

Federal Court



Cour fédérale

**Date: 20210504**

**Docket: IMM-2967-19**

**Citation: 2021 FC 398**

**Ottawa, Ontario, May 4, 2021**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**ATTILA KISS and ANDREA KISS**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**ORDER AND REASONS**

I. Overview

[1] The Applicants ask the Court to appoint a special advocate pursuant to s 87.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], or alternatively a security-cleared *amicus curiae*, to ensure their interests are protected in a forthcoming *in camera*, *ex parte* hearing of a motion brought by the Attorney General of Canada [AGC]. The motion is for an

order of non-disclosure of certain information contained in a supplemental certified tribunal record [CTR].

[2] For the reasons that follow, the request is denied.

## II. Background

[3] The Applicants are citizens of Hungary. They were issued electronic travel authorizations [eTAs] to fly from Budapest to Toronto. However, following interviews with security personnel at Budapest Airport, they were prevented from boarding an aircraft and their eTAs were cancelled.

[4] The Applicants have sought judicial review of the decision to cancel their eTAs. The Minister of Citizenship and Immigration [Minister] concedes that the application should be granted on the grounds of procedural fairness. However, the Applicants maintain that the “indicators” relied upon by the Minister and his staff to identify individuals who may be misrepresenting the purpose of their travel to Canada are discriminatory. They seek a declaration to that effect.

[5] The current motion for non-disclosure is the second one brought in this proceeding. The first motion was brought when the initial CTR was transmitted to the Applicants. The Applicants were not then represented by counsel, but were being advised by Dr. Gábor Lukács, an advocate for air travellers’ rights.

[6] Dr. Lukács sought leave of the Court to make oral submissions on behalf of the Applicants, but this was refused on December 12, 2019. At the same time, the Court refused the Applicants' request to appoint a special advocate or security-cleared *amicus curiae*, holding as follows:

A special advocate or *amicus curiae* will be appointed only where the presiding judge is of the opinion that considerations of fairness and natural justice require such an appointment in order to protect the interests of an applicant (*Malikaimu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1026 at paras 33-43 [*Malikaimu*]).

The Court has reviewed the unredacted information that the Minister seeks not to disclose pursuant to s 87 of the IRPA. The information is brief, comprising only a few sentences. The Minister concedes that the application for judicial review should be granted, and the only remaining dispute between the parties concerns the appropriate remedy. The legal and factual issues raised by the Minister's motion for non-disclosure are not complex, and may be understood by the Court without the participation of a special advocate or security-cleared *amicus curiae*. There is no risk to the fairness of the proceedings. Accordingly, the Applicants' motion for the appointment of a special advocate or security-cleared *amicus curiae* must be dismissed.

[7] The Court also noted that the Applicants' procedural rights in these proceedings are at the lower end of the spectrum (citing *Malikaimu* at para 39). Ultimately, the AGC's motion for the non-disclosure of information contained in the initial CTR was largely dismissed (*Kiss v Canada (Citizenship and Immigration)*, 2020 FC 584).

[8] On or about November 5, 2020, the Applicants retained Mr. Benjamin Perryman as their counsel. They then brought a motion for production of a further and better CTR, which was

granted on January 15, 2021. The production of a further and better CTR resulted in the current motion for non-disclosure pursuant to s 87 of the IRPA.

[9] A supplemental redacted CTR was transmitted to Mr. Perryman on February 5, 2021. Mr. Perryman immediately forwarded the CTR in electronic form to Dr. Lukács. Dr. Lukács was able to manipulate the electronic CTR to reveal the information that the AGC had attempted to redact. He then forwarded the electronic CTR with the faulty redactions to his counsel in Canada and to his father in Hungary.

[10] Once counsel for the AGC were made aware of the faulty redactions, they sought interim injunctive relief from the Court. This was granted on February 26, 2021. The AGC then identified further information that had been inadvertently disclosed in the supplemental CTR that was transmitted to Mr. Perryman on February 5, 2021, and subsequently to Dr. Lukács and others.

[11] The AGC filed a corrected motion record pursuant to s 87 of the IRPA on February 13, 2021. On March 22, 2021, this Court issued an injunction preventing the retention, dissemination or use of the inadvertently disclosed information pending determination of the current motion for non-disclosure of information (*Kiss v Canada (Citizenship and Immigration)*, 2021 FC 248).

III. Analysis

[12] The Applicants argue that the inadvertent disclosure of information and the injunctive relief granted by this Court have caused them prejudice and placed their counsel, Mr. Perryman, in an untenable position. According to the Applicants:

The Court's urgent, interim Order only enjoined counsel for the Applicant from viewing the Improperly Redacted Information,

The Court clarified, at the February 8 case management conference, that counsel could view the remainder of the filed documents, including the Non-Redacted Information,

As a result of the inadvertent disclosure, counsel for the Applicants viewed some of the purportedly sensitive information for which the Minister now seeks confidentiality,

The Court's interim Order enjoins Applicants' counsel from sharing the document at issue with his clients because it contains the Improperly Redacted Information [...] and as a result [he] cannot seek and receive instructions from his clients concerning the Non-Redacted Information,

The scenario significantly limits what use the Applicants can make of the allegedly inadvertently disclosed information, and as a result they are effectively barred from making submissions on part of the information for which the Minister seeks national security confidentiality,

The second issue of unfairness is the overbreadth of the Minister's assertion of national security confidentiality and the impact of disclosure on the Applicants' ability to make full submissions on this issue,

The Applicants need to use the disclosed information to show that it is not properly protected by national security confidentiality, but the interim relief granted in response to the Minister's disclosure prevents such use.

[13] Pursuant to s 87.1 of the IRPA, a judge may appoint a special advocate if considerations of fairness and natural justice require that this be done to protect the interests of the foreign national. While the appointment of a special advocate is mandatory in cases involving security certificates issued pursuant to s 77 of the IRPA, as a general rule motions under s 87 will be considered without the participation of a special advocate (*Malikaimu* at paras 33-43).

[14] A number of factors must be considered in determining whether fairness and natural justice require the appointment of a special advocate. These include the importance of the decision to the individual, the nature of the interests affected, the degree of procedural fairness to which the affected individual is entitled, the amount of information that has been disclosed, and the extent to which the individual is aware of the case to meet. The Court must balance all of the competing considerations in order to arrive at a just result (*Farkhondehfall v Canada (Citizenship and Immigration)*, 2009 FC 1064 at paras 31-41).

[15] As the Court found in the first request by the Applicants for the appointment of a special advocate or *amicus curiae*, the duty of fairness owed to the Applicants is at the lower end of the spectrum. The Applicants are not citizens of Canada, and they have no right to enter or remain in Canada. They are not facing detention or removal. Furthermore, the Minister concedes that the application for judicial review should be granted. The only remaining dispute pertains to remedy.

[16] The Applicants attempt to distinguish the circumstances surrounding their second request for the appointment of a special advocate or *amicus curiae* primarily due to the inadvertent disclosure of information, some of which was seen by Mr. Perryman before the Court granted

injunctive relief. I am not persuaded that these considerations justify a departure from the Court's previous ruling.

[17] Mr. Perryman does not claim to have seen any of the information that was subject to the faulty redactions applied to the supplemental CTR; only the small quantity of additional information the AGC has specified in the corrected motion for non-disclosure. This case therefore differs from *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 223, where all three of the documents in issue were inadvertently shared with counsel for the applicant. The motion judge had previously found that disclosure of the documents would be injurious to national security.

[18] The information at issue in this case consists primarily of materials used by the Minister to train government officials, airline personnel and/or private security personnel in Hungary on passenger screening. The information the AGC seeks to protect in the supplemental CTR is of a similar nature to that which the AGC sought to protect in the first motion for non-disclosure. For the most part, it consists of the "indicators" relied upon by the Minister and his staff to identify individuals who may be misrepresenting the purpose of their travel to Canada. Some additional information has been redacted on the grounds of privacy or relevance.

[19] The information the AGC seeks to protect in the supplemental CTR appears in PowerPoint presentations of "Case Studies" of fraudulent travel documents. Some information is redacted in slides that pertain to "Passenger Assessment", under headings such as "Passenger

Clothing”, “Passenger Language”, “Passenger Behaviour”, “Ticketing: Warning Flags”, “Luggage”, “Supporting Documents”, “Facilitator/Escort” and “What Questions to Ask”.

[20] The redacted documents contained in the corrected motion record of the AGC may all be disclosed to the Applicants, and they may instruct their counsel accordingly. Given the disclosure of the headings, the Applicants are well-placed to search for information in the public domain that pertains to the “indicators” in issue. Furthermore, on February 17, 2021, Dr. Lukács sent an e-mail message to counsel for the AGC alleging that “the Minister is making claims of national security confidentiality with respect to ‘indicators’ that are in the public domain and are reportedly used by the United States on routine visa interviews”. Dr. Lukács provided links to a number of websites, and asserted that counsel for the AGC owe a duty of candour to disclose this information to the Court.

[21] As occurred in the first motion for non-disclosure, the Applicants may rely on evidence in the public domain respecting the “indicators” relied upon by government officials and their agents to identify suspicious travellers. Any argument the Applicants may wish to make regarding the consequences of the inadvertent disclosure or *res judicata* may be made in open court. Their argument that many of the records at issue were shared with airlines and private sector security guards, and therefore cannot be protected pursuant to s 87 of the IRPA, may also be advanced in open court without the assistance of a special advocate or security-cleared *amicus curiae*.



IV. Conclusion

[22] The Applicants' request for the appointment of a special advocate or security-cleared *amicus curiae* is denied.

[23] The Applicants note that the AGC's motion record does not distinguish between redactions due to national security and for reasons of privacy. I agree with the Applicants that the grounds for the different redactions should be made clear, to enable them to prepare their submissions accordingly.

[24] Consistent with s 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, no costs will be awarded.

**ORDER**

**THIS COURT ORDERS that:**

1. The request of the Applicants for the appointment of a special advocate or security-cleared *amicus curiae* is denied.
  
2. The Attorney General of Canada shall specify the grounds for the different redactions of information contained in the corrected motion record filed pursuant to s 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.
  
3. No costs are awarded.

"Simon Fothergill"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2967-19

**STYLE OF CAUSE:** ATTILA KISS AND ANDREA KISS v MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**APPLICANTS' MOTION RECORD DATED FEBRUARY 22, 2021**

**ORDER AND REASONS:** FOTHERGILL J.

**DATED:** MAY 4, 2021

**WRITTEN SUBMISSIONS BY:**

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