Federal Court  Cour fédérale

**Date: 20100224**

**Docket: IMM-3679-09**

**Citation: 2010 FC 207**

**Ottawa, Ontario, February 24, 2010**

**PRESENT: The Honourable Mr. Justice Kelen**

**BETWEEN:**

**SORJNARAINE CHETARU**
**GUNAWATTIE CHETARU**

**Applicants**

**and**

**THE MINISTER OF PUBLIC SAFETY**
**AND EMERGENCY PREPAREDNESS**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of an Enforcement Officer's decision dated July 22, 2009 denying the applicants' request to defer their removal from Canada. On July 14, 2009 the applicants requested, for the fourth time, that removal be deferred until a decision is rendered on their application for permanent residence based on humanitarian and compassionate grounds (H&C application). The H&C application is outstanding since February 19, 2008 and is not expected to be decided until 2011.

**FACTS**

**Background**

[2] The applicants are citizens of Guyana. They are a husband and wife. Fifty three (53) year old Mr. Sorjnaraine Chetaru is the husband applicant and fifty (50) year old Mrs. Gunawattie Chetaru is the wife applicant.

[3] The applicants entered Canada on May 30, 2006 and claimed refugee protection on June 14, 2006. On July 31, 2007 a panel of the Refugee Protection Division (RPD) of the Immigration and Refugee Board determined that the applicants failed to rebut the presumption of state protection and dismissed their claim for refugee protection.

[4] The applicants submitted a Pre-Removal Risk Assessment (PRRA) application and an application for permanent residence in Canada on humanitarian and compassionate grounds on December 4, 2007. The H&C application was returned on January 24, 2008 because the requisite fees have not been paid. The applicants resubmitted their H&C application which was accepted by the respondent on February 19, 2008.

[5] The applicants' PRRA application was denied on April 4, 2008. The execution of applicants' removal date was then set for June 7, 2008. Four requests for deferral of the applicants' removal date followed. The timeline was summarized by Madam Justice Heneghan in *Chetaru v. Canada (MPSEP)*, 2009 FC 436 at paragraphs 4-8:

> ¶4 The Applicants submitted a deferral request on May 12, 2008, on the grounds that their application for permanent residence in Canada on humanitarian and compassionate grounds ("H & C application") was undecided. That application was initially received in December 2007 but because the fees had not been paid, the Applicants were required to re-submit their application. The application was received again on February 19, 2008. The request was refused on May 27, 2008.
>
> ¶5 The Applicants made a second deferral request on May 28. Again, the basis for this request was their H & C application. An interim stay of removal was granted by Mr. Justice Campbell on June 5, 2008 upon terms that allowed the Applicants to make further submissions to the removals Officer. The interim stay was to remain in effect until June 20, 2008. The stay was granted in cause number IMM-2507-08.
>
> ¶6 On June 27, 2008, the Applicants presented further documents and submissions. In particular, they reiterated that they based their request for deferral upon their outstanding H & C application and further, they requested that the processing of the application be expedited. In the request for a deferral of removal that was made on May 12, 2008, former Counsel for the Applicants had also asked for expeditious processing of the H & C application.
>
> ¶7 In due course, the removal of the Applicants was rescheduled for September 9, 2008. The Applicants commenced the within proceeding on August 8, 2008, seeking to review the last refusal of the Enforcement Officer to defer their removal. That decision was received by the Applicants on August 1, 2008 and the Officer's Notes were received on August 6, 2008. In the decision, the request for deferral was again denied.
>
> ¶8 On September 5, 2008, Justice Dawson granted a stay of removal pending final disposition of this application for leave and judicial review.

[6] On April 30, 2009 the applicants' application for judicial review of the Enforcement Officer's decision was dismissed. Justice Heneghan held at paragraph 20 that the Enforcement Officer was not required to conduct a "mini H&C" and could reasonably decide not defer the

applicants' removal date on the evidence before him, despite the applicants' sympathetic circumstances.

[7] On June 10, 2009 the applicants filed an application for leave and for judicial review in the cause number IMM-2945-09 seeking an order of *mandamus* with respect to their H&C application.

[8] On July 13, 2009 the applicants received notice that their removal date has been set for August 3, 2009. A fourth request for deferral was promptly filed on July 14, 2009 and denied on July 22, 2009. The present application for judicial review was filed on the same day of the Enforcement Officer's decision.

[9] On July 30, 2009 Madam Justice Mactavish granted a stay of removal pending final disposition of this application for leave and judicial review. Justice Mactavish granted leave to commence judicial review in the present application, but denied leave to commence judicial review for an order of *mandamus* and the associated stay motion as she was of the view that there has been no undue delay in the processing of the applicants' H&C application.

**Decision under review**

[10] The fourth and most recent request for deferral was based on the same H&C grounds as the previous three requests, namely the fact that the Mrs. Chetaru's Canadian sister and elderly mother reside with the applicants and accordingly rely on them for care and support. It was submitted that

none of the Chetaru's Canadian family members are able to take charge of Mrs. Chetaru's mother and sister since they are all in ill health.

[11] The applicants acknowledged that the Enforcement Officer cannot conduct a "mini H&C" but submitted that "special considerations" as defined in *Baron v. Canada (MPSEP)*, 2009 FCA 81 compelled the deferral of removal until the H&C application is decided. The special considerations were submitted to include the backlogged status of the applicants' H&C application, the fact that their H&C application is based in part on risk in Guyana, and the adverse impact of the applicants' removal on two Canadian citizens.

[12] The Enforcement Officer determined based on communication from Citizenship and Immigration Canada (CIC) that the applicants' H&C application is scheduled to be complete in 2011 and thus a decision on their file is not imminent. The Enforcement Officer also found that there are insufficient factors to request CIC to expedite the applicants' H&C application.

[13] The Enforcement Officer noted the fragile condition Mrs. Chetaru's mother faces and the mental illness which Mrs. Chetaru's sister endures which renders them both dependent on the applicants. The Enforcement Officer concluded that the request for deferral was based on nearly identical grounds as the previous requests. The Enforcement Officer then adopted the reasons of Enforcement Officer Vatikiotis who dismissed the applicants' third deferral request, which was upheld by Justice Heneghan in *Chetaru*, *supra*:

> Although the remaining family members may not be able to care for the mother and sister in the same manner as the subjects have been

> able, I still find that a network of family support does exist that can assist and determine how best to provide and care for the mother and sister and assist in this period of transition. Moreover, Mrs. Chetaru's mother and sister are Canadian Citizens, and as such have the right to remain in Canada and are entitled to the benefits of the social programs and medical care that are normally available to Canadians.

[14] The request to defer the applicants' removal was therefore denied.

## LEGISLATION

[15] The authority granted to an Enforcement Officer is contained section 48 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27:

| | |
|---|---|
| 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 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. |

## ISSUE

[16] The applicants raise the following issues:

a. Is the decision of Madam Justice Heneghan distinguishable?

b. Did the officer err in law by relying on the decisions of the previous officers without considering at all the relevant considerations set out in *Baron* and described in the Applicants' submissions? In particular:

   i. Did the officer err by failing to consider whether there were "special considerations" upon which the officer could defer deportation?

ii. Did the officer err by failing to consider whether the Applicants meet the criteria of having a pending H&C delayed as a result of backlogs in the system?

iii. Did the officer err in law by failing to consider at all the risk the Applicants faced in their home country?

c. Was the officer's decision that a network of family support existed for the Applicant's mother and sister made in complete disregard of the evidence?

d. Was the officer's decision not to request that the H&C application be expedited deficient?

**STANDARD OF REVIEW**

[17] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question": *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[18] The Federal Court of Appeal recently held in *Baron v. Canada (MPSEP)*, *supra*, per Justice Nadon at paragraph 25 that at the standard of review of an Enforcement Officer's refusal to defer removal is reasonableness: see also my decisions in *Ragupathy v. Canada (MPSEP)*, 2006 FC 1370 at paragraph 12; *Level (Litigation Guardian) v. Canada (MPSEP)*, 2008 FC 227 at paragraphs 12-13.

[19] In reviewing the Officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, *supra* at paragraph 47, *Khosa*, *supra*, at paragraph 59).

**<u>Issue No. 1</u>: Is the decision of Madam Justice Heneghan distinguishable?**

[20] The applicants submit that the Justice Heneghan decision in *Chetaru*, *supra*, is distinguishable from the present application, not on the facts since they are nearly identical, but because the applicants specifically asked the Enforcement Officer in the decision under review to directly address the factors set out in *Baron*, *supra*, and determine whether there were special considerations in the applicants' H&C application, whether the H&C application is delayed due to backlogs, and consider that risk to the applicants in Guyana forms in part the basis of the H&C application.

[21] Justice Heneghan invited the parties to make submissions on the impact of *Baron*, *supra* and both chose to do so. Justice Heneghan set out the position of the applicants with respect to *Baron*, *supra* at paragraph 14 of her reasons:

> ¶14 In the present case, both parties rely on the decision in *Baron*. The Applicants argue that in *Baron*, the Court noted that as in *Wang*, an outstanding H & C application could be the basis for deferring removal when there are "special considerations". They allege that such "special considerations" exist in this case, specifically the need for their continued presence in Canada until a decision on their H & C application so that they may provide

> assistance and leave to sick family members, that is the mother and sister of the female applicant.

[22] Contrary to the applicants' submissions, the fact that *Baron, supra*, was not released at the time the applicants made their submissions before the Enforcement Officer in *Chetaru, supra*, does not render Justice Heneghan's Judgment distinguishable.

[23] The applicants concede that *Baron, supra*, did not change the law on requests for deferrals. It begs logic to then accept the argument that *Baron, supra*, has since required Enforcement Officers to consider "the criteria set out in *Baron*". If the law has not changed, then the effect of *Baron, supra*, could not have been to set out a new test for granting deferrals. In *Baron, supra*, at paragraph 49-51 the Court set out a number of examples where deferral may be justified which the applicants contend applies to them. Those examples are derived from case law which preceded the applicants' requests for deferral: *Simoes v. Canada (MCI)*, [2000] F.C.J. No. 936 (T.D.) (QL), 7 Imm.L.R. (3d) 141, per Justice Nadon (as he then was) at paragraph 12 and *Wang v. Canada (MCI)*, [2001] 3 F.C. 682, per Justice Pelletier (as he then was).

[24] The applicants' submissions to the Enforcement Officer dated June 27, 2008 set out the same factual background in support of their request for deferral, namely the risk in Guyana and the support that they provide to two Canadian citizens. Little if any has changed since then. The Court is of the view that the Judgment of Justice Henghan in *Chetaru, supra*, is not distinguishable.

[25] This holding is in my view sufficient to dismiss the application at bar since much of the Enforcement Officer's analysis was based on Enforcement Officer Vatikiotis's reasons which were upheld as reasonable by Justice Heneghan. In the event that I am wrong, I will address the remainder of the issues raised by the applicants in the reasons that follow.

**<u>Issue No. 2</u>: Did the officer err in law by relying on the decisions of the previous officers without considering at all the relevant considerations set out in *Baron* and described in the Applicants' submissions**

[26] The applicant submits that the Enforcement Officer erred in relying on Enforcement Officer Vatikiotis' reasons without considering the factors set out int *Barons, supra*.

[27] A timely filed H&C application which is delayed as a result of backlogs may justify a deferral, along with a number of other examples that were mentioned in *Baron, supra*, at paragraphs 49-51:

> ¶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. …*
>
> ¶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:
>
> > …
> >
> > - 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*.
> >
> > …
>
> I agree entirely with Mr. Justice Pelletier's statement of the law.
>
> [Emphasis added]

[28] The applicant mistakenly refers to the examples set out in *Baron, supra*, as “factors” which the Enforcement Officer was required to address. Invoking *Baron, supra*, does not change the Enforcement Officer’s mandate to consider whether it is “reasonably practicable” to execute the removal order in light of the particular circumstances of the applicants.

[29] Justice Heneghan held that Enforcement Officer Vatikiotis' reasons were reasonable and I have no reason to depart from her Judgment.

[30] The present Enforcement Officer reasonably relied on the Enforcement Officer Vatikiotis's analysis. The applicants submitted the same factual circumstances four times. Enforcement Officer Vatikiotis reasonably addressed the applicants' concerns with respect to the adverse impact of removal upon Mrs. Chetaru's mother and sister. Enforcement Officer Vatikiotis reasonably declined to expedite the applicants' H&C application because there were insufficient grounds to distinguish this application from the other applications in the processing queue. The allegations of risk consisted of general risk of violence and crime and fall far short of what is described in *Wang*, *supra*. This determination was reasonably open to Enforcement Officer Vatikiotis on the facts before him without having to conduct a "mini H&C". Since the facts have not changed in the deferral request that followed Justice Heneghan's Judgment, the Enforcement Officer reasonably relied on Enforcement Officer Vatikiotis' reasons. It is unreasonable to ask for deferral four times on the basis of the H&C application, and then appeal the decision to this Court. That is an abuse of the Court's process. Chief Justice Blais of the Federal Court of Appeal (then Blais J.A.) held in *Baron*, *supra.* at paragraph 74 that:

> … Recently, claimants have entered into an abusive cycle of deferral requests, judicial review applications and stay of removal applications …

Justice Blais continued at paragraph 83:

> … It's time to stop this abusive cycle.

**Issue No. 3: Was the Officer's decision that a network of family support existed for the Applicant's mother and sister made in complete disregard of the evidence?**

[31] The applicant submits that the Enforcement Officer erred by disregarding evidence which established the dependency of Mrs. Chetaru's mother and sister on the applicants and the inability of any other family member to assume care of those individuals, and the Court should find that the decision was based on an erroneous finding of fact from the failure of the Enforcement Officer to mention the applicants' evidence: *Cepeda-Gutierrez v. Canada (MCI)* (1998), 157 F.T.R. 35 (F.C.T.D.), per Justice Evans (as he then was) at paragraph 17.

[32] This is not a case where the Court can infer an erroneous finding of fact has been made. A close reading of the reasons establishes that the Enforcement Officer found that the applicants' family could guide the future care of Mrs. Chetaru's mother and sister as they take advantage of the panoply of social and health programs that are available in Canada:

> Although the remaining family members may not be able to care for the mother and sister in the same manner as the subjects have been able, I still find that a network of family support does exist that *can assist and determine how best to provide and care for the mother and sister and assist in this period of transition. Moreover, Mrs. Chetaru's mother and sister are Canadian Citizens, and as such have the right to remain in Canada and are entitled to the benefits of the social programs and medical care that are normally available to Canadians.*
>
> [Emphasis added]

It was open to Enforcement Officer on the evidence before him to conclude that the applicants' family could help Mrs. Chetaru's mother and sister take advantage of Canada's social and health programs without having to directly provide care.

[33] The Enforcement Officer acknowledged that the applicants' family are not able to offer care. This admission is sufficient to establish that the Enforcement Officer made his finding with regard to the evidence. This ground of review must therefore fail.

**Issue No. 4: Was the Officer's decision not to request that the H&C application be expedited deficient in its reasons?**

[34] The applicant submits that the Enforcement Officer provided inadequate reasons for declining to request that CIC expedite the processing of the applicants' H&C applications.

[35] H&C applications are by definition based on H&C grounds. An H&C will not be expedited simply because it is based on H&C grounds. The Enforcement Officer was correct in determining that this case did not present any special circumstances that would justify a request to expedite processing.

[36] Suffice it to say that the circumstances at bar are not special, a determination which was reasonably open to the Enforcement Officer. On July 30, 2009 Madam Justice Mactavish of this Court held that the applicants' H&C application has not been unduly delayed: *Chetaru v. Canada (MCI)*, IMM-2945-09, per Justice Mactavish. I see no reason to hold differently since I am of the view that a two year delay does not constitute undue delay in the present circumstances. This ground of review must therefore fail.

**CERTIFIED QUESTION**

[37] The applicants proposed the following question for certification to the Federal Court of Appeal:

> Where a person subject to removal has an outstanding H&C application and requests deferral on that basis, what are the types of detailed circumstances which a Removal Officer should consider as being a potentially valid basis for deferring the deportation?"

[38] The respondent opposed the certification of this proposed question because this raises the same factors as the Federal Court of Appeal just decided on in *Baron, supra.* The Court agrees. Absent "special considerations", an outstanding H&C application will not justify deferral of removal. Obviously, the "special considerations" must be other than the basis for the H&C, or else all H&C applications would have "special considerations". Then the Enforcement Officer would be expected to undertake a "mini H&C", which the Federal Court of Appeal in *Baron, supra* has held the Enforcement Officer is not authorized to conduct. Accordingly, the Court finds that this proposed question does not raise a serious question of general importance which has not already been determined by the Federal Court of Appeal.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that:**

The application for judicial review is dismissed.

"Michael A. Kelen"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-3679-09 |
| **STYLE OF CAUSE:** | SORJNARAINE CHETARU ET AL. v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | February 16, 2010 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | KELEN J. |
| **DATED:** | February 24, 2010 |

**APPEARANCES:**

| | |
|---|---|
| Mr. Matthew Jeffrey | FOR THE APPLICANTS |
| Ms. Neeta Logsetty | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Matthew Jeffrey<br>Barrister & Solicitor<br>Toronto, Ontario | FOR THE APPLICANTS |
| John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |