

Federal Court



Cour fédérale

Date: 20210322

**Docket: IMM-2967-19
IMM-5570-19**

Citation: 2021 FC 248

Ottawa, Ontario, March 22, 2021

PRESENT: The Honourable Mr. Justice Fothergill

Docket: IMM-2969-19

BETWEEN:

ATTILA KISS and ANDREA KISS

Applicants

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Docket: IMM-5570-19

BETWEEN:

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

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

ORDER AND REASONS

I. Overview

[1] The Attorney General of Canada [AGC] has brought motions in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106, for the following relief:

- a. A permanent injunction restraining the use, dissemination and publication of sensitive information inadvertently transmitted by the Respondent in error on February 5, 2021,
- b. A mandatory injunction requiring the Applicants, the Applicant's counsel, Gabor Lukacs and any third persons to whom they [*sic*] or any other recipients of the information to destroy the information referred to in paragraph a including any and all printouts, copies, notes or summaries of the information that may have been made by them and to confirm to the Respondent that they have done so,
- c. A mandatory injunction requiring the identification of any individuals to whom Applicants, Gabor Lukacs and any third persons to whom they or any other recipients of the information may have further transmitted the information, and
- d. Such other relief that this Honourable Court deems just.

[2] The motion for injunctive relief in Court File No IMM-2967-19 purports to name Dr. Gabor Lukacs as a third party. In response to objections by the Applicants and Dr. Lukacs, the AGC seeks to amend that motion to remove Dr. Lukacs' name from the style of cause, but then

to add him as a third party by Court order. The AGC also asks to delete references to secret affidavits from both motions for injunctive relief.

[3] The grounds for the injunctive relief are described in the AGC's Notices of Motion as follows:

- a. The Respondent transmitted a Supplemental Tribunal Record which contained blacked out confidential and sensitive material,
- b. The Respondent was unaware that the blacked out text could be lifted to reveal confidential and sensitive information,
- c. Counsel for the Applicants advised the Court and the Respondent that the blacked out information was viewable using an ordinary PDF reader,
- d. Counsel for the Applicants further advised that the Supplemental Tribunal Record was provided to the Applicants and Dr. Lukacs,
- e. Requests were immediately made to retrieve the documents after the inadvertent disclosure was discovered,
- f. The Respondent contacted the Court immediately to take the steps to rectify the issue and to advance the motion,
- g. There is no unfairness or prejudice to the Applicants in maintaining privilege over the confidential and sensitive material,
- h. There is a section 87 [of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]] application underway regarding that material based on national security interest,
- i. No unfairness will be caused to the processes of the court by the request for the relief sought.

[4] For the reasons that follow, the motions to amend and the motions for injunctive relief are granted in part.

II. Background

[5] The Applicants in both proceedings 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.

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

[7] Dr. Lukacs is an advocate for air travellers’ rights, and has been advising the Applicants in both proceedings. On November 12, 2019, he sought leave of the Court to make oral submissions on behalf of the Applicants in Court File No IMM-2967-19, but this was denied. Dr. Lukacs continues to follow both cases closely, and to advance the Applicants’ interests behind the scenes.

[8] On October 16, 2019, the AGC brought a motion under s 87 of the IRPA regarding the non-disclosure of certain Indicators contained in the certified tribunal record [CTR] transmitted by the decision-maker in Court File No IMM-2967-19. On May 5, 2020, this motion was granted in part (*Kiss v Canada (Citizenship and Immigration)*, 2020 FC 584).

[9] On or about November 5, 2020, the Applicants in both proceedings retained Mr. Benjamin Perryman as their counsel. The Applicants in Court File No IMM-2967-19 then brought a motion for production of a further and better CTR, which was granted on January 15, 2021. This Court also ordered that Court Files Nos IMM-2967-19 and IMM-5570-19 be heard together.

[10] The production of a further and better CTR in Court File No IMM-2967-19, and of the CTR in Court File No IMM-5570-19, resulted in additional motions for non-disclosure pursuant to s 87 of the IRPA in both proceedings. The s 87 motion in Court File No IMM-5570-19 is currently in abeyance pending determination of the s 87 motion in Court File No IMM-2967-19.

[11] Redacted CTRs in both proceedings were transmitted to Mr. Perryman on February 5, 2021. Mr. Perryman immediately forwarded the CTRs in electronic form to Dr. Lukacs.

[12] According to Dr. Lukacs:

Upon review of the Amended CTR, Dr. Lukacs discovered that some information was not treated using the customary redaction tools for electronic documents; rather, it was highlighted using standard PDF highlighting, albeit using the colour black, leaving the text underneath legible [Fake Redaction].

The Fake Redactions were apparent on the face of the Amended CTR, and no special knowledge, skill, or software was required to discover the Fake Redactions. The text underneath the Fake Redactions was selectable, and could be Copy-Pasted.

[13] On February 5, 2021, Dr. Lukacs forwarded the electronic CTRs, which he knew to contain faulty redactions, to his lawyer in Canada and to his father in Hungary. He also informed Mr. Perryman of the faulty redactions. Mr. Perryman then informed the AGC.

[14] As a result of communications with the Court by the parties and Dr. Lukacs, the Court issued the following order on February 6, 2021:

THIS COURT ORDERS that:

1. Counsel for the Applicants shall maintain the Disputed Information in a separate, secure folder. No person, including counsel for the Applicants, shall review the Disputed Information contained in the separate, secure folder pending further order or direction of the Court.
2. Any third party to whom the Disputed Information has been disclosed by counsel for the Applicants shall forthwith destroy the Disputed Information, and counsel for the Applicants shall confirm to the Court that this has been done.
3. The Disputed Information shall be preserved in its original electronic format and sealed by the Registry pending further direction or order of the Court.
4. Counsel for the parties shall inform the Registry of their mutual availability for a case management conference in both proceedings during the week of February 8, 2021.

[15] Mr. Perryman subsequently confirmed his compliance with the Court's order dated February 6, 2021, as did Dr. Lukacs and Dr. Lukacs' father. Dr. Lukacs has not identified his

lawyer in Canada, and it is unclear whether the lawyer, or other persons, are currently in possession of the CTRs with the faulty redactions. Dr. Lukacs has appealed the order of this Court dated February 6, 2021 to the Federal Court of Appeal.

[16] Despite the urging of this Court that the parties and Dr. Lukacs cooperate in the resolution of the inadvertent disclosure of information that is currently subject to motions under s 87 of the IRPA, they are unwilling or unable to do so.

III. Issues

[17] The issues before the Court are:

- A. Should the motions of the AGC for injunctive relief be amended?
- B. Should the motions of the AGC for injunctive relief be granted?

IV. Analysis

- A. *Should the motions of the AGC for injunctive relief be amended?*

[18] The AGC concedes that Dr. Lukacs is improperly named as a third party in the motion for injunctive relief in Court File No IMM-2967-19. The AGC therefore seeks to add Dr. Lukacs as a third party by Court order. The AGC also asks to delete references to secret affidavits in both motions for injunctive relief.

[19] Because Dr. Lukacs has been named, albeit improperly, in the AGC's motion for injunctive relief in Court File No IMM-2967-19, he should be given limited standing to respond to that motion. Dr. Lukacs filed a responding motion record on March 15, 2021.

[20] The decision to allow an amendment is a matter of simple fairness, common sense and the interest that the courts have that justice be done (Rule 75; *Janssen Inc v AbbVie Corporation*, 2014 FCA 242 at para 3; *McCain Foods Limited v J.R. Simplot Company*, 2021 FCA 4 at para 20).

[21] The Applicants consent to the AGC's request to delete references to secret affidavits in the motions for injunctive relief. However, Dr. Lukacs and the Applicants in Court File No IMM-2976-19 maintain that the AGC's request to add Dr. Lukacs as a third party is improper.

[22] Rule 301 refers to the parties in an application as "applicant" and "respondent". Rule 104(1)(b) permits the joinder of additional parties by court order, although no person may be made an applicant or plaintiff without their consent. Rules 193 to 199 apply only to third party claims in actions.

[23] There is no provision in the Rules that would permit Dr. Lukacs to be named as a third party in the applications for judicial review. As will be explained below, nor is it necessary for Dr. Lukacs, or anyone else, to be a named party in the proceedings in order to be bound by injunctive remedies.

[24] The AGC's motions to amend the motions for injunctive relief to remove Dr. Lukacs' name from the style of cause and to delete references to secret affidavits should be granted. In all other respects, the motions to amend must be dismissed.

B. *Should the motions of the AGC for injunctive relief be granted?*

[25] This Court has plenary jurisdiction to hear and adjudicate motions for injunctive relief arising from the inadvertent disclosure of confidential information in legal proceedings. The source of the jurisdiction is s 44 of the *Federal Courts Act*, RSC, 1985, c F-7, and the Court's plenary jurisdiction over disclosure in immigration matters (*Sellathurai v Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FCA 223 [*Sellathurai*] at para 38).

[26] This Court's jurisdiction is not based directly or indirectly upon s 87 of the IRPA, and exists whether or not any related application for judicial review happens to be pending before the Court. Irrespective of whether related proceedings are already in existence, the proper procedure is for a notice of application to be filed seeking injunctive relief (*Sellathurai* at para 39, citing *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626).

[27] However, a failure to abide by this procedure is not fatal to a motion for injunctive relief. Non-compliance with the *Federal Courts Rules* does not render a proceeding, or a step in the proceeding, void (Rule 56; *Sellathurai* at para 40). As in *Sellathurai*, the AGC has filed notices of motion within the pending applications for judicial review of the Minister's decisions to

cancel the Applicants' eTAs. The notices of motion fully disclose the grounds relied upon by the Minister.

[28] In *Abi-Mansour v Canadian Human Rights Commission et al*, Court File No T-924-11 (August 23, 2013), Justice Richard Mosley ordered the return of a *prima facie* solicitor-client privileged document that was accidentally disclosed to the applicant by the Canadian Human Rights Commission in response to a request under the *Access to Information Act*, RSC 1985, c A-1. Justice Mosley ordered that the applicant not retain or otherwise transmit any copies of the document, destroy all copies in his possession, and refrain from communicating directly or indirectly about, commenting upon or making any use of the document or information derived from the document.

[29] The Federal Court of Appeal dismissed an appeal of Justice Mosley's order, holding as follows (*Abi-Mansour v Canada (Human Rights Commission)*, 2014 FCA 74 [*Abi-Mansour*] at para 3):

Whether or not the Commission should have formally sought to be joined as a party to the underlying judicial review proceedings in order to submit its motion to Mosley J., in the overall circumstances of these proceedings, no prejudice or injustice has resulted. It would be an abuse of the judicial process to overturn Mosley J.'s order on such procedural formalities.

[30] It is clear from the Federal Court of Appeal's decisions in *Sellathurai* and *Abi-Mansour* that this Court has plenary jurisdiction to grant injunctive relief to address the inadvertent disclosure of confidential information in legal proceedings. The proper procedure for a party seeking to recover and protect information that has been inadvertently disclosed is to proceed by

way of application. However, if a motion is brought within a pending application for judicial review, this will not deprive the Court of its jurisdiction to grant injunctive relief provided that the grounds are fully disclosed and no person is prejudiced.

[31] In this case, both Mr. Perryman and Dr. Lukacs are well aware that the redacted information in the CTRs they received was inadvertently disclosed. It was necessary for Dr. Lukacs to manipulate the electronic documents to reveal the information that the AGC is seeking to protect. Dr. Lukacs has compounded the problem by wilfully distributing the information to additional individuals.

[32] The Applicants and Dr. Lukacs both complain that the AGC's motions are not supported by affidavits that explain the injury resulting from the inadvertent disclosure and the further public dissemination of the information in issue. However, all of the information that has been inadvertently disclosed is the subject of motions for non-disclosure pursuant to s 87 of the IRPA that are currently before the Court.

[33] Pursuant to ss 87 and 83(d) of the IRPA, the Court must 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. Unless and until the Court determines that disclosure of the information would not be injurious, the Court must ensure that the information remains confidential in order to discharge its statutory functions.

[34] In the words of the Supreme Court of Canada in *R v Basi*, 2009 SCC 52 (at para 44):

It thus remains as true in this case as it was in *Named Person v. Vancouver Sun*, 2007 SCC 43 that “[w]hile the judge is determining whether the privilege applies, all caution must be taken on the assumption that it does apply” (para. 47). No one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies.

[35] Injunctive relief may be ordered against someone who is not a party to the underlying proceedings (*Google Inc v Equustek Solutions Inc et al*, 2017 SCC 34 at para 28). As the Supreme Court of Canada explained in *Cadbury Schweppes Inc v FBI Foods Ltd*, [1999] 1 SCR 142 (at paras 19-20):

Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of that fact even if innocent at the time of acquisition) and impose its remedies.

[36] Dr. Lukacs asks that the motions not be determined in writing pursuant to Rule 369, and that he be given an opportunity to present arguments in an oral hearing. Despite Dr. Lukacs’ efforts to characterize the motions as legally and factually complex, they are neither. There is no question that information the AGC seeks to protect pursuant to s 87 of the IRPA was inadvertently disclosed to the Applicants, and thereafter to Dr. Lukacs and others. It is equally clear that the injunctive relief sought by the AGC is necessary to preserve the integrity of the

Court's process, and its capacity to discharge its statutory functions under s 87 of the IRPA. The motions are apt for determination in writing under Rule 369.

[37] Both the Applicants and Dr. Lukacs seek costs on a solicitor-client basis. Dr. Lukacs says that costs should be awarded against counsel for the AGC personally. Pursuant to s 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, costs are not ordinarily available in immigration-related proceedings. Even if the AGC's inadvertent disclosure of information may be considered a special circumstance, success on the motions is divided. Accordingly, no costs will be awarded.

ORDER

THIS COURT ORDERS that:

1. The motions of the Attorney General of Canada for injunctive relief, and to amend the motions for injunctive relief, are granted in part.
2. Dr. Gabor Lukacs is given limited standing to respond to the motion of the Attorney General of Canada for injunctive relief in Court File No IMM-2967-19.
3. The motions for injunctive relief are amended to remove the name of Dr. Gabor Lukacs from the style of cause in Court File No IMM-2967-19, and to delete references to secret affidavits from the motions for injunctive relief in both proceedings.
4. The Applicants and any other person who is, or has been, in unauthorized possession of information that is currently the subject of the motions brought in these proceedings pursuant to s 87 of *Immigration and Refugee Protection Act*, SC 2001, c 27 [Disputed Information], are permanently enjoined from using, disseminating or publishing the Disputed Information pending further order of this Court.
5. The Applicants and any other person who is, or has been, in unauthorized possession of the Disputed Information shall forthwith destroy the Disputed

Information, whether in electronic or paper form, as well as any notes or summaries of the Disputed Information that may have been made.

6. Any person who is, or has been, in unauthorized possession of the Disputed Information, and who becomes aware of this Order, shall forthwith communicate this Order to every other person with whom he or she has shared the Disputed Information.
7. The Disputed Information shall continue to be preserved in its original electronic format and sealed by the Registry pending further direction or order of the Court.
8. No costs are awarded.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: 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 UNDER RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS: FOTHERGILL J.

DATED: MARCH 22, 2021

WRITTEN SUBMISSIONS BY:

Benjamin Perryman FOR THE APPLICANTS

Patricia MacPhee FOR THE RESPONDENT

Gabor Lukacs PROPOSED PARTY IN IMM-2967-19

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