Federal Court Cour fédérale

Date: 20230104

Docket: IMM-5570-19

Citation: 2023 FC 22

Ottawa, Ontario, January 4, 2023

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

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

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] László and Judit Szép-Szögi are husband and wife. Laura and Léna Szép-Szögi are their children.

[2] The Szép-Szögis are citizens of Hungary. They have brought an application for judicial review of a decision made on July 11, 2019 by a liaison officer [Officer] with the Canada Border Services Agency [CBSA]. The Officer cancelled the Szép-Szögis' Electronic Travel Authorizations [eTAs], preventing them from boarding an Air Canada Rouge flight to Canada.

[3] The Minister of Citizenship and Immigration [Minister] concedes that the application for judicial review should be granted on the grounds of procedural fairness. However, the Szép-Szögis maintain that the "indicators" relied upon by CBSA officers to identify individuals who may be misrepresenting the true purpose of their travel to Canada are discriminatory. They seek declarations to that effect.

[4] The Attorney General of Canada [AGC] has brought a motion pursuant to s 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for non-disclosure of certain information contained in the Updated Corrected Certified Tribunal Record [CTR]. The information pertains to some of the indicators CBSA officers may rely upon to identify suspicious travellers. The Minister maintains that revealing the indicators to the public will undermine their effectiveness, thereby causing injury to Canada's national security.

[5] On February 24, 2021, this Court ordered that the present motion be held in abeyance pending determination of an identical motion brought by the AGC in *Kiss v Canada (Citizenship and Immigration)*, 2022 FC 373 [*Kiss*]. In *Kiss*, this Court granted the motion for non-disclosure of some indicators the AGC sought to protect, but ordered disclosure of other indicators the Court found to be in the public domain, obvious, or matters of common sense.

[6] The Szép-Szögis say the present motion should not be governed by the Court's Order and Reasons in *Kiss*, because in that proceeding the AGC failed to adduce some relevant evidence that was publicly available. They also argue that some evidence adduced by the AGC during the *in camera*, *ex parte* hearing in *Kiss* should have been disclosed to the Applicants in both proceedings, and the lack of an opportunity to challenge this evidence breached their right to procedural fairness.

[7] The AGC notes the present motion was held in abeyance on the understanding that the legal and factual issues would be substantially resolved in *Kiss*. The AGC therefore argues that the Szép-Szögis' position is an improper collateral attack on the Court's ruling in *Kiss*, and should be rejected as an abuse of process.

[8] For the reasons that follow, the present motion will be granted on the same terms as the motion decided in *Kiss*, subject to the disclosure of some additional information contained in the CTRs in both proceedings that the AGC now concedes is in the public domain.

II. Background

[9] The underlying application for judicial review in *Kiss* was commenced on May 9, 2019. The Szép-Szögis commenced their application for judicial review on September 16, 2019. The two applications arise in very similar circumstances, and the arguments made by the Applicants in both proceedings are substantially the same.

[10] Before they retained counsel, the Applicants in both proceedings were assisted by Dr. Gábor Lukács, an advocate for air travellers' rights. Dr. Lukács has continued his involvement in these proceedings, and has served as the Applicants' principal affiant in all three of the motions brought by the AGC pursuant to s 87 of the IRPA.

[11] On January 12, 2021, the Szép-Szögis brought a motion before this Court to consolidate their application with the application for judicial review in *Kiss*. According to the Szép-Szögis' written submissions in support of the motion:

> 25. Consolidating the Szép-Szögi and Kiss applications will avoid a multiplicity of proceedings and promote the expeditious and inexpensive determination of these proceedings. This is important given the common issue of national importance each application raises: Whether Canada's interdiction program and the "indicators" it uses to identify Roma travellers or travellers associated with Roma people are discriminatory?

[12] At paragraphs 26 and 27 of their written submissions, the Szép-Szögis noted that the purpose of Rule 105 of the *Federal Courts Rules*, SOR/98-106, is to avoid multiple proceedings and promote the expeditious and inexpensive determination of proceedings (citing *Apotex Inc v Bayer Inc*, 2020 FCA 86 at para 45 [*Apotex*]). They asserted that all four factors identified by the Federal Court of Appeal in *Apotex* favouring consolidation were present here: (a) common parties; (b) common legal and factual issues; (c) no prejudice or injustice; and (d) efficient resolution.

[13] The Szép-Szögis also noted the similarities between their application for judicial review and the underlying application in *Kiss*:

> 31. Both applications seek identical remedial relief: (i) restoration of the respective eTAs, (ii) a declaration that the Liaison Officer was not authorized to examine the applicants in this context, and (iii) a declaration that the Liaison Officer was not authorized to rely on association with Roma people as an “indicator” when assessing admissibility.
>
> 32. The applications arise in substantially similar factual contexts. Both applications concern an eTA cancellation decision that was made by a Liaison Officer operating out of the Embassy of Canada in Vienna, Austria. Both concern interdiction at the Budapest airport in Hungary when the respective Applicants arrived to check-in for their flights. Both involve a BudSec private security agent who questioned the Applicants before relaying information to the Liaison Officer. Both involve reasons for cancellation that turn on the travellers’ real or perceived association with Roma refugees in Canada who arrived “irregularly.” Both were made in 2019, presumably under the same policy framework.

[14] With respect to the CTR, the Szép-Szögis said the following:

> 37. While the certified tribunal record has already been filed in the Kiss application, the Respondent will now be required to produce a further record that incorporates relevant documents on Canada’s interdiction program. This will allow the Respondent time to simultaneously prepare the applicant-specific records in this application. Accordingly, consolidation will not require the Respondent to address applications that are at different stages.

[15] The Szép-Szögis noted the potential abuse of process that could result from conducting separate proceedings “that each relied on the same large evidentiary record” (written representations at para 38, citing *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2018 FC 396 [*Canadian Council for Refugees*] at para 37). At paragraph 45 of their written submissions, the Szép-Szögis asserted that resolution of the central issue in both applications for judicial review was unlikely to be applicant-specific: “Instead, both applications

will rely on the same evidence of Canada's interdiction program and the same expert evidence on the experience of Roma travellers from Hungary".

[16] The Szép-Szögis emphasized the need to consider the implications of non-consolidation, including the "wasteful use of judicial resources", disrespect for the "public purse and the taxpayer", and the delays imposed on other cases before the Court (written representations at para 46, citing *Canadian Council for Refugees* at para 7). They warned that if the applications were not consolidated, then the Applicants in both proceedings would be required to duplicate the evidence of each other; the Minister would be required to file two separate CTRs containing substantially the same evidence; and counsel for both parties would be required to duplicate all of the same evidence and argument put forward in each proceeding (written representations at paras 47-48). In the words of the Szép-Szögis, this "epitomizes inefficiency".

[17] On January 28, 2021, the Court declined to consolidate the two applications for judicial review, noting the Minister's position that the efficiencies to be gained from consolidation would also be achieved by having the matters heard together (as previously ordered by the Court). The Minister acknowledged that the Court could consider common evidence in a coordinated way, rather than separately in the two proceedings. The Order of January 28, 2021 included the following:

> Documents pertaining to Canada's policies and practices respecting the interdiction of Hungarian travellers that are included in the CTR filed in Court File No IMM-2967-19 (*Kiss*) should also be included in the CTR filed in this application for judicial review.

[18] On February 12, 2021, the AGC brought a motion pursuant to s 87 of the IRPA for non-disclosure of excerpts from the Corrected Supplemental Tribunal Record. On February 22, 2021, the Szép-Szögis asked the Court to hold the AGC's motion for non-disclosure in abeyance pending the determination of "the identical motion" brought by the AGC in *Kiss*. The AGC supported the request. On February 24, 2021, the Court ordered that the AGC's motion in the Szép-Szögis' proceeding be held in abeyance, noting that granting the request may promote the expeditious resolution of both motions, and result in the efficient use of judicial resources.

[19] On May 5, 2022, this Court issued its Public Order and Reasons in the motion for non-disclosure brought by the AGC in *Kiss*. The Court upheld the request for non-disclosure of approximately 82 pieces of information (Annex A), but refused the AGC's request to maintain the confidentiality of approximately 35 pieces of information (Annex B).

[20] On May 6, 2022, the Szép-Szögis informed the Court of their position that the Order and Reasons in *Kiss* should not govern the outcome of the identical motion brought in their proceeding:

> The Applicants would like to avoid having to file a complete motion record in this matter and the Court having to engage in a full hearing on evidence. This would be unnecessary and inefficient given the substantial overlap between the two matters. However, there is material information in the record in this application that appears not to have been canvassed in the *ex parte* proceedings in *Kiss*. This information has the potential to produce a different result on the motion for non-disclosure in this application that would then require the parties in Court File No IMM-2967-19 to revisit the redactions ordered in that case.
>
> Specifically, there are three "indicators" in this application that are clearly part of the public domain because they appear in the

officer's unredacted reasons at page 10 of the Respondent's non-disclosure Motion Record:

- hotel is reserved but not pre-paid;
- passports issued two months prior to travel; and
- tickets purchased three weeks prior to travel.

[21] The Szép-Szögis also relied on indicators they said had been made public in response to requests submitted under access to information legislation, and speculated that further indicators may have been disclosed in open court in an affidavit filed in *R v Chisholm*, 2018 ONCJ 479. They did not produce a copy of the affidavit, arguing that this should be done by the AGC.

[22] On June 10, 2022, following a case management conference, the Court issued an Order to the parties that included the following:

> 1. The parties shall meet and confer respecting the application of this Court's Public Order and Reasons in *Kiss v Canada (Citizenship and Immigration)*, 2022 FC 373 [*Kiss* Disclosure Order] to the certified tribunal record produced in IMM-5570-19.
>
> 2. On or before July 29, 2022, counsel for the Attorney General of Canada [AGC] shall:
>
> (a) advise the Court whether the parties have agreed upon the application of the *Kiss* Disclosure Order to the certified tribunal record produced in Court File No IMM-5570-19, with any variations that may be appropriate;

[23] On August 4, 2022, the parties informed the Court that they were unable to agree upon the application of this Court's Order and Reasons in *Kiss* to the identical motion brought by the AGC in the proceeding commenced by the Szép-Szögis.

[24] The AGC's Amended Motion Record was served and filed on August 12, 2022. The Szép-Szögis served and filed their responding Motion Record on September 12, 2022.

[25] The AGC served and filed his Reply on September 16, 2022, taking the position that the Applicants' response to the motion was an improper collateral attack on the Court's Order and Reasons in *Kiss*, and should be rejected as an abuse of process.

[26] The AGC filed an *ex parte* classified affidavit on October 24, 2022. By letter dated November 7, 2022, the AGC conceded that the indicator "hotel is booked but not paid for", included in Annex A of *Kiss*, was in the public domain and could no longer be protected.

III. Issue

[27] The sole issue raised by this motion for non-disclosure is whether its disposition should be governed by the Court's Order and Reasons in *Kiss*.

IV. Analysis

A. *Abuse of Process*

[28] According to the AGC:

> The Applicants' response is an improper collateral attack on the *Kiss* section 87 Order and their attempt to have the same issues re-litigated in this motion should be dismissed. As previously acknowledged by the Applicants, the information sought to be protected in this case is the same information that was determined to be properly protected by section 87 in *Kiss*.
>
> The Court has already considered the Applicants' arguments that the information should not be protected since it has not been treated as confidential by the Respondent and that it is already in the public domain in the context of *Kiss*. Their attempt to have the same issues re-litigated in this motion should not be sustained.

[29] The Szép-Szögis acknowledge that "closely scrutinizing the Respondent's claims of national security confidentiality uses substantial and scarce judicial resources". They nevertheless insist that further scrutiny is necessary.

[30] Judicial review is intended to be summary in nature, and does not entail the procedural thoroughness of an action (*Sivak v Canada (Citizenship and Immigration)*, 2011 FC 402 at paras 13-14). Applications for judicial review are to be "heard and determined without delay and in a summary way" (*Federal Courts Act*, RSC 1985, c F-7, s 18.4(1)).

[31] The Szép-Szögis' 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.

[32] As Justice Barry Strayer explained in *Pharmacia Inc v Canada (Minister of National Health & Welfare)* (1994), 176 NR 48 (FCA) at 53:

> […] the focus in judicial review is on moving the application along to the hearing stage as quickly as possible. This ensures that objections to the originating notice can be dealt with promptly in the context of consideration of the merits of the case.

[33] The Federal Court of Appeal said the following in *Access Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224 (at para 21):

> […] When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party demanding more complete disclosure has the burden of advancing the evidence justifying the request. It is this final element that is completely lacking in this case.

[34] An applicant cannot engage in a fishing expedition in the hope of discovering documents to establish their claim (*Humane Society of Canada Foundation v Canada (National Revenue)*, 2018 FCA 66 at para 8). The indicators that remain at issue in this case are on the outer periphery

of relevance to both applications for judicial review. The Szép-Szögis' insistence that the Court revisit its Order and Reasons in *Kiss* amounts to relitigation of matters decided previously.

[35] The "fresh evidence" relied upon by the Szép-Szögis is not new, and could have been adduced by the Applicants in *Kiss*. The Applicants in both proceedings are represented by the same counsel, and Dr. Lukács has served as their principal affiant in all motions brought by the AGC pursuant to s 87 of the IRPA. I agree with the AGC that the Szép-Szögis' attempt to rely on additional evidence is a "pure fishing expedition at the expense of the parties and the Court", and a "veiled attack" on this Court's Order and Reasons in *Kiss*.

[36] In *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, the Supreme Court of Canada explained the purpose behind a number of legal doctrines that limit relitigation (at paras 28-29):

> Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.
>
> The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place …

[37] In their written submissions in support of the motion for consolidation, the Applicants in both proceedings asserted that all factors favouring consolidation were present, including the

commonality of parties. While the Applicants in the two proceedings are different, they are represented by the same counsel. Dr. Lukács plays a central role in both proceedings.

[38] Even if the formal requirements of issue estoppel may not be wholly satisfied in this case, I am satisfied that the doctrine of abuse of process applies. Abuse of process is "a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel" that "engages the inherent power of the court to prevent the misuse of its procedure" (*Toronto (City) v CUPE, Local 79*, 2003 SCC 63 [*CUPE*] at para 37; *Maynes v Allen-Vanguard Technologies Inc (Med-Eng Systems Inc)*, 2011 ONCA 125 at para 38).

[39] Courts retain a discretion to apply the doctrine of abuse of process to preclude litigation that would violate the principles of judicial economy, consistency, finality, and the integrity of the justice system (*CUPE* at para 37). The Szép-Szögis' position regarding the present motion for non-disclosure is an improper attempt to relitigate the Court's Order and Reasons in *Kiss*, and must be rejected.

B. *Procedural Fairness*

[40] The Szep-Szogis' complaint of a denial of procedural fairness is similarly without merit. During the *in camera*, *ex parte* hearing in *Kiss*, an affiant who testified on behalf of the AGC addressed the manner in which the CBSA trains private security personnel in Budapest. The witness explained that training is conducted in a secure area of the airport to which only personnel with security clearances have access. Evidence was also provided about the

Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295 [*Convention*], including *Annex 17 – Safeguarding International Civil Aviation Against Acts of Unlawful Interference* [Annex 17].

[41] In *Kiss* at paragraph 23, the Court noted that Chapter 4.2 of Annex 17 of the *Convention*, 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.

[42] The Court drew the following conclusion from this evidence (*Kiss* at para 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.

[43] The Szép-Szögis say there was no reason for the AGC to adduce evidence concerning the manner in which the CBSA trains private security personnel or the implementation of Annex 17 of the *Convention* during an *in camera*, *ex parte* hearing. All of this evidence could have been offered during the public hearing, as illustrated by the absence of any objection by the AGC to the public release of the Court's decision in *Kiss*, particularly paragraphs 22, 23 and 25.

[44] Because the Applicants in *Kiss* were not given an opportunity to challenge the evidence summarized by the Court at paragraphs 22, 23 and 25 of *Kiss*, the Szép-Szögis say the Applicants in both proceedings have been denied procedural fairness and the Court's conclusion must be revisited in this proceeding. Presumably, this would entail giving the Szép-Szögis an opportunity to cross-examine the AGC's affiant on this evidence.

[45] It is improper for the AGC to adduce evidence during an *in camera*, *ex parte* hearing that can be presented during a public hearing, particularly if the purpose is to shield a witness from cross-examination. However, I am not persuaded that this is what occurred here. It may not be a simple task to separate unclassified information from classified information. The evidence regarding training and the *Convention* appears in just three paragraphs of *Kiss*. While the AGC did not object to the public release of those paragraphs, it should not be assumed that the AGC would countenance a more thorough public examination of the manner in which the CBSA trains private security agents abroad or the implementation of Annex 17 of the *Convention*.

[46] The central finding of the Court at paragraph 25 of *Kiss* was that, despite the absence of formal security classification, only some of the information in issue had been disclosed to the public. It had not been demonstrated that the remaining information was widely known or accessible. This conclusion was only partially dependent on the evidence adduced by the AGC concerning the training of private security personnel or the implementation of Article 17 of the *Convention*. It was primarily a reflection of the absence of any evidence, from the Applicants or otherwise, that the indicators the AGC wished to keep confidential were in fact known to the public at large.

[47] I am not persuaded that providing the Applicants in *Kiss* with an opportunity to cross-examine the AGC's affiant on these specific matters would have changed the result of that decision. Nor does this provide a sufficient justification to revisit the Court's previous determination in this proceeding.

[48] As explained above, applications for judicial review are intended to be conducted in a summary fashion. There must be a measure of proportionality between the importance of a proceeding and the expenditure of scarce judicial resources to resolve the dispute. Re-opening the evidence relied upon by the Court in *Kiss* would be a waste of judicial resources with no discernable benefit to the underlying litigation.

V. Conclusion

[49] In light of the AGC's concession that the indicator "hotel is booked but not paid for", included in Annex A of this Court's Order and Reasons in *Kiss*, is in the public domain, this indicator must be disclosed in both the underlying application for judicial review in *Kiss* and this proceeding.

[50] In all other respects, the motion of the AGC pursuant to s 87 of the IRPA for non-disclosure of information will be granted on the same terms as the identical motion determined by this Court in *Kiss*.

ORDER

THIS COURT ORDERS that:

1. In light of the concession of the Attorney General of Canada that the indicator "hotel is booked but not paid for", included in Annex A of this Court's Order and Reasons in *Kiss v Canada (Citizenship and Immigration)*, 2022 FC 373 [*Kiss*], is in the public domain, this indicator shall be disclosed in both the underlying application for judicial review in *Kiss* and this proceeding.

2. In all other respects, the motion of the Attorney General of Canada pursuant to s 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, for non-disclosure of information is granted on the same terms as the identical motion determined by this Court in *Kiss*.

3. No costs are awarded.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5570-19
STYLE OF CAUSE:	LÁSZLÓ SZÉP-SZÖGI, JUDIT SZÉP-SZÖGI, LAURA SZÉP-SZÖGI, AND LÉNA SZÉP-SZÖGI v MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING PURSUANT TO SECTION 87 OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT*

ORDER AND REASONS:	FOTHERGILL J.
DATED:	JANUARY 4, 2023

SUBMISSIONS BY:

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

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