Federal Court Cour fédérale

Date: 20200611

Docket: IMM-5229-19

Citation: 2020 FC 681

Ottawa, Ontario, June 11, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

ADEDAMOLA OLADAPO ADELEYE
OLUWATUMININU YETUNDE ADELEYE
MOJOLAOLUWA ADEWUNMI ADELEYE
MOROLALUWA ADESOLA ADELEYE
MOMOREOLUWA ADEBOLA ADELEYE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The applicants applied for judicial review of the dismissal of their claim for asylum. I denied their application. They now move for an order anonymizing the style of cause. They allege that the publication of my judgment will expose them to a risk of reprisal. I am denying their motion. Even though this Court has adopted a generous approach towards anonymization

orders in immigration and refugee cases, I find that the risk they allege is incompatible with the determinations made regarding their claim for asylum.

I. Background

[2] The applicants are a family of five from Nigeria. They claimed asylum in Canada, alleging that members of their extended family wanted to perform female genital mutilation [FGM] on the three minor applicants. Their claim was denied by the Refugee Protection Division [RPD] and, on appeal, by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RPD had serious concerns about their credibility. The RAD found that, even if the facts they alleged were true, they had an internal flight alternative [IFA]. In other words, they could not be refugees because they could safely move to a different location within Nigeria to avoid the alleged persecution.

[3] I recently dismissed their application for judicial review of the RAD's decision: 2020 FC 640. A few days after I issued my decision, they brought a motion for an order anonymizing the style of cause. They allege that the publication of my decision on databases such as CanLII or the Federal Court's web site would put them in danger if they return to Nigeria. They say that if the agent of persecution becomes aware that they made a claim for asylum in Canada on the basis of his actions, they would be exposed to a risk of reprisal. The respondent Minister does not consent, but does not oppose the motion.

[4] The applicants' motion was made by informal letter. They offered to swear an affidavit attesting to the factual allegations of the motion. It is not necessary to require them to do so,

because, even assuming the truth of the facts stated in the motion, I find that the test for an anonymization order is not met.

II. Analysis

[5] It is useful to begin the analysis by a review of the exceptions to the open court principle, both in general terms and in the specific context of immigration and refugee cases. I will then turn to the applicants' case.

A. *The Open Court Principle and Its Exceptions*

[6] Courts do their business in public. Justice Louis LeBel of the Supreme Court of Canada stated that the "principle that the proceedings of the courts are public is unquestionably one of the fundamental values of Canadian procedural law" (*Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc*, 2001 SCC 51 at paragraph 62, [2001] 2 SCR 743 [*Lac d'Amiante*]). The open court principle is protected by the constitution, as a component of freedom of expression and freedom of the press: *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326. Rules 26 and 29 of the *Federal Courts Rules*, SOR/98-106, provide that this Court's hearings and records are public.

[7] The open court principle is subject to exceptions. Courts increasingly recognize that public access to court proceedings may impinge upon the right to privacy of litigants or other persons: *Lac d'Amiante*. In some cases, proceeding in open court may hamper access to justice, if litigants need to waive their right to privacy in order to vindicate their rights.

[8] Legislators have thus made exceptions to the open court principle for entire categories of cases where the nature of the matter is such that one can assume that making the matter public would have significant deleterious effects on the persons involved. Family law and child protection cases and criminal prosecutions for sexual offences are well-known examples of categories of matters where various measures seek to protect the privacy of the participants: see, for example, *Code of Civil Procedure*, CQLR c C-25.01, s 15; *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sch 1, s 87; *Criminal Code*, RSC 1985, c C-46, s 486.4.

[9] Where a case does not belong to a category subject to automatic restrictions to the open court principle, the parties may nonetheless ask the Court to exercise its inherent powers to impose such restrictions on a case-by-case basis. The *Federal Courts Rules* make explicit provision for certain situations: rule 29(2) allows the Court to order that a hearing take place in camera and rules 151–152 provide for the filing of confidential material. A party who seeks such an order must prove that it is necessary to protect a legitimate interest and that the salutary effects of the proposed restriction outweigh its deleterious effects on the open court principle: *R v Mentuck*, 2001 SCC 76 at para 32, [2001] 3 SCR 442; see also *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522. In certain cases, the justification of limits on the open court principle is obvious and requires no evidence: *AB v Bragg Communications Inc*, 2012 SCC 46, [2012] 2 SCR 567. However, embarrassment or shame or the wish to keep one's affairs private, without more, are usually not sufficient grounds to depart from the open court principle: *S v Lamontagne*, 2020 QCCA 663 at paragraph 17.

B. *Anonymity and Immigration and Refugee Cases*

[10] Subsection 166(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], provides that hearings before the RPD and RAD must be held in private. When an application for judicial review is made before this Court, however, there is no statutory provision making an exception to the open court principle. Rules 26 and 29 of the *Federal Courts Rules* remain applicable. Nevertheless, judges of this Court are well aware that such cases often involve delicate or intimate matters that may have been a traumatic part of an applicant's life or that an applicant may normally be reluctant to disclose.

[11] For those reasons, judges of this Court attempt, where possible, to draft their reasons in a way that minimizes the disclosure of personal information. For example, in my reasons in this case, I did not name the agent of persecution nor indicate the precise place in Nigeria where the alleged events took place. Moreover, cases published on CanLII or on this Court's web site are not searchable by commercial search engines. Thus, a search for the main applicant's name on a commercial search engine would not identify this Court's judgment.

[12] In certain cases, these measures may not be sufficient. In appropriate cases, this Court has been prepared to anonymize the style of cause of immigration and refugee cases. While these categories are not closed, such orders have been mainly made in two kinds of circumstances.

[13] In the first category of cases, the anonymization of the style of cause aims at preventing prejudice that flows from the disclosure of certain kinds of intimate information, whatever the

outcome of the case. The immigration context is not directly relevant to the inquiry: similar orders would be made to protect similar information in other contexts. In particular, such orders were issued to avoid disclosing that the applicant or another person was a victim of sexual assault: *AB v Canada (Citizenship and Immigration)*, 2009 FC 640; *IMPP v Canada (Citizenship and Immigration)*, 2010 FC 259; *LF v Canada (Citizenship and Immigration)*, 2016 FC 534; *AB v Canada (Citizenship and Immigration)*, 2018 FC 237; *AC v Canada (Citizenship and Immigration)*, 2019 FC 1196. The disclosure of that fact is likely to revictimize the person and hamper healing. Other cases were anonymized in order to keep confidential the applicant's HIV-positive status: *AB v Canada (Citizenship and Immigration)*, 2017 FC 629; *XY v Canada (Citizenship and Immigration)*, 2020 FC 39. Disclosure of that fact could expose the applicant to discrimination.

[14] In the second category of cases, anonymization of the style of cause seeks to avoid harm that might befall the applicants upon return to their countries of origin. Such harm may take various forms. The decision may disclose an intimate characteristic of the applicant, such as apostasy or homosexuality, that may be illegal in the country of origin: *AB v Canada (Citizenship and Immigration)*, 2009 FC 325, [2010] 2 FCR 75; *AB v Canada (Citizenship and Immigration)*, 2009 FC 640. It may disclose criminal activity that, while not leading to a conviction, was the basis of a finding of inadmissibility: *John Doe v Canada (Citizenship and Immigration)*, 2011 FC 1057. It may also identify the applicant as a member of a political party or organization that is frequently the subject of persecution in the country of origin: *SK v Canada (Citizenship and Immigration)*, 2011 FC 788; *NK v Canada (Citizenship and Immigration)*, 2015 FC 1040; *MN v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 796. In all these

cases, there are reasons to believe that the authorities in the country of return would mistreat the applicant if they learned of certain information or allegations contained in the claim for asylum, irrespective of the latter's merits.

[15] The second category also comprises cases involving a non-state agent of persecution, such as a drug cartel: *AB v Canada (Citizenship and Immigration)*, 2019 FC 165; *FGH v Canada (Citizenship and Immigration)*, 2020 FC 54. In one case, the style of cause was anonymized to prevent the applicant's husband, who was the alleged agent of persecution, to learn about the fact that his wife claimed asylum in Canada: *EF v Canada (Citizenship and Immigration)*, 2015 FC 842 [*EF*].

[16] A number of observations may be derived from these cases.

[17] First, this Court has consistently found that the anonymization of the style of cause is a minor restriction on the open court principle. Nonetheless, anonymization is not granted automatically and must be justified.

[18] Second, the magnitude of the harm that needs to be shown is not the same as the test for refugee status or protection under sections 96 and 97 of the Act. To obtain the anonymization of the style of cause, the applicant need not prove what would be in essence a *sur place* claim. The bar is lower. As my colleague Justice Richard Southcott wrote in *EF*, at paragraph 8, the aim of such an order may include the "reduction of the risk of violence."

[19] Third, while this might seem counter-intuitive, the rejection of the claim for asylum is not a bar to an anonymization order; see, for example, *RS v Canada (Citizenship and Immigration)*, 2016 FC 13. The rejection of the claim does not mean that the applicant is not exposed to any risk, but simply that the risk does not rise to the requisite threshold or that, for other reasons, the conditions for claiming asylum or protection were not met. This is especially so where the applicant is found to be inadmissible to Canada. Likewise, the rejection of a claim on the basis of adequate state protection does not mean that no risk exists. An anonymization order, however, cannot be based on a risk of harm that was explicitly rejected in the refugee status determination process.

[20] Fourth, such orders are often issued at the early stages of the proceedings, when this Court is not in a position to assess the evidence nor the decision challenged. Decisions made at those early stages are based more on the allegations of the applicants than on a thorough analysis of the evidence.

[21] Thus, this Court has adopted a generous approach in the granting of anonymization orders in the immigration and refugee context, as long as there is some evidence of a risk of harm that rises above mere inconvenience or embarrassment.

C. *Application to This Case*

[22] In this case, the applicants invoke, in essence, their fear of reprisal if the agent of persecution becomes aware that they named him in their claim for asylum. I must assess whether

anonymization of the style of cause is necessary to prevent this harm and whether the beneficial effects of such an order outweigh its deleterious effects on the open court principle.

[23] As in most cases of this kind, the alteration of the style of cause has little deleterious effects. There is no suggestion that the applicants are seeking to avoid any kind of legitimate public scrutiny. Nothing singles this case out among the hundreds of immigration and refugee cases that this Court hears every year.

[24] That brings me to the harm that the applicants seek to avoid by moving for anonymization. One peculiarity of this case is that the motion for anonymization is brought after this Court has dismissed the application for judicial review. In addition, the harm that is now alleged is inextricably linked to the harm that formed the basis for the claim for asylum. My analysis is made even more difficult by the fact that the two divisions of the IRB took different approaches leading to the rejection of the claim. The RPD expressed serious doubts as to the credibility of most of the evidence supporting the applicants' claim, including their own testimony. The RAD, on its part, did not assess the applicants' credibility. It held that, even assuming the events took place as alleged, the applicants had an IFA in major Nigerian cities.

[25] As a result, I am left with the following situation. The applicants may, as contemplated in the RAD's decision, choose to relocate to a place in Nigeria where the agent of persecution will not be able to find them. In this scenario, the agent of persecution can cause no harm to them, even though he learns of this Court's judgment. The applicants may also choose to relocate to a place where they will have some contacts with their family, with the result that the agent of

persecution might learn of their return to Nigeria and possibly find them. This is where the applicants' fear of reprisal comes into play. From that point, and assuming for the sake of argument that the agent of persecution locates them and finds out about this Court's decision, two hypotheses must be contemplated.

[26] The first hypothesis is that the applicants' story about the agent of persecution resorting to violence in order to perform FGM on the minor applicants is true. In that scenario, the agent of persecution, who is motivated by his will to enforce custom, will likely resume his recourse to threats and violence in order to achieve his purpose. It is difficult to understand how the agent of persecution's knowledge of the details of the applicants' claim to asylum would make any difference in his motivations. An anonymization order would not, to use my colleague's words in *EF*, reduce the risk of violence. If any harm results, it would be caused by the applicants' decision not to avail themselves of an IFA.

[27] The second hypothesis is that the applicants' story is false or, as the RPD suggested several times in its decision, "embellished." It is then difficult for me to know where falsehood ends and where truth begins, so as to find a factual foundation for the anonymization order. If the person whom the applicants named as the agent of persecution exists but did not do what they alleged, they may feel embarrassed like anyone who lies in Court, but the purpose of anonymization orders is not to protect against this kind of embarrassment.

[28] The applicants also mentioned briefly that their claim for asylum and, presumably, this Court's decision, discloses "highly personal information," including the fact "that their children

have been targeted for female genital mutilation and that a prominent member of their family is their agent of persecution." They do not provide evidence of the harm that may result from the disclosure of that information. I am not in a position to take judicial notice of how this is perceived in Nigeria. They do not make the argument that this harm falls into the first category that I described above. Thus, this issue is better left to be decided when it is properly argued on an adequate evidentiary record.

[29] As a result, the anonymization order sought by the applicants is not necessary to prevent any possibility of harm established on the record.

[30] For these reasons, the applicants' motion will be dismissed.

ORDER in IMM-5229-19

THIS COURT ORDERS that:

1. The applicants' motion to anonymize the style of cause is dismissed.

2. No order is made as to costs.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5229-19
STYLE OF CAUSE:	ADEDAMOLA OLADAPO ADELEYE, OLUWATUMININU YETUNDE ADELEYE, MOJOLAOLUWA ADEWUNMI ADELEYE, MOROLALUWA ADESOLA ADELEYE, MOMOREOLUWA ADEBOLA ADELEYE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*
ORDER AND REASONS:	GRAMMOND J.
DATED:	JUNE 11, 2020

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