Federal Court  Cour fédérale

Date: 20210915

Docket: T-2064-18

Citation: 2021 FC 951

Ottawa, Ontario, September 15, 2021

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The Applicant, Dr. Gabor Lukács [Dr. Lukács] brings this motion pursuant to Rule 312 of the *Federal Courts Rules*, SOR/98-106 [the Rules], seeking leave to file and serve two supplementary affidavits: his own affidavit affirmed January 10, 2021 [the Lukács Supplementary Affidavit], attaching 19 documents, and the affidavit of Judit Mihala affirmed September 22, 2020 [the Mihala Affidavit], attaching two documents. Dr. Lukács seeks leave to

use the supplementary affidavits as part of his record for both the underlying application for judicial review [Application] and as part of his record for the outstanding preliminary motions.

[2] The Respondent opposes the motion and argues that the supplemental affidavits are not relevant or admissible for either the determination of the Application or for the determination of the preliminary motions. However, subsequent to the hearing of this motion, the Respondent identified some documents that it now agrees can be used by Dr. Lukács as part of his record for both the Application and prehearing motions. Dr. Lukács also identified some documents that he no longer seeks to use in his record for either the Application or the determination of outstanding preliminary motions.

[3] For the reasons that follow, Dr. Lukács may serve and file the Lukács Supplementary Affidavit with only Exhibits R and S for the purpose of his record on the Application. The Court refuses to grant leave to serve and file any other exhibit for Dr. Lukács' record on the Application. The Court refuses to grant leave to Dr. Lukács to serve and file the Lukács Supplementary Affidavit and any exhibit for Dr. Lukács' record on the outstanding preliminary motions.

I. Background

[4] The following information provides the relevant context. This same information was set out in previous orders, for example, *Lukács v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1142.

[5] Dr. Lukács seeks judicial review of the decision of the Canada Border Services Agency [CBSA] which refused to grant him access to all the records he had requested pursuant to the *Access to Information Act*, RSC 1985, c A-1 [the Act]. Dr. Lukács seeks the records of three persons [the travellers] who were denied boarding on flights to Canada from Budapest, Hungary in 2015. Dr. Lukács obtained the signed authority of the travellers to request the records at issue. The CBSA provided some records to Dr. Lukács in September 2015 and relied on the exemptions in the Act, including subsection 16(1), to decline to provide other records or unredacted records. The CBSA subsequently provided some additional documents with fewer redactions.

[6] Dr. Lukács complained to the Information Commissioner of Canada [Information Commissioner] with respect to the undisclosed records. The Information Commissioner considered the complaint and, in October 2018, advised Dr. Lukács that his complaint was not well founded.

[7] Dr. Lukács then brought the Application pursuant to section 41 of the Act.

[8] In accordance with section 44.1 of the Act, an application under section 41 is to be heard and determined as a new proceeding (commonly referred to as a *de novo* review). The Court's review focuses on the decision to provide or withhold the records. As previously noted in other Orders, the decision of the Information Commissioner is an essential step in the process, which triggers the right to seek judicial review. However, the decision of the Information Commissioner is not the subject of review. Although Dr. Lukács noted his concern that the

Information Commissioner's finding that the complaint was not well founded would be considered by the Court on this motion and on the Application, this is not a factor. On judicial review, the Court determines whether the original decision-maker (the CBSA) correctly applied the exemptions under the Act and whether the decision-maker reasonably exercised their discretion to either disclose or withhold records.

[9] The Act requires that the Court "take every reasonable precaution" to avoid the disclosure of the records that have been withheld pending the Court's determination of the Application. This may include receiving submissions *ex parte* and conducting hearings *in camera* (section 47). The Court may also make a confidentiality order pursuant to Rule 151 of the *Rules*, where a motion for such an order is brought and the requisite criteria are established, in order to ensure that the information withheld remains protected pending the Court's determination of the Application. As noted below, the Respondent's motion for a Confidentiality Order remains to be determined.

[10] The Court is also required to determine the Application in a summary way (section 45). However, this has not occurred due to the proliferation of motions and the parties' requests that the motions be determined in a particular order.

[11] In February 2019, the Respondent brought a motion for a Confidentiality Order because the parties were unable to agree on its terms. Dr. Lukács opposes this motion. Dr. Lukács cross-examined two affiants, Mr. O'Brien and Mr. Nause, who had sworn affidavits in support of the Respondent's motion.

[12] In June 2019, Dr. Lukács brought a motion to compel answers refused by Mr. Nause on cross-examination and to compel Mr. Nause to produce an unredacted copy of an Operational Bulletin, which Mr. Nause had referred to in his cross-examination, but which was not part of the records sought or refused by the CBSA.

[13] In June 2019, the Respondent also brought a motion to strike parts of Dr. Lukács' Notice of Application, the affidavits of Dr. Cynthia Levine-Rasky and Erzsébet Poroszkai in their entirety, and the affidavit of Dr. Lukács in part. (As noted below, these affidavits are also included in Dr. Lukács' Motion Record for the within motion.)

[14] The parties requested, and I directed, that Dr. Lukács' motion to compel answers (to the extent that the answers sought were not subsequently answered) and the Respondent's motion to strike parts of the Notice of Application and all or parts of the three affidavits would be heard and determined at an oral hearing on the same date and prior to the determination of the Respondent's motion for a Confidentiality Order. These motions have not yet been determined.

[15] Following the Respondent's production of the redacted CBSA Operational Bulletin in February 2020, the Respondent brought a motion for a Second Confidentiality Order seeking to protect the Operational Bulletin in its unredacted form and to file confidential material for consideration by the Court in the context of Dr. Lukács' motion to compel answers from Mr. Nause.

[16] In July 2020, the Respondent discontinued their motion for a Second Confidentiality Order following the decision in *Kiss v Canada (Citizenship and Immigration)*, 2020 FC 584 [*Kiss*]. The Respondent then provided Dr. Lukács with an unredacted copy of the Operational Bulletin.

[17] In *Kiss*, in the context of an application for judicial review of the decision of the Minister of Citizenship and Immigration to cancel the applicants' electronic travel authorization [ETA], the Minister sought an order pursuant to section 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for non-disclosure of excerpts of the immigration officer's notes. The Court granted the motion in part, finding that, with one exception, it was untenable for the Minister to object to the disclosure of the "indicators" relied upon by the officer to cancel the applicants' ETA, noting that this information was already in the public domain.

[18] In light of *Kiss*, the CBSA subsequently reviewed the records provided to Dr. Lukács and prepared a new package of documents for release to him.

[19] There are now only six small redactions remaining in the documents disclosed to Dr. Lukács; in other words, only six redactions will be the subject of the Court's *de novo* review to determine, first, whether the exemptions in the Act can be relied on and second, whether CBSA has reasonably exercised its discretion to withhold the records.

[20] On August 28, 2020, Dr. Lukács cross-examined Mr. Nause and Mr. O'Brien on their affidavits sworn in two other applications for judicial review brought by Dr. Lukács (T-320-20

and T-321-20). These other applications are being held in abeyance pending the determination of this underlying Application (T-2064-18).

[21] On December 10, 2020, I granted the Respondent's motion to file a supplementary affidavit, in part. I ordered that the Respondent may file and serve the Supplementary Affidavit of Mr. O'Brien, to be used in the Respondent's record for the purpose of the preliminary motions yet to be determined, and the redacted Supplementary Affidavit of Mr. O'Brien, for the purpose of the Respondent's record for the determination of the Application. I also ordered that the Respondent may file and serve a Supplementary Affidavit of Mr. Nause for use in both the preliminary motions and the Application, addressing Mr. Nause's continued belief in the injury to the enforcement of the law in the event that certain information is disclosed.

[22] At the present time, the following preliminary motions are pending hearing and determination:

1. the Respondent's motion for the first Confidentiality Order;
2. the Applicant's Motion to Compel answers from Mr. Nause;
3. the Respondent's Motion to Strike the Notice of Application in part, to strike the affidavits of Dr. Cynthia Levine-Rasky and Erzsébet Poroszkai in their entirety, and to strike the affidavit of Dr. Lukács in part; and
4. the Applicant's motion to file two supplementary affidavits (the within motion).

[23] I have convened several case management conferences over the last two years in an effort to move forward with the preliminary motions and the Application, but with little success.

II. The Applicant's Motion

[24] As noted above, Dr. Lukács filed this motion in January 2021 seeking to file the Lukács Supplementary Affidavit, attaching 19 documents (approximately 400 pages in length) and the the Mihala Affidavit, which confirms the English translation of the "Opinion of the Deputy Commissioner for Fundamental Rights for the Protection of the Rights of National Minorities in Hungary", dated July 15, 2016, which is an exhibit to Dr. Lukács' affidavit. As noted below, the Mihala Affidavit no longer needs to be addressed.

[25] Dr. Lukács seeks leave to use the Lukács Supplementary Affidavit as part of his record for the hearing and determination of all preliminary motions in this proceeding and as part of his record for the hearing and determination of the Application.

[26] In support of his motion to file two supplementary affidavits, including the Lukács Supplementary Affidavit, Dr. Lukács submits his own affidavit, also affirmed on January 10, 2021, with 11 exhibits, which are emails and letters between Dr. Lukács and the Respondent during the period from December 2019 to November 2020.

[27] In addition, Dr. Lukács' Motion Record for this motion includes his previous affidavit and the affidavits of Ms. Erzsébet Poroszkai and Dr. Cynthia Levine-Rasky, all affirmed on January 14, 2019. These affidavits are the subject of the Respondent's Motion to Strike, which remains to be determined. Dr. Lukács also includes transcripts of the cross-examination of Mr. Arthur Nause and Mr. Neil O'Brien (March 14, 2019).

[28] As noted, the Respondent has agreed that some exhibits attached to the Lukács Supplementary Affidavit may be included in Dr. Lukács' records. Dr. Lukács has also identified some exhibits that he no longer seeks to have produced. The complete list of the exhibits originally sought to be admitted, together with a notation to indicate the current status, is set out below:

- Exhibit A – CBSA Operational Bulletin OPS-2012-05 [the Respondent no longer opposes the inclusion of this exhibit];

- Exhibit B – Letter from Mr. O'Brien, Assistant Director, ATIP Division, CBSA, August 24, 2020 [Dr. Lukács no longer seeks to include this exhibit in his records];

- Exhibit C – Redacted records relating to the travellers provided by CBSA, August 24, 2020 [the Respondent no longer opposes the inclusion of this exhibit];

- Exhibit D – Email from Mr. O'Brien to Dr. Lukács, August 25, 2020 [Dr. Lukács no longer seeks to include this exhibit in his records];

- Exhibit E – Email from Mr. Jan Jensen (Counsel for the Respondent), March 13, 2019 [Dr. Lukács no longer seeks to include this exhibit in his records];

- Exhibit F – Letter from Mr. O'Brien to Dr. Lukács attaching additional records, some with redactions, which were located after the first package of documents was provided [Dr. Lukács no longer seeks to include this exhibit in his records];

- Exhibit G – Additional redacted records regarding the travellers provided on August 24, 2020 [the Respondent no longer opposes the inclusion of this exhibit];

- Exhibit H – Redacted records related to Ms. Éva Kalla (Fátyol) provided by CBSA on August 24, 2020 in another proceeding;

- Exhibit I – Redacted records related to Mr. Orsós and family provided by CBSA on August 24, 2020 in another proceeding;

- Exhibit J – Letter from Counsel for the Attorney General of Canada, July 21, 2020, to Mr. and Mrs. Kiss, enclosing a replacement copy of the Global Case Management System [GCMS] notes previously provided to Mr. and Mrs. Kiss (the applicants in IMM-2967-19) as a result of the Court's decision in *Kiss*;

- Exhibit K – Letter from Counsel for the Attorney General of Canada, July 21, 2020, to Mr. Szép-Szögi and family enclosing a replacement copy of the GCMS notes previously provided to Mr. Szép-Szögi (applicant in IMM-5570-19) as a result of the Court's decision in *Kiss*;

- Exhibit L – Letter from Counsel for the Attorney General of Canada, January 30, 2020 to Mr. Szép-Szögi and family clarifying the Respondent's submissions in reply in IMM-5570-19 and indicating that the Respondent (Attorney General of Canada) did not intend to defend the decision under review in that application for judicial review) [Dr. Lukács no longer seeks to include this exhibit in his records];

- Exhibit M – The Opinion of the Deputy Commissioner for Fundamental Rights for the Protection of the Rights of National Minorities in Hungary, July 15, 2016 (regarding 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);

- Exhibit N – The English translation of the Opinion of the Deputy Commissioner for Fundamental Rights for the Protection of the Rights of National Minorities in Hungary, July 15, 2016;

- Exhibit O – The Joint Submission of the Public Defender of Rights of the Czech Republic and the Deputy Commissioner for Minority Rights in Hungary to the United Nations Committee on the Elimination of Racial Discrimination, July 7, 2017 [Dr. Lukács no longer seeks to include this exhibit in his records];

- Exhibit P – The transcript of the August 28, 2020, cross-examination of Mr. Nause by Dr. Lukács in T-320-20 and T-321-20 (applications for judicial review which are being held in abeyance);

- Exhibit Q – The transcript of the August 28, 2020, cross-examination of Mr. O'Brien by Dr. Lukács in T-320-20 and T-321-20;

- Exhibit R – CBSA's "Audit of Lookouts – Traveller Mode", June 2013, (a CBSA report on an audit of the use of "lookout" processes and systems designed and implemented by CBSA to manage and intercept high-risk travellers and goods connected to, among other things, irregular migrants. The audit was conducted to ensure that lookouts are appropriately managed and processed and to determine whether controls are well designed and effective in identifying and intercepting high-risk travellers and goods upon entry to Canada. The report notes at the outset that the CBSA enforces the provisions of

the *Customs Act* and IRPA and also administers over 90 other acts, regulations and international agreements);

- Exhibit S – CBSA's Lookout Policy, June 2013 (a policy statement with guidelines for CBSA employees who issue, assess or use lookouts. The policy statement notes, among other things, that it is the policy of the CBSA to create and issue lookouts that are relevant to the CBSA's jurisdiction and to manage lookout information in accordance with the *Privacy Act*, relevant legislation and the CBSA's policies on information sharing);

- The affidavit of Judit Mihala, affirmed September 22, 2020, attests to the accuracy of the translation of the Opinion of the Deputy Commissioner for Fundamental Rights for the Protection of the Rights of National Minorities in Hungary, July 15, 2016. [The Respondent notes that the accuracy of the translation of the document is not in dispute; however, the admission of the Opinion (Exhibits M and N) is in dispute.]

III. The Applicant's Submissions

[29] Dr. Lukács submits that the Lukács Supplementary Affidavit and all exhibits are relevant to both the preliminary motions and the underlying Application. Dr. Lukács argues that the evidence he now seeks to admit is relevant and admissible in accordance with Rule 312 and the test established in *Canada (Attorney General) v Oshkosh Defence Canada Inc*, 2018 FCA 102 at para 43 [*Oshkosh*].

[30] Dr. Lukács submits that between 2012 and 2018, over 1200 Hungarian nationals were prevented from travelling to Canada due to a recommendation by the CBSA to air carriers. He further submits that the majority of the interdicted passengers were Roma, a visible minority with a history of discrimination. Dr. Lukács points to the experience of Roma passengers who were denied boarding flights to Canada at the Vienna airport and the Budapest airport, including 19 Roma passengers that were recommended to be offloaded from a flight to Canada at the Budapest airport on July 2, 2015.

[31] Dr. Lukács also points to a 2012 CBSA Operational Bulletin, entitled "The CBSA Liaison Officer's Role in Providing Advice to Transporters Concerning Improperly Documented, Visa-Exempt Foreign Nationals."

[32] Dr. Lukács argues that CBSA unlawfully refused to provide him with the documents he seeks from CBSA regarding the interdiction of the three travellers. He argues that CBSA cannot rely on the exemptions in the Act to withhold or redact the documents because the documents relate to unlawful government action—discrimination by interdicting Roma travellers seeking to travel to Canada.

[33] Dr. Lukács submits that in the aftermath of the Court's decision in *Kiss* and the release of further documents to him, he gained more insight into how Roma travellers are identified for interdiction, including the indicators relied upon—for example, that the traveller will be hosted in Canada by a refugee claimant.

[34] Dr. Lukács acknowledges that following the release of additional documents to him in August 2020, there remain only six redactions, in particular, the review date of the lookout and a redaction in the GCMS notes for each of the three travellers.

[35] Dr. Lukács argues that the record before the Court must be updated to reflect the current package of documents provided to him. He submits that the evidence he now seeks to file is admissible on the Application, and relevant to the issues of whether the documents withheld fall within the paragraph 16(1)(c) exemption and whether the CBSA reasonably exercised its discretion to withhold the documents.

[36] Generally, Dr. Lukács submits that all the exhibits are relevant to the issue of whether CBSA can rely on the paragraph 16(1)(c) exemption to withhold or redact parts of documents. First, Dr. Lukács submits that the exhibits are relevant to the determination of whether CBSA acted within its statutory mandate. Second, Dr. Lukács submits that the exhibits are relevant to the determination of whether any injury would be caused by the release of the documents. Dr. Lukács argues that CBSA cannot rely on the exemptions given that the CBSA's statutory mandate to enforce the IRPA does not extend to interdicting travellers in a discriminatory manner. He submits that the exemption cannot be relied on for unlawful activity.

[37] Dr. Lukács submits that in *Russell v Canada (Attorney General)*, 2019 FC 1137 at paras 31–32 [*Russell*], Justice Fothergill established the principle that the exemptions in section 16 can only be relied on if they pertain to a valid exercise of the record holder's statutory mandate.

[38] Dr. Lukács submits that CBSA's conduct at issue is governed by the IRPA. He notes the objectives of the IRPA, in particular, paragraph 3(3)(d):

> This Act is to be construed and applied in a manner that
>
> > **(d)** ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;

[39] Dr. Lukács submits that CBSA does not have a statutory mandate to discriminate against travellers to Canada based on their actual or perceived ethnicity or to engage in practices that disproportionately affect people of a particular ethnicity.

[40] He submits that the evidence he now seeks to include in his records is about the disparate impact of the interdiction of Roma passengers and is relevant to the determination of whether CBSA's actions are part of a discriminatory practice, which is relevant to whether this is within its mandate.

[41] Dr. Lukács submits that Exhibits H–O demonstrate the disparate impact of the interdiction policy on a protected group—i.e., Roma. Exhibits H and I are records released by CBSA about other interdicted passengers. He submits that the indicators relied on to prevent these travellers from boarding a plane to Canada appear to be that their hosts in Canada were refugee claimants.

[42] Exhibits J and K are the officer's GCMS notes regarding other Hungarian travellers, including the Kiss family, whose ETAs were cancelled. Dr. Lukács submits that these documents

reveal the indicators relied on to cancel the ETA, including that the travellers' hosts in Canada were refugee claimants. He submits that these documents demonstrate a pattern or policy of discrimination based on certain stereotypes.

[43] Dr. Lukács submits that Exhibit M, the Opinion of the Deputy Commissioner for Fundamental Rights for the Protection of the Rights of National Minorities in Hungary, is relevant to the determination of whether any injury would result from the disclosure of the documents requested and whether the CBSA's decision to withhold the documents is reasonable. Dr. Lukács submits that the Opinion notes that the interdiction policy affected a significant proportion of Roma. Dr. Lukács submits that this information is already in the public domain and was considered by the Court in *Kiss*.

[44] Dr. Lukács submits that Exhibit P, Mr. Nause's cross-examination in T-320-20 and T-321-20, is relevant to the issues of whether CBSA is acting within its mandate and whether this information has been made public, in which case no injury would arise from its disclosure. Dr. Lukács submits that Mr. Nause's testimony noted the targeting of travellers to be hosted by a refugee claimant in Canada. He argues Mr. Nause testified that training was provided by CBSA to private document screeners and acknowledged that the indicators were shared with private security operators outside Canada. He submits that this demonstrates that CBSA engages in discrimination against some foreign nationals.

[45] Dr. Lukács submits that Exhibit Q, Mr. O'Brien's cross-examination in T-320-20 and T-321-20, is similarly relevant to the issue of whether any injury would result from disclosure.

Dr. Lukács submits that Mr. O'Brien stated that he was given incorrect information by his colleagues at CBSA and was not previously aware that the CBSA liaison officer shared information (including the indicators) with third parties.

[46] Dr. Lukács submits that Exhibits R and S relate to CBSA's policy regarding lookouts and are public documents. He also submits that these documents demonstrate that the review date for the lookout for passengers, which has been redacted for each of the three passengers whose records he requested, is harmless information. He submits that this information cannot be exempted because its disclosure would not cause any injury.

[47] More generally, with respect to the exhibits, Dr. Lukács submits that government-generated documents or correspondence should be admissible. He adds that sworn cross-examinations would also meet the criteria for admissibility.

[48] With respect to the exercise of the Court's discretion to grant leave to serve and file additional affidavits where the criteria of relevance and admissibility have been met, Dr. Lukács submits that many of the exhibits were only provided to him after he filed his Notice of Application. He adds that he was not aware of the existence of other documents and/or that their relevance could not be anticipated. He notes that the piecemeal disclosure of additional records alerted him to the existence of other documents and/or their relevance. He argues that the record should be updated to reflect the current state of disclosure and more recent related matters.

[49] He further submits that this evidence will assist the Court in determining the issue on the Application.

[50] Dr. Lukács also argues that the evidence is relevant to the Respondent's Motion for a Confidentiality Order because the evidence will assist the Court in determining the proper scope of that Order, which he submits should not include information that is already public.

IV. The Respondent's Submissions

[51] The Respondent submits that the Lukács Supplementary Affidavit and the exhibits which remain in dispute do not meet the requirements of Rule 312 as guided by the jurisprudence. The evidence is not relevant to any issue on the Application nor to any issue in the outstanding preliminary motions.

[52] The Respondent submits that the issue on the Application is CBSA's decision to withhold records from Dr. Lukács. The scope of the Application is limited to the matter that was the subject of the complaint by Dr. Lukács to the Information Commissioner (subsection 41(1)). The Respondent notes that Dr. Lukács' complaint was about the application of the exemptions, not about issues that the Respondent characterizes as collateral, which Dr. Lukács now seeks to raise. The Respondent argues that, as a result, the Court does not have the jurisdiction on the Application to review the practices of the CBSA or its employees more generally.

[53] The Respondent also notes that the remedies available to the Court, in the event the Court determines that the records should not be withheld, are to order that the records, parts of the records or a summary of the records be disclosed, and nothing more.

[54] The Respondent emphasizes that only six small redactions remain to be reviewed by the Court.

[55] The Respondent disputes Dr. Lukács' reliance on *Russell* as establishing that an *Access to Information Act* application can address the scope of the CBSA's mandate. The Respondent submits that *Russell* is a determination based on its facts; that the alleged persecution of an individual by the CSIS is not within the mandate of CSIS, and as a result, an exemption for information related to such persecution could not be justified.

[56] The Respondent submits that Dr. Lukács' argument—that the affidavit and exhibits are necessary to inform whether paragraph section 16(1)(c) can be relied on to exempt the documents and to show whether there would be any injury—is the issue for the Application and not for any of the preliminary motions. The Respondent submits that this issue cannot be determined in the preliminary motions to circumvent the Application.

[57] The Respondent notes that their motion for confidentiality remains outstanding and is a stumbling block to moving the Application forward. The Respondent notes that the Court is required to safeguard the documents once filed (section 47 of the Act) and that confidential affidavits filed in support are customarily similarly protected. The Respondent argues that none

of the disputed exhibits are relevant to the Court's determination of the Respondent's Motion for a Confidentiality Order.

[58] The Respondent further submits that, although Dr. Lukács intends to argue that the travellers were subjected to discrimination, the issue for the Court on the Application is not about the *Charter* rights of foreign travellers.

[59] The Respondent submits that the Court should not wade into *Charter* issues where the issue before the Court can be determined otherwise. The Respondent notes, among other things, that the three travellers whose records are sought by Dr. Lukács are not applicants and they have not provided any evidence at all about how their rights were impacted. The Respondent adds that the travellers did not have any *Charter* right to visit Canada.

[60] The Respondent further submits that the exhibits which refer to the impact on Roma travellers is anecdotal evidence which does not address the proportion of travellers of all backgrounds that may have been subject to screening at airports. The Respondent notes that the CBSA's mandate in providing border services involves interaction with persons of many national origins and ethnicities and the consideration of many factors. In other words, these exhibits do not support the allegation of discrimination against Roma.

[61] The Respondent further submits that the evidence sought to be admitted is not relevant to Dr. Lukács' motion to compel answers from Mr. Nause (noting that several answers have been

provided). The motion to compel Mr. Nause to return to answer previously refused questions is limited to those questions. Nothing in the disputed exhibits is relevant.

[62] The Respondent further submits that if the Court finds that the exhibits are relevant and admissible, the Court should not exercise its discretion to admit the Lukács Supplementary Affidavit with the disputed exhibits. Although some of the exhibits were not available to Dr. Lukács at the time he filed his motion, the exhibits are not evidence that will assist the Court on the determination of the Application as they are not sufficiently probative, and some of the exhibits would cause prejudice to the Respondent as there is no means to test the evidence.

[63] The Respondent submits that Exhibit M, the Opinion of the Deputy Commissioner for Fundamental Rights for the Protection of the Rights of National Minorities in Hungary, does not meet the requirements of Rule 81 of the Rules. In addition, the Respondent argues that the admission of this Opinion is highly prejudicial because there is no way for the Respondent to test the accuracy of the author's allegations or to identify who provided the underlying information. The Opinion includes statements many times removed from their source, the sources are not identified, and the information is dated.

[64] The Respondent further submits that the Opinion is not properly submitted as a statement of foreign law. Foreign law is a question of fact to be established by evidence (*Allen v Hay* (1922), 64 SCR 76 at 80–81, 1922 CarswellBC 74). Moreover, foreign law is not within the scope of the Application.

[65] The Respondent submits that Exhibits H, I, J and K are not relevant as they pertain to other persons and other applications that are not at issue in this Application or preliminary motions, and the issues in those cases should not be conflated with the issues now before the Court.

[66] The Respondent submits that Exhibits P and Q, the transcripts of the cross-examination of Mr. Nause and Mr. O'Brien in T-320-20 and T-321-21, are not relevant. Those proceedings are held in abeyance and Dr. Lukács has cross-examined both affiants in the context of this Application.

[67] The Respondent submits that Exhibits R and S, regarding the CBSA's Audit of Lookouts and the Lookout Policy, are not relevant to any prehearing motions and that Dr. Lukács has not established how these are sufficiently probative of the issue to be determined on the Application.

[68] The Respondent further submits that the Court should disregard the improper evidence included in Dr. Lukács' Motion Record for the within motion, noting the three affidavits that are the subject to the Respondent's motion to strike, which has yet to be determined.

[69] The Respondent also submits that the affidavits of Ms. Erzsébet Poroszkai and Dr. Cynthia Levine-Rasky were not filed in accordance with the Court's Code of Conduct for Expert Witnesses, including that there is no summary of the opinion provided. The affidavit of Dr. Cynthia Levine-Rasky attaches a whole book.

V. Should the Lukács Supplementary Affidavit with the Disputed Exhibits Be Admitted for the Purpose of the Applicant's Record for the Application and/or for the Outstanding Preliminary Motions?

A. *The Rules*

[70] Rule 3 of the Rules states:

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	**3** Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

[71] Rule 312 states:

312 With leave of the Court, a party may	**312** Une partie peut, avec l'autorisation de la Cour :
(a) file affidavits additional to those provided for in rules 306 and 307;	**a)** déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307;
(b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or	**b)** effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308;
(c) file a supplementary record.	**c)** déposer un dossier complémentaire.

B. *The Test*

[72] The test for admitting additional affidavits was set out in *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 at paras 4–6 and reiterated in *Oshkosh* at para 43:

> … [T]o obtain an order under Rule 312 the applicants must satisfy two preliminary requirements:
>
> (1) The evidence must be admissible on the application for judicial review. As is well known, normally the record before the reviewing court consists of the material that was before the decision-maker. There are exceptions to this. See *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.); *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.
>
> (2) The evidence must be relevant to an issue that is properly before the reviewing court. For example, certain issues may not be able to be raised for the first time on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654.
>
> Assuming the applicants establish these two preliminary requirements, they must convince the Court that it should exercise its discretion in favour of granting the order under Rule 312. The Court exercises its discretion on the basis of the evidence before it and proper principles.
>
> In *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101 at paragraph 2, this Court set out the principles that guide its discretion under Rule 312. It set out certain questions relevant to whether the granting of an order under Rule 312 is in the interests of justice:

(a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?

(b) ill the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?

(c) Will the evidence cause substantial or serious prejudice to the other party?

C. *The Court's Observations*

[73] As I noted at the hearing of this motion, the context for this and other preliminary motions must be considered. The motions do not have a life of their own. This Application is a *de novo* review to determine whether the decision of the CBSA to refuse to disclose all records requested in an unredacted form correctly applied the statutory exemptions (paragraph 16(1)(c) of the Act) and reasonably exercised the discretion to provide some records and withhold others. Both parties acknowledge that as a result of the additional disclosure provided by the CBSA to Dr. Lukács, there are now only six small redactions at issue.

[74] If Dr. Lukács' goal is to obtain the unredacted documents—i.e., to lift six small redactions which are likely the same two redactions for each of the three travellers whose documents were requested—the record for the outstanding motions and the Application is disproportionately voluminous and the procedural history is unnecessarily complicated.

[75] If the Court were to grant leave to Dr. Lukács to file the Lukács Supplementary Affidavit and all the attached exhibits, together with the documents already on the record for the Application, the Court would have over 2000 pages of documents for the purpose of determining whether six redactions should remain. This does not include the confidential and other public affidavits the Respondent may yet file in support of their submission that the six redactions should remain protected.

[76] I also note that this Application differs from other applications for judicial review in that there was no "record" before the CBSA when it made its determinations to withhold some documents and disclose others, apart from Dr. Lukács' request for the documents. The principle that the Court should determine the reasonableness of a decision on the basis of the record before the decision-maker, with some exceptions, is not at play. As a result, the first consideration pursuant to Rule 312—whether the evidence is admissible on the Application—must be considered in the context of this *de novo* review. In my view, this does not open the door for the Court to admit a wide range of documents for additional context or to support policy arguments that are not probative of the key issue before the court. Rule 312 exists to appropriately limit additional evidence. Rule 3 guides the interpretation of all the Rules, to secure a just and expeditious outcome. A just and expeditious outcome of the Application and all preliminary motions does not demand an ever expanding record.

[77] The Application is restricted to determining whether the CBSA correctly applied the exemptions in the Act and reasonably exercised their discretion—and nothing more. I understand Dr. Lukács' position to be that CBSA cannot rely on paragraph 16(1)(c) to exempt documents

from disclosure if its investigation was not lawful or if the enforcement of the IRPA (or other federal or provincial statutes) was not lawful. Dr. Lukács has clearly articulated his position in this and previous motions—that CBSA has engaged in discriminatory practices against Roma by preventing (or directing that Roma be prevented) from travelling from Hungary to Canada. Much of the information Dr. Lukács has included and now seeks to add to his Application Record pertains to his submission that Roma travellers have been subjected to discrimination and that CBSA has participated in this discrimination, contrary to its statutory mandate and contrary to its obligations to respect the *Charter*.

[78] If the Court ultimately determines that the CBSA did not correctly apply the exemptions or did not exercise its discretion to withhold the documents reasonably, the only remedy available to the Court is to direct that the records be provided in whole or part in an unredacted form, with or without conditions, or that a summary of the withheld records be provided. The outcome of the Application will not include pronouncements about the policy of the CBSA regarding the possible interdiction of travellers before boarding flights to Canada—or about the broad allegations of discrimination against Roma.

[79] Dr. Lukács submits that the disputed exhibits should be part of his record because at the time he filed his Application he had received a disclosure package with several redactions. He explains that his Application Record, which included his original affidavit affirmed in January 2019, which attached several documents, was tailored to the issues that he was aware of based on that initial disclosure package. Dr. Lukács submits that as a result of the subsequent additional disclosure of documents by CBSA with fewer redactions, the Court should receive the

additional information included in the Lukács Supplementary Affidavit to "put him in the position" he would have been in if the disclosure had been provided to him at that earlier date (to paraphrase his submission) and to ensure that the Court has relevant information for the purpose of determining the Application.

[80] However, Dr. Lukács is already in a different position than he was when he filed his Application because he has received most of the documents he sought. The Application is now focussed on six redactions, although the "matter" which underlies the Application is his original complaint to the Information Commissioner arising from CBSA's initial redacted disclosure package.

[81] In addition, as noted above, the Respondent has agreed that some of the exhibits attached to the Lukács Supplementary Affidavit can be served and filed for both the outstanding preliminary motions and the Application. As a result, the CBSA Operational Bulletin and additional redacted records regarding the three travellers may be included in Dr. Lukács' records.

D. *No Leave to File the Supplementary Affidavit with the Disputed Exhibits for the Preliminary Motions*

[82] Dr. Lukács argues that for the purpose of the Respondent's confidentiality motion, the Court should consider all the exhibits he seeks leave to file, in particular regarding documents that are in the public domain (for example, on CBSA websites or disclosed in other proceedings) to ensure that the Confidentiality Order is not broader than necessary. This suggests to me a lack of trust in the Respondent and also in the Court's ability to determine the scope of a

confidentiality order, which is customary to protect the disclosure of documents in proceedings that will ultimately determine whether those same documents should be protected. Moreover, there is ample jurisprudence to guide the Court regarding the application of Rule 151 and the applicable test established in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53.

[83] I find that the Lukács Supplementary Affidavit with the disputed exhibits is not relevant to the determination of the Respondent's motion for a Confidentiality Order. It will not assist the Court in this determination and in ensuring that the Court's obligations pursuant to section 47 of the Act are met.

[84] Dr. Lukács has not established how the additional exhibits would be relevant to his motion to compel answers to questions refused by Mr. Nause on cross-examination in March 2019. Several answers have already been provided and Dr. Lukács subsequently cross-examined both Mr. Nause and Mr. O'Brien on their additional affidavits. The issue on the motion to compel is focussed on specific refusals of Mr. Nause at the time of his first cross-examination.

[85] Dr. Lukács has not established how the additional exhibits would be relevant to the Respondent's motion to strike part of Dr. Lukács' Notice of Application, the affidavits of Dr. Cynthia Levine-Rasky or Erzsébet Poroszkai, and parts of Dr. Lukács' January 21, 2019 affidavit filed in support of the Application.

[86] On the within motion, Dr. Lukács has also filed his affidavit affirmed on January 21, 2019, which attaches as exhibits the same affidavits of Dr. Cynthia Levine-Rasky and Erzsébet Poroszkai that are at issue in the Respondent's Motion to Strike. Dr. Lukács has cited this material in his submissions on the within motion. Among other things, he notes that the same affidavit of Dr. Cynthia Levine-Rasky was accepted as evidence by Justice Boswell in *Feher v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335 [*Feher*].

[87] In *Feher*, Justice Boswell determined an application for judicial review of a decision regarding a pre-removal risk assessment that included a constitutional challenge to the Designated Countries of Origin regime under the IRPA. The parties each filed numerous affidavits. The Respondent sought to strike eight of the applicants' affidavits, including that of Dr. Cynthia Levine-Rasky. Although Dr. Lukács now argues that Justice Boswell accepted this affidavit (i.e., Justice Boswell did not strike it) and that this Court should also accept the same affidavit, he overlooks that Justice Boswell did not address each affidavit "line-by-line and state which portions are relevant and which are not" (*Feher* at para 169). Justice Boswell did not address whether the affidavit of Dr. Cynthia Levine-Rasky was proper opinion evidence. Rather, Justice Boswell found that the opinion evidence included in various affidavits, including that of Dr. Cynthia Levine-Rasky would be assigned little or no weight (at para 174).

[88] Moreover, whether an affidavit is found to be admissible in one proceeding is not determinative of whether the same affidavit is admissible in this proceeding. The issues are very different and the Court has not yet heard and considered the Respondent's motion to strike this affidavit or the affidavit of Erzsébet Poroszkai.

[89] I have not considered the affidavits of Dr. Levine-Rasky or Erzsébet Poroszkai in the context of determining the within motion.

[90] Taking into account the principles noted above, I find that none of the exhibits to the Lukács Supplementary Affidavit are relevant to the preliminary motions, nor would the exhibits assist the Court. The Court therefore refuses leave to Dr. Lukács to serve and file the Lukács Supplementary Affidavit for the outstanding preliminary motions.

E. *Leave to File the Supplementary Affidavit with only Exhibits R and S for the Application Record*

[91] As noted above, Dr. Lukács has clearly articulated that his position on the Application will be that the CBSA cannot rely on paragraph 16(1)(c) because it is not within its mandate to interdict travellers in a discriminatory manner. The Court will determine whether the CBSA can rely on this exemption on the Application, once the Court has reviewed the documents at issue and considered the relevant evidence and submissions—including those of the Respondent regarding the scope of the mandate of the CBSA.

[92] Although Dr. Lukács has made submissions regarding CBSA's mandate with respect to the IRPA, its mandate is much broader. The CBSA report on an audit (Exhibit R), which Dr. Lukács seeks to attach, notes that CBSA enforces the provisions of the *Customs Act* and the IRPA and also administers over 90 other acts, regulations and international agreements.

[93] With respect to Dr. Lukács' reliance on *Russell* at paras 31 and 32 for the principle that the exemptions in section 16 can only be relied on if they pertain to a valid exercise of the record holder's statutory mandate, I note that *Russell* was a judgment on judicial review in a particular context, and not a preliminary motion.

[94] In *Russell*, the applicant sought a wide range of records from CSIS. CSIS refused to provide the records based on the exemptions in the Act. On judicial review, Justice Fothergill stated, at para 3:

> Mr. Russell requested access to CSIS' records under s 6 of the *Access to Information Act*, RSC 1985, c A-1 [ATIA]. CSIS refused his request by letter dated July 4, 2014 [Refusal Letter], invoking exemptions found in ss 15(1), 16(1)(a) or 16(1)(c) of the ATIA. These exemptions are available only if the actual or hypothetical records pertain to a valid exercise of CSIS' mandate to investigate and prevent threats to Canada's national security, national defence, or international relations.

[95] Justice Fothergill concluded at para 31:

> Having reviewed the public and secret evidence filed by CSIS in this application, I am satisfied that the actual or hypothetical records in question were correctly found by CSIS to be exempt from disclosure. This is a significant finding, because records would not be exempt from disclosure if they revealed CSIS' complicity in a coordinated and illegal campaign of persecution against Mr. Russell and his family. Pursuant to ss 15(1) and 16(1)(a) and (c), CSIS may refuse disclosure of information contained in CSIS PPU 045 only if the actual or hypothetical information pertains to a valid exercise of CSIS's statutory mandate to investigate and prevent threats to Canada's national security, national defence, or international relations.

[96] I am not persuaded that *Russell* is of assistance on this motion. In *Russell,* Justice Fothergill reviewed the records at issue and could, therefore, make the determination whether CSIS could rely on the exemptions claimed.

[97] I decline to grant leave to file Exhibits H, I, J or K for either the Application or, as noted above, for any preliminary motions. Although I understand Dr. Lukács' position that any evidence that addresses similar issues regarding the treatment of Roma travellers—particularly that which arose after he filed his Application—supports his argument that CBSA engaged in unlawful practices, these exhibits arise from other proceedings where the issues are not identical. Moreover, even if marginally relevant, the Court fully understands Dr. Lukács' intended argument that CBSA acted outside its mandate. As noted above, the Application Record is ample, subject to the Respondent's motion to strike. These exhibits will not be probative and will not assist the Court on the Application, which is now focussed on six small redactions.

[98] I find that Exhibit M, the Opinion of the Deputy Commissioner for Fundamental Rights for the Protection of the Rights of National Minorities in Hungary, July 15, 2016 and Exhibit N, the English translation of that Opinion, are not relevant to the issue on the Application, which is the application of Canadian law. I also agree with the Respondent that their inclusion would be prejudicial because the Respondent has no ability to test the statements in the opinion, which are derived from several other sources. In addition, these exhibits would not be probative or assist the Court in determining the issue on the Application.

[99] I find that Exhibits P and Q, which are the transcripts of the August 28, 2020, cross-examinations of Mr. Nause and Mr. O'Brien by Dr. Lukács in two other applications, T-320-20 and T-321-20, are not relevant to the Application. T-320-20 and T-321-20 are being held in abeyance pending the determination of this Application (T-2064-18). In addition, Mr. Nause and Mr. O'Brien have both been extensively cross-examined by Dr. Lukács in this proceeding. Although Dr. Lukács appears to rely on this evidence to support his argument that CBSA exceeded its mandate in interdicting travellers, I fail to see how the cross-examinations in the other proceedings would add to the existing record or would assist the Court on this Application.

[100] I find that Exhibit R, the CBSA Audit of Lookouts – Traveller Mode, June 2013, and Exhibit S, the CBSA Lookout Policy, June 2013 (a policy statement with guidelines for CBSA employees who issue, assess or use lookouts), should be included in the Application Record, if the six remaining redacted documents at issue relate to these policies, as argued by Dr. Lukács. It appears that these documents are publicly available. The exhibits may assist the Court and will not seriously prejudice the Respondent. As a result, I exercise my discretion to admit Exhibits R and S for Dr. Lukács' Application Record.

VI. Costs

[101] Dr. Lukács has been partially successful on this motion, but only in very small part. Only two of the exhibits he seeks to include in his records for the Application and preliminary motions may be filed—and only in his record for the Application.

[102] Although Dr. Lukács requested costs of a very modest and reasonable amount, I decline to order costs.

[103] The Court's overarching concern in this motion and the other outstanding preliminary motions is that they have stalled the determination of the Application, perhaps unnecessarily, which should be determined in a summary way. In addition, as noted, a 2000 page plus Record is simply disproportionate and unnecessary, particularly for the determination of the six remaining redactions. I am not inclined to award costs.

ORDER in file T-2064-18

THIS COURT ORDERS that:

1. The Applicant may serve and file the Lukács Supplementary Affidavit, together with Exhibits R and S, which may be used in the Applicant's Record only for the Application for Judicial Review.

2. There is no order for costs.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2064-18
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 1, 2021
REASONS FOR ORDER AND ORDER:	KANE J.
DATED:	SEPTEMBER 15, 2021

APPEARANCES:

Dr. Gabor Lukács	ON HIS OWN BEHALF
Jan Jensen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

None	FOR THE APPLICANT
Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT