Federal Court Cour fédérale

Date: 20220505

Docket: IMM-2967-19

Citation: 2022 FC 373

Ottawa, Ontario, May 5, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ATTILA KISS and ANDREA KISS

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

PUBLIC ORDER AND REASONS

I. Overview

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

[2] 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.

[3] This is the second application brought by the Attorney General of Canada [AGC] in these proceedings 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, and was largely dismissed (*Kiss v Canada (Citizenship and Immigration)*, 2020 FC 584 [*Kiss #1*]).

[4] After they retained counsel in November 2020, the Applicants sought production of a further and better CTR. Pursuant to an Order of the Court dated January 15, 2021, the Minister was required to disclose additional documentation, including:

(a) materials used by the Minister to train Government of Canada officials, airline personnel and/or private security personnel in Hungary on document screening at or near the relevant time; and

(b) any list of suspicious “indicators” referred to by the liaison officer [Officer] with the Canada Border Services Agency [CBSA] whose decisions are the subject of these applications for judicial review.

[5] The production of a further and better CTR resulted in the second application by the AGC for non-disclosure of information pursuant to s 87 of the IRPA.

[6] The “indicators” listed in Annex A to this Order and Reasons are not in the public domain. Nor are they obvious or matters of common sense. The AGC’s assertion that disclosure of these indicators would be injurious to national security is supported by the evidence adduced in these proceedings. The AGC’s determination that they should not be disclosed is entitled to deference. The Application is granted insofar as it relates to the indicators listed in Annex A.

[7] The AGC has not met his burden of demonstrating that the “indicators” listed in Annex B to this Order and Reasons are not in the public domain, or that they are neither obvious nor matters of common sense. These claims of public interest immunity must be rejected because the AGC has not established, on a balance of probabilities, that their disclosure would cause injury to Canada’s national security or endanger the safety of any person. The Application is refused insofar as it relates to the indicators listed in Annex B.

II. Issues

[8] This motion for non-disclosure of information raises the following issues:

A. Whether the information in issue cannot be protected because it was inadvertently disclosed to counsel for the Applicants and others in these proceedings.

B. Whether the information in issue cannot be protected because it was intentionally disclosed by government officials to airlines and private security personnel.

C. Whether disclosure of the information in issue would be injurious to Canada's national security.

D. Whether the information in issue should have been protected pursuant to Rule 151 of the *Federal Courts Rules*, SOR/98-106, rather than s 87 of the IRPA.

III. Analysis

[9] Pursuant to s 87 of the IRPA:

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

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

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

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

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

[12] The legal principles that govern applications for non-disclosure of information pursuant to s 87 of the IRPA were discussed at some length in *Kiss #1* at paragraphs 24 to 29. For ease of reference, those principles are briefly summarized here:

(a) The state has a considerable interest in protecting national security. The disclosure of confidential information could have a detrimental effect on the ability of

investigative agencies to fulfil their mandates in relation to Canada's national security (*Nadarasa v Canada (Citizenship and Immigration)*, 2009 FC 1112 at para 17).

(b) Section 87 of the IRPA does not permit the Court to weigh the public interest in disclosure against the public interest in confidentiality (*Soltanizadeh v Canada (Citizenship and Immigration)*, 2018 FC 114 [*Soltanizadeh (FC)*] at para 34, rev'd on other grounds, *Canada (Attorney General) v Soltanizadeh*, 2019 FCA 202). Accordingly, the only question before the Court is whether the information in issue would be injurious to national security. If so, the Court must ensure the information is not disclosed. The relevance of the redacted information to the underlying application for judicial review is immaterial (*Soltanizadeh (FC)* at para 35).

(c) The Minister bears the burden of establishing that disclosure "would" be injurious to national security, or "would" endanger the safety of any person. This is an elevated standard compared to the use of the permissive "could" in the determination of whether a closed hearing is necessary (*Soltanizadeh (FC)* at para 21).

(d) In applying s 83 of the IRPA, the judge must be "vigilant and skeptical with respect to the Minister's claims of confidentiality" given "the government's tendency to exaggerate claims of national security confidentiality" (*Soltanizadeh (FC)* at para 51).

(e) Deference to the Minister's assessment of injury is warranted where the Minister has provided evidence that reasonably supports a finding that disclosure of the information would be injurious to national security (*Soltanizadeh (FC)* at para 52).

(f) With respect to the oft-cited "mosaic effect", the bald assertion that the information could be of value to an informed reader is not enough. There must be a reasonably articulated evidentiary basis for the claim that makes sense to the judge (*Soltanizadeh (FC)* at para 41).

(g) The Minister cannot seek non-disclosure of information that is already in the public domain (*Teva Canada Limited v Janssen Inc*, 2017 FC 437 at para 6; *Alemu v Canada (Minister of Citizenship and Immigration)*, 2004 FC 997 at para 16).

A. *Whether the information in issue cannot be protected because it was inadvertently disclosed to counsel for the Applicants and others in these proceedings*

[13] Following the Court's Order dated January 15, 2021, a supplemental redacted CTR was transmitted to Benjamin Perryman, counsel for the Applicants, on February 5, 2021. Mr. Perryman immediately forwarded the CTR in electronic form to Dr. Gábor Lukács, an advocate for air travellers' rights. Dr. Lukács was able to manipulate the electronic CTR to reveal the information that the AGC had attempted to redact. He then forwarded the electronic CTR with the faulty redactions to his counsel in Canada and to his father in Hungary.

[14] Once counsel for the AGC were made aware of the faulty redactions, they sought interim injunctive relief from the Court. This was granted on February 26, 2021. The AGC then

identified further information that had been inadvertently disclosed in the supplemental CTR that was transmitted to Mr. Perryman on February 5, 2021, and subsequently to Dr. Lukács and others.

[15] The AGC filed a corrected motion record pursuant to s 87 of the IRPA on February 13, 2021 [Motion Record]. On March 22, 2021, this Court issued an injunction preventing the retention, dissemination or use of the inadvertently disclosed information pending determination of the current motion for non-disclosure of information (*Kiss v Canada (Citizenship and Immigration)*, 2021 FC 248 [*Kiss #2*]).

[16] Inadvertent release of information for which a claim of public interest immunity is made does not constitute a waiver (*Canada (Attorney General) v Almalki*, 2010 FC 1106 [*Almalki*] at para 190). As Justice Richard Mosley held in *Almalki* at paragraph 191:

> […] the evidence points to a series of errors in the internal government review and redaction process, and in the final preparation of the electronic version of the documents sent to the respondents. The steps taken by counsel for the applicant to notify counsel for the respondents, and to give formal notice to the Attorney General, when the mistake was discovered, are also inconsistent with advertent disclosure. I find, therefore, that the disclosure was not deliberate and the circumstances of its release do not constitute a waiver of the claimed privilege. The information in question […] is, therefore, subject to the same three-step analysis as the other information at issue: *Khadr*, 2008 SCC 28 above, at para. 40.

[17] *Almalki* concerned a claim of public interest immunity pursuant to s 38 of the *Canada Evidence Act*, RSC, 1985, c C-5, and references to the "three step analysis" under that statutory

scheme, which includes public interest balancing, do not apply in this context. But the same principle applies here: inadvertent release of information for which a claim of public interest immunity is made does not amount to a waiver.

[18] The Applicants, Mr. Perryman, Dr. Lukács and Dr. Lukács' father have all confirmed to the Court that they have complied with the injunction issued in *Kiss #2*. Accordingly, the information is not widely known or accessible. The inadvertent disclosure of information to the participants in these proceedings, and to a very small number of other people, does not undermine the AGC's efforts to protect the information pursuant to s 87 of the IRPA.

B. *Whether the information in issue cannot be protected because it was intentionally disclosed by government officials to airlines and private security personnel*

[19] The Applicants assert that risk indicators are routinely shared by the CBSA with airlines and private document screeners for their use. CBSA liaison officers also share materials with airlines and private security guards when training them on how to assess passengers, identify imposters, and determine if travellers are "immigrants without visas".

[20] According to the Applicants, the casual way in which the Minister's officials have treated the information in issue is not indicative of any risk of injury to national security if it were released. The Applicants note that Canada has a legal and policy framework to protect information the release of which could harm national security. A Directive on Security Management [Directive] creates mandatory procedures for safeguarding information, including an obligation to "[a]ssign a security category to departmental information resources

commensurate with the degree of injury that could reasonably be expected as a result of its compromise".

[21] The Directive creates different security categories for different kinds of information. Information that implicates national security falls into one of three categories: "top secret", "secret", or "confidential". The Minister's officials did not assign a classified security category to any of the information the AGC now seeks to protect pursuant to s 87 of the IRPA. The Applicants say there is no evidence to suggest this was inadvertent, which leads to the inference that the Minister's officials did not think there was even a limited or moderate risk of injury to national security if the information were disclosed.

[22] According to the AGC, private security companies are retained by airlines to assist in screening passengers prior to boarding. The CBSA trains private security personnel directly. The training is conducted in a secure area of the airport to which only personnel with security clearances have access.

[23] Canada is a contracting state to the *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, including *Annex 17 – Safeguarding International Civil Aviation Against Acts of Unlawful Interference* [Annex 17]. Chapter 4.2 of Annex 17, titled *Measures relating to access control*, requires each contracting state to control access to secure areas at airports to prevent unauthorized entry. This includes ensuring that identification systems are established in respect of persons and vehicles, and that access is granted only to those who have an operational need and legitimate reason.

[24] In *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials)*, 2007 FC 766 [*Arar*], Justice Simon Noël observed that there are many circumstances that may justify protecting information available in the public domain, including where only a limited part of the information has been disclosed to the public; the information is not widely known or accessible; the authenticity of the information is neither confirmed nor denied; or the information was inadvertently disclosed (at para 56).

[25] The evidence adduced in these proceedings establishes that, despite the absence of formal security classification, only some of the information has been disclosed to the public. The remaining information in issue is not widely known or accessible. It was disclosed for official purposes to individuals with appropriate security clearances and subject to conditions. The disclosure of the information by CBSA liaison officers to airline personnel and private security agents for the purposes of training and passenger screening does not undermine the AGC's efforts to protect the information pursuant to s 87 of the IRPA.

C. *Whether disclosure of the information in issue would be injurious to Canada's national security*

[26] The information the AGC seeks to protect in the supplemental CTR appears primarily in PowerPoint presentations of "Case Studies" of fraudulent travel documents and other suspicious indicia. Some information is redacted in slides that pertain to "Passenger Assessment", under headings such as "Passenger Clothing", "Passenger Language", "Passenger Behaviour", "Ticketing: Warning Flags", "Luggage", "Supporting Documents", "Facilitator/Escort" and "What Questions to Ask?". All of these headings have been disclosed.

[27] By letter dated October 12, 2021, counsel for the AGC advised the Court that several claims of public interest immunity respecting the information in issue had been abandoned.

[28] The Applicants say this Court has previously decided the national security confidentiality claims asserted in the present motion, albeit in the context of redactions of the Officer's reasons (citing *Kiss #1*). The AGC did not appeal *Kiss #1*, and the Applicants therefore take the position that re-litigation of these issues constitutes an abuse of the Court's process.

[29] In *Kiss #1*, the Court found that questions about "the amount of luggage accompanying the traveller, and whether the bags are checked or carry-on" were already in the public domain, and accordingly the indicator "no checked bags for three-month trip" was not confidential. The Applicants therefore object to the AGC's efforts to maintain the confidentiality of indicators related to a traveller's luggage.

[30] In *Kiss #1*, the Court found that questions regarding a traveller's plans were a matter of public record, and accordingly the indicators "explain what else they will do for three months" and "explain what she did [on a previous trip]" were not confidential. The Applicants therefore object to the AGC's efforts to maintain the confidentiality of indicators related to travellers' plans at their destination.

[31] In an affidavit affirmed on February 21, 2021, Dr. Lukács deposes that much of the information the AGC seeks to withhold is in the public domain, and therefore cannot be protected pursuant to s 87 of the IRPA. He alludes to a report published by the Deputy

Commissioner for the Protection of the Rights of National Minorities in Hungary (Erzsébet Szalayné-Sándor, “On the Preliminary Screening of Passengers of International Flights Prior to Boarding at the Airport for the Purpose of Compliance with the Immigration Legislation of the Destination Country”, July 2016), cited in *Kiss #1* at paragraph 33.

[32] Dr. Lukács also refers to information released by the Government of Canada pursuant to access to information requests in other proceedings. He says that information currently in the public domain reveals that the following areas of inquiry are, “at least nominally”, of interest to the CBSA:

(a) who paid for the ticket (self or third party);

(b) in what country was the ticket purchased;

(c) how was the ticket paid for (e.g., by credit card);

(d) how much in advance was the ticket purchased;

(e) financial means to pay for the ticket and expenses while in Canada;

(f) employment status in the country of domicile;

(g) ties to the country of domicile;

(h) history of past travel outside the country of domicile;

(i) purpose of travel;

(j) level of details of plans for activities in Canada;

(k) passenger’s baggage (quantity and/or size);

(l) relationship to the host;

(m) level of familiarity with the host’s circumstances (e.g., name of spouse);

(n) whether children (if any) are supposed to attend school, and if they do not, the reason for same.

[33] Dr. Lukács also maintains that the "indicators" used by the CBSA are "fairly similar to the questions used by US consular officers conducting visa interviews, and which are publicly available on the Internet". He attaches the following documents to his affidavit:

(a) "Ask the Consul – Applying for Non-Immigrant US Visa: Preparing for the Interview" page, published by the US Embassy in the Dominican Republic;

(b) "US Visitor Visa Interview" page, published on the website VisaGuide.world;

(c) "USA B2 Tourist Visa Applications – 20 Consul Interview Questions You could Be Asked and How Best to Answer Them" page, published by the Two Monkeys Travel Group;

(d) B2 Visa Interview Questions" page, published on the STILT website;

(e) "US B1 Visa Questions and Answers" page, published on the immihelp website.

[34] I agree with the AGC that information made available on the Internet by other countries or third parties has not been disclosed by the Government of Canada. Dr. Lukács' assertion that the "indicators" used by the CBSA are "fairly similar to the questions used by US consular officers conducting visa interviews" is conjecture, and is neither confirmed nor denied by the AGC (see *Arar* at para 56).

[35] I nevertheless agree with the Applicants that the "indicators" disclosed in *Kiss #1* or released by the Government of Canada, whether in response to access to information requests or otherwise, are in the public domain and can no longer be protected under s 87 of the IRPA. Not

only are these “indicators” publicly known; they are also largely a matter of common sense (*Kiss #1* at para 36).

[36] The AGC cautions that “common sense” is in the eye of the beholder, and may be affected by numerous factors including one’s professional and life experiences, and one’s level of education. “Common sense” may also be culturally specific. Travellers from abroad may have different conceptions of what constitutes suspicious behaviour. Many travellers may be unaware that CBSA officials actively seek to identify suspicious behaviour. I accept that these are relevant considerations when assessing the AGC’s claims of potential injury if certain “indicators” are disclosed.

[37] The evidence adduced in these proceedings confirms that the “indicators” listed in Annex A to this Order and Reasons are not in the public domain. Nor are they obvious or matters of common sense. The AGC’s assertion that disclosure of these indicators would be injurious to national security is supported by the evidence adduced in these proceedings. The AGC’s determination that they should not be disclosed is entitled to deference.

[38] However, I am not satisfied that the AGC has met his burden of demonstrating that the “indicators” listed in Annex B to this Order and Reasons are not in the public domain, or that they are neither obvious nor matters of common sense. These claims of public interest immunity [the Unproven Claims] must be rejected because the AGC has not established, on a balance of probabilities, that their disclosure would cause any quantifiable injury to Canada’s national security.

[39] My reasons for rejecting the Unproven Claims are explained below. The numbering of the headings corresponds to those used in the Annexes.

(2) *Language and Passport*

[40] Case Study #2 on page 125 of the Motion Record pertains to a Greek passport holder. The words "Greek passport holder" have been disclosed, as has the passenger's travel routing. The word "Greek" is disclosed in the third bullet, but the AGC maintains that disclosure of the words "Spoke no" in that bullet would detract from the effectiveness of this indicator.

[41] The AGC's witness testified as follows:

> […] language matters on a multiplicity of fronts, I would argue, in many of the interviews that we have done over the years. In this specific study, we are linking two specific indicators, or pieces of information, to allow us to further assess the passenger and their purpose in coming to Canada.

[42] A different witness called on behalf of the AGC cautioned that "a lot of what we feel is common sense in North America is not common sense in other parts of the world". She explained that she had observed trends in some parts of the world where an analyst's first reaction would be that an indicator was a matter of common sense, but the continued usefulness of the indicator demonstrated this was not the case. The witness was unable to confirm whether the indicator of language was part of this trend. Furthermore, it appeared that she may have been unaware that many of the subject headings of the case studies had already been disclosed in these proceedings (Transcript at page 143).

[43] Having disclosed that the case study pertains to a Greek passport holder, and that a suspicious indicator has something to do with “Greek”, an obvious inference is that it concerns the traveller’s ability to speak the language associated with his passport. This is buttressed by the disclosure of the words at the bottom of the page: “Result: Iranian national with a bio-data pg substituted Greek PPT”.

[44] Page 129 of the Motion Record pertains to the language spoken by the traveller. The heading “Passenger Language” has been disclosed. The page features images of passports from a variety of countries. The AGC nevertheless maintains that disclosure of the words “Matches language and accent spoken in country of travel document?”, “consistent with country of birth and residence?” and “Does the traveller speak other languages?” would detract from the effectiveness of these indicators.

[45] The AGC also seeks to protect the indicator in the third bullet of page 143 of the Motion Record: “Does not speak language spoken in country of travel document/residence”.

[46] The testimony of the AGC’s witness was as follows:

> […] if we release the idea that language is of importance to us, and in particular that it should match the country of origin that the passport is there, it would lead individuals to go to greater means to obtain the necessary documents or to match the travel documentation to their ability to speak a certain language, or, even further, to come up with an argument as to why they don’t, to be able to justify this behaviour that would appear inconsistent to us in our screening.

[47] It is a matter of common sense that a person who travels on a passport issued by a particular country, but is unable to speak any language of that country or speaks with an atypical accent, is likely to arouse suspicion. The indicators “Matches language and accent spoken in country of travel document?”, “consistent with country of birth and residence?”, “Does the traveller speak other languages?” and “Does not speak language spoken in country of travel document/residence” are therefore obvious. Having disclosed “Passenger Language” as a suspicious indicator coupled with images of passports, it is untenable for the AGC to maintain that inconsistency between travellers’ spoken language and their travel documents is an indicator that can be protected.

(3) *Timing and Method of Ticket Purchase*

[48] Case Study #2 on page 140 of the Motion Record concerns a Sri Lankan imposter travelling on a Swiss passport. Two suspicious indicators the AGC wishes to keep secret are that the traveller’s ticket was booked at the last-minute, and paid for in cash. The AGC also seeks to protect the indicator at the first bullet on page 143 of the Motion Record: “Recently purchased cash-paid” ticket, “Cash paid tickets” at the third bullet on page 268 of the Motion Record, and “cash paid” and “one-way” on page 311 of the Motion Record. Similar indicators appear at pages 65, 131, 139, 142, 264 and 272 of the Motion Record.

[49] The AGC’s witness acknowledged that the CBSA’s interest in whether a ticket was paid for in cash is in the public domain, but suggested that the inferences that might be drawn from that information are not. Similarly, counsel for the AGC acknowledged the CBSA’s interest in

when a ticket was purchased is in the public domain, but asserted that the specific time frames of interest are not. While this may be true, the information included in the case study does not disclose any particular inferences that may be drawn from whether or not a ticket was purchased in cash, or at the "last minute".

[50] "The manner in which the traveller's ticket was purchased" was found in *Kiss #1* to be an indicator in the public domain (at para 30). Dr. Lukács states in his affidavit that "how was the ticket paid for (e.g., by credit card)" and "how much in advance was the ticket purchased" are publicly known to be of interest to the CBSA. These indicators are therefore in the public domain, and can no longer be protected.

(4) *Income, Employment and Financial Situation*

[51] Page 265 of the Motion Record concerns indicators pertaining to immigrants without visas. The first heading, "Employment" is disclosed, but the AGC seeks to protect the indicator at the first bullet: "Income vs. cost of travel" and the word "irregular" in the second bullet. The AGC also seeks to protect the heading of the second bullet: "Minimal ties to home country". A similar indicator appears at page 263: "Life savings or huge amount of income".

[52] Page 269 of the Motion Record concerns Case Study #3 pertaining to immigrants without visas. The indicator at the fifth bullet is "Unemployed, could not explain how they will finance their trip". The word "Unemployed" has been disclosed, but not the remainder of the bullet. On page 271 of the Motion Record (Case Study #5), the AGC seeks to protect the indicator "Low

income". On page 272 of the Motion Record, the fact that the passenger works in a church is disclosed, but the AGC seeks to protect "unable to explain her duties".

[53] The AGC's witness had only general observations to make regarding these indicators:

> […] If the income does not seem to match the expenditures that are being presented here, perhaps there is a source of concern and, therefore, we would look into the situation a bit further.
>
> And, of course, one could suppose that, if this information is out there, it could lead to falsification, obviously, of documents to be able to present a higher income in this case study.

[54] "The traveller's occupation and employment history" and "the amount of money available to the traveller" were found in *Kiss #1* to be indicators in the public domain (at para 30). Dr. Lukács states in his affidavit that "financial means to pay for the ticket and expenses while in Canada" and "employment status in the country of domicile" are publicly known to be of interest to the CBSA. It is therefore untenable for the AGC to maintain that a traveller's inability to explain their employment and how they will finance their trip, particularly if they have a low income, must remain secret. These indicators are in the public domain. They are also obvious and matters of common sense.

(5) *Host Information and Travel Plans*

[55] Page 138 of the Motion Record is titled "What Questions to Ask?" This title has been disclosed, as have questions pertaining to the purpose of the traveller's trip, its duration, where the traveller will stay, whether the traveller has family or friends at the destination or is travelling

with anyone, where the traveller lives, is employed, and was born, where the traveller's passport was issued, whether the traveller has school-aged children who have been taken out of school, and if so whether written permission was obtained from the school. The AGC nevertheless seeks to protect the indicator "Return tix?"

[56] The AGC's witness testified as follows:

> If we, again, release this question ["When are you expected to return to work"], we are suggesting to individuals who are ill-intended that they need to learn/rehearse what the proper, acceptable answer should be and simply state that to officers to avoid the line of questioning around their intended stay in Canada and eventually return to their home country.

[57] In fact, the AGC abandoned its claim with respect to the question "When are you expected to return to work" in its letter dated October 12, 2021. The indicators that were held in *Kiss #1* to be in the public domain encompass numerous questions pertaining to the purpose of and duration of a traveller's trip. As Dr. Lukács states in his affidavit, it is publicly known that a traveller's employment status in the country of domicile and ties to that country are of interest to the CBSA. Questions regarding whether a traveller has purchased a return ticket and when the traveller is expected to return to work are therefore in the public domain, or are obvious and matters of common sense.

[58] Case Study #3 on page 141 of the Motion Record concerns an Albanian national travelling on an Italian passport with a substituted bio-data page. The AGC seeks to protect the suspicious indicator that the traveller has "no contacts" in Canada.

[59] Page 263 of the Motion Record concerns indicators pertaining to immigrants without visas, particularly the purpose of their travel. Under the heading “Visiting family or friends”, which has been disclosed, the AGC seeks to protect the indicators “When did they last see each other” and “What does the host do in Canada”. Under the heading “Obtain host’s full name [emphasis original], date of birth or age, address, phone number”, which has been disclosed, the AGC seeks to protect “Do they know it, or do they have to look it up”.

[60] The AGC also seeks to protect the indicator “unable to provide name or address” at pages 65 and 142 of the Motion Record, despite having disclosed the preceding part of the sentence “Visiting cousin for a month”.

[61] The AGC’s witness conceded that questions about whom someone is going to visit are routinely asked by CBSA and are in the public domain, as are questions about where someone is planning to stay. The witness continued:

> So, while the question is routinely asked, the expected answer is not in the public domain. […]. Therefore, if we were to signal to people, ill-intentioned individuals, that the answer “no contacts in Canada” is of concern to us, we could be faced with individuals who make up stories about contacts that they have in Canada to avoid that line of questioning.

[62] “The identity of the traveller’s intended host in Canada, and the nature of their relationship” and “what their actual relationship with the person inviting them is” were found in *Kiss #1* to be indicators in the public domain (at paras 30, 33). Dr. Lukács states in his affidavit that “relationship to the host” and “level of familiarity with the host’s circumstances (*e.g.*, name

of spouse)" are publicly known to be of interest to the CBSA. It is therefore untenable for the AGC to maintain that a traveller's lack of contacts in the country of destination is an indicator that must remain secret. It is obvious and a matter of common sense that persons travelling to a country where they have no contacts may arouse suspicion.

[63] The indicator of a traveller's lack of familiarity with his or her intended host provoked the following exchange between the Court and the AGC's witness:

> Q: It's clearly a suspicious indicator. My question is: Why do you think this is not already in the public domain?
>
> A: I don't have an opinion as to why it's not in the public domain, but I would say that it is something that we encounter regularly and that we feel is critical to the assessment that our officers make in determining whether someone can travel to Canada.
>
> And so the release of it will hinder our ability to conduct that assessment in a comprehensive manner.
>
> Q: Even though you don't know whether or not this is already in the public domain?
>
> A: I haven't encountered it in the public domain, no.

[64] The witness' answers caused the Court to ask whether she had prepared for her testimony by familiarizing herself with the indicators the Applicants say are in the public domain: "Has that been done by the Crown? Has there been an assessment of the evidence put forward by the applicants in this case?" Counsel for the AGC responded as follows: "There has been. It has not been as thorough as I would have wished …". In light of this admission, the Court must approach the witness' testimony with caution.

[65] Page 270 of the Motion Record concerns Case Study #4 pertaining to immigrants without visas. The AGC seeks to protect the indicator at the fourth bullet: "Cannot name any sight to be seen in Canada". The indicator "unable to describe any other travel plans" on page 272 of the Motion Record is not protected.

[66] The AGC's testimony regarding these indicators repeated a common theme:

> Again, I would say that, if we were to indicate that this is an element of concern for us, it could lead individuals to "learn" the proper answer to be able to avoid further scrutiny or to raise any suspicions while being interviewed by the officials.

[67] "If the stated purpose of travel is tourism, the traveller's ability to identify places to visit for sightseeing" was found in *Kiss #1* to be an indicator in the public domain (at para 30). Dr. Lukács states in his affidavit that "level of details of plans for activities in Canada" is publicly known to be of interest to the CBSA. It is therefore untenable for the AGC to maintain that travellers' inability to name any sights they wish to see must remain secret. This indicator is in the public domain. It is also obvious and a matter of common sense.

Injury to Canada's intelligence-sharing relationships

[68] In this application the AGC advances a new argument that was not made in *Kiss #1*. The AGC maintains that some of the "indicators" in issue were developed in cooperation with other countries that together form the "Five Eyes" (United States, United Kingdom, Canada, Australia and New Zealand). The Five Eyes maintain a close intelligence-sharing relationship. It is widely

understood and accepted that Canada is a “net importer” of foreign intelligence, and maintaining this relationship is of paramount importance.

[69] One of the AGC’s witnesses testified that she had been in touch with her counterparts in Five Eyes countries, and all had expressed concern about the possible disclosure of the information the AGC seeks to protect in this application. The witness did not provide any details regarding the manner in which she solicited the views of her counterparts, or the substance of their responses beyond the general assertion that all were opposed to further disclosure.

[70] When questioned by the Court, the AGC’s witness was unable to identify which of the “indicators” in issue had been formulated in cooperation with other Five Eyes countries. As mentioned previously, she appeared to be unaware that many indicators had been voluntarily disclosed by the Government of Canada in these proceedings or elsewhere.

[71] In argument, counsel for the AGC conceded that the CBSA has voluntarily disclosed numerous indicators, and there was no evidence before the Court of any adverse reaction from representatives of Five Eyes countries. She agreed that Five Eyes countries share common values and have similar legal systems. All are familiar with the requirement of disclosure in legal proceedings, and to comply with access to information legislation.

[72] Deference to the Minister’s assessment of injury is warranted only where evidence is provided that reasonably supports a finding that disclosure of the information would be injurious (*Soltanizadeh (FC)* at para 52). The AGC has failed to discharge his burden of establishing that

disclosure of the information subject to the Unproven Claims "would" be injurious to national security by damaging Canada's intelligence relationships within the Five Eyes. As this Court has held on previous occasions, in applying s 83 of the IRPA, the judge must be "vigilant and skeptical with respect to the Minister's claims of confidentiality" given the government's tendency to exaggerate claims of national security confidentiality (*Soltanizadeh (FC)* at para 51).

D. *Whether the information in issue should have been protected pursuant to Rule 151, rather than s 87 of the IRPA*

[73] The Applicants say that Rule 151 provides the Minister with an alternative, and in this case preferable, mechanism for protecting the information the government seeks to protect in these proceedings. Rule 151 provides as follows:

Motion for order of confidentiality	**Requête en confidentialité**
151 (1) On motion, the Court may order that material to be filed shall be treated as confidential.	**151 (1)** La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.
Demonstrated need for confidentiality	**Circonstances justifiant la confidentialité**
(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.	**(2)** Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

[74] In *Idada v Canada*, 2010 FC 218 [*Idada*], the plaintiff sought damages from Her Majesty the Queen arising from his alleged illegal detention and search, his alleged assault and battery, and the alleged slander of him by customs officers. The Defendant called a witness to give evidence regarding the types and categories of indicators that fell within the parameters of the action, and to provide an opinion regarding the validity of the indicators used by the investigating officer in that case. The witness' evidence was given *in camera* (*Idada* at para 102).

[75] The public reasons of Justice Russel Zinn in *Idada* reveal that the witness testified to a number of categories of subjective indicators, including verbal and non-verbal behaviour, routing, physical indicators, documentation and situational indicators. A number of paragraphs are omitted from the public reasons, but the reasons nevertheless confirm that the witness identified 19 indicators that were relied upon by the investigating officer, and expressed the view that these were valid and supported the level of search conducted (*Idada* at paras 106-110).

[76] *Idada* concerned the use of indicators to detect and prevent drug smuggling, which the Applicants say poses more serious risks to Canadians than the travellers targeted by Canada's "document screening" at overseas airports, including those who may subsequently make refugee claims. *Idada* demonstrates that the Court's ordinary confidentiality procedures are a viable option for protecting screening indicators used by the CBSA.

[77] During a case management conference on July 22, 2021, the Court raised with counsel for the AGC whether Rule 151 might provide a suitable mechanism for protecting the

confidentiality of the indicators in these proceedings in a way that would maximize participation by counsel for the Applicants. Counsel for the AGC were initially receptive, but changed course when apprised that, pursuant to Rule 151(2), the Court would still have to be satisfied that "the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings". By letter dated July 30, 2021, counsel for the AGC advised the Court and the Applicants that they would continue with the application pursuant to s 87 of the IRPA.

[78] The information the government has sought to protect in these proceedings has been shared with airlines and private security personnel with no explicit security classification, and with only broad and largely undocumented measures to ensure its confidentiality. Airline personnel, private security agents and government officials regularly disclose suspicious indicators in the course of their interactions with members of the travelling public. Very similar, and sometimes identical, indicators are used to assess visa applications, and these are routinely disclosed in legal proceedings and in responses to requests for access to information.

[79] All of the indicators the government seeks to protect have been inadvertently disclosed to the Applicants and others in these proceedings. According to affidavit evidence adduced by the Applicants, documents containing allegedly classified information have been delivered to the parties by unsecure means and left unattended in mailboxes.

[80] The Federal Court of Appeal has determined that the classified information in the appeal of *Kiss #*2 may be protected by a confidentiality order issued pursuant to Rule 151 (*Lukács v*

Canada (Citizenship and Immigration), Court File No A-47-21, April 28, 2021). Counsel for the AGC says the government did not consent to the use of Rule 151 for this purpose, but concedes there may be no other procedure to protect classified information in the appeal.

[81] The effect of a successful application under s 87 of the IRPA is to deprive some parties in the underlying proceeding of their opportunity to consider the information, and perhaps to contest it. I agree with the Applicants that a confidentiality order under Rule 151 would have permitted them to participate more fully in these proceedings, and would have been less destructive of the open court principle.

[82] While it remains the prerogative of the AGC to determine whether and how to protect information the government considers to be potentially injurious to Canada's national security, the Court cannot disregard the casual and sometimes haphazard way in which the government has handled the information it has sought to protect in these proceedings. When government information attracts a low level of protection in practice, and when less severe measures are available to ensure its continued protection in legal proceedings, a judge seized of an application pursuant to s 87 of the IRPA must be particularly "vigilant and skeptical" with respect to the AGC's claims of confidentiality (*Soltanizadeh (FC)* at para 51).

[83] Bald assertions of speculative harm are not enough. There must be a reasonably articulated evidentiary basis to demonstrate the validity of the claims on a balance of probabilities. The AGC has failed to meet this test with respect to the Unproven Claims.

IV. Conclusion

[84] The “indicators” listed in Annex A to this Order and Reasons are not in the public domain. Nor are they obvious or matters of common sense. The AGC’s assertion that disclosure of these indicators would be injurious to national security is supported by the evidence adduced in these proceedings. The AGC’s determination that they should not be disclosed is entitled to deference. The Application is granted insofar as it relates to the indicators listed in Annex A.

[85] The AGC has not met his burden of demonstrating that the “indicators” listed in Annex B to this Order and Reasons are not in the public domain, or that they are neither obvious nor matters of common sense. These claims of public interest immunity are rejected because the AGC has not established that their disclosure would, on a balance of probabilities, cause any quantifiable injury to Canada’s national security. The Application is refused insofar as it relates to the indicators listed in Annex B.

V. Postscript

[86] A confidential version of this Judgment and Reasons, classified “Secret”, was provided to counsel for the AGC in advance of the issuance of the public version. Counsel for the AGC identified some errors and omissions that have since been corrected. In all other respects, the public version of this decision is the same as the classified one, save for the redactions applied to the protected information.

PUBLIC ORDER

THIS COURT ORDERS that:

1. The Application is granted insofar as it relates to the indicators listed in Annex A.

2. The Application is refused insofar as it relates to the indicators listed in Annex B.

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

4. Counsel for the Attorney General of Canada shall inform the Court within thirty-one (31) days of the date of the Confidential Order and Reasons of any portions that should be redacted or modified before they are issued to the public.

"Simon Fothergill"
Judge

ANNEX A

Proven Claims – Application Granted

Indicator	Motion Record Page #
TYPE # 1 - CLOTHING	
[redacted]	128
TYPE # 2 - LANGUAGE & PASSPORT	
[redacted]	139
TYPE # 3 – TIMING, METHOD OF PURCHASE & TRAVEL BEHAVIOUR	
[redacted] (Routing incoming from China) [redacted]	57
[redacted]	59
[redacted] (One way cash-paid ticket), routed [redacted]	65
(Greek passport holder with a third party paid ticket associated to) [redacted]	125
[redacted]	130
[redacted] (tickets)	131
(Checked bag with) [redacted]	132

(Ticket issued) [redacted]	136
(Cash-paid ticket) [redacted] (dpt. routed CDG-VIE-YYZ)	139
(Last-minute booked tix,) [redacted] (paid cash)	140
[redacted]	141
[redacted]	65
(One way cash-paid ticket), [redacted]	142
(Ticket purchased by a third party in a) [redacted]	143
[redacted]	257
[redacted]	263
[redacted] (international travel)	
(Ticket purchased) [redacted]	264
(Female travelling with two Canadian permanent residents -) [redacted]	267
[redacted] (passenger claimed her credit card didn't work)	
(Cash paid tickets) (issued) [redacted]	268
(Provided hotel voucher) [redacted]	271
(One-way tickets purchased) [redacted] (from Dublin via Kefalik to Toronto)	274
(Tickets bought with Russian currency) [redacted] (for a six day trip)	275

(Tickets purchased) [redacted]	276
(Short lead bought) [redacted] [redacted] (routing) (Travel originating) [redacted] [redacted] (Appear at) [redacted] (Older passport) [redacted] [redacted]	311
TYPE # 4 - INCOME, EMPLOYMENT & FINANCE RELATED QUESTIONS	
N/A	
TYPE # 5 - HOST INFORMATION & TRAVEL/ACCOMODATION PLANS	
(Recent travel) [redacted]	136
(Hotel Voucher) [redacted]	141
(Pre-printed) [redacted] [redacted] [redacted] (“hotel vouchers”) [redacted]	262
(Accompanied by a minor girl not related to the family. Head of family explained the girl’s parents were friends) [redacted] [redacted]	270
(Travelling for six day sight-seeing trip) [redacted] (stating to visit) [redacted] (within the six days, travelling by bus or train between the cities)	274
(Travelling to visit a hospital in Toronto for a medical appointment.) [redacted]	275

[redacted] (in Canada); [redacted]	276
(Repeat the same) [redacted] [redacted] (Hotel) [redacted] (Hotel) [redacted]	311
TYPE # 6 - DOCUMENTATION	
[redacted] [redacted] (between passport and other ID are different) [redacted]	133
[redacted]	134
[redacted]	135
[redacted] (passport)	264
[redacted] (HU PPT)	267
(All PPTs) [redacted]	268
(All but one PPT) [redacted]	269
(All PPTs) [redacted]	270
[redacted] (Different family names for all three passengers) [redacted] (by) [redacted]	271
[redacted]	273
[redacted] [redacted]	278

[redacted] (passport)	311

ANNEX B

Unproven Claims – Application Dismissed

Indicator	Motion Record Page #
TYPE # 1 - CLOTHING	
N/A	
TYPE # 2 - LANGUAGE & PASSPORT	
Spoke no (Greek)	125
Matches language and accent spoken in country of travel document? (Language) consistent with country of birth or residence? Does the traveller speak other languages? (Why/Why Not)?	129
Does not speak language spoken in country of travel document/residence	143
TYPE # 3 – TIMING, METHOD OF PURCHASE & TRAVEL BEHAVIOUR	
One way cash-paid ticket, …	65
Recently bought Paid in cash One way ticket	131
(Where do you live? Are you employed?) When are you expected to return to work?	138
Cash-paid ticket … (dpt. routed CDG-VIE-YYZ)	139
Last-minute booked tix… paid cash	140
One way cash-paid ticket, …	65 142

Recently purchased cash-paid (ticket)	143
Recently purchased (ticket)	264
Cash paid tickets (issued) …	268
Recently issued one way ticket paid cash	272
Short lead (bought) … Cash paid One-way	311
TYPE # 4 - INCOME, EMPLOYMENT & FINANCE RELATED QUESTIONS	
Life savings or huge amount of income (used for a 'vacation' to Canada)	263
Income vs. cost of travel Irregular (work, long vacations) Minimal ties to home country No property, family, guaranteed job, etc	265
(Unemployed,) could not explain how they will finance their trip	269
Low income	271
(Pax claims to work in a church in Romania but is) unable to explain her duties	272
TYPE # 5 - HOST INFORMATION & TRAVEL/ACCOMODATION PLANS	
(How long do you plan to stay?) Return tix?	138
No contacts (in Canada)	141
Visiting cousin for a month – unable to provide name or address	65 142

When did they last see each other? What does the host do in Canada? Do they know (the host's full name) or do they have to look it up?	263
Cannot name any sight to be seen in Canada, (provided book with printout of desired tourist locations)	270
TYPE # 6 - DOCUMENTATION	
N/A	

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2967-19
STYLE OF CAUSE:	ATTILA KISS AND ANDREA KISS v MINISTER OF CITIZENSHIP AND IMMIGRATION
DATE OF HEARINGS:	JUNE 9, 2021 (PUBLIC HEARING BY VIDEOCONFERENCE BETWEEN HALIFAX, NOVA SCOTIA AND OTTAWA, ONTARIO) OCTOBER 27, 2021 (*EX PARTE*, *IN CAMERA* HEARING IN OTTAWA, ONTARIO) DECEMBER 16, 2021 (*EX PARTE*, *IN CAMERA* HEARING IN OTTAWA, ONTARIO)
ORDER AND REASONS:	FOTHERGILL J.
DATED:	MAY 5, 2022

APPEARANCES:

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Helene Robertson Ami Assignon Patricia Johnston	FOR THE RESPONDENT

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