Federal Court Cour fédérale

Date: 20240712

Docket: T-2724-23

Citation: 2024 FC 1102

2024 FC 1102 (CanLII)

St. John's, Newfoundland and Labrador, July 12, 2024

PRESENT: Associate Judge Trent Horne

BETWEEN:

KATIA FRIDMAN

Applicant

and

CANADA (MINISTER OF FOREIGN AFFAIRS)
AND THE ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

I. Overview

[1] In March 2014, the Governor in Council introduced the *Special Economic Measures (Russia) Regulations*, SOR/2014-58 ("*Russia Regulations*") pursuant to the *Special Economic Measures Act*, SC 1992, c 17 ("SEMA").

[2] SEMA provides the Governor in Council with authority to impose sanctions against foreign states, individuals and entities in prescribed circumstances, including when there has

been a breach of international peace and security, or when gross and systemic human rights violations have been committed (ss 4(1.1)(b)-(c)).

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[3] The applicant is the daughter of Mikhail Fridman, the principal owner and co-founder of the Alfa Group. On May 27, 2022, the applicant became a “designated person” by having her name added to Part 1, Schedule 1 of the *Russia Regulations* (the “Sanctions List”) on the basis that she is the daughter of Mr Fridman.

[4] Under section 8 of the *Russia Regulations*, a person may apply in writing to the Minister to have their name removed from the Sanctions List.

[5] On December 23, 2022, the applicant, her sister, and their mother filed delisting applications with Global Affairs Canada. The applicant’s detailed delisting application contained a series of attachments, including a solemn affirmation that was affirmed on December 22, 2022.

[6] On November 24, 2023, the Minister notified the applicant of her decision not to recommend that the applicant’s name be removed from the Sanctions List (the “Decision”). This proceeding seeks judicial review of the Decision.

[7] The applicant has brought a motion for a confidentiality order, specifically that certain portions of the delisting application and solemn affirmation be redacted and treated as confidential in this application for judicial review. The applicant asserts that, without a

confidentiality order, she and her family members will be at risk of prosecution under Russian law, and that her personal safety may be at risk.

[8] Much of what the applicant wants to designate as confidential is, or will be, in the public record. Other than a proposed redaction to a bank account number, I am not satisfied that the applicant has demonstrated a serious risk to an identified interest.

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II. Law

[9] In determining whether a confidentiality order should be granted, the Court must be satisfied that the following three prerequisites have been established: (a) court openness poses a serious risk to an important public interest; (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects (*Canada (Commissioner of Competition) v Google Canada Corporation*, 2023 FC 1038 at para 40, citing *Sherman Estate v Donovan*, 2021 SCC 25 (“*Sherman Estate*”) at para 38).

[10] Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at “serious risk” is a fact-based finding that is necessarily made in context (*Sherman Estate* at para 42).

[11] A risk to safety abroad has been recognized as an important public interest (*AB v Canada (Citizenship and Immigration)*, 2023 FC 29 at paras 6-7; *Ishmela v Canada (Minister of Citizenship and Immigration)*, 2003 FC 838 at para 7).

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[12] There is a strong presumption of court openness. The mere assertion of grave physical harm is insufficient to show a serious risk to an important interest. The test requires the serious risk asserted to be well grounded in the record or the circumstances (*Sherman Estate* at para 102).

[13] The power to impose limits on the openness and accessibility of court proceedings must be exercised with care and restraint. A party seeking a confidentiality order bears a heavy burden. Confidentiality orders are exceptional (*Rémillard v Canada (National Revenue)*, 2022 FCA 63 at paras 49-51).

III. Risk of Criminal Prosecution

[14] The applicant's motion is supported by an affidavit of Evgenii Zhilin, a Russian citizen/lawyer residing in Switzerland. Mr Zhilin is held out as an expert in Russian law. His affidavit provides an opinion regarding the applicability of Russian law to statements made by the applicant, and the potential risk to the applicant and her family of making these statements public, including as part of a public court record.

[15] The Zhilin affidavit refers to Article 20.3.3 of the Code of Administrative Offences of the Russian Federation, and Article 280.3 of the Criminal Code of the Russian Federation. He states

that these Articles establish the prohibition of public actions, including statements that can be accessed publicly, aimed at discrediting the use of the Armed Forces of the Russian Federation, as well as discrediting the exercise by state bodies of the Russian Federation of their powers outside the territory of the Russian Federation. These are referred to collectively in the affidavit as the "discrediting actions."

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[16] The Zhilin affidavit reproduces a number of statements in the applicant's delisting application, and concludes that making these statements public could subject the applicant to prosecution and liability under Russian law. The statements are considered and analyzed in the aggregate.

[17] A similar motion was recently decided by associate judge Duchesne in *Makarov v Canada (Foreign Affairs)*, 2024 CanLII 27355 ("*Makarov*"). A significant factor in AJ Duchesne's decision was the fact that the salient part of the statements sought to be made confidential in that proceeding were pleaded in the notice of application, and were therefore part of the public record. He concluded that the Court cannot make confidential that which the applicant has already made public (para 5).

[18] In this proceeding, the notice of application states:

> 4. The Delisting Application was very detailed and included objective and credible evidence that (i) there is no nexus between the listing of the Applicant and the objectives of the Russia Regulations and Canada's sanctions regime, (ii) the Applicant had received minimal financial support from her father since her parents separated in 1999, and (iii) the Applicant strongly opposes the war in Ukraine; (emphasis added)

> […]
>
> 15. The Applicant is suffering substantial financial harm along with personal harm stemming from being incorrectly and unjustly smeared by Canada as a supporter of the Russian regime and its invasion of Ukraine;

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[19] The Zhilin affidavit states that he reviewed the notice of application, but does not address the fact that the applicant's strong opposition to the war in Ukraine was publicly stated in that document, which was filed on December 21, 2023. This weighs heavily against granting a confidentiality order that would apply to the applicant's statement that she strongly opposes the war in Ukraine, and that she is not a supporter of the Russian regime.

[20] What is proposed to be designated as confidential is underlined in the indented text below.

> c. <u>She strongly opposes the war in Ukraine. Ms. Fridman has strong ties to Ukraine, as her father and paternal grandparents are Ukrainian.</u> She has visited her grandparents in Ukraine on many occasions, and recalls watching Ukrainian television as a child. <u>She is proud of her Ukrainian background and Jewish cultural and religious identity.</u>

[21] This paragraph appears on pages 3 and 11 of the delisting application. The following text appears on page 11 of the delisting application:

> <u>1. Ms. Fridman is opposed to the Russian invasion of Ukraine</u>
>
> <u>Ms. Fridman strongly opposes the war in Ukraine, the Russian invasion, and the Russian regime of Vladimir Putin. She is proud of her Jewish Ukrainian cultural identity and feels little to no connection to Russia.</u> As a child, she has fond memories of visiting her paternal grandparents in Lviv, Ukraine, where her father was born. Ms. Fridman's grandparents are Ukrainian citizens, and

> her grandfather was still working in Lviv up until the beginning of the invasion.

[22] Even if the applicant's statement that she strongly opposes the war in Ukraine is a "discrediting action" as that term is used in the Zhilin affidavit, this statement was publicly made in the notice of application.

[23] As for strong ties to Ukraine and pride in Jewish and Ukrainian identity, I am not satisfied that the Zhilin affidavit demonstrates that these statements would constitute "discrediting actions." In any event, the applicant's sister Laura Fridman brought an almost identical motion in T-2726-23. Laura Fridman's delisting application, at page 5, states: "Ms Fridman's father always ensured that his children were aware and proud of their Jewish Ukrainian heritage. As children, they would visit their paternal grandparents in Lviv, Ukraine and, even when they were not in Ukraine, would watch Ukrainian television with their father. To this day, like her father, Ms. Fridman's attachment to Ukraine remains much stronger than her attachment to Russia." No request was made to redact this statement in T-2726-23. The fact that the applicant has Jewish and Ukrainian heritage, and is proud of that heritage, will all be publicly known when Laura Fridman's application record is filed.

[24] The Zhilin affidavit includes a heading "consequences for family members." In the three paragraphs that comprise this section, he states that it is highly probable that sanctions may be imposed on family members in the event a person is found liable for discrediting the use of the Armed Forces of the Russian Federation. Examples are given of circumstances where persons were fired or forced to quit their jobs because their spouse made disparaging comments about

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Russian authorities. Mr Zhilin refers to the applicant's father, and states that even the slightest signal from a family member that they do not support Russian actions in Ukraine could be used as a trigger for state action against the father and his substantial Russian assets. While the applicant's father is described as a person of public interest with substantial Russian assets, the applicant's grandparents are not discussed.

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[25] The Zhilin affidavit includes an article in which the applicant's father condemns the war in Ukraine, however there is no indication that the applicant's father has been subject to administrative fines or criminal prosecution. I am not satisfied that a reasonable inference can be drawn that the applicant's statements above, beyond those that are already in the public record, will lead to liability for her father.

[26] This section of the Zhilin affidavit does not specifically address the information proposed to be redacted from pages 3 and 11 of the delisting application.

[27] The Zhilin affidavit otherwise explains that, according to Russian Court practice, certain actions could be deemed to be discrediting actions: signing the text of a document opposing the military operation in Ukraine; and public statements opposing the special military operation in Ukraine. There is no indication that the applicant's grandparents signed a document opposing the war in Ukraine, or made public or private statements to that effect. The applicant's grandparents did not sign a solemn affirmation, and did not sign the delisting application. I am not satisfied that the Zhilin affidavit demonstrates a risk of criminal prosecution to the applicant's grandparents.

[28] The applicant wants to redact the following from her solemn affirmation:

> 4. As indicated in the Application for Delisting, I absolutely oppose the war in Ukraine, the Russian invasion, and Putin's regime. I strongly believe in Ukraine's right to self-determination and hope to see it become a part of the European Union one day.

[29] The applicant's opposition to the war in Ukraine is set out in the notice of application and publicly known, as are (or will be) her pride in her Jewish and Ukrainian heritage. The Zhilin affidavit does not explain how or why a public statement as to a belief in Ukraine's right to self-determination is a "discrediting action", or could lead to criminal prosecution.

[30] Having regard to all of the above, I am not satisfied that the applicant has demonstrated a serious risk to an identified interest, specifically a risk of criminal prosecution to her or family members, in the event the requested confidentiality order is not granted for the paragraphs discussed above.

[31] The applicant also requests a confidentiality order for a bank account number that appears in attachment 19 to the delisting application. The respondent does not oppose this request. Concealing a bank account number would not impede public understanding of the record, and would protect the applicant's financial information. The motion in this respect is granted.

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IV. Risk of Physical Harm

[32] The applicant's request for a confidentiality order is also based on an assertion that, unless the order is granted, the physical safety of her and her family members will be at risk.

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[33] The evidence in this respect is an affidavit affirmed by an articling student employed by counsel for the applicant. The affidavit attaches seven reports and news articles reporting on businessmen and their family members who have reportedly been found dead under mysterious circumstances after speaking out about the war in Ukraine. The applicant argues that the risk to her physical safety can be logically inferred from these exhibits.

[34] The same kind of evidence, from the same affiant, was before AJ Duchesne in *Makarov*. He found the evidence presumptively inadmissible because the affiant did not affirm that he has personal knowledge of the facts included in his affidavit. On this motion, the affiant states that he has personal knowledge but does not, contrary to Rule 81(1) of the *Federal Courts Rules*, SOR/98-106, state the grounds for the belief.

[35] I adopt AJ Duchene's reasons in *Makarov* as my own:

> [13] The Applicant also seeks to have the Court accept news reports and publications from Human Rights Watch as compelling evidence on the contentious issue that lay at the heart of this motion, specifically, whether the Applicant's or his family's physical safety is at serious risk if the content of certain paragraphs of his December 8, 2022, "Confidential Solemn Affirmation of Mr. Igor Makarov" might form part of the public record. News articles and reports ought not to be considered as evidence of specific facts about specific events. If they are admitted into evidence in court due to the particular context in

> which they are presented, the weight to be given to them depends very much upon the context itself and the articles' general indicia of reliability although they are often given very little evidentiary weight.
>
> [14] In essence, what the affidavit does is to offer evidence from an uninformed witness that they believe an assertion made by someone else. Such evidence is evidence of little or no weight at all, and of little or no probative value.
>
> [Citations omitted.]

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[36] I also note the Federal Court of Appeal's decision in *Canada (Attorney General) v Bertrand*, 2021 FCA 103 at para 17 where the Court rebuked the increasing practice of filing material obtained from the Internet without an affidavit. An articling student's affidavit that simply attaches news articles without context or explanation, and without stating the grounds for the affiant's belief, does little more to make such evidence reliable or admissible.

[37] The applicant relies on *Rebel News Network Ltd v Guilbeault*, 2023 FC 121 ("*Rebel News*") for the proposition that this kind of evidence can be received to establish that certain articles exist and are publicly available. *Rebel News* was a preliminary motion in an application for judicial review to strike certain affidavit evidence, not a decision on the merits. In that matter, the disputed affidavit was only tendered for the existence of publicly available tweets (para 16). Here, the news articles are not proffered simply for the fact that they exist, rather the applicant asks the Court to accept the contents as true, and draw inferences and conclusions from them. More precisely, the applicant asks the Court to accept as true the suspicions of persons quoted in the articles that certain suicides were not suicides at all.

[38] I am not satisfied that the news articles can be received for the truth of their content, or that any weight should be given to them. As such, I am not satisfied that the applicant has demonstrated a serious risk to an identified interest, specifically a risk of physical harm to her or her family members, in the event a confidentiality order is not granted.

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V. Costs

[39] The respondent was almost entirely successful on the motion, and costs should follow the event.

[40] Costs will assessed using the middle of Column III of Tariff B (5 units x $180.00 per unit), payable in any event of the cause.

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ORDER in T-2724-23

THIS COURT ORDERS that:

1. Documents containing the applicant's bank account number shall be treated as confidential and may be filed under seal.

2. Any material that is filed under seal pursuant to this order shall only be available to counsel for the parties and appropriate Court personnel.

3. A public version of any document filed under seal pursuant to this order shall be filed at the same time, with only the applicant's bank account number redacted from it.

4. The applicant's motion is otherwise dismissed.

5. Costs are awarded to the respondent, fixed at $900.00, payable in any event of the cause.

"Trent Horne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2724-23
STYLE OF CAUSE:	KATIA FRIDMAN v CANADA (MINISTER OF FOREIGN AFFAIRS) ET AL

MATTER CONSIDERED IN WRITING WITHOUT THE PERSONAL APPEARANCE OF THE PARTIES

ORDER AND REASONS:	HORNE A.J.
DATED:	JULY 12, 2024

WRITTEN REPRESENTATIONS BY:

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