Federal Court Cour fédérale

Date: 20230417

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

Citation: 2023 FC 562

Ottawa, Ontario, April 17, 2023

PRESENT: The Honourable Mr. Justice Fothergill

Docket: IMM-2967-19

BETWEEN:

ATTILA KISS and ANDREA KISS

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-5570-19

AND BETWEEN:

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

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The Applicants in these related proceedings have brought motions to amend their Applications for Leave and Judicial Review to seek the following additional relief:

> (c) an Order declaring that Canada's interdiction program (the "Program"), including the overseas examination of holders of electronic travel authorizations ("eTAs"), is not authorized by the *Immigration and Refugee Protection Act* and *Immigration and Refugee Protection Regulations*;
>
> (d) an Order declaring that the *Immigration and Refugee Protection Act* and *Immigration and Refugee Protection Regulations* are contrary to binding international human rights law to the extent they authorize the Program against Hungarian holders of eTAs;
>
> (e) an Order declaring, pursuant to s. 52 of *Constitution Act, 1982*, that the *Immigration and Refugee Protection Act* and *Immigration and Refugee Protection Regulations* are contrary to s. 15(1) of the *Charter of Rights and Freedoms* (the "*Charter*") to the extent they authorize the Program against Hungarian holders of eTAs;
>
> (f) an Order declaring, pursuant to s. 24(1) of the *Charter*, that the Officer's cancellation of the Applicants' eTAs unjustifiably infringed their s. 15(1) *Charter* rights;

[2] The Applicants are citizens of Hungary. Their applications for judicial review concern decisions made in 2019 by a liaison officer [Officer] with the Canada Border Services Agency [CBSA]. The Officer cancelled the Applicants' Electronic Travel Authorizations [eTAs], preventing them from boarding flights to Canada.

[3] The Minister of Citizenship and Immigration [Minister] concedes that the applications for judicial review should be granted on the grounds of procedural fairness. However, the Applicants' 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 Kisses commenced their application for leave and judicial review on May 9, 2019. The Szép-Szögis commenced their application for leave and 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.

[5] Both applications seek Orders setting aside the Officer's decisions and restoring the Applicants' eTAs, together with declarations that the Officer acted unlawfully. The grounds cited by the Applicants include that "the Officer acted without jurisdiction, acted beyond their jurisdiction or refused to exercise their jurisdiction". Declarations regarding the lawfulness of the Officer's decisions and his jurisdiction to cancel the Applicants' eTAs are therefore within the scope of the applications as currently constituted.

[6] The Applicants raised the possibility that they may challenge the Officer's decision on *Charter* grounds and under international law for the first time during a case management conference on February 13, 2023. They delivered a Notice of Constitutional Question to the Attorney General of Canada and the Attorneys General of all provinces and territories on March 9, 2023. These motions to amend the applications were filed on March 10, 2023.

[7] The Applicants note that their applications were commenced before they received the Officer's reasons, before this Court granted their request for further and better certified tribunal records [CTRs], and before final determination of the Minister's claims of confidentiality pursuant to s 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. They maintain that amendments should be allowed at any stage of a proceeding for the purpose of determining the real questions in controversy between the parties, provided the amendments do not cause injustice that cannot be compensated with costs, and they have a reasonable prospect of success (citing *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 [*McCain*] at para 20).

[8] According to the Applicants, allowing the proposed amendments will help to determine the real questions in controversy between the parties and will not result in injustice to the Minister that cannot be compensated with an award of costs. They argue that the proposed amendments meet the low threshold of having a reasonable prospect of success, and it is therefore in the interests of justice to grant the motion.

[9] The Minister responds that the proposed amendments seek constitutional remedies without a proper factual or legal foundation, and therefore stand no real chance of success. The proposed amendments are not required to determine the essential dispute between the parties, and would vastly expand the scope of the proceedings in the absence of a proper record. The Minister therefore argues that they do not serve the interests of justice.

[10] According to the Minister, it is plain and obvious, assuming the facts pleaded to be true, that the proposed amendments disclose no reasonable cause of action (citing *McCain* at paras 20-

22). The Minister characterizes this as a threshold question that must be answered before consideration is given to other factors that may inform the Court's determination of the motions to amend.

[11] The Minister notes that the Applicants are foreign nationals who are outside of Canada, and they therefore lack standing to bring a *Charter* claim. An individual must have a recognized "nexus" to Canada in order to benefit from the protections of the *Charter*. A nexus to Canada is recognized in three situations: (1) where a person is a citizen of Canada; (2) where a person is present in Canada; and (3) where a person is subject to criminal proceedings in Canada (citing *Slahi v Canada (Justice)*, 2009 FC 160 at paras 47, 48 & 52, aff'd 2009 FCA 259; *Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957 at para 81; *Kinsel v Canada (Citizenship and Immigration)*, 2012 FC 1515 at paras 45-47; *Zeng v Canada (Attorney General)*, 2013 FC 104 at paras 70-72; *Tabingo v Canada (Citizenship and Immigration)*, 2013 FC 377 at paras 61-79).

[12] Even if the Applicants had the requisite nexus to Canada, the Minister says it would not be appropriate for them to challenge Canada's international interdiction program generally, as well as the entire legislative scheme that supports it. The essential dispute between the parties concerns the Officer's exercise of administrative discretion, not the constitutionality of the legislative scheme itself. The Minister says the Applicants have failed to establish a sufficient factual basis to impugn the legislative scheme as a whole.

[13] The Applicants disagree that the dispute between the parties is limited to the Officer's decisions to cancel their eTAs. They say the decisions were made in accordance with an interdiction program that is both *ultra vires* and discriminatory. The program is ongoing and may affect the Applicants, and other similarly situated people, who seek to board a flight to Canada in the future. The Applicants object to the interdiction program generally, and in particular to the Minister's reliance on "association with refugees" as an indicator that individuals may be misrepresenting the true purpose of their travel to Canada.

[14] The Applicants say they have standing to challenge the Minister's interdiction program under the *Charter* and pursuant to international law as persons directly affected by the administrative decisions in issue. In the alternative, they say they have public interest standing. They acknowledge that the *Charter* does not ordinarily apply extraterritorially (citing *R v Hape*, 2007 SCC 26 [*Hape*] at paras 52, 56). However, an exception may arise where Canada engages in conduct that violates binding international human rights law (citing *Canada (Justice) v Khadr*, 2008 SCC 28 [*Khadr*] at paras 18-19).

[15] It is doubtful that the Applicants can bring themselves within the exception to the principle that the *Charter* does not apply outside Canada recognized by the Supreme Court of Canada in *Khadr*. That case concerned the interrogation by Canadian security intelligence officials of a Canadian youth detained by the United States of America at Guantanamo Bay, Cuba in circumstances that the U.S. Supreme Court had declared to be a clear violation of fundamental human rights protected by international law. The actions of Canadian officials were found by the Supreme Court of Canada to have contributed to Mr. Khadr's deprivation of liberty.

This must be contrasted with the present case, where Hungarian nationals were prevented from boarding flights from Budapest to Toronto.

[16] In *R v McGregor*, 2023 SCC 4, the Supreme Court of Canada was presented with an opportunity to revisit its analysis in *Hape* and *Khadr* but declined to do so. The observations of Justice Suzanne Côté at paragraph 24 are apt in the present context:

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

[17] I am not persuaded that the proposed amendments to the applications for leave and judicial review have a reasonable prospect of success, principally because it is unnecessary to decide the constitutional questions raised by the Applicants in order to resolve the dispute. Declarations regarding the lawfulness of the Officer's decisions and his jurisdiction to cancel the Applicants' eTAs are within the scope of the applications as currently constituted.

[18] As I observed in *Szép-Szögi v Canada (Citizenship and Immigration)*, 2023 FC 22 at paragraph 30, judicial review is intended to be summary in nature, and does not entail the procedural thoroughness of an action (citing *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)).

[19] A number of other considerations identified by the Federal Court of Appeal in *Janssen Inc v Abbvie Corporation*, 2014 FCA 242 also militate against granting the relief sought, specifically the timeliness of the motions to amend; the extent to which the proposed amendments will delay the expeditious hearing of the matter; the extent to which a position taken originally by one party has led another party to follow a course of action which would be difficult or impossible to alter; and whether the amendments sought will facilitate the court's consideration of the true substance of the dispute on its merits (at para 3, citing *Continental Bank Leasing Corp v R*, (1993) 93 DTC 298 at page 302; *Merck & Co Inc v Apotex Inc*, 2003 FCA 488, leave to appeal to SCC ref'd, 30193 (May 6, 2004)).

[20] The Applicants have known for a number of years that "association with refugees" was one of the indicators relied upon by the Officer to cancel their eTAs. It is unclear whether the protracted dispute over the disclosure of numerous other indicators contained in the further and better CTRs has provided any additional support for the Applicants' argument that the Minister's international interdiction program is discriminatory.

[21] The Minister has responded to the applications for judicial review since they were commenced on the understanding that the decisions in issue were those made by a single Officer in Budapest in 2019. The applications are scheduled to be heard on their merits in June 2023. The motions to amend the applications are not timely.

[22] The further and better CTRs contain documents that pertain to the Minister's interdiction program as applied at the Budapest Airport in 2019. While it is possible that some of these

documents inform the Minister's interdiction program more generally, there is insufficient evidence in the record to support a broad constitutional challenge to the interdiction program as administered by the Minister throughout the world.

[23] If the Court were to permit the proposed amendments at this late stage, the Minister may seek to expand the record to permit a defence of the constitutionality of the international interdiction program generally. This would have the effect of delaying the currently scheduled hearing, and would ultimately not assist the Court in determining the questions of administrative law that lie at the heart of these proceedings.

[24] The motions to amend the applications for leave and judicial review are therefore refused.

[25] The Minister requested an extension of time of three weeks following the issuance of this Order and Reasons to inform the Applicants and the Court whether he intends to cross-examine the Applicants' affiants and/or submit responding affidavits. Given the Court's decision to refuse the motions to amend, the Minister should be able to accomplish this within ten days or less.

ORDER

THIS COURT ORDERS that:

1. The motions to amend the applications for leave and judicial review are refused.

2. Within ten (10) days of the issuance of this Order and Reasons, the Minister shall inform the Applicants and the Court whether he intends to cross-examine the Applicants' affiants and/or submit responding affidavits.

3. As soon as reasonably practicable, the parties shall provide the Court with an agreed schedule for the completion of the remaining steps in these applications for judicial review to permit both applications to be heard on June 23, 2023

4. 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

MOTION IN WRITING PURSUANT TO RULES 75 AND 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	FOTHERGILL J.
DATED:	APRIL 17, 2023

SUBMISSIONS BY:

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

SOLICITORS OF RECORD:

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