants sought leave for judicial review of the Decision. On August 3, 2018, the Applicants filed a motion to stay their removal. The Court granted their motion by order dated August 3, 2018 (Stay Order).

II. Decision under review

[16] The Decision is dated August 2, 2018. The CBSA enforcement officer (Officer) considered the Applicants' request for a deferral of their removal in two sections: (1) the pending 2018 Application; and (2) the best interests of Cleval, then 17. The Officer concluded that neither consideration warranted a deferral of the removal order.

[17] The Officer noted the recent filing of the 2018 Application and stated that insufficient corroborated evidence had been submitted to indicate that a decision on the application was

either overdue or imminent. The Officer referred to the Principal Applicant's explanation in the deferral request for her delay in submitting her own H&C application but stated that any failure to act on the part of her chosen representatives was her responsibility. The Officer also noted that the Principal Applicant had failed to appear for her follow-up removal interview in 2010 and that she evaded CBSA until she came to their attention as a result of a police investigation. The Officer concluded that the submission of the 2018 Application seven years after the Principal Applicant wilfully evaded immigration proceedings was untimely.

[18] The Officer then assessed the H&C considerations presented by the Applicants in their deferral request, including Cleval's best interests, noting that while it was beyond an officer's authority to perform an H&C evaluation, the specific considerations brought forward in the request had been considered. The Officer emphasized that a deferral of removal is a temporary measure intended to alleviate exceptional circumstances.

[19] The Officer acknowledged that the separation of the Applicants from Mr. Patterson and his son would be challenging but stated that such separation is an inherent part of the removals process. The Officer also noted that Mr. Patterson could continue to sponsor the Applicants from overseas.

[20] With respect to Cleval's short-term best interests, the Officer acknowledged that she has been in Canada since she was approximately six years old and has not returned to St. Vincent since that time. The Officer stated that Cleval would have a challenging period of adjustment in St. Vincent but that she would be returning with her mother who would be able to provide her

with love and support. The Officer also stated that insufficient evidence had been presented to demonstrate that Cleval would not be able to continue her education in St. Vincent or that, in the short term, she would be unable to cope with her new circumstances.

III. Preliminary Issue: Whether this application should be dismissed because the Principal Applicant has not come to the Court with clean hands?

[21] The Respondent submits that this application should be dismissed on the basis that the Principal Applicant does not come to the Court with clean hands as she failed to report for removal in 2010 and evaded Canadian immigration authorities for six years *(Baron v Canada (Public Safety and Emergency Preparedness),* 2009 FCA 81 at para 65 *(Baron); Debnath v Canada (Immigration, Refugees and Citizenship),* 2018 FC 332 at paras 23, 27 (*Debnath*)). The Respondent also submits that the Officer properly took the Principal Applicant's non-compliance with Canadian immigration laws into account in the Decision (*Crawford v Canada (Public Safety and Emergency Preparedness),* 2017 FC 743 at para 49).

[22] The principles applicable to my determination of whether this application should be dismissed because of the Principal Applicant's non-compliance with Canadian immigration laws were set forth by the Federal Court of Appeal (FCA) in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 (*Thanabalasingham*), and considered and confirmed in *Debnath*, a recent PRRA decision of this Court. In *Debnath*, Justice Strickland summarized the FCA's treatment of the clean hands doctrine in *Thanabalasingham*, stating that the remedies available on judicial review are discretionary and that the Court may decline to consider the merits of an application based on the conduct of the applicant (at para 21):

> [21] The leading decision on the application of the unclean hands doctrine is *Thanabalasingham*. There the Federal Court of Appeal considered a certified question being, when an applicant comes to the Court without clean hands on an application for judicial review, should the Court in determining whether to consider the merits of the application, consider the consequences that might befall the applicant if the application is not considered on its merits. The Federal Court of Appeal did not agree with the assertion by the respondent in that case that, if it was established that an applicant had not come to court with clean hands, then the Court must refuse to hear or grant the application on its merits. Rather, the Federal Court of Appeal found that the case law suggested, if satisfied that an applicant had lied or was otherwise guilty of misconduct, then the reviewing court may dismiss the motion without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief. Further:
>
> > [10] In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[23] It is clear that the Principal Applicant comes before this Court without clean hands. She knowingly failed to report for removal in 2010 and took no action to regularize her status until 2016. The Principal Applicant's misconduct frustrated a valid removal process, undertaken after a negative RPD decision and timely PRRA assessment. Her risks on removal had been fully evaluated in conformity with Canadian immigration laws.

[24] The Principal Applicant's stated reason for evading removal in 2010 was her continued fear of abuse in St. Vincent. However, in her affidavit dated January 22, 2019, the Principal Applicant addresses her claims of domestic abuse in St. Vincent, stating that she had failed to give the correct name of her abuser in 2007 as she remained close to his sister in Canada and that "although he was violent towards me, I exaggerated how violent he was when I testified at the Board. I used the same facts when I applied for the PRRA, later". In my view, the Principal Applicant's conduct warrants the exercise of my discretion to dismiss the application for lack of clean hands.

[25] Balanced against the Principal Applicant's conduct is the fact that Cleval played no part in her mother's decisions to try to mislead the RPD and the PRRA officer and to evade removal in 2010, as noted by Justice Mosely in the Stay Order. The consequential impact on Cleval of her mother's conduct is a relevant consideration but is not determinative (*Debnath* at para 27):

> As to the submission that, because one of the Applicants is a minor the Court cannot exercise its discretion to dismiss the application for judicial review "in order to punish the Minor Applicant for a decision she did not make", at best, this demonstrates a clear lack of understanding of the clean hands doctrine which is concerned with equity and not punishment. In any event, and as discussed below in the context of the question proposed for certification by the Applicants, the fact that one of the Applicants is a minor is not a determinative factor or one which precludes the Court from considering and exercising its discretion with respect to the clean hands doctrine. Rather, a consideration of the Minor Applicant's interests is captured in the balancing process by way of the consideration of the likely impact on the Applicants if the negative PRRA decision is not reviewed by the Court and is allowed to stand.

[26] For the reasons set out below, I have found that the Officer failed to reasonably consider the Principal Applicant's efforts to file an H&C application. She began the process prior to

CBSA renewing its removal efforts in 2017. Had the H&C application been filed in 2016, the Applicants' long establishment in Canada and Cleval's specific circumstance of having effectively lived her whole life in Canada could have been considered in a timely fashion. Taking into account the implications of the Officer's error in the context of a deferral decision, and the importance of a current assessment of Cleval's interests, I will exercise my discretion and consider this application on its merits.

IV. Issues

[27] The issue before me is whether the Decision was reasonable. The Applicants submit that the Officer erred in two respects:

1. The Officer failed to reasonably assess Cleval's best interests; and
2. The Officer unreasonably discounted the Principal Applicant's efforts since 2016 to submit her H&C application.

[28] Although the Applicants argue that the Officer fettered their discretion in failing to take into account the Principal Applicant's issues with the first two consultants retained to assist with her H&C application, the submissions are best characterized as submissions questioning the reasonableness of the Decision.

V. Standard of review

[29] The standard of review of an enforcement officer's refusal to defer an applicant's removal is reasonableness (*Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 at para 28 (*Forde*); *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017

FCA 130 at para 43 (*Lewis*); *Baron* at para 25). My role is to assess whether the Decision is justified, transparent and intelligible and whether the Officer's refusal of the request for a deferral of removal falls within the range of possible, acceptable outcomes which are defensible on the particular facts of the Applicants' case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Analysis: Was the Decision reasonable?

[30] I find that the Decision was not reasonable. Although the Officer did not err in the consideration of Cleval's best interests within the limited scope of the discretion afforded to a CBSA enforcement officer, the Officer failed to reasonably consider the circumstances that resulted in the Principal Applicant's delay in filing her own H&C application. As a result, the Officer's assessment of the timeliness of Mr. Patterson's 2018 Application was not reasonable.

1. Did the Officer err in considering Cleval's best interests?

[31] The Officer's consideration of Cleval's best interests in the Decision is brief. It is by no means a comprehensive analysis. However, the Officer was not engaged in the assessment of an H&C application. The Officer's best interests analysis must be reviewed against: (1) the principles established in the current jurisprudence regarding the parameters of an enforcement officer's duty and discretion to consider the best interests of a child in making a deferral decision; and (2) the content of the Applicants' deferral request.

[32] The scope of a CBSA enforcement officer's discretion to defer a valid removal order has been recently and thoroughly canvassed both by the FCA in *Lewis* and by this Court in *Forde. The two cases establish that an enforcement officer's discretion in considering a deferral request is very limited and is focused on short-term considerations,* as subsection 48(2) of the IRPA requires the enforcement of removal orders as soon as possible *(Lewis* at para 54*; Forde* at para 36).

[33] In *Lewis*, the FCA addressed both the short-term nature of an enforcement officer's inquiry and the Supreme Court of Canada's decision in *Kanthasamy v. Canada (Citizenship and Immigration),* 2015 SCC 61 (*Kanthasamy*). Justice Gleason first addressed the scope of an officer's discretion, citing the FCA's 2009 decision in *Baron* and stating (*Lewis* at paras 54-56):

> [54] Deferral requests are typically the last application made by those who are not entitled to remain in Canada. In light of this and of the language used by Parliament in section 48 of the IRPA, directing that removal orders be enforced as soon as possible (or formerly as soon as is reasonably practicable), this Court and the Federal Court have long held that the discretion that an enforcement officer may exercise is very limited: *Shpati* at para. 45; *Baron* at para. 51; *Wang v. Canada (Minister of Citizenship and Immigration),* [2001] 3 F.C.R. 682 at para. 45, 2001 FCT 148 (F.C.T.D.); and *Simoes v. Canada (Minister of Citizenship and Immigration)*, 187 F.T.R. 219 at para. 12, 7 Imm. L.R. (3d) 141 (F.C.T.D.) [*Simoes*].
>
> [55] As this Court noted in *Baron* at paragraph 49 (citing with approval from the earlier decision of the Federal Court in *Simoes*):
>
> > […] the discretion that [an enforcement] officer may exercise is very limited, and […] is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, [an enforcement] 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.
>
> [56] This Court went on to accept the Federal Court's further holding in *Simoes* that "the mere existence of an H&C application [does] not constitute a bar to the execution of a valid removal order" and that "an enforcement officer [is] not required to undertake a substantive review of the children's best interests before executing a removal order" (*Baron* at para. 50). Nor does the fact that the individual being removed is the parent of a Canadian-born child that may accompany the parent back to the country of origin justify deferral; this was precisely the situation in *Baron* and, indeed, is often the case for those who have remained in Canada while their immigration applications are being processed.

[34] With respect to the impact of *Kanthasamy*, Justice Gleason stated (*Lewis* at para 74):

> [74] In light of the foregoing, I disagree with Mr. Lewis and the intervener that *Kanthasamy* requires that a full-blown best interests of the child analysis be undertaken before a child's parent(s) may be removed from Canada or that such children's best interests must outweigh other considerations in the analysis. In my view, the holding in *Kanthasamy* applies only to H&C decisions made under section 25 of the IRPA and, even there, does not mandate that the affected children's best interests must necessarily be the priority consideration.

[35] The FCA then considered the analysis of Justice de Montigny (as he then was) in *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, and subsequent decisions of this Court, and concluded that an enforcement officer may consider the short-term best interests of children whose parent(s) are being removed from Canada but cannot undertake a full-blown H&C analysis of such children's long-term best interests (*Lewis* at para 61; see also *Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888 at paras 18-19 (*Newman*)).

[36] In *Forde*, the Chief Justice referred to *Baron* (at para 51) and *Lewis* (at paras 54, 83) and emphasized the importance of subsection 48(2) of the IRPA in Canada's immigration system, the restricted role of an enforcement officer in assessing any extreme, short-term implications of an immediate removal, and the temporal limitations on an officer's discretion (*Forde* at para 36).

[37] In order to assess whether the Officer properly exercised their discretion and reasonably considered the Applicants' submissions regarding Cleval's short-term best interests, it is necessary to review the deferral request itself. The Applicants first submitted their request by letter from Mr. Ramkissoon on July 18, 2018. The focus of the submissions in the letter was the issues encountered by the Principal Applicant in attempting to prepare and file her H&C application in 2016 and 2017. The June 25, 2018 letter requesting the Minister's intervention in the Applicants' case also focused on the H&C application.

[38] Additional deferral submissions were made by the Applicants' current counsel on July 31, 2018. Cleval's best interests were addressed in those submissions:

> The best interests of the Applicant's daughter must be your primary consideration in assessing this request. It is not a question of whether she will suffer hardship in St. Vincent; it is a question of what is in her best interests. If it is not in her best interests to return to St. Vincent, then barring any serious considerations, other than the enforcement of the Act, they should not be removed. To decide contrary to this would be against the Supreme Court of Canada and international case law on children and the deportation of parents.

[39] Counsel referred to the fact that Cleval was born in St. Vincent but came to Canada at the age of nine months. As of July 2018, she had completed grade 11, subject to some credit recovery she was to do in August 2018 to continue to grade 12. The submissions stated that

Cleval has been "the subject of an Individualized Education Plan since grade 7 as she is a slow learner". A copy of the Individualized Education Plan (IEP) was before the Officer. The submissions also spoke generally to the Applicants' lives with Mr. Patterson and his son and the disruption to the family that would occur on removal.

[40] In the Decision, the Officer noted that he is not an H&C officer and could only assess Cleval's short-term best interests. The Officer acknowledged that Cleval had been in Canada since she was approximately six years old and had not returned to St. Vincent. The Officer also acknowledged that it would be challenging for Cleval to return to St. Vincent but that she would be with the Principal Applicant. The Officer concluded:

> I also note that insufficient evidence was presented to indicate that Cleval will not be able to continue with her education upon return to St. Vincent. I find that insufficient evidence was presented to indicate that in the short term, Cleval will be unable to cope in her new circumstances.

[41] The question before me is whether the Officer reasonably considered Cleval's short-term best interests based on the Applicants' deferral request. In their submissions in this application, the Applicants argue that the Officer's best interests analysis was generic and reviewed Cleval's interests through a hardship lens.

[42] The Officer's analysis was somewhat generic and brief but this is a reasonable reflection of the Applicants' deferral submissions. The Applicants did not identify any short-term issues for Cleval of the nature identified in the jurisprudence. The submissions focussed on concerns of family separation and dislocation. No doubt the separation from Mr. Patterson and his son would

be disruptive as would the return to a country of which Cleval has no knowledge or experience. However, these are not short-term issues and are among the inherent consequences of removal.

[43] In the July 31, 2018 submissions, the Applicants refer to the fact that Cleval has an IEP and is a slow learner. The reference may have been intended to denote Cleval's interest in finishing grade 12 in Canada, a shorter term interest, but this is not apparent. The IEP does not identify a learning disability. Rather, it sets out educational accommodations for Cleval, including extended time limits, strategic seating and proximity to instructor. The Applicants provided no documentary evidence regarding the availability of education, or accommodation, for Cleval in St. Vincent. While there is no reference in the Decision to the IEP, I find that this omission does not constitute a reviewable error on the evidence before the Officer.

[44] There is a statement in the deferral submissions that Cleval had recently divulged to the Principal Applicant that she was sexually assaulted at the age of 8 by a man her mother was dating. The submissions also state that this individual is back in St. Vincent. Other than the Principal Applicant's statement to this effect, there is no evidence or detail in the record regarding the assault, the identity, removal or return to St. Vincent of the individual, or the short- or long-term impact of the alleged assault on Cleval.

[45] With respect to the Applicants' second submission, there is no reference or indication in the Decision that the analysis of Cleval's short-term interests was undertaken on the basis of hardship. The Applicants' reference to the "lens of hardship" based on *Kanthasamy* is not persuasive.

[46] When considering a deferral request, an enforcement officer must focus on the short-term best interests of any children affected by the removal. In order to do so, the officer must be provided with reasonably specific submissions and information regarding those short-term interests. It is not enough to state that the child or children in question will suffer emotionally or that separation from remaining family members will be disruptive. The Applicants' general reliance on *Kanthasamy* in support of their deferral submissions is misplaced as the Officer was not conducting a section 25 H&C evaluation. As stated in *Lewis* (at para 74), the Officer was not required to conduct a full-blown best interests of the child analysis, nor did Cleval's best interests necessarily outweigh all other considerations in the analysis.

2. Did the Officer unreasonably discount the Principal Applicant's efforts since 2016 to submit her H&C application?

[47] The Applicants submit that the Officer failed to reasonably consider the evidence of negligence on the part of the Principal Applicant's professional advisors through 2016 and 2017 that negated her attempts to file an H&C application. They argue that the delays must be taken into account in assessing the timeliness of Mr. Patterson's 2018 Application. I agree with the Applicants as the evidence in the record suggests that, but for the inaction of her advisors, the Principal Applicant would have submitted an H&C application in 2016, a relevant consideration in the deferral request.

[48] The Officer's treatment of this evidence suggests a boilerplate approach. The statement in the Decision that it is an applicant's responsibility to ensure any and all applications prepared on their behalf are properly made, while true, does not take into account the Applicants' specific

circumstances. I find that the Decision is not reasonable as I am unable to assess whether the refusal of the deferral request is among the possible outcomes for the case in light of the particular facts and evidence before the Officer.

[49] In *Forde*, the Chief Justice reviewed the impact of a pending spousal application on a request for a deferral of removal. He emphasized the temporal limitations of a deferral and the fact that a spousal sponsorship or H&C application filed shortly before a scheduled removal, or after an applicant is notified that he or she is subject to removal, will not permit deferral (*Forde* at paras 36, 40):

> [36] Moreover, it is now settled law that an enforcement officer's discretion to defer removal is "very limited," and is restricted to deferring for a short period of time in situations "where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment": *Baron*, above, at para 51; *Lewis*, above, at paras 54 and 83. In cases where a determination has not yet been made on a previously submitted H&C application, CBSA enforcement officers do not have the discretion to defer removal in the absence of "special considerations" or a "threat to personal safety": *Baron*, above, at para 51; *Danyi*, above, at paras 29-32. Even in such "special situations," as discussed below, there are important temporal limits on a removal officer's discretion to defer removal. It does not appear that the Court's attention in *Ortiz*, above, was drawn to the foregoing jurisprudence and its progeny.
>
> …
>
> [40] To permit a person to avoid removal from Canada by filing a spousal sponsorship or an H&C application shortly before the scheduled removal, or indeed well after being notified that he or she is subject to removal, would be contrary to the principles articulated in *Lewis* and the jurisprudence cited therein. Pursuant to that case law, a removals officer is not entitled to defer removal where a decision on an outstanding application is unlikely to be imminent: *Baron*, above, at para 80; *Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888, at paras 28-34 [***Newman***]; *Singh v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 403, at para 7. Moreover, a removals officer does not have the discretion to defer removal to an

> indeterminate date: *Baron*, above, at para 80; *Fatola v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 479, at para 33. Rather, the "special considerations" that may warrant deferral must be associated with the impending or imminent removal being challenged and cannot be more than temporary in nature: *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286, at para 45; *Newman*, above, at para 33. In this context, the word "temporary" cannot be construed as including a deferral of indeterminate or lengthy duration.

[50] The trio of *Baron*, *Lewis* and *Forde* establish the following:

1. An enforcement officer's discretion to defer removal is very limited and, ultimately, an officer is required to enforce a removal order in accordance with subsection 48(2) of the IRPA (*Baron* at paras 51, 80: *Lewis* at para 54; *Forde* at para 36);

2. In the exercise of their discretion, an officer cannot defer removal to an indeterminate date (*Baron* at para 80: *Forde* at paras 36-37, 43);

3. An officer's discretion is not only limited temporally but is also focused on serious, short-term issues relating to the safety of an applicant, ability to travel, immediate medical issues, impending births and deaths and, in the case of children, such considerations as finishing the school year, whether care has been arranged if they are remaining in Canada, or the need for special medical care in Canada (*Baron* at para 51: *Lewis* at paras 55, 83; *Forde* at para 36). The often-quoted language from *Baron* (at para 50) which situates the tone of the inquiry is that deferral should be reserved for those situations involving "the risk of death, extreme sanction or inhumane treatment" to the applicant;

4. The existence of an outstanding H&C or spousal application in Canada is not a bar to removal absent special considerations. Both the timeliness of filing and the imminence of any decision on the application are important considerations for an officer (*Baron* at paras 51, 80: *Lewis* at paras 55-58, 80; *Forde* at paras 35-40). As stated in *Forde* (at para 36), even "in such 'special situations,' as discussed below, there are important temporal limits on a removal officer's discretion to defer removal".

[51] In the present case, the mere filing of the 2018 Application by Mr. Patterson would not preclude removal of the Applicants. On its face, the 2018 Application was neither filed in a timely manner vis-à-vis the Applicants and their removal, nor was a decision imminent. At issue are the Principal Applicant's attempts to file her own H&C application in 2016 and whether those attempts mitigate the delay until 2018 of a filed application which would, if granted, regularize the Applicants' status in Canada.

[52] The Officer addressed the issue as follows:

> I note that the onus and responsibility remains with the applicants to ensure they seek the appropriate means to regularize their status in Canada, including ensuring all applications have been submitted on their behalf. I further note that insufficient evidence was presented to indicate that any formal complaint has been brought against the former representatives. Lastly, I also note that Ms. Toney was previously in the process for the making of her removal arrangements in 2010 when she failed to appear for her follow up removal interview. I note that a warrant was issued for her arrest and that she continued to evade CBSA until she came to CBSA's attention as a result of a police investigation. Thus, I find the submission of an application for permanent residence within Canada, seven years after Ms. Toney wilfully evaded immigration proceedings, to be untimely.

[53] In their deferral request, the Applicants provided a detailed explanation of the Principal Applicant's attempts to file an H&C application in 2016 and 2017, as well as her allegations of incompetence and negligence against two immigration consultants. As noted above, the focus of the July 18, 2018 letter from Mr. Ramkissoon initiating the deferral request was the Principal Applicant's explanation for the delay in filing an H&C application. The letter highlights the Applicants' allegations of negligence and the fact that the CBSA officer who met with the Principal Applicant in March 2018 was led by the second consultant to believe that the H&C application had been filed. These issues were again the focus of the June 25, 2018 letter to the Minister requesting intervention. The subsequent July 31, 2018 letter from current counsel noted the role of the consultants in the delayed H&C filing. The correspondence between the Principal Applicant and both consultants was submitted to the Officer. The notes from the Principal Applicant's meeting with CBSA in March 2018 acknowledging, based on the second consultant's assurances, the filing of the H&C application were also before the Officer.

[54] I agree with the Officer that an applicant bears responsibility for ensuring any immigration filing is complete and properly filed. However, a detailed explanation was furnished to the Officer regarding the Principal Applicant's efforts to file an H&C application and the relationship of those failed efforts to the 2018 Application. While the jurisprudence emphasizes the limited scope of an officer's discretion, the discretion nonetheless exists and an officer must consider the deferral request and evidence before them.

[55] As stated by Justice Mosley in the Stay Order, there is an "air of reality" to the Applicants' efforts to regularize their status in Canada since early 2016. In my view, the fact that

the Principal Applicant's efforts in this regard pre-date the resumption by CBSA of the removal process in 2017 is a relevant consideration. I note also that, subsequent to the Stay Order, the Applicants' counsel followed the required procedural steps regarding allegations against prior counsel and sent detailed letters to each of the two consultants alleging negligence.

[56] The Officer failed to consider whether the Principal Applicant's reliance on her consultants mitigated her ultimate responsibility to ensure the H&C filing been made and whether the inaction of the consultants established special circumstances justifying a deferral of removal. The Officer did note that the Principal Applicant had not filed formal complaints against the consultants. In my view, if this fact led to a belief that the allegations of negligence were not credible, the Officer was required to make a credibility finding in the interests of transparency and intelligibility.

[57] A reasonable consideration of the effects on timeliness of the Principal Applicant's frustrated H&C efforts may or may not have resulted in the granting of a deferral. The Officer would have to assess the temporal limitations on the discretion to defer removal. In *Forde*, the Court stated that the special considerations that may warrant deferral must be temporary in nature (*Forde* at para 40, citing *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286, at para 45, and *Newman* at para 33). The special considerations in this case impact on the issue of timeliness. If the Principal Applicant had filed an H&C application in 2016, it would have been outstanding for two years at the time of the Decision. The timing of that filing would not have addressed the Principal Applicant's six-year delay from 2010 but would have cast the timing of the 2018 Application, and her actions, in a different light. Also, a

decision on a 2016 H&C application would have been a much shorter term proposition than a decision on the 2018 Application.

VII. Conclusion

[58] The application is allowed.

[59] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-3701-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3701-18
STYLE OF CAUSE:	YEMARIA SHERNA TONEY AND CLEVAL TIMARA JONESIA TONEY v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 7, 2019
JUDGMENT AND REASONS:	WALKER J.
DATED:	JULY 30, 2019

APPEARANCES:

Richard Wazana	FOR THE APPLICANTS
Nicole Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

WAZANALAW Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT