Federal Court Cour fédérale

Date: 20240213

Dockets: IMM-1407-22
IMM-8585-22

Citation: 2024 FC 243

Ottawa, Ontario, February 13, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

Docket: IMM-1407-22

KHALIL MAMUT
AMINIGULI AIZEZI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-8585-22

SALAHIDIN ABDULAHAD
ZULIPIYE YAHEFU

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] Khalil Mamut and Salahidin Abdulahad are Chinese citizens of Uyghur ethnicity. Both were captured in Pakistan in 2001 after coalition forces invaded Afghanistan in response to the terrorist attacks in the United States on September 11, 2001. United States authorities eventually transferred them to the Guantanamo Bay detention facility in early 2002. The two men were held there until 2009, when they were cleared to be released to Bermuda.

[2] Mr. Mamut and Mr. Abdulahad have both brought applications for leave and for judicial review seeking orders in the nature of *mandamus* and other relief arising from what they allege is an unreasonable delay in the processing of their applications for permanent residence in Canada. Their respective spouses (the co-applicants) are also Uyghurs who were born in China. Both of the co-applicants have been recognized by Canada as Convention refugees. Because the two applications for judicial review share a number of issues in common, they have been joined and are being determined together.

[3] The present Order and Reasons concerns requests by the applicants for orders that would anonymize their identities in connection with their applications for judicial review and in related proceedings and that would protect personal information relating to their minor children.

[4] When the applicants in IMM-8585-22 filed their application for leave in August 2022, they included a request for an anonymity order pursuant to Rule 8.1 of the *Federal Courts*

Citizenship, Immigration and Refugee Protection Rules, SOR/93-22 (*FCCIRPR*). If granted, all documents that are prepared by the Court and that may be made available to the public would be amended and redacted to the extent necessary to make the applicants' identities anonymous: see *FCCIRPR*, Rule 8.1(1). The applicants also requested that the anonymity order cover the identities of their four minor children. Even though the respondent opposes the request, the parties agreed to refer to the applicants in IMM-8585-22 by initials pending the Court's determination of the request.

[5] Under *FCCIRPR*, Rule 8.1(4), the Court shall determine the request for an anonymity order at the same time, and on the basis of the same materials, as the application for leave. By separate Order of the same date as this Order and Reasons, the Court is granting leave to proceed with the application for judicial review in IMM-8585-22. Accordingly, it is now time to dispose of the request for an anonymity order in that matter.

[6] In contrast, when the applicants in IMM-1407-22 filed their application for leave in February 2022, they did not include a request for an anonymity order. The issue of anonymization was only raised in October 2023, when the applicants brought a motion pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 (*FCR*) for (1) an order of confidentiality under Rule 151 of the *FCR* pursuant to which the records in the application for leave and for judicial review be redacted to anonymize the identities of the applicants and their four minor children and (2) an order amending the style of cause so that the applicants are referred to only by initials.

[7] The respondent opposes the requests for anonymization and for related relief principally on the basis that anonymity orders at this stage would serve no useful purpose because extensive information concerning all of the applicants is already in the public domain, a circumstance for which the applicants themselves are largely responsible.

[8] For the reasons that follow, the request for an anonymity order in IMM-8585-22 is denied. I am not persuaded that the publication of the applicants' full names in documents prepared by the Court and made available to the public would pose a serious risk to a public interest given the extensive information relating to the applicants that is already in the public domain. Furthermore, while I can see no valid interest in the identities of the applicants' minor children being made public, an order under Rule 8.1 of the *FCCIRPR* is limited to the identity of a party and the applicants' minor children are not parties to this litigation. Of course, it remains open to the applicants to move for a confidentiality order under Rule 151 of the *FCR* to protect the identities of their children and other personal information pertaining to the children.

[9] Also for the reasons that follow, the motion in IMM-1407-22 will be granted in part. Any personal information pertaining to the applicants' minor children shall be redacted from any part of the record in the application for leave and for judicial review that may be made available to the public. The applicants shall be responsible for preparing and filing public versions of the Application Record and the Certified Tribunal Record that are redacted in accordance with this Order. The unredacted versions of the Application Record and the Certified Tribunal Record currently filed with the Court shall not be made available to the public. On the other hand, I am not persuaded that the publication of the applicants' full names in documents prepared by the

Court and made available to the public would pose a serious risk to a public interest given the extensive information relating to the applicants that is already in the public domain.

II. THE TEST FOR AN ANONYMITY ORDER

[10] The Court's general power to make a confidentiality order is set out in Rule 151 of the *FCR*. Rule 151(2) provides that, before making a confidentiality order, the Court "must be satisfied that the material should be treated as confidential notwithstanding the public interest in open and accessible court proceedings." Any part of the Court's file covered by a confidentiality order is subject to strict limitations on access: see Rule 152 of the *FCR*.

[11] An anonymity order is a more limited form of confidentiality order. For proceedings under the *Immigration and Refugee Protection Act* (SC 2001, c 27), or under the *Citizenship Act* (RSC 1985, c C-29), Rule 8.1(5) of the *FCCIRPR* provides that the Court may make an anonymity order "if, after taking the public interest in open and accessible court proceedings into account, the Court is satisfied that the party's identity should be made anonymous." An anonymity order is generally considered a minor restriction on the open court principle but it still must be justified by the circumstances of the case in which it is sought (*Adeleye v Canada (Citizenship and Immigration)*, 2020 FC 681 at para 17).

[12] Rule 8.1 is a relatively recent innovation, having been introduced into the *FCCIRPR* in June 2021. Prior to this, in November 2018 the Court had adopted a pilot project for a simplified and informal procedure permitting the parties to seek a limited form of confidentiality (anonymity) without sealing the Court record. As Justice Rochester (then a member of this

Court) explained in *GU v Canada (Citizenship and Immigration)*, 2021 FC 1055, as an alternative to a motion under Rule 369 of the *FCR*, this simplified procedure "enabled the applicants to address privacy and security concerns, while reducing costs by permitting the applicants to avoid preparing and filing a separate motion record" (at para 22). This is also true of the procedure now formally adopted in Rule 8.1.

[13] Not surprisingly, Rule 151 of the *FCR* and Rule 8.1 of the *FCCIRPR* effectively state the very same test for a limitation on public access to information concerning a court proceeding: the Court must be satisfied that the order being requested is warranted notwithstanding the public interest in open and accessible court proceedings.

[14] Whether framed as a motion under Rule 151 (as in IMM-1407-22) or as a request under Rule 8.1 (as in IMM-8585-22), the applicants are seeking discretionary orders from the Court that would place limits on the open court principle.

[15] Court proceedings are presumptively open to the public. The general rule is that justice should be carried out in the open and not in secret. Doing so helps to ensure the integrity of court proceedings, enhances the legitimacy of decisions, fosters public confidence in the court system, and promotes public understanding of the administration of justice. Open courts are a fundamental component of the rule of law. They are also essential to the proper functioning of democratic forms of government. As well, because the news media often act as the eyes and ears of the public, the open court principle has an important constitutional dimension, engaging the rights guaranteed by section 2(b) of the *Charter*. These weighty considerations have given rise to

a strong presumption that court proceedings and court records should be open to the public and can be reported on by the news media without delay: see *Sherman Estate v Donovan*, 2021 SCC 25 at paras 30 and 37-39 as well as the authorities cited therein.

[16] In *Sherman Estate*, the Supreme Court of Canada recast the test that a party must meet when asking a court to exercise discretion in a way that limits the open court principle. Writing for the Court, Justice Kasirer emphasized that the new test preserves the essence of the test previously established in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, while clarifying the burden on a party seeking an exception to the open court principle.

[17] The test is as follows:

> In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> (*Sherman Estate*, at para 38)

[18] This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Sherman Estate*, at para 38).

III. THE TEST APPLIED

[19] In IMM-8585-22, the applicants request an anonymity order "to protect themselves and their minor children from the risk of intimidation and harassment by the Chinese government and its overseas agents, and to protect their remaining family members and relatives in China from violence, arbitrary detention, and intensified persecution by Chinese authorities."

[20] In IMM-1407-22, the applicants request a confidentiality order to protect themselves and their minor children "from the risk of violence, retribution and persecution by the Chinese government and its overseas agents." The applicants also seek such an order "to protect their remaining family members in China from potential violence, arbitrary detention, and intensified persecution by Chinese authorities because of their connection to the Applicants." They submit that, without a confidentiality order, "the Chinese government may be able to gather further information about the Applicants by searching and reviewing publicly available Court documents."

[21] The applicants submitted extensive evidence documenting the persecution of Uyghurs by the People's Republic of China. None of that evidence is challenged in the present context. As well, it is indisputable that there is an important public interest in protecting the applicants and their families from persecution and other adverse treatment. However, I agree with the respondent that there is a fatal flaw in the applicants' requests for anonymity orders. This is that, as demonstrated by the news articles and other documents gathered by the respondent in response to the present requests, there is already substantial evidence in the public domain

concerning all of the applicants, including the names and refugee status of the co-applicants. I also agree with the respondent that, to a very large extent, it is the applicants themselves and their counsel who are responsible for this state of affairs.

[22] I am in no way suggesting that there was anything improper about the applicants drawing public attention to their plight and to their legal battles. However, having done so, they have undermined their own case for an anonymity order.

[23] As well, in the case of Mr. Mamut and Ms. Aizezi, their case for an anonymity order is further weakened by their delay in seeking such an order. As noted above, they filed their application for leave and for judicial review in February 2022, but they did not request an anonymity order at that time. They did not make this request until October 2023. During the intervening 20 months, the Court issued two orders in which their full names appeared in the style of cause: see 2023 FC 406 and 2023 FC 1108. These orders were publicly available until shortly after the applicants brought their motion for an order under Rule 151.

[24] That being said, I am not persuaded by the respondent's submission that the applicants in IMM-1407-22 are precluded from relying on Rule 151 altogether because, by its own terms, such an order may be sought only with respect to material "to be filed" – in other words, that it cannot be applied to material already filed with the Court, as the applicants are attempting to do so here. This strikes me as an unduly restrictive reading of the provision that is inconsistent with the general principle that the Rules shall be interpreted and applied "so as to secure the just, most expeditious and least expensive outcome of every proceeding" (*FCR*, Rule 3(a)). As well, I

agree with the applicants that the cases relied on by the respondent in support of this argument (*Levi Strauss & Co v Era Clothing Inc*, 1999 CanLII 8401 (FC) and *Canada (Minister of Citizenship and Immigration) v Fazalbhoy*, 1999 CanLII 7446 (FC)) are distinguishable. In my view, rather than precluding the applicants from obtaining an order under Rule 151, their delay in bringing this motion is simply one factor to consider in determining whether they have demonstrated that the limitation they seek on the open court principle is warranted.

[25] As the applicants emphasize, the manner in which filings occur in matters under the *Immigration and Refugee Protection Act* is unusual compared to other applications for judicial review before the Federal Court and this often precludes seeking confidentiality orders prior to the filing taking place. For example, it is the respondent, not the applicants, who dictates the timing of the filing of the Certified Tribunal Record under Rule 17 of the *FCCIRPR*. Consequently, if it were necessary to do so, I would apply the gap principle expressed in Rule 4 of the *FCR* to permit consideration of the applicants' motion on its merits: see *Charkaoui (Re)*, 2009 FC 342 at paras 23-33; and *Bah v Canada (Citizenship and Immigration)*, 2014 FC 693 at para 13.

[26] I recognize that an anonymity order is generally considered a minor restriction on the open court principle (*Adeleye*, at para 17; *GU*, at para 25). Nevertheless, it is still a restriction and, to be justified, it must serve some purpose. The first part of the *Sherman Estate* test imposes on the applicants "the burden to show that the important public interest is at serious risk" (*Sherman Estate*, at para 76). Given how much information about the applicants is already in the public domain, I am not persuaded that being named as parties in the present proceedings

would increase the risk to any of the applicants or their extended families in any way. In short, the applicants have failed to establish that court openness in the sense that their full names should appear in the styles of cause of these applications for judicial review poses a serious risk to an important public interest.

[27] Since the applicants have not met the first part of the *Sherman Estate* test in relation to the request to anonymize their identities, it is not necessary to consider the other two parts of the test.

[28] On the other hand, in IMM-1407-22, I am satisfied that there is an important public interest in protecting the privacy of the applicants' minor children. The respondent submits that it is now too late to protect personal information in the record pertaining to the minor children because the applicants did not make a timely request for a confidentiality order. I do not agree. While the applicants certainly tempted fate by waiting so long before bringing this motion, it remains the case that there is substantially more personal information concerning the applicants' minor children in the Court record than there is in the public domain. Moreover, despite being accessible to the public during all that time, there is no evidence that any member of the public obtained access to the Court file before the applicants moved for a confidentiality order. It is also important to note that the minor children are not themselves litigants; they are, in an important sense, innocent third parties. Thus, I am satisfied that the first part of the *Sherman Estate* test is met in this regard.

[29] Furthermore, redactions of personal information in the record relating to the applicants' minor children are necessary to protect their privacy because no other measure is capable of doing so.

[30] Finally, as a matter of proportionality, I am satisfied that the benefits of an order to this effect outweigh its minimal negative effects.

[31] As I have already noted, an order protecting personal information pertaining to the minor children can be granted to the applicants in IMM-1407-22 under Rule 151 of the *FCR*; however, such an order is not available to the applicants in IMM-8585-22 under Rule 8.1 of the *FCCIRPR*. It remains open to the applicants in IMM-8585-22 to move for relief under Rule 151, if so advised.

IV. CONCLUSION

[32] For these reasons, the motion for a confidentiality order in IMM-1407-22 is granted in part. The terms of the order are set out below. The request for an anonymity order in IMM-8585-22 is denied.

ORDER IN IMM-1407-22 & IMM-8585-22

THIS COURT ORDERS that

1. The motion for a confidentiality order in IMM-1407-22 is granted in part.
2. Any personal information pertaining to the applicants' minor children shall be redacted from any part of the record in the application for leave and for judicial review that may be made available to the public.
3. The applicants shall be responsible for preparing and filing public versions of the Application Record and the Certified Tribunal Record that are redacted in accordance with this Order.
4. The unredacted versions of the Application Record and the Certified Tribunal Record currently filed with the Court in IMM-1407-22 shall not be made available to the public.
5. The request for an anonymity order in IMM-8585-22 is denied.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1407-22
STYLE OF CAUSE:	KHALIL MAMUT ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	IMM-8585-22
STYLE OF CAUSE:	SALAHIDIN ABDULAHAD ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	NORRIS J.
DATED:	FEBRUARY 13, 2024

WRITTEN REPRESENTATIONS BY:

Prasanna Balasundaram Asiya Hirji	FOR THE APPLICANTS
Gregory George Bradley Bechard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT