Federal Court  Cour fédérale

Date: 20200917

Docket: IMM-5567-19

Citation: 2020 FC 900

Ottawa, Ontario, September 17, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MASUD MASHAL
FATIMA ANWARI MASHAL
ALI MASHAL
ILJAS MASHAL through his litigation guardian MASUD MASHAL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, a married couple from Afghanistan and their two sons, are all Dutch citizens, having previously made successful refugee claims in the Netherlands. They seek judicial review of a decision by a Senior Immigration officer [the Officer], dated September 3,

2019 [the Decision], refusing their application for permanent residence in Canada on humanitarian and compassionate [H&C] grounds.

[2] For the reasons explained in greater detail below, this application for judicial review is dismissed. I have considered the arguments advanced by the Applicants but find they do not undermine the reasonableness of the Decision.

II. **Background**

[3] As noted above, the Applicants, Masud Mashal, his spouse, Fatima Anwari Mashal, and their two eldest children, Ali (currently age 23) and Iljas (currently age 18 but a minor at the time of the H&C application) are citizens of the Netherlands. Their family also includes a daughter who was born in Canada and is a Canadian citizen.

[4] The Applicants left Afghanistan in 1999, subsequently arriving in the Netherlands where they obtained refugee protection and later citizenship. They claim they left the Netherlands in 2007 due to constant harassment and intimidation at the hands of a member of the Afghan community in the Netherlands and his family. Mr. Mashal states that he had an affair with the wife of a powerful individual in the Dutch-Afghan community and that this individual and his family subjected the Applicants to threats and violent harassment.

[5] In 2007, the Applicants travelled to New Zealand to live with Mrs. Mashal’s family. Following a 2011 earthquake, which devastated the city where they were living and left them

homeless, the Applicants left New Zealand and travelled to the United States. They entered Canada on August 28, 2012 and subsequently made refugee claims in Canada.

[6] However, the Applicants falsified their identities on their refugee application. After the Canada Border Services Agency intervened in their refugee claim, the Applicants withdrew their claim in September 2017 and instead applied for permanent residence in Canada on January 8, 2018, on the basis of H&C considerations. They cited establishment in Canada, hardship they would suffer if returned to the Netherlands, including as a result of language barriers and the threats which caused them to flee that country originally, as well as the best interests of their children [BIOC].

[7] In relation to BIOC, the Applicants rely in particular on the medical condition of their younger son. Iljas has been diagnosed in Canada with nephronophthisis, short stature, and delayed puberty. He is currently suffering from end-stage kidney disease, requiring dialysis on a short term basis until he can get a kidney transplant. By withdrawing their refugee claim, the Applicants lost their federal health coverage. On April 1, 2019, they requested that the Minister grant them such coverage, citing exceptional and compelling circumstances. Coverage was not in place at the time of the September 3, 2019 Decision but was provided later that month.

III. **Decision under Review**

[8] The Decision sets out the factors relevant to the Applicants' establishment in Canada and the BIOC analysis, as well as other factors for consideration, including the fact the Applicants misrepresented themselves when they came to Canada and claimed refugee protection.

[9] The Officer accepted the Applicants are well established in Canada and placed positive weight on this establishment. However, the Officer noted the Applicants intentionally withheld their true identities from Canadian authorities for the purposes of obtaining refugee status. Although noting the Applicants claimed they misled Canadian authorities because they feared harassment in the Netherlands, the Officer found their reasons lacking.

[10] The Officer considered the Applicants' allegations surrounding events in the Netherlands but rejected this explanation, finding their fear speculative. Although there was evidence that incidents had occurred in the past, the Officer found little evidence supporting a likelihood of future harassment. The Officer also considered that the Applicants reported the incidents to the police and were provided assistance, as shown by police reports submitted as evidence. The Officer stated there was no evidence indicating that the family the Applicants feared had power or influence to harm them despite police intervention. Referencing the country condition documentation on the Netherlands, the Officer concluded the police in the Netherlands are able and willing to provide adequate protection to the Applicants if they return to their country of citizenship and face harassment. As a result, the Officer placed little weight on the potential threat and found unlikely that the Applicants would return to a situation of hardship in the Netherlands.

[11] The Officer therefore found the Applicants' reasons for leaving the Netherlands and concealing their identities to Canadian immigration authorities not compelling. Rather, the Officer found they acted in self-interest in seeking immigration status in Canada through fraudulent means and placed negative weight on their actions.

[12] The Officer then considered the Applicants' submission that they would face trouble integrating into the Netherlands, because they do not speak Dutch, but rejected this submission because the adult Applicants had learned English and had demonstrated adaptability in relocating across the globe on a number of occasions. The Officer did not find returning to the Netherlands and being unable to speak Dutch fluently to be a persuasive factor that could be considered hardship. The Officer further noted that the Applicants were employed during their time in the Netherlands from 1999 to 2007, indicating some familiarity with the culture, the country, and the people. The Officer ultimately gave little weight to the difficulty of integrating into the Netherlands.

[13] The Officer considered that Ali had come to Canada as a child, learned English, and graduated high school here. He is working and aims to attend post-secondary education. The Officer acknowledged Ali's connections to Canada and his fears of returning to the Netherlands due to his childhood memories and his parents' fears. The Officer also noted his significant experience moving internationally. Overall, the Officer weighed Ali's desire to remain in Canada positively, to be balanced against his parents' actions in misleading immigration authorities.

[14] The Officer then considered Iljas, noting his medical diagnoses that required a high level of medical care and his letter describing his fear of going to the Netherlands, because he does not speak Dutch, and his worry about his medical treatment. The Officer considered the specialized health care that Iljas was receiving in Canada from a team of doctors and his awaiting a kidney transplant. The Officer observed that Iljas' health care needs are high and are being well cared for in Canada, describing this as a positive factor.

[15] The Officer also considered Iljas' parents' fear for his health if he returns to the Netherlands, noting the concern that Iljas will not be cared for to the degree that he is in Canada. The Officer described this as a serous concern, to be taken into account, but found a lack of evidence that the Netherlands healthcare system could not provide for Iljas' medical treatment, noting documentary evidence that the Dutch healthcare system had been ranked the best in Europe. The Officer found that, because of this, Iljas' best interests would not be negatively compromised if he returned to the Netherlands.

[16] The Officer then considered the Applicants' Canadian daughter, who was 6 years old at the time of the Decision. The Officer noted she was doing well in school, spoke English, and considered Canada her home. The Officer found it was in her best interests to remain in the loving care of her family, wherever they may settle. Although she does not speak Dutch, the Officer noted she was very young and lived within a multicultural context in Canada, finding that if she lived in the Netherlands with her family, she would be well cared for, able to access education, and residing in a peaceful society, such that her best interests would not be compromised.

[17] In conclusion, although the factors presented in support of this application were very positive, the Officer placed negative weight on the Applicants' misrepresentation in relation to their refugee claim and, on a global assessment of all factors, determined that the positive factors were not sufficient to warrant the requested relief.

IV. **Issues and Standard of Review**

[18] The Applicants raise the following issues for the Court's consideration:

A. Did the Officer err in the BIOC assessment?

B. Did the Officer err in assessing the hardship the Applicants would face if returned to the Netherlands?

C. Did the Officer speculate as to the adaptability of the Applicants?

[19] The parties agree, and I concur, that these issues are to be reviewed on a standard of reasonableness.

V. **Analysis**

A. *Did the Officer err in the BIOC assessment?*

[20] The Applicants raise a number of arguments in support of their position that the Officer's BIOC analysis is unreasonable. One of their principal positions asserts that the Officer did not show the required attention and sensitivity to the BIOC, as the Decision's reference to Iljas' health care needs being cared for well in Canada demonstrates the Officer overlooked the fact that, at the time of the Decision, Iljas did not have Canadian healthcare coverage.

[21] As the Applicants submit, the record before the Officer evidences that Iljas did not have health care coverage at the time of the Decision. However, I cannot conclude that the Officer's failure to mention this fact, or reference to Iljas being cared for well in Canada, renders the

Decision unreasonable. As the Respondent submits, the H&C application was premised in part on the health care that Iljas was receiving in Canada, which he and his parents did not wish to have disrupted by a move to the Netherlands. The Officer appears to have accepted the Applicants' submission and treated it as a positive H&C factor. If anything, an observation that public funding for this care was not yet available might have resulted in a less favourable assessment of this factor, because funding for his health care would be more accessible in the Netherlands. I find no reviewable error arising from this argument.

[22] The Applicants also argue that the BIOC analysis related to Iljas fails to take into account considerations other than his medical conditions and treatment therefor. In particular, they submit the Officer failed to assess the challenges Iljas would face in learning Dutch or relocating to a new country in light of his medical conditions. The Applicants note that the Officer expressly considered such challenges in the context of the two other children.

[23] I find little merit to this submission. The Decision refers to Iljas' statement that he does not want to go back to the Netherlands because he does not speak Dutch, does not have friends there, and fears for his health. The Officer then focuses upon Iljas' medical conditions, his care in Canada, and the availability of care in the Netherlands. Iljas' medical conditions were a principal factor underlying the H&C application. Against that backdrop, including the Officer's reference to the non-medical challenges raised by Iljas, the Decision's focus on his medical care does not support a conclusion that the Officer overlooked the non-medical challenges in conducting the BIOC analysis.

[24] The Applicants also argue that the Officer did not consider the challenges of taking a child off dialysis temporarily to relocate to the Netherlands, the effects of having to transition to new medical providers, or the availability of a kidney transplant in the Netherlands. However, as the Respondent submits, the Officer observed that the Applicants provided no evidence to indicate that Iljas' care would be compromised if he returned to the Netherlands. In an H&C application, the onus is on the applicants to introduce the evidence to prove their case (see, e.g., *Zhu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 952 at para 20).

[25] Finally, in relation to the BIOC analysis, the Applicants submit that the Officer improperly undertook that analysis through the lens of hardship, by focusing upon whether the children could overcome the hardships that would accompany a move to the Netherlands. I disagree with this characterization of the Officer's analysis. As the Respondent notes, when conducting a BIOC assessment, an officer is not required to follow any specific formula (see *Boukhanfra v Canada (Citizenship and Immigration)*, 2019 FC 4 at paras 18-24). In the case at hand, the Officer was not treating hardship as a prerequisite to a favourable BIOC assessment but, rather, was considering the particular concerns emphasized by the Applicants in their H&C application.

B. *Did the Officer err in assessing the hardship the Applicants would face if returned to the Netherlands?*

[26] The Applicants submit that the Officer unreasonably assessed the hardship that would be associated with returning to the Netherlands. First, they argue the Decision demonstrates that certain directly relevant evidence was not considered. The Applicants rely on an affidavit

submitted by Mrs. Mashala, a letter provided by a family friend resident in the Netherlands, and the police reports related to the issues the Applicants experienced before departing the Netherlands.

[27] In her affidavit, Mrs. Mashal testifies to her fear that her family will be subjected to threats and abuse if they return to the Netherlands. The Applicants argue that this is evidence of forward-looking risk that the Officer ignored. However, the Officer expressly notes consideration of Mrs. Mashal's statements, that she will return to a situation of harassment, but finds those fears speculative in nature. It is clear from the Decision that her affidavit was not overlooked.

[28] Similarly, the Officer expressly considers the records of the Applicants' reports to the police surrounding the incidents with the Dutch-Afghan family. The Applicants submit that the last of the reports indicates no particular action taken by the police. However, this submission does not support a conclusion that the evidence was overlooked. The Officer relies on the evidence of the Applicants' interactions with the police, as well as the country condition evidence related to the Dutch police system, in concluding the police are willing and able to protect the Applicants if they face further harassment. I find nothing unreasonable in the Officer's assessment of this evidence.

[29] The Officer does not expressly reference the letter from the Applicants' friend, who refers to threats made in 2017. However, the Officer is presumed to have considered all the evidence, unless the contrary is shown (see, e.g., *Daniel v Canada (Citizenship and*

Immigration), 2019 FC 248 at paras 26-27, relying on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (FCTD) at paras 16-17). In the case at hand, the Officer states there is "very little" forward looking evidence that indicates the Applicants will face harassment in the Netherlands. This finding does not support a conclusion that the Officer overlooked the letter from the Applicants' friend. Moreover, as previously noted, the Officer reasonably concludes that, if the Applicants do face harassment upon a return to the Netherlands, the Dutch police will be able to protect them.

[30] The Applicants also argue the Officer failed to consider the hardship they would face, in light of their establishment in Canada, if they were required to apply for permanent residence from outside the country. They rely on case law to the effect that such a failure can be a reviewable error (see, e.g., *Stuurman v Canada (Citizenship and Immigration)*, 2018 FC 194 at para 24).

[31] In my view, the Decision does not demonstrate an error of this nature. The Officer analyzes the evidence indicating the Applicants are very well established in Canada and places positive weight on this factor. However, the Officer also notes that the fact one is leaving behind such connections to Canada would not necessarily be enough to justify granting an application for permanent residence from within the country on H&C grounds. This principle is well established (see, e.g., *Singh Gill v Canada (Citizenship and Immigration)*, 2012 FC 835 at para 28). The Officer weighs the Applicants' establishment and other positive factors against their misrepresentation in relation to their refugee claims and is not satisfied the H&C considerations justify granting their application. This analysis and outcome are reasonable.

C. *Did the Officer speculate as to the adaptability of the Applicants?*

[32] The Applicants submit that, in arriving at the Decision, the Officer improperly speculated as to the resilience and adaptability of the Applicants. They rely on *Bautista v Canada (Citizenship and Immigration)*, 2014 FC 1008 [*Bautista*] at para 28, in which Justice Diner noted that children are more malleable than adults and held that starting with the question whether they can adapt will almost invariably predetermine the outcome and render a BIOC analysis meaningless. Similarly, in *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 at para 31, Justice Diner held it was an error to conclude that children have the ability to adapt to a new environment because they are young.

[33] The Applicants also reference *Edo-Osagie v Canada (Citizenship and Immigration)*, 2017 FC 1084 at paras 27-29, in which Justice Manson relied on *Bautista*, in considering an officer's statements regarding children's ability to adapt based on the intrinsic resiliency accompanying their young age. However, in that case, Justice Manson was satisfied as to the reasonableness of the officer's analysis, because the officer based his conclusion, that the children would adapt to their new surroundings, on their parents' ability to guide them through the transition.

[34] On a similar point, the Applicants argue that the Officer's analysis also demonstrates a reviewable error by applying the Applicants' positive establishment to their detriment, concluding their ability to establish themselves in Canada indicates an ability to adapt upon

returning to the Netherlands (see, e.g., *Sosi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1300 at para 18).

[35] In contrast, the Respondent submits that the Officer was entitled to consider the adaptability of the Applicants, including the children, and their ability to re-establish themselves in the Netherlands. The Respondent refers the Court to *Zhang v Canada (Citizenship and Immigration)*, 2020 FC 503 at para 33, in which Justice McDonald found no error where an officer considered the applicant's ability to adjust to life in China separately from the establishment factors. Similarly, in *Shah v Canada (Citizenship and Immigration)*, 2018 FC 537 at para 74, Justice Kane found no error in an officer's BIOC assessment, which included consideration of children's adaptability.

[36] In my view, there is no inconsistency in these authorities. An applicant's ability to adapt upon returning to another country is a relevant consideration. Officers fall into error if they speculate on adaptability in the absence of evidence, based solely on the youth of children, or if they conflate the analysis of establishment and hardship factors. In the case at hand, I do not read the Decision as demonstrating either of these errors. In assessing the Applicants' adaptability, separate from the establishment analysis, the Officer considered the Applicants' personal experience, including their history of having resided in the Netherlands and the support available to the children from Mr. and Mrs. Mashal.

VI. **Conclusion**

[37] Having considered the various arguments advanced by the Applicants, I find no basis to conclude that the Decision is unreasonable. As such, this application for judicial review must be dismissed. Neither party raised any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-5567-19

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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