Federal Court  Cour fédérale

~~**SECRET**~~

Date: 20200505

Docket: IMM-2967-19

Citation: 2020 FC 584

Ottawa, Ontario, May 5, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ATTILA KISS and ANDREA KISS

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

~~CONFIDENTIAL~~ ORDER AND REASONS

I. Overview

[1] Attila and Andrea Kiss are husband and wife. They are Hungarian citizens of Roma ethnicity. They live in Budapest.

[2] The Kisses have brought an application for leave and judicial review of a decision made on April 2, 2019 by an officer [Officer] with Immigration, Refugees and Citizenship Canada

[IRCC]. The Officer cancelled the Kisses' Electronic Travel Authorizations [eTAs], preventing them from boarding an Air Canada Rouge flight to Canada.

[3] The Minister of Citizenship and Immigration [Minister] seeks an order pursuant to s 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for non-disclosure of excerpts from the notes of the Officer's decision. The excerpts disclose the nature of certain "Indicators" that informed the Officer's decision to cancel the Kisses' eTAs.

[4] The Minister filed the confidential affidavit of a Canada Border Services Agency employee [Affiant] to explain the rationale for not disclosing the "Indicators". On January 21, 2020, the Court convened an *in camera*, *ex parte* hearing to permit the Affiant to provide oral testimony, and the Minister's counsel to make oral submissions. The Court did not consider it necessary to appoint a special advocate.

[5] At the conclusion of the *in camera, ex parte* hearing, the Court invited the Minister to reconsider whether it was necessary to maintain the confidentiality of all of the excerpts from the Officer's notes that are the subject of the motion. The Minister filed a Confidential Memorandum of Argument on March 2, 2020 conceding that some of the information in issue could not be protected, but affirming the remaining objections to disclosure.

[6] With one exception, it is untenable for the Minister to object to disclosure of the "Indicators" relied upon by the Officer, given information that is already in the public domain. The motion is granted only in part.

II. Background

[7] The Kisses had planned to travel to Canada to visit Andrea's sister, Edit, who lives in Toronto. Edit and her family have been accepted as Convention refugees in Canada. Andrea had previously visited Edit in 2017 with an eTA and encountered no issues. She stayed with her sister for almost three months. Andrea's eTA was valid until 2022.

[8] On January 11, 2019, Attila also obtained an eTA to travel to Canada. One week later, the Kisses purchased round-trip tickets to depart from Budapest on April 2, and return on June 3, 2019.

[9] On April 2, 2019, the Kisses arrived at the Air Canada Rouge check-in at Budapest International Airport. The airline had hired personnel from BUD Security Kft [BudSec] to pre-screen passengers' travel documents. A BudSec employee asked the Kisses to produce their documents and answer questions about their intended travel, including the duration of their trip, with whom they would stay, and whether they had a letter of invitation.

[10] The BudSec employee allowed the Kisses to proceed. However, before they could check-in, a different employee of BudSec summoned them for further questioning. The employee also reviewed the Kisses' documents. The employee left to make a telephone call. When she returned, she informed the Kisses that their eTAs were cancelled.

[11] The Kisses questioned the BudSec employee about the reasons for the cancellation of their eTAs. Unbeknownst to the employee, the Kisses recorded the conversation. The BudSec employee identified a number of concerns arising from the Kisses' responses to her questions. The employee also clarified that the decision to cancel the eTAs had been made by an immigration officer, not by her.

[12] On their return home, the Kisses found two e-mail messages from the IRCC dated April 2, 2019 informing them that their eTAs had been cancelled.

[13] On May 10, 2019, the Kisses applied for leave and judicial review of the decision to cancel their eTAs. The Kisses allege that the "Indicators" used to identify Hungarian-Roma travellers or travellers associated with Roma people are discriminatory. They say that the IRCC's reliance on these "Indicators" has adversely affected a large number of Hungarian nationals and Roma travellers, and they hope to set a precedent to end the practice.

[14] On July 11, 2019, the Minister applied in writing for judgment setting aside the Officer's decision on procedural fairness grounds, and remitting the matter to a different decision-maker for redetermination. The Kisses would be given an opportunity to make additional submissions.

[15] The Kisses opposed the Minister's motion for judgment. In correspondence sent to the Court on July 17, 2019, they asserted that the cancellation of their eTAs was unlawful and the remedies proposed by the Minister were inadequate. The Minister's motion for judgment was dismissed by Justice Elizabeth Heneghan on October 1, 2019.

[16] On October 16, 2019, the Minister served and filed a motion for non-disclosure of excerpts from the Officer's notes, produced under Rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

[17] The excerpts from the Officer's notes that the Minister seeks to protect are reproduced in bold text below:

> […] stated purpose of visit is tourism, can identify Niagara Falls and CN Tower **but unable to explain what else they will do for three months** – employed in manual labour, provided letter from employer dated December 2018 indicating employment at that time, **but unable to explain how they can take three months off work – weak ties to home country**, do not own a home or hold a long-term rental lease – travelling with $2000 CAD in cash, **no access to other funds – no checked bags for three-month trip**; stated sister has purchased everything on their behalf – wife previously travelled to Canada for three months for tourism purpose in 2017 **but unable to explain what she did**; first trip for husband – hosts identified as [redacted] and [redacted], **convention refugees who arrived in Canada via irregular means in 2015 and 2016 respectively** [redacted]

[18] The notes that have been disclosed to the Kisses include the following statement:

> Based on these Indicators, [the Officer] determined that on the balance of probabilities, subjects will not comply with conditions imposed upon entry to Canada as a temporary resident and will not leave Canada at the end of the period authorized for stay.

III. Issue

[19] The sole issue raised by this motion is whether disclosure of the "Indicators" relied upon by the Officer to cancel the Kisses' eTAs would be injurious to Canada's national security.

IV. Analysis

[20] The Minister argues that disclosure of the "Indicators" would give those wishing to evade the attention of Canadian officials the means to do so. The Kisses respond that the information the Minister refuses to disclose is already public, and therefore cannot be injurious to national security (citing *Teva Canada Limited v Janssen Inc*, 2017 FC 437 at para 6).

[21] Pursuant to s 87 of the IRPA:

87 The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 — other than the obligations to appoint a special advocate and to provide a summary — applies in respect of the proceeding and in respect of any appeal of a decision made in the proceeding, with any necessary modifications.	**87** Le ministre peut, dans le cadre d'un contrôle judiciaire, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. L'article 83 s'applique à l'instance et à tout appel de toute décision rendue au cours de l'instance, avec les adaptations nécessaires, sauf quant à l'obligation de nommer un avocat spécial et de fournir un résumé

[22] Section 83 of the IRPA provides in relevant part:

83 (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:	**83 (1)** Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :
…	…
(d) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person	d) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

[23] The "information" referred to in these sections is defined in s 76 of the IRPA as follows:

Information means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization. (renseignements)	**Renseignements** Les renseignements en matière de sécurité ou de criminalité et ceux obtenus, sous le sceau du secret, de source canadienne ou du gouvernement d'un État étranger, d'une organisation internationale mise sur pied par des États ou de l'un de leurs organismes. (information)

[24] The competing interests of the public's right to an open court system and the state's need to protect information and its sources were discussed by Justice Yves de Montigny in *Nadarasa v Canada (Citizenship and Immigration)*, 2009 FC 1112 (at paras 17-18):

> The state has a considerable interest in protecting national security and the security of its intelligence services. The disclosure of confidential information could have a detrimental effect on the ability of investigative agencies to fulfil their mandates in relation to Canada's national security. Indeed, this Court recognized in

> *Henrie v. Canada (S.I.R.C.)*, [1989] 2 F.C. 229, that information related to national security ought not to be disclosed is an important exception to the principle that the court process should be open and public.
>
> The Supreme Court of Canada and other courts have repeatedly recognized the importance of the state's interest in conducting national security investigations and that the societal interest in national security can limit the disclosure of materials to individuals affected by the non-disclosure. In *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, the Court encouraged a deferential standard of judicial review if the Minister is able to demonstrate that disclosure reasonably supports a finding of danger to Canada's security.

[25] Section 87 of the IRPA does not permit the Court to weigh the public interest in disclosure against the public interest in confidentiality. In this and other respects, s 87 of the IRPA differs from s 38 of the *Canada Evidence Act*, RSC 1985, c C-5 (*Soltanizadeh v Canada (Citizenship and Immigration)*, 2018 FC 114 [*Soltanizadeh (FC)*] at para 34, rev'd on other grounds, (*Canada (Attorney General) v Soltanizadeh*, 2019 FCA 202). Accordingly, the only question before the Court is whether disclosure of the "Indicators" would be injurious to national security. If so, the Court must ensure the information is not disclosed. The relevance of the redacted information to the underlying application for judicial review is immaterial (*Soltanizadeh (FC)* at para 35).

[26] The information the Minister seeks to withhold does not concern confidential sources, targets of surveillance, the identities of individuals or members of organizations that may constitute threats to national security, or information received in confidence from foreign states. The information the Minister wishes to protect is limited to methods or techniques of

investigation used by immigration officers to identify individuals who may be misrepresenting their intentions in travelling to Canada.

[27] The standard for determining an application for non-disclosure under s 87 of the IRPA was comprehensively explained by Justice Richard Mosely in *Soltanizadeh (FC)*:

> [20] As is apparent from the text, s 87 of the Act contains no standard for the determination of a non-disclosure application other than the reference to s 83 of the Act. Section 83 of the Act, amongst other things, provides that the judge (defined in s 76 of the IRPA as the Chief Justice or a designated judge of the Federal Court) shall, upon request of the Minister, conduct a hearing in the absence of the public if, in the judge's opinion, disclosure of the information could be injurious to national security or endanger the safety of any person. The judge shall ensure the confidentiality of the information or other evidence if, in the judge's opinion, disclosure would be injurious or endangering. I have underlined these words because they describe the nature of the discretion accorded the designated judge by Parliament and because the distinction between "could" and "would" in the text of the statute is meaningful.
>
> [21] As discussed by Madam Justice Dawson in Jaballah, Re, 2009 FC 279 at paras 8–10, 340 FTR 43 [Jaballah], the decision to hold a closed hearing under s 83 is discretionary. But once satisfied that disclosure would be injurious or endangering, the designated judge must, pursuant to paragraph 83(1)(d) of the Act, ensure the confidentiality of the information. The Minister bears the burden of establishing that disclosure "would" be injurious to national security, or endanger the safety of any person. This is an elevated standard compared to the use of the permissive "could" in the determination of whether a closed hearing is necessary.
>
> [22] The expression, "in the opinion of the judge", is frequently found in the statutes and gives the judge broad discretion. […]
>
> …
>
> [51] The Supreme Court of Canada has referred to the "gatekeeper role" of designated judges: Harkat, above, at para 46. In applying s 83 of the IRPA, it has stated that the judge must be "vigilant and

> skeptical with respect to the Minister's claims of confidentiality" given "the government's tendency to exaggerate claims of national security confidentiality": Harkat, at para 63.
> […]
>
> [52] Deference to the Minister's assessment of injury is warranted where the Minister has provided evidence that reasonably supports a finding that disclosure of the information would be injurious to national security: Sellathurai v Canada (Minister of Public Safety & Emergency Preparedness), 2010 FC 1082 at para 31 (appeal allowed regarding the appointment of an amicus curiae, 2011 FCA 223 at para 63).
>
> [Emphasis original.]

[28] Justice Mosely also cautioned against applying this Court's decision in *Henrie v Canada (Security Intelligence Review Committee)*, [1989] 2 FC 229 too readily, given the age of the precedent and subsequent developments in national security law and practice. Regarding the oft-cited "mosaic effect", Justice Mosely stated: "the bald assertion that the information could be of value to an informed reader is not enough. There must be a reasonably articulated evidentiary basis for the claim that makes sense to the judge: Canada (Attorney General) v Almalki, 2010 FC 1106 at paras 115-119."

[29] The Minister cannot seek non-disclosure of information that is already in the public domain (*Alemu v Canada (Minister of Citizenship and Immigration)*, 2004 FC 997 at para 16). There is no assertion in this case of inadvertent or unauthorized disclosure.

[30] The Minister concedes that some questions asked of other Hungarian nationals who attempted unsuccessfully to travel to Canada have been previously disclosed in response to

access to information [ATI] requests. The Minister provided three ATI responses confirming the prior disclosure of questions concerning:

- the purpose of the traveller's trip to Canada;
- the relationship between individuals who are travelling together;
- the identity of the traveller's intended host in Canada, and the nature of their relationship;
- whether the traveller's intended host has made a refugee claim;
- the traveller's occupation and employment history;
- the duration of the traveller's intended visit to Canada;
- how the traveller is able to be absent from work for the duration of the intended trip;
- the manner in which the traveller's ticket was purchased and by whom;
- the amount of money available to the traveller;
- whether the traveller has a letter of invitation;
- the amount of luggage accompanying the traveller, and whether the bags are checked or carry-on; and
- if the stated purpose of travel is tourism, the traveller's ability to identify places to visit for sightseeing.

[31] In her affidavit filed in support of the application for leave and judicial review, Andrea Kiss deposes as follows:

> The female [BudSec] agent asked us:
>
> (a) to show our documents;
>
> (b) where we were travelling;

(c) how long we were intending to stay in Canada;

(d) to whom we were travelling;

(e) whether my sister or her family members were working;

(f) where Attila and I work;

(g) how long we have been working;

(h) what is Attila's job title;

(i) how much money we had in total in Canadian Dollars on our person and in Hungarian Forints in our bank accounts;

(j) what we intended to do in Canada "for three months" (the agent did not appear to understand that we were travelling only for two months and a day);

(k) why we were travelling with carry-ons and no checked baggage;

(l) how long my sister and her family have been living in Canada; and

(m) what is the status of my sister and her family in Canada.

[32] The Kisses recorded their conversation with the BudSec employee. In response to the question "what was the problem", the employee said the following:

> I thought … Many things … For example, that you do not have checked luggage, but for me it is really more, ummm, multiple factors, but mostly many small things.
>
> …
>
> Yes, that is also weird that you are travelling for 3 months. And I say the biggest problem is … that the person whom you are travelling to has no status.

[33] The Kisses also rely on a translated report published by the Deputy Commissioner for the Protection of the Rights of National Minorities in Hungary (Erzsébet Szalayné-Sándor, "On the

Preliminary Screening of Passengers of International Flights Prior to Boarding at the Airport for the Purpose of Compliance with the Immigration Legislation of the Destination Country", July 2016) [translation provided by the Applicants], which states the following:

> At the Budapest airport, BUD Security Kft., a subsidiary of Budapest Airport Zrt., conducts aviation security activities pursuant to Hungarian and EU legislation, including the so-called aviation security screening, which affects air passengers directly. … According to the information provided by BUD Security Kft., during the aforementioned activities, employees screen the documents of passengers intending to travel to Canada to examine whether they are in the passenger's possession and whether all documents relating to the travel and the intended entry to Canada (for example, passport, air ticket, visa, and an employer's or other letter of invitation) are genuine and not fraudulent. However, on the other hand, the screening extends beyond the documents to the examination of the personal circumstances of the passenger through questioning in the following areas: the passenger's employment circumstances, income situation, real estate properties, family in Hungary, family relations in Canada, and financial resources set aside for the travel.
>
> During the screening, personnel conducting the screening sought to determine, based on the answers provided to the questions, the following:
>
> — whether the person in question makes any statements contradicting their documents;
>
> — what the true purpose of the travel of the person in question is;
>
> — what their actual relationship with the person inviting them is;
>
> — whether they have sufficient funds to cover their planned stay abroad;
>
> — whether there are circumstances in Hungary (for example, lack of regular income and work) from which it can be concluded that the person in question does not intend to return to Hungary.
>
> Answers to the aforementioned questions could establish the suspicion of BUD Security Kft. employees that the true purpose of

> the person in question is not visiting, but rather immigration, or taking up employment in Canada, even though they did not possess the necessary documents (for example, a visa).

[34] The Affiant was asked by the Court whether he was aware of Andrea Kiss' affidavit, the recorded conversation between the Kisses and the BudSec employee, or the report of the Deputy Commissioner for the Protection of the Rights of National Minorities in Hungary. He said that he was not. Counsel for the Minister was given an opportunity to ask further questions of the Affiant, but she declined to do so. The Minister did not file additional affidavit evidence following the *in camera, ex parte* hearing, and the Minister's Confidential Memorandum of Argument does not address the prior disclosure of the "Indicators" commonly used by immigration officers to assess the *bona fides* of Hungarian travellers to Canada.

[35] With one exception, it is untenable for the Minister to object to disclosure of the "Indicators" relied upon by the Officer, given information that is already in the public domain. In particular, there is insufficient evidence before this Court to demonstrate that disclosure of the following excerpts from the Officer's notes, reproduced in bold text below, would be injurious to Canada's national security:

> […] stated purpose of visit is tourism, can identify Niagara Falls and CN Tower **but unable to explain what else they will do for three months** – employed in manual labour, provided letter from employer dated December 2018 indicating employment at that time, **but unable to explain how they can take three months off work – weak ties to home country**, do not own a home or hold a long-term rental lease – travelling with $2000 CAD in cash, **no access to other funds – no checked bags for three-month trip**; stated sister has purchased everything on their behalf – wife previously travelled to Canada for three months for tourism purpose in 2017 **but unable to explain what she did**; first trip for

> husband – hosts identified as [redacted] and [redacted], **convention refugees who arrived in Canada via irregular means in 2015 and 2016 respectively** […]

[36] Not only are these "Indicators" publicly known; they are also largely a matter of common sense. The Minister attempts to distinguish between the questions asked of travellers and the inferences made by immigration officers based on the answers provided. However, the inferences that the Minister seeks to protect in this case have been previously disclosed in publicly available documents, or are implicit in the questions themselves.

[37] The evidence tendered in this proceeding does not establish that the use of the following Indicator is publicly known; nor is it apparent as a matter of common sense:

[redacted]

[38] The Minister's assertion that disclosure of this Indicator would be injurious to national security finds some support in the evidence of the Affiant. The Minister's determination that it should not be disclosed is entitled to deference from this Court.

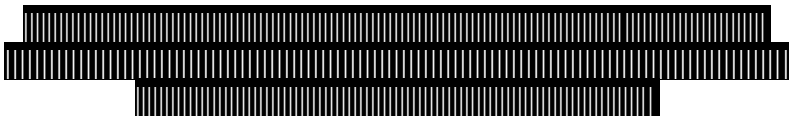
[39] The Kisses assert that the Indicators relied upon by the Officer are discriminatory, and therefore unlawful. It is doubtful that the Minister could avail himself of s 87 of the IRPA to maintain the confidentiality of an unlawful, discriminatory practice (see *Russell v Canada (Attorney General)*, 2019 FC 1137 at paras 31-32). The sole Indicator that this Court has found

to be deserving of protection is unrelated to any immutable characteristic of the Kisses, and does not evince a discriminatory practice.

~~CONFIDENTIAL~~ ORDER

THIS COURT ORDERS that:

1. The Minister's motion pursuant to s 87 of the IRPA for non-disclosure of the following information is granted:



2. The Minister's motion for non-disclosure of the following information, reproduced in bold text below, is dismissed:

> […] stated purpose of visit is tourism, can identify Niagara Falls and CN Tower **but unable to explain what else they will do for three months** – employed in manual labour, provided letter from employer dated December 2018 indicating employment at that time, **but unable to explain how they can take three months off work – weak ties to home country**, do not own a home or hold a long-term rental lease – travelling with $2000 CAD in cash, **no access to other funds – no checked bags for three-month trip**; stated sister has purchased everything on their behalf – wife previously travelled to Canada for three months for tourism purpose in 2017 **but unable to explain what she did**; first trip for husband – hosts identified as [redacted] and [redacted]**, convention refugees who arrived in Canada via irregular means in 2015 and 2016 respectively** […]

3. The information that the Minister has sought to protect in this motion shall remain confidential until the time in which to commence an appeal expires, unless the Minister informs the Court that no appeal is contemplated.

4. Counsel for the Minister shall inform the Court within twenty-one (21) days of the date of the Confidential Order and Reasons of any portions that should be redacted or modified before they are issued to the public.

"Simon Fothergill"
Judge