Federal Court Cour fédérale

Date: 20230824

Dockets: IMM-2967-19
IMM-5570-19

Citation: 2023 FC 1147

Ottawa, Ontario, August 24, 2023

PRESENT: The Honourable Mr. Justice Fothergill

Docket: IMM-2967-19

BETWEEN:

ATTILA KISS and ANDREA KISS

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-5570-19

AND BETWEEN:

LÁSZLÓ SZÉP-SZÖGI, JUDIT SZÉP-SZÖGI,
LAURA SZÉP-SZÖGI, AND LÉNA SZÉP-SZÖGI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants in these related proceedings are citizens of Hungary. They seek judicial review of decisions by a Liaison Officer [Officer] with the Canada Border Services Agency [CBSA]. The Officer cancelled the Applicants' electronic travel authorizations [eTAs], preventing them from boarding flights from Budapest to Toronto. The Applicants allege that the Officer lacked authority under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] to cancel the eTAs, and that the Officer's decisions were discriminatory.

[2] CBSA officers are trained to detect "indicators" that travellers may be misrepresenting the true purpose of their travel to Canada. In both of these cases, one of the indicators relied upon by the Officer to cancel the Applicants' eTAs was that their intended hosts in Canada were successful refugee claimants.

[3] The Applicants maintain that the indicator "association with refugees", when applied to Hungarian-Roma travellers or travellers associated with Roma people, is discriminatory and contravenes international human rights law, as well as s 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]. They say that CBSA liaison officers' reliance on this indicator has adversely affected a large number of Hungarian nationals and Roma travellers, and they hope to set a precedent ending the practice.

[4] The Minister of Citizenship and Immigration [Minister] concedes that the Officer's decisions should be set aside on the grounds that they were procedurally unfair and unreasonable. The Minister acknowledges that "association with refugees" is not a sufficient justification to cancel an eTA, although the Minister disputes that this was the sole, or even the primary, reason for the Officer's decisions. The Minister says that declaratory relief is not warranted in these cases, and ordinary administrative law remedies will suffice.

[5] For the reasons that follow, the applications for judicial review are allowed and the Applicants' eTAs are restored. The Applicants' requests for declaratory and other relief are refused.

II. Background

A. *Court File No IMM-2967-19*

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

[7] In 2019, the Kisses planned to travel to Canada to visit Andrea's sister, Edit, who was about to undergo abdominal surgery in Toronto. Edit and her family have refugee status in Canada.

[8] Andrea previously visited Edit in 2017 with an eTA. She stayed with her sister for almost three months. Andrea's eTA was valid until 2022. On January 11, 2019, Attila obtained an eTA to travel to Canada. The Kisses purchased round-trip tickets departing from Budapest on April 2, and returning 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 perform document screening. 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 BudSec employee summoned them for further questioning. The employee again reviewed the Kisses' documents. The employee left to make a telephone call to the Officer, who was located in Vienna, Austria. The Officer consulted the Global Case Management System [GCMS], and discovered that the Kisses' intended hosts had made successful inland refugee claims in Canada. The Officer decided to cancel the Kisses' eTAs.

[11] The BudSec employee informed the Kisses that their eTAs were cancelled and they could not board their flight to Canada. The Kisses asked the employee about the reasons for the cancellation. Unbeknownst to the employee, the Kisses recorded the conversation. Although the BudSec employee identified a number of concerns, she stated that the "biggest problem" was that "the person whom you are travelling to has no status" (translated from Hungarian). She also

clarified that the decision to cancel the eTAs had been made by a CBSA officer, not by her. Later that day, the Kisses received two e-mail messages from Immigration, Refugees and Citizenship Canada [IRCC] informing them that their eTAs had been cancelled.

[12] The reasons for the Officer's decision, as recorded in the GCMS, were the following:

> On 2019-04-02, CBSA LO VIENN was contacted by BudSec document checkers at Budapest International Airport (BUD) on behalf of Air Canada Rouge regarding two Hungarian nationals seeking to board flight AC1911 from BUD-YYZ. Through information in GCMS and statements made to BudSec, subjects exhibited the following indicators of being an intending immigrant without a visa (IWOV): -husband (UCI 1118327278) and wife (UCI 1104873105) -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 indication 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]**. Based on these indicators, LO VIENN determined that on the balance of probabilities, subjects will not comply with conditions imposed upon entry to Canada as temporary resident and will not leave Canada at the end of the period authorized for stay. Subjects assessed as IWOV as per OB 2012-05 and as such are ineligible to hold an eTA. A no-board recommendation was made to the airline; eTAs cancelled as per IRPR 12.06/07. [Emphasis added]

B. *Court File No IMM-5570-19*

[13] László and Judit Szép-Szögi are husband and wife. Laura and Léna Szép-Szögi are their children. The Szép-Szögis are Hungarian citizens who live in Komárom.

[14] On May 17, 2019, the Szép-Szögis obtained eTAs to travel to Canada for a seven-day vacation. They purchased round-trip tickets departing from Budapest on July 11, and returning on July 18, 2019. They also hired a driver to transport them from the Toronto airport to their hotel in Kitchener, Ontario. The driver was a former employee of the Szép-Szögis in Hungary, and a successful refugee claimant in Canada.

[15] On July 11, 2019, the Szép-Szögis arrived at the Budapest International Airport and proceeded to the boarding gate of their flight. While in line at the gate, a BudSec employee asked the Szép-Szögis to produce their documents and answer questions about their intended travel, including the duration of their trip, where they would stay, if they had return tickets, where they worked, and how much money they made.

[16] The BudSec employee made a telephone call to the Officer in Vienna, Austria. The Officer consulted the GCMS and discovered that the Szép-Szögis' intended driver was a "current CR [convention refugee] who entered a refugee claim at Kitchener IRCC." The Officer made a no-board recommendation and decided to cancel the Kisses' eTAs.

[17] The BudSec employee subsequently informed the Szép-Szögis that their eTAs were cancelled and they could not board their flight. She provided no reasons, and advised the Szép-Szögis to contact the CBSA for more information. Later that day, the Szép-Szögis received four e-mail messages from the IRCC informing them that their eTAs had been cancelled.

[18] The reasons for the Officer's decision, as recorded in the GCMS, were the following:

> On 2019-07-11, CBSA LO VIENN was contacted by BudSec document checkers at Budapest International Airport (BUD) on behalf of Air Canada Rouge regarding a family of four Hungarian nationals seeking to board flight AC1911from BUD-YYZ. Through information in GCMS and statements made by the head of family (UCI 1113620999) to BudSec and LO VIENN, subjects exhibited the following indicators of being an intending immigrant without a visa (IWOV): -husband, wife, two minor children -stated purpose of travel is to visit friend in Kingston, ON for one week -unable to provide host's DOB, only know his approximate age (40-50) -based on a search in GCMS of name and phone number, **host identified as UCI [REDACTED], a Hungarian national and current CR who entered a refugee claim at Kitchener IRCC on 2018-07-12** -husband and wife are self-employed, own a security company -host used to work for their security company and invited them to visit -family will not stay with host, instead will stay at the Kitchener Inn and Suites; stated that the hotel is reserved but not pre-paid -unable to identify any sights or activities they will pursue except to look around Toronto (approximately 220km round trip to Kitchener) -tickets purchased three weeks prior to travel, passports issued two months prior to travel -family travelling with small carry-on luggage only, no checked bags Based on these indicators, LO VIENN 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. Subjects assessed as IWOV as per OB 2012-05 and as such are inadmissible under A41(a) by R6 and R50(l). A no-board recommendation was made to the airline; eTAs cancelled as per IRPR 12.07. Subjects advised of the reasons for eTA cancellation and directed to contact the Canadian Embassy for further information. [Emphasis added]

C. *Procedural History*

[19] These applications have a lengthy procedural history.

[20] The Kisses commenced their application for leave and judicial review on May 9, 2019. On July 11, 2019, the Minister applied in writing for judgment setting aside the Officer's decision on the ground of procedural fairness, and remitting the matter to a different decision-maker for redetermination. 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 (*Kiss v Canada (Citizenship and Immigration)*, 2019 FC 1247).

[21] On October 16, 2019, the Attorney General of Canada [AGC] brought a motion pursuant to s 87 of the IRPA for non-disclosure of excerpts from the Officer's reasons.

[22] The Kisses were initially assisted by Dr. Gábor Lukács, an advocate for air passengers' rights. On October 31, 2019, they brought a motion in writing for an order appointing a special advocate pursuant to s 87.1 of the IRPA or, in the alternative, a security-cleared *amicus curiae* to assist the Court. They also made an informal request to have Dr. Lukács appear before the Court and make oral submissions on their behalf. The Court refused both requests on December 12, 2019.

[23] The AGC's first motion pursuant to s 87 of the IRPA was largely dismissed on May 5, 2020 (*Kiss v Canada (Citizenship and Immigration)*, 2020 FC 584).

[24] The Szép-Szögis commenced their application for leave and judicial review on September 13, 2019.

[25] On or about November 5, 2020, the Applicants in both proceedings retained Mr. Benjamin Perryman as their counsel. The Applicants then brought a motion for production of a further and better-certified tribunal record [CTR] in both proceedings, which was granted on January 15, 2021. The Court also ordered that the two applications be heard together.

[26] On January 12, 2021, the Szép-Szögis brought a motion to consolidate their application with the one commenced by the Kisses. On January 28, 2021, the Court declined to consolidate the two applications, noting the Minister's position that the efficiencies to be gained from consolidation would also be achieved by having the matters heard together, as previously ordered by the Court. The Minister agreed that the Court could consider common evidence in a coordinated way, rather than separately in the two proceedings.

[27] The production of a further and better CTR resulted in additional motions for non-disclosure pursuant to s 87 of the IRPA in both proceedings. At the Applicants' request, the s 87 motion in the Szép-Szögis' application was held in abeyance pending determination of the s 87 motion in the Kisses' application.

[28] Redacted CTRs in both proceedings were transmitted to Mr. Perryman on February 5, 2021. Mr. Perryman forwarded the CTRs in electronic form to Dr. Lukács, who was able to manipulate the documents to reveal the information the AGC had redacted pursuant to s 87 of the IRPA.

[29] The AGC brought two motions for interlocutory relief to safeguard the redacted information pending the Court's determination of the second motion pursuant to s 87 of the IRPA. The Court issued two orders enjoining Dr. Lukács and others from retaining, disclosing or disseminating the redacted information, the first on February 8, 2021 and the second on March 22, 2021 (*Kiss v Canada (Citizenship and Immigration)*, 2021 FC 248, aff'd, 2023 FCA 36).

[30] On February 22, 2021, the Applicants brought another motion for the appointment of a special advocate or security-cleared *amicus curiae* to assist the Court in the second motion for non-disclosure pursuant to s 87 of the IRPA. This was refused on May 4, 2021 (*Kiss v Canada (Citizenship and Immigration)*, 2021 FC 398).

[31] On September 8, 2021, the Applicants brought a motion to conduct an out-of-court examination of the Officer in both applications. This was refused on February 3, 2022 (*Kiss v Canada (Citizenship and Immigration)*, 2022 FC 133). The Applicants attempted to appeal the Court's decision, but the Notice of Appeal was quashed on April 20, 2022 (*Kiss v Canada (Citizenship and Immigration)*, unreported, April 20, 2022, Court File No A-37-22).

[32] The AGC's second motion for non-disclosure pursuant to s 87 of the IRPA was granted in part on May 5, 2022 (*Kiss v Canada (Citizenship and Immigration)*, 2022 FC 373). The Szép-Szögis subsequently took the position that the s 87 motion filed in their application should not be governed by the Court's Order and Reasons in 2022 FC 373. On January 4, 2023, the Court ruled that the Szép-Szögis' position was an improper collateral attack on the Court's previous ruling, and constituted an abuse of process (*Szép-Szögi v Canada (Citizenship and Immigration)*, 2023 FC 22).

[33] On March 10, 2023, the Applicants brought a motion to amend their applications to bring a constitutional challenge to the CBSA's worldwide program to interdict travellers who may be misrepresenting the true purpose of their travel to Canada. This was refused on April 17, 2023 (*Kiss v Canada (Citizenship and Immigration)*, 2023 FC 562).

[34] The applications were heard together in Halifax on June 23, 2023. The Applicants brought a motion returnable at the hearing to preclude the Minister from arguing that "association with refugees" was not an indicator relied upon by the Officer in rendering his decisions in both applications. This motion was dismissed for reasons delivered from the bench.

III. Issues

[35] These applications for judicial review raise the following issues:

A. Did the Officer have legal authority to cancel the Applicants' eTAs?

B. Were the Officer's decisions discriminatory?

C. What are the appropriate remedies?

IV. Analysis

[36] Subsection 11(1.01) of the IRPA provides as follows:

Application before entering Canada

11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Electronic travel authorization

(1.01) Despite subsection (1), a foreign national must, before entering Canada, apply for an electronic travel authorization required by the regulations by means of an electronic system, unless the regulations provide that the application may be made by other means. The application may be examined by an officer and, if the officer determines that the foreign national is not inadmissible and meets the requirements of this Act, the authorization may be issued by the officer.

Visa et documents

11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

Autorisation de voyage électronique

(1.01) Malgré le paragraphe (1), l'étranger doit, préalablement à son entrée au Canada, demander l'autorisation de voyage électronique requise par règlement au moyen d'un système électronique, sauf si les règlements prévoient que la demande peut être faite par tout autre moyen. S'il décide, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi, l'agent peut délivrer l'autorisation.

[37] The requirement for prescribed foreign nationals to have a valid eTA when seeking entry to Canada has been in effect since November 2016. It serves as an early screening process for proposed visitors to Canada from certain visa-exempt countries, including Hungary.

[38] Under s 12.07 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], CBSA liaison officers are authorized to cancel eTAs under certain conditions:

Cancellation	**Annulation**
12.07 An officer may cancel an electronic travel authorization that was issued to a foreign national if the foreign national is inadmissible or becomes ineligible to hold such an authorization under section 12.06.	12.07 Un agent peut annuler une autorisation de voyage électronique délivrée à un étranger si ce dernier est interdit de territoire ou s'il n'est plus habilité, aux termes de l'article 12.06, à en détenir une.

[39] The Minister concedes that the present applications should be granted on the grounds that they were procedurally unfair and unreasonable. The Minister proposes that the Court order the reinstatement of the Applicants' eTAs. Counsel for the Minister provided the Court with an assurance that, assuming no material change in circumstances, the Applicants' eTAs will not be cancelled in the future.

[40] The Applicants agree that the Officer's decisions were procedurally unfair and unreasonable. However, they maintain that the decisions suffered from more fundamental defects. They say the Officer lacked legal authority to cancel the eTAs, and his decisions to do so were discriminatory. They seek declarations to this effect.

A. *Did the Officer have legal authority to cancel the Applicants' eTAs?*

[41] The Applicants assert that CBSA liaison officers are not authorized to enforce the IRPA extraterritorially by creating informal ports of entry at airports overseas. They claim that CBSA officers may stop, question or examine foreign nationals in only three discrete and limited situations: (a) when a person makes an application (IRPA, s 15); (b) when a person seeks to enter Canada (IRPA, s 18); and (c) where there are reasonable grounds to believe a person has entered Canada without presenting themselves at a port of entry (*Customs Act*, RSC 1985, c 1 (2nd Supp), ss 11, 99.1).

[42] According to the Applicants, a CBSA officer's power to examine is limited geographically to ports of entry in Canada. They refer to s 37 of the IRPR, which specifies that the examination of a person who "seeks to enter Canada" ends only when (a) a person is "authorized to enter Canada ... [or] is authorized to leave the port of entry at which the examination takes place", (b) an in-transit passenger departs Canada, (c) a person is authorized to withdraw an application and departs Canada, or (d) an inadmissibility decision is made and the person leaves the port of entry. They note that this reading of the IRPR is consistent with provisions in the *Customs Act* that govern the presentation of persons at designated customs offices (s 11).

[43] The Applicants say there is a well-established presumption of statutory interpretation that Parliament does not intend legislation to apply extraterritorially unless a contrary intention is expressly stated or implied. They argue there is no express or implied language in the IRPA to

rebut this presumption, and the IRPA explicitly prescribes when foreign border service officers are permitted to stop, question, and examine people in Canada.

[44] The Applicants urge this Court to adopt a purposive reading of the IRPA that favours a discrete and limited authority for CBSA liaison officers to stop and question foreign travellers outside Canada. The statement of purpose contained in s 3(2) of the IRPA does not mention extraterritorial enforcement, but instead focuses on refugee protection, offering safe haven to those facing persecution, and family reunification in Canada. The only exception concerns refugee claimants who pose security risks or are serious criminals. The Applicants therefore argue that the IRPA cannot be construed in a manner that authorizes extraterritorial enforcement against prospective refugees and people who are "associated with refugees".

[45] I am not persuaded that the Officer conducted an overseas examination of the Applicants before deciding to cancel their eTAs. The Officer was located in Vienna, Austria and had no direct contact with the Applicants. The BudSec employee was hired by Air Canada, not the CBSA.

[46] The Officer's decisions were based on information provided by a private security agent employed by the transporter, combined with other information contained in the GCMS. This did not constitute the examination of foreign nationals, but rather the provision of assistance to an air carrier in meeting its obligation to ensure travellers are eligible to enter Canada. CBSA liaison officers are among the officials authorized to cancel eTAs under s 12.07 of the IRPR.

[47] While the parties agree that the requirements of s 12.07 of the IRPA were not met in either of these cases, this does not mean that the Officer was wholly without statutory authority to cancel the eTAs.

B. *Were the Officer's decisions discriminatory?*

[48] The Applicants submit that the Officer decided to cancel the Applicants' eTAs because they exhibited the suspicious indicator "association with refugees". They say that the use of this indicator in relation to Roma people, or those who associate with Roma people, is a discriminatory practice.

[49] The Minister disputes that "association with refugees" was the sole, or even the primary, reason for the Officer's decisions. The Minister nevertheless concedes that "association with refugees" it not in itself a sufficient justification for cancelling an eTA, and both applications for judicial review should be granted. The Minister says that declaratory relief is not warranted in these cases, and ordinary administrative law remedies will suffice.

[50] A discriminatory decision is inherently unreasonable, because it is premised on irrelevant considerations, or procedurally unfair, because it betrays a reasonable apprehension of bias. A decision maker's reasons must be internally coherent and justified in light of the relevant legal and factual constraints (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 101).

[51] The Supreme Court of Canada has long recognized that "discretion" necessarily implies good faith in discharging a public duty. There is always a perspective within which law is intended to operate, and any clear departure from its purpose is as objectionable as fraud or corruption. If administration according to law is superseded by action dictated by the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, this is an affront to the rule of law (*Roncarelli v Duplessis*, [1959] SCR 121 at 140, 142).

[52] According to the Applicants:

> In the context of Hungary, people who are "associated with refugees" in Canada are more likely to be Roma because Roma claims represent the large majority (79.5%) of claims from Hungary. The "association with refugees" indicator is not race-neutral and functions as a proxy for Roma ethnicity or race. It will disproportionately impact Roma people because they are more likely to be "associated with refugees" than other Hungarian nationals. […].

[53] The legal precedent that bears the closest resemblance to the matters before the Court is the decision of the United Kingdom House of Lords [UKHL] in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*, [2004] UKHL 55 [*Prague Airport*]. The case arose in the following context (*Prague Airport* at para 4):

> In February 2001 the governments of [the UK] and the Czech Republic made an agreement. The effect of this was to permit British immigration officers to give or refuse leave to enter the UK to passengers at Prague Airport before they boarded aircraft bound for this country. The agreement was first implemented on 18 July 2001. British immigration officers were posted to Prague airport to "pre-clear" all passengers before they boarded flights for the UK. Leave to enter was granted to those passengers requiring it who

> satisfied the officers that they were intending to visit the UK for a purpose within the Immigration Rules. Others who required leave to enter, including those who stated that they were intending to claim asylum in the UK and those who the officers concluded were intending to do so, were refused leave to enter. This effectively prevented them from travelling to this country, since no airline would carry them here.

[54] There was evidence before the UKHL that, over a period of 51 days, 68 out of 78 Roma were refused boarding, while only 14 out of 6,170 non-Roma were rejected. Thus, any individual Roma was 400 times more likely to be rejected than any individual non-Roma. (*Prague Airport* at para 92).

[55] There was also evidence before the UKHL of an experiment in which three people tried to travel to the UK for a short visit. Two were young women with similar incomes, intentions and amounts of money with them, one non-Roma and one Roma. The third was a mature professional married Roma woman working in the media. The non-Roma woman was allowed through after only brief questioning. The young Roma woman was rejected after longer questioning which she considered to be probing and intrusive. The mature Roma woman was questioned for a lengthy period, and then told to wait in a separate room. She was eventually allowed to travel. A similar experiment was conducted by a Czech television program with comparable results (*Prague Airport* at para 94).

[56] Six Roma Czech nationals who had been refused leave to enter the UK challenged the Prague operation. Three of the claimants made no secret of their intention to seek asylum on arrival in the UK. They did not complain of discrimination, because their less favourable treatment was on grounds other than their ethnic origin. Two of the claimants also intended to

claim asylum but pretended that they did not. The UKHL observed that it was difficult for them to complain of more intensive questioning that revealed their true intentions. A note to file regarding the last claimant recorded that her grandson-in-law, whom she hoped to visit, said he had been awarded refugee status in the UK, was in receipt of social assistance, and was seeking employment. This invited the question whether a non-Roma in similar circumstances would have been refused (*Prague Airport* at para 95).

[57] The UKHL (*per* Baroness Hale) concluded that the Prague operation was carried out in a discriminatory fashion (*Prague Airport* at para 97):

> […] All the evidence before us, other than that of the intentions of those in charge of the operation, which intentions were not conveyed to the officers on the ground, supports the inference that Roma were, simply because they were Roma, routinely treated with more suspicion and subjected to more intensive and intrusive questioning than non-Roma. There is nothing surprising about this. Indeed, the Court of Appeal considered it 'wholly inevitable'. This may be going too far. But setting up an operation like this, prompted by an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group, requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion is that the operation was inherently and systemically discriminatory and unlawful.

[58] The Applicants say that the Officer's decisions in the present applications must be understood in the context of a broader interdiction policy that seeks to enforce Canada's border and immigration laws extraterritorially. The policy uses a "multiple borders strategy" that "strives to 'push the border out' so that people posing a risk to Canada's security and prosperity are identified as far away from the actual border as possible, ideally before a person departs their

country of origin" (citing Report of the Auditor General of Canada, Chapter 5, *Citizenship and Immigration Canada – Control and Enforcement* (April 2003); CBSA, Strategy and Coordination Branch, *Admissibility Screening and Supporting Intelligence Activities – Evaluation Study* (July 2009); Public Safety Canada, *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness* (February 2011); Public Safety Canada, *2015 Beyond the Border Implementation Report*).

[59] In testimony before a House of Commons Standing Committee, a CBSA official described the advantages of eTAs in the following terms: "people who would be deemed inadmissible would not be coming to the country. There are also advantages from a refugee perspective, which is that we will get fewer refugee claims" (House of Commons, Standing Committee on Citizenship and Immigration, Minutes of Proceedings and Evidence, 41st Parl, 1st Sess, No 21 (14 Feb 2012)).

[60] An IRCC official who testified before the same Standing Committee praised the "beauty and efficiency" of ensuring that certain categories of foreign nationals are interdicted overseas (House of Commons, Standing Committee on Citizenship and Immigration, Minutes of Proceedings and Evidence, 41st Parl, 1st Sess, No 59 (19 Nov 2012)):

> What we are proposing with the eTA is to push the threat and risk of those types of cases offshore so that those individuals would not be able even to make it to a port of entry, unless of course they had been screened through the eTA prior to departure.

[61] The Applicants submitted expert evidence of the historical and ongoing disadvantages faced by Roma people in Hungary. None of this was disputed by the Minister.

[62] The Applicants say that Canada has adopted various legal and political measures to limit the number of Roma refugee claimants arriving in Canada, including visa requirements, a designated country of origin regime, and a “lead case” approach at the Immigration and Refugee Board [IRB]. In 2012, the CBSA initiated “Project SARA” to respond to an influx of Hungarian refugee claimants. According to the Executive Summary of the Project Sara Final Report:

> Since the elimination of the visa requirement for Hungarian nationals travelling to Canada in 2008, the Canada Border Services Agency (CBSA) has seen significant yearly increases in the number of Hungarian passport holders coming to Canada for the purpose of entering a claim for refugee protection. In large part, these individuals are requesting protection on the grounds that they are persecuted because they are ethnic Roma. The majority of these individuals are primarily arriving and entering refugee claims in the Greater Toronto Area Region (GTAR). In 2011 alone, approximately 4,442 Hungarian nationals entered a claim for refugee protection in Canada, representing approximately 17% of the total number of refugee claimants for the year. Approximately 3,759 individuals requested refugee protection at Pearson International Airport (PIA) and at Citizenship and Immigration Canada’s Etobicoke office. This represents a significant increase from last year's 2,353 claimants for all of Canada. The migration patterns exhibit characteristics of a co-ordinated movement. As a result, the CBSA launched an action plan both domestically and internationally, aimed at exploring actions that could be taken to mitigate this irregular migration movement.

[63] Under the heading “Specific Strategies”, the Project Sara Final Report recommended the following “pre-border actions”:

- Maintain enhanced interception efforts at strategic embarkation points; it should however be noted that while interdictions have yielded positive results, the movement appears to be highly responsive to interdiction efforts: a number of interdicted individuals subsequently used alternate transit points ultimately making their way to Canada, thereby shifting the problem elsewhere. Furthermore, it is not viewed as a long term sustainable option in light of challenging logistics (lack of time, lack of facilities, translation issues) as well as heavy resource needs and financial requirements.

- Uphold [Liaison Officer] co-operation with international enforcement and intelligence authorities aimed at detecting and preventing irregular migration flows.

[64] The Applicants presented evidence of the number of "no-board" recommendations against Hungarian nationals abroad between 2012 and 2018 and the success rate of Roma refugee claimants in Canada. It is unclear what conclusions may be drawn from these data.

[65] Dr. Lukács submitted an affidavit in which he deposed that between 2012 and 2018, CBSA liaison officers made no-board recommendations against 1,252 Hungarian nationals. Dr. Lukács did not specify what proportion of these Hungarian nationals were of Roma ethnicity, or associated with Roma people. There is no evidence before the Court of the reasons for the no-board recommendations.

[66] Professor Sean Rehaag of Osgoode Hall Law School, York University submitted an affidavit in these proceedings in which he deposed that during the period 2013 to 2019:

(a) refugee claims from Hungary represented 1.7% of all claims finalized by the IRB;

(b) the recognition rate of claims from Hungary was 69.7%;

(c) Roma claims represented the large majority (79.5%) of claims from Hungary;

(d) the recognition rate of Roma claims from Hungary was 70.9%;

(e) Hungary was the most common country for claims involving Roma, representing 47.5% of such claims;

(f) Roma claims were the most common type of claim involving Race/Ethnicity/Nationality, representing 22.2% of all such claims; and

(g) Roma claims from Hungary represented 10.6% of claims involving Race/Ethnicity/Nationality.

[67] The data contained in Professor Rehaag's affidavit demonstrate an increase in refugee claims from Hungary, including claims by people of Roma ethnicity, in the years following 2013:

Table 5: Outcomes in Claims from Hungary (2013-19)					
Decision Year	**Abandoned / Withdrawn**	**Negative**	**Positive**	**All**	**Recognition Rate**
2013	7	11	6	24	0.352941
2014	16	34	48	98	0.585366
2015	29	47	170	246	0.783410
2016	44	83	210	337	0.716724
2017	48	45	86	179	0.656489
2018	92	49	116	257	0.703030
2019	70	28	47	145	0.626667
All	306	297	683	1286	0.696939

Table 8: Outcomes in Roma Claims from Hungary (2013-19)						
Decision Year	**Abandoned / Withdrawn**	**Negative**	**Positive**	**All**	**Recognition Rate**	**Proportion**
2013	0	5	2	7	0.285714	0.006849
2014	7	26	38	71	0.593750	0.069472
2015	21	45	145	211	0.763158	0.206458
2016	37	72	187	296	0.722008	0.289628
2017	34	37	80	151	0.683761	0.147750
2018	38	40	111	189	0.735099	0.184932
2019	26	25	46	97	0.647887	0.094912
All	163	250	609	1022	0.708964	1.000000

[68] According to the data contained in Dr. Lukács' affidavit, no-board recommendations for all Hungarians increased in 2015 and 2016. But so did the total number of Hungarian refugee claimants entering Canada during this period. The evidence before this Court does not permit any reliable conclusions regarding the number of prospective Hungarian Roma refugee claimants whose travel was prevented by CBSA liaison officers abroad.

[69] Moreover, the evidence does not establish the existence of a coordinated program by the CBSA to interdict travellers abroad solely on the ground that they are of Roma ethnicity or associated with Roma refugee claimants in Canada. The facts giving rise to these applications are therefore distinguishable from those that resulted in a finding of discrimination in *Prague Airport*.

[70] The materials used to train CBSA liaison officers and private security employees at Budapest International Airport at the relevant times do not mention a traveller's ethnicity or "association with refugees". The suspicious "indicators" appear in PowerPoint presentations of "Case Studies" of fraudulent travel documents, and 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”.

[71] According to the Minister, a decision maker may consider any information he or she deems relevant to whether persons with eTAs for temporary entry will leave Canada at the end of their authorized stay. There is no requirement that a decision take into account only specific factors (citing Operational Bulletin PRG-2017-41). While decision makers receive training on “indicators”, this is intended only to provide them with helpful indicia to assist in making determinations. The indicators included in the training materials do not limit a decision maker’s discretion.

[72] The “indicators” contained in the CBSA training materials do not provide any factual foundation for the Applicants’ allegation of discrimination. Ultimately, the Applicants placed no reliance on these indicators to support their arguments.

[73] The Officer in these cases made no finding regarding the Applicants’ ethnicities. In fact, while the Kisses are of Roma ethnicity, the Szép-Szögis are not. The Officer’s focus was on the immigration status of the Applicants’ intended hosts, which the Minister says may in some circumstances be a legitimate consideration in assessing a traveller’s *bona fides*.

[74] The burden is on the Applicants to demonstrate that the CBSA's use of "indicators" in relation to Hungarian travellers, including the immigration status of their intended hosts in Canada, amounts to discrimination in law. They have not done so.

[75] In light of this conclusion, it is unnecessary to consider the Applicants' argument that the Officer's decisions contravened international human rights law. I would nevertheless observe that the UKHL was satisfied that the operation at Prague Airport contravened the obligations of the UK under international treaties and also under customary international law (*per* Lord Bingham at paras 39-46).

[76] It is similarly unnecessary to consider the Applicants' Charter arguments. Furthermore, as previously noted in *Kiss v Canada (Citizenship and Immigration)*, 2023 FC 562 at paragraphs 15 and 16:

> It is doubtful that the Applicants can bring themselves within the exception to the principle that the Charter does not apply outside Canada recognized by the Supreme Court of Canada in *Khadr*. That case concerned the interrogation by Canadian security intelligence officials of a Canadian youth detained by the United States of America at Guantanamo Bay, Cuba in circumstances that the U.S. Supreme Court had declared to be a clear violation of fundamental human rights protected by international law. The actions of Canadian officials were found by the Supreme Court of Canada to have contributed to Mr. Khadr's deprivation of liberty. This must be contrasted with the present case, where Hungarian nationals were prevented from boarding flights from Budapest to Toronto.
>
> In *R v McGregor*, 2023 SCC 4, the Supreme Court of Canada was presented with an opportunity to revisit its analysis in *Hape* and *Khadr* but declined to do so. The observations of Justice Suzanne Côté at paragraph 24 are apt in the present context:

> It is thus preferable to leave for another day any reconsideration of the *Hape* framework. A restrained approach is amply supported by our jurisprudence. As Sopinka J. emphasized in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, "This Court has said on numerous occasions that it should not decide issues of law that are not necessary to a resolution of an appeal. This is particularly true with respect to constitutional issues" [citations omitted].

C. *What are the appropriate remedies?*

[77] The Applicants seek declaratory relief in order to "put an end to the Minister's unlawful and discriminatory policy, that may target them again in the future". According to the Applicants:

> In the absence of a declaratory remedy, all that is available to the Applicants is to return to the Budapest airport to face the same screening and then to bring another judicial review application. The practical utility of a declaration is that it would clarify what CBSA Liaison Officers can or cannot do extraterritorially when the Applicants next seek to travel to Canada and whether Liaison Officers can use the "association with refugees" indicator.

[78] Declaratory relief is a narrow discretionary remedy that is available only where the Court has jurisdiction to hear the issue, the dispute is real and not theoretical, the party raising the issue has a genuine interest in its resolution, and the declaration will have practical utility, in that it will settle a live controversy between the parties (*Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11).

[79] The Court has found that the Officer had statutory authority to cancel the Applicants' eTAs, although the criteria for exercising that authority were not satisfied in either of these cases. This is conceded by the Minister. There would therefore be no practical utility in issuing a declaration respecting this issue.

[80] The evidence has not established the existence of a coordinated program by the CBSA to interdict travellers abroad solely on the ground that they are of Roma ethnicity or associated with Roma refugee claimants in Canada. Declaratory relief is therefore not warranted respecting this issue.

[81] The Minister maintains that the immigration status of a traveller's intended hosts in Canada may in some circumstances be a relevant consideration in assessing the traveller's *bona fides*. As Baroness Hale remarked in *Prague Airport*, the implementation of policies in response to "an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group requires enormous care if it is to be done without discrimination" (at para 97). While this Court has not found that the CBSA's use of "indicators" amounts to a discriminatory practice, the Minister must ensure that the application of indicators to Roma travellers, or those who associate with Roma people, does not inadvertently result in discriminatory decisions.

[82] Counsel for the Minister has provided an assurance to the Court that, assuming no material change in circumstances, the Applicants' eTAs will not be cancelled in the future. In

particular, the Applicants' eTAs will not be cancelled solely on the ground that their intended hosts in Canada have refugee status in this country.

[83] The applications for judicial review will therefore be granted, and the Applicants' eTAs will be restored.

V. Questions for Appeal

[84] The Applicants have been successful in these proceedings, and accordingly the only possible questions for appeal relate to the availability of declaratory relief. The Minister has conceded that the applications should be granted, and opposes the certification of any questions for appeal.

[85] A question cannot be certified unless it is serious, dispositive of the appeal, and transcends the interests of the parties. It must also have been raised and dealt with by the court below, and it must arise from the case rather than from the judge's reasons. Finally, and as a corollary of the requirement that it be of general importance pursuant to s 74 of the IRPA, the question cannot have been previously settled by the decided case law (*Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151 at para 28).

[86] The Applicants have proposed six questions for appeal. Three of these relate to the application of international human rights law or the Charter to the facts of these cases. These

questions have not been dealt with by the Court in these reasons, and they cannot therefore be certified.

[87] In light of the Court's conclusion regarding the insufficiency of the evidence, the Applicants' proposed question whether a CBSA liaison officer's use of the "association with refugees" indicator is discriminatory would not be dispositive of the appeal. This question cannot therefore be certified.

[88] The remaining two questions proposed by the Applicants are:

1. What is the meaning of "examination" in sections 15 and 18 of the *Immigration and Refugee Protection Act* and does a CBSA officer's questioning or interviewing of foreign nationals in foreign airports, directly or indirectly, constitute an "examination" under those sections or another section of the Act?

2. Does the *Immigration and Refugee Protection Act* authorize a CBSA officer to examine, question or interview foreign nationals in foreign airports, directly or indirectly, as part of determining whether to cancel their electronic travel authorizations or providing advice to transporters or enforcing the Act?

[89] These questions have been dealt with by the Court in these reasons. The Court has found that the Officer's decisions were based on information provided by a private security agent employed by the transporter, combined with other information contained in the GCMS. This did not constitute the examination of foreign nationals, but rather the provision of assistance to an air carrier in meeting its obligation to ensure travellers are eligible to enter Canada.

[90] The Officer was located in Vienna, Austria, and had no direct interaction with the Applicants. He did not exercise any coercive powers under the IRPA. The Applicants' assertion that the Officer conducted an unauthorized overseas examination is largely unsupported by the evidence.

[91] The Applicants' argument respecting the Officer's authority to cancel their eTAs was peripheral to their central assertion that the decisions were discriminatory. Even if the Officer lacked authority to cancel the eTAs, the outcome of these proceedings would be the same. The Officer's decisions would still be quashed and the Applicants' eTAs would still be restored. I am therefore not satisfied that questions regarding the Officer's legal authority to cancel the Applicants' eTAs are of sufficient general importance to warrant certification in the context of these proceedings.

[92] In the result, no questions will be certified pursuant to s 74 of the IRPA.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are granted and the Applicants' electronic travel authorizations are restored.

2. No questions are certified for appeal.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-2967-19 IMM-5570-19
STYLE OF CAUSE:	ATTILA KISS AND ANDREA KISS v MINISTER OF CITIZENSHIP AND IMMIGRATION LÁSZLÓ SZÉP-SZÖGI, JUDIT SZÉP-SZÖGI, LAURA SZÉP-SZÖGI AND LÉNA SZÉP-SZÖGI v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JUNE 23, 2023
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	AUGUST 24, 2023

APPEARANCES:

Benjamin Perryman	FOR THE APPLICANTS
Patricia MacPhee Ami Assignon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Benjamin Perryman Barrister and Solicitor Halifax, Nova Scotia	FOR THE APPLICANTS
Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT