Federal Court  Cour fédérale

Date: 20220203

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

Citation: 2022 FC 133

Ottawa, Ontario, February 3, 2022

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

BETWEEN:

LÁSZLÓ SZÉP-SZÖGI
JUDIT SZÉP-SZÖGI
LAURA SZÉP-SZÖGI
LÉNA SZÉP-SZÖGI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicants have brought motions pursuant to Rule 41 of the *Federal Courts Rules*, SOR 98/106 [Rules] for leave of the Court to issue a subpoena to the liaison officer [Officer] whose decisions are the subject of these applications for judicial review. The Applicants wish to conduct an out-of-court examination respecting the "unwritten indicator(s)" relied on by the Officer to cancel the Applicants' electronic travel authorizations [eTAs]. The Applicants also seek an opportunity to examine the Officer respecting documents they say have been deliberately withheld or destroyed.

[2] A subpoena may be issued in an application for judicial review only rarely. Whether a subpoena is warranted is a discretionary decision based on the facts of the case.

[3] The Applicants have failed to meet the preconditions for the issuance of a subpoena. The motions are therefore dismissed.

II. Background

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

[5] The Applicants have sought judicial review of the decisions to cancel their eTAs. The Minister of Citizenship and Immigration [Minister] concedes that the applications should be granted on the grounds of procedural fairness. However, the Applicants maintain that the "indicators" relied upon by the Minister and his staff to identify individuals who may be misrepresenting the true purpose of their travel to Canada are discriminatory. They seek declarations to that effect.

[6] The Attorney General of Canada has brought two applications for non-disclosure of information pursuant to s 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The first application was brought when the initial certified tribunal record [CTR] was transmitted to the Applicants in IMM-2967-19, and was largely dismissed (*Kiss v Canada (Citizenship and Immigration)*, 2020 FC 584).

[7] After they retained counsel in November 2020, the Applicants brought a motion for production of a further and better CTR in both proceedings. This was granted on January 15, 2021. The production of a further and better CTR resulted in a second application by the Attorney General of Canada for non-disclosure of information pursuant to s 87 of the IRPA.

[8] At the heart of these applications for judicial review are the "indicators" relied on by CBSA liaison officers to interdict individuals who may be misrepresenting the true purpose of their travel to Canada. The Attorney General of Canada has sought to maintain the confidentiality of some of these indicators, arguing they will remain effective only if they do not become widely known.

[9] The Applicants say the Officer cancelled their eTAs primarily because of their association with refugees. Based on the information contained in the initial and supplementary CTRs, the Applicants assert this is an "unwritten indicator" that is deliberately kept "off the books" in an attempt to insulate the Minister's interdiction program from judicial review.

[10] At the hearings of these motions for the issuance of a subpoena, the parties agreed that the Court's decision should await its review of the *in camera, ex parte* evidence adduced in support of the Attorney General of Canada's second application pursuant to s 87 of the IRPA. The *in camera, ex parte* hearings concluded on December 16, 2021. The evidence presented during those hearings confirms the Applicants' contention that association with refugees is not one of the "indicators" identified in the written materials used to train CBSA liaison officers, private security agents or airline personnel in Budapest, Hungary during the relevant time.

III. Preliminary Matter

[11] The Minister sought to adduce two supplementary affidavits of a legal assistant employed by the Department of Justice in Halifax, Nova Scotia. Attached to the supplementary affidavits

were e-mail messages from the Officer in which he provided explanations for his decisions not to retain e-mail messages from private security agents at Budapest Airport that accompanied copies of the Applicants' passports.

[12] The Applicants object to the late introduction of this evidence, given the lack of notice or opportunity to cross-examine. They note that it is incongruous for the Minister to present evidence from the Officer in a manner that shields him from cross-examination, while simultaneously arguing that his testimony is unnecessary and should not be compelled in these applications for judicial review.

[13] Following submissions from the parties, the Court declined to accept the supplementary affidavits proffered by the Minister. Counsel for all parties indicated their support of the Court's ruling on this preliminary matter.

IV. Analysis

[14] Rule 41 permits a subpoena to be issued only rarely in applications for judicial review, and only if the following criteria are met: (a) the evidence is necessary; (b) there is no other way of obtaining the evidence; (c) it is clear that an applicant is not engaged in a fishing expedition, but instead has raised a credible ground for review beyond the applicant's say-so; and (d) a witness is likely to have relevant evidence (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh*] at para 103).

[15] Judicial review is intended to be a summary process, and does not involve the procedural thoroughness of an action (*Sivak v Canada (Citizenship and Immigration)*, 2011 FC 402 at paras 13-14). Ordinarily, the proper procedure to be followed when seeking records in connection with an application for judicial review is to request them as part of the CTR (*Yeager v Canada (Attorney General)*, 2015 FC 978 at paras 45-47). The Minister notes that the Applicants have already availed themselves of this remedy.

[16] The Applicants' procedural rights are at the lower end of the spectrum (*Malikaimu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1026 at para 39). They are not Canadian citizens. Nor are they present in Canada. They are Hungarian nationals who wish to travel to Canada as visitors.

[17] The Minister acknowledges that one of the indicators that aroused the Officer's suspicion was that the Applicants' intended hosts in Canada were refugee claimants. This is apparent from the Officer's written reasons for his decisions to cancel the eTAs.

[18] The Minister denies that a decision maker is bound to rely on specific factors to determine if an eTA should be cancelled, or that relevant factors may be classified as either written or unwritten indicators. Rather, 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.

[19] The Minister notes that, with one exception upheld by the Court pursuant to s 87 of the IRPA, the indicators relied upon by the Officer in IMM-2967-19 have all been disclosed. All of the indicators relied upon by the Officer in IMM-5570-19 have been disclosed. Permitting further questioning of the decision maker regarding the reasons for his decisions would exceed the parameters of judicial review. It would amount to a fishing expedition, or an attempt to generate new evidence in an attempt to bolster the Applicants' allegation that the Minister's interdiction policy is unlawful.

[20] There is no evidence to support the Applicants' assertion that a prospective traveller's association with refugees is an "unwritten indicator" that is deliberately kept "off the books" in an attempt to evade accountability. This is pure conjecture. Furthermore, the assertion is contradicted by the Officer's explicit acknowledgment in his written reasons that he considered this to be a significant risk factor in both cases.

[21] One of the preconditions in Rule 41 for the issuance of a subpoena is that there be no other way of obtaining the evidence. However, in these cases the evidence has already been disclosed. The Applicants know that the Minister's interdiction policy permits a liaison officer to consider a prospective traveller's association with refugees, and that this is what occurred here. Any further inquiry into the Officer's motivations in considering this indicator is beyond the proper scope of judicial review.

[22] The Applicants rely on *McDougall v Black & Decker Canada Inc*, 2008 ABCA 353 to make the following argument (Applicants' Written Representations at para 65):

> The doctrine of spoliation applies "where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation." Where triggered, spoliation creates a rebuttable presumption that the evidence would have been unfavourable to the party who destroyed the evidence.

[23] The Applicants maintain that the following documents are missing from the CTRs:

(a) e-mail messages that were sent to the Officer by a private security agent, the attachments to which have been disclosed;

(b) "interception reports" allegedly sent by Air Canada Rouge to the CBSA; and

(c) CBSA Operational Bulletin PRG-2017-41, titled "Electronic Travel Authorization (eTA) Cancellation by CBSA Officials", obtained by the Applicants through an access to information request.

[24] The Minister acknowledges that a security agent sent e-mail messages to the Officer attaching photographs of the Applicants' passports and, in IMM-5570-19, a copy of a paper form. The attachments have been produced. The Minister says that the absence of the covering e-mail message leads to the inference that it was not sufficiently substantive to be retained, or that

it was inadvertently deleted. The Minister has previously asserted that no "interception reports" exist in either of these cases.

[25] The Minister denies that CBSA Operational Bulletin PRG-2017-41 forms a part of the training materials that were ordered to be produced as part of the supplemental CTRs. Furthermore, the document is in the Applicants' possession, and they may make use of it as they see fit.

[26] There is no factual basis for the Applicants' allegation that the Officer intentionally destroyed relevant evidence in an attempt to affect the litigation. Once again, this is pure conjecture. Permitting the Officer to be examined on allegedly missing documents would amount to a fishing expedition, and would be beyond the proper scope of judicial review.

[27] The Applicants' request for leave to issue a subpoena to the Officer must therefore be refused.

V. Certified Question

[28] The Applicants acknowledge the Federal Court of Appeal's jurisprudence confirming that subpoenas are rarely, but potentially, available in applications for judicial review (citing *Austria v Canada (Citizenship and Immigration)*, 2014 FCA 191 at para 85 and *Tsleil-Waututh* at para 103). However, they say there is very limited guidance on the application of Rule 41 to applications for judicial review, particularly in the context of immigration.

[29] The Applicants therefore ask this Court to certify two questions for appeal:

> (a) Where an administrative decision-maker relies on unwritten policies or indicators and the respondent has not included information about those policies or indicators in the tribunal record, is a Motions Judge required to grant leave to the Applicant(s) to subpoena the administrative decision-maker for an out-of-court examination?
>
> (b) Where an administrative decision-maker destroys records or fails to produce records that the Court ordered included in the tribunal record, is a Motions Judge required to grant leave to the Applicant(s) to subpoena the administrative decision-maker for an out-of-court examination?

[30] In order to be certified, a question must be a serious one of general importance that would be dispositive of the appeal. The question must have been raised and dealt with in the judge's reasons. Otherwise, the certified question is nothing more than a reference of a question to the Federal Court of Appeal (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at paras 11-12).

[31] The test for the issuance of a subpoena is well-established. A subpoena may be issued in an application for judicial review only rarely. Whether a subpoena is warranted is a discretionary decision based on the facts of the case.

[32] Both of the questions proposed by the Applicants presuppose that there are circumstances where a judge is "required" to issue a subpoena in an application for judicial review. This is inconsistent with established jurisprudence and the text of Rule 41(4), which states that leave of

the Court is required to compel the attendance of a witness at a hearing other than a trial or a reference under Rule 153.

[33] In any event, the Applicants have failed to demonstrate that the Officer relied on "unwritten indicators" that are deliberately kept "off the books" in an attempt to evade accountability. They have also failed to demonstrate that the Officer intentionally withheld or destroyed relevant evidence in order to affect the litigation. The Applicants have not met the preconditions for the issuance of a subpoena, and it has not been necessary for the Court to address either of the proposed certified questions in these reasons.

[34] The Applicants' request that the Court certify questions for appeal must therefore be refused.

VI. Conclusion

[35] The Applicants' request for leave of the Court to issue a subpoena to the Officer is refused.

[36] The Applicants' request that the Court certify questions for appeal is refused.

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

ORDER

THIS COURT ORDERS that:

1. The Applicants' motions for leave of the Court to issue a subpoena to the liaison officer whose decisions are the subject of the applications for judicial review are dismissed.

2. No questions are certified for appeal.

3. No costs are awarded.

"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:	BY VIDEOCONFERENCE BETWEEN HALIFAX, NOVA SCOTIA AND OTTAWA, ONTARIO
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