Federal Court  Cour fédérale

Date: 20220128

Docket: IMM-264-21

Citation: 2022 FC 96

Ottawa, Ontario, January 28, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

SALLY SABAH MARROGI
MARTIN KARIM
RIVEL KARIM

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant [PA] and her two teenage sons claim to be citizens of Iraq. They have applied under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 for judicial review of the January 4, 2021 decision by a Senior Immigration Officer [Officer]

rejecting their application for permanent residence from within Canada on Humanitarian and Compassionate [H&C] grounds.

[2] I am convinced that the Court's intervention is warranted. For the reasons detailed below, the Officer's consideration of the identified H&C factors and the global assessment of those factors fail to reflect the required attributes of a reasonable decision: justification, transparency and intelligibility.

II. Background

[3] The Applicants identify as Chaldean Catholics. The PA reports that Muslim extremists kidnapped her husband, the father of her two sons, from their home in Bagdad on May 5, 2007, because he owned and operated a liquor store. The kidnappers threatened to return for the children and to rape and kill the PA. The PA, her mother and her two sons fled Baghdad, escaping to Turkey in June 2007. The PA's mother then travelled to Canada in February 2008 and her claim for refugee protection was accepted in May 2010. The PA and her sons arrived in Canada in July 2012 and they too sought refugee protection.

[4] The Refugee Protection Division [RPD] did not hear the Applicants' claim until August 2017. The RPD rejected the claim, finding the Applicants had not established their personal identities and nationalities. This Court dismissed an Application for Judicial Review of the RPD decision on its merits in April 2018.

[5] The Applicants filed an H&C application on May 21, 2019. The PA relied on the family's establishment in Canada, the best interests of her two sons and the hardship a return to Iraq would create for the Applicants. The PA identified security concerns, separation from friends and her mother in Canada, the inability of her sons to attend school as Christians in Iraq, the absence of any family in Iraq and the impact of a return to Iraq on the physical and mental health of the Applicants.

III. Decision under Review

[6] The Officer considered the Applicants' submissions under the headings of establishment in Canada, hardship and risk associated with adverse country conditions and the best interests of the children [BIOC].

[7] The Officer acknowledged the Applicants have resided in Canada since July 2012. The Officer assigned some positive weight to the establishment, noting attendance at school for the PA's sons and the PA's Canadian friendships, mother and involvement in the community. The Officer also gave a small amount of positive weight to the PA's lack of criminal record, membership in a local church and history of paying some taxes in Canada.

[8] In addressing the Applicants' identities, the Officer noted the absence of any new identity documents with the H&C application and that the documentation provided had been found by the RPD to be fraudulent. The PA stated in her affidavit that the CBSA forensics unit did not evaluate the authenticity of her documents and that her counsel was pursuing confirmation of her and her family's identities through the Iraqi Embassy in Canada. The Officer concluded the

Applicants had not established their identities as Iraqi nationals and therefore gave little consideration to their descriptions of risk, discrimination and hardship arising out of adverse country conditions. Furthermore, the Officer noted Canada has enacted a temporary stay of removal [TSR] to Iraq because of dangerous country conditions and the refusal of the Applicants' H&C application would accordingly not result in their immediate removal.

[9] The Officer then acknowledged that the PA would miss her Canada-based friends and family should she return to Iraq but noted that these relationships could be maintained through social media tools like Facebook, Twitter and Skype. In addressing health concerns, the Officer recognized the mental and physical health issues experienced by the Applicants and the poor state of Iraq's healthcare system. The Officer found a return to Iraq would cause a degree of hardship in terms of healthcare.

[10] Lastly, the Officer performed a BIOC analysis. The Officer recognized that the PA's two sons have resided in Canada for many of their developmental years, have formed ties to Canada through school and community activities, do not speak Arabic and reportedly suffer from anxiety and depression. Overall, the Officer found the H&C application did not provide sufficient evidence to demonstrate that the development or wellbeing of the PA's sons would be significantly affected by a negative H&C decision. The Officer recognized such a decision would cause the co-Applicants distress and it is likely in their best interests to remain in Canada, but the negative decision would not result in their removal because of the TSR.

IV. Issues and Standard of Review

[11] The Application raises the following issues:

A. Was the Officer's treatment of the country condition evidence reasonable?

B. Was the Officer's BIOC analysis reasonable?

C. Did the Officer reasonably consider the Applicants' personal circumstances?

[12] The parties submit, and I agree, that the issues raised are reviewable on a reasonableness standard. A reasonable decision is one that is justified, transparent and intelligible and falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 86).

V. Analysis

[13] In addressing the country condition evidence, the Officer relies on the Applicants' failure to establish their identities to conclude: "I am unable to give full weight to their description of risk, discrimination and hardship arising out of adverse country conditions in [Iraq]. As such, I give little consideration to this factor."

[14] In *Diaby v Canada (Citizenship and Immigration)*, 2014 FC 742 [*Diaby*], Justice James Russell considered similar circumstances which also arose in the context of an H&C decision. He found that an individual's failure to establish their identity did not mean they would not be

exposed to identified risks and hardships upon removal and that it was therefore unreasonable not to assess those risks and hardships:

> [62] It was unreasonable for the Officer not to assess hardship in this case because it is clear on the evidence that the Applicant either comes from Sierra Leone or Guinea, and the Guinea claim was clearly fraudulent. Hence, it is obvious that the Applicant will either be retuned [*sic*] to Sierra Leone or she will remain as a stateless person in Canada. The Respondent has accepted, for purposes of the PRRA decision, that the same Officer should have assessed risk against Sierra Leone even if nationality has not been clearly established. The fact that the Applicant did not establish to the Officer's satisfaction that she is a citizen of Sierra Leone does not mean she will not be exposed to risks and hardship when she is returned there. And, if the Applicant remains in Canada, then the Officer should have assessed the hardship she will face as a stateless person.

[15] The Respondent argues that *Diaby* is to be distinguished on the basis that there was only one country of return credibly identified, which is not the case here. I am not persuaded that such a distinction arises. In this case, as in *Diaby*, neither the evidence nor the parties identify any other possible country of return. In addition, the Officer expressly relies on the TSR to Iraq at two different points in the decision to conclude that a negative H&C decision will not result in removal. The Officer has undertaken the H&C analysis on the premise that the Applicants would, if removed, be returned to Iraq. It is contradictory to, on the one hand, conclude risk in Iraq need be given little consideration and, on the other, presume removal to Iraq.

[16] The Officer's treatment of country conditions also taints the Officer's BIOC analysis. The Officer finds it likely to be in the children's best interests to remain in Canada. At the same time, the Officer finds there to be little evidence to demonstrate that a negative H&C decision will "significant[ly] negatively affect their development or wellbeing."

[17] Having given little consideration to the country conditions in Iraq, it is not at all evident how the Officer arrived at this conclusion other than through a reliance on the TSR. Finding there to be an absence of evidence establishing a significant negative impact on the wellbeing of affected children also misstates what is to be assessed in a BIOC analysis – the holistic consideration of a child's circumstances (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 45).

[18] The Officer has failed to meaningfully grapple with the varied consequences that are likely to result if the PA's sons are removed to Iraq.

[19] I am also of the view that the Officer failed to reasonably address the PA's circumstances, in particular her health concerns, given the Officer's acknowledgement that the documentary evidence indicated Iraq's healthcare system is in crisis. It may well have been open for the Officer to conclude the degree of hardship and instability a return to Iraq would entail did not warrant H&C relief. However, transparency required the Officer to articulate some rationale in support of this conclusion.

VI. Conclusion

[20] For all of the above reasons, I am of the opinion that the Officer's decision is unreasonable. The Application is granted.

[21] The parties have not identified a question of general importance for certification, and I am satisfied none arises.

JUDGMENT IN IMM-264-21

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. The matter is returned for redetermination by a different decision maker.

3. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-264-21
STYLE OF CAUSE:	SALLY SABAH MARROGI, MARTIN KARIM, RIVEL KARIM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 12, 2022
JUDGMENT AND REASONS:	GLEESON J.
DATED:	JANUARY 28, 2022

APPEARANCES:

Mary Jane Campigotto	FOR THE APPLICANTS
Sally Thomas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Campigotto Law Firm Windsor, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT