



EDITOR'S NOTE: This document is subject to editorial revision before its reproduction in final form in the *Federal Courts Reports*.

CITIZENSHIP AND IMMIGRATION

IMMIGRATION PRACTICE

Application for judicial review of decisions by Liaison Officer (Officer) with Canada Border Services Agency (CBSA) cancelling applicants' electronic travel authorizations (eTAs), preventing them from boarding flights from Budapest to Toronto — Applicants citizens of Hungary — Alleged that Officer lacked authority under *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) to cancel eTAs, that Officer's decisions discriminatory — CBSA officers trained to detect "indicators" that travellers may be misrepresenting true purpose of their travel to Canada — Applicants maintained that indicator "association with refugees", when applied to Hungarian-Roma travellers or travellers associated with Roma people, was discriminatory, contravened international human rights law, as well as *Canadian Charter of Rights and Freedoms*, s. 15(1) — Stated that CBSA liaison officers' reliance on this indicator adversely affected large number of Hungarian nationals, Roma travellers; hoping to set precedent ending practice — In file IMM-2967-19, applicants husband, wife — Applicants in that file planned to travel to Canada to visit female applicant's sister who was scheduled to have surgery — Both female applicant's sister, her family having refugee status in Canada — When applicants arrived at Budapest airport, were prevented from boarding flight to Canada after being screened by BUD Security Kft (BudSec) who consulted Officer in Vienna, Austria — Applicants told primary reason eTAs cancelled was that host they were travelling to having no status, were Convention refugees — In file IMM-5570-19, applicants also husband, wife, their children — Family obtained eTAs to travel to Canada for 7 days; purchased round-trip tickets departing from Budapest — Were also refused to board flight once at airport after screening after BudSec contacting Officer who discovered that applicants' driver in Canada was Convention refugee — Applicants' eTAs were therefore cancelled, denied flight boarding — Both applications heard together — Issues were: whether Officer having legal authority to cancel applicants' eTAs; whether Officer's decisions discriminatory; what were appropriate remedies — Requirement for prescribed foreign nationals to have valid eTA when seeking entry to Canada in effect since November 2016 — Under *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 12.07, liaison officers authorized to cancel eTAs under certain conditions, namely if foreign national is inadmissible or becomes ineligible to hold such authorization under s. 12.06 — While respondent conceded that present applications should be granted on the grounds they were procedurally unfair, unreasonable, applicants maintained that decisions suffered from more fundamental defects — According to applicants, CBSA officer's power to examine is limited geographically to ports of entry in Canada — Applicants argued that Act cannot be construed in manner that authorizes extraterritorial enforcement against prospective refugees, people "associated with refugees" — Was not established that Officer conducted overseas examination of applicants before deciding to cancel their eTAs — Officer located in Vienna, Austria; had no direct contact with applicants — BudSec employee hired by Air Canada, not CBSA — Officer's decisions based on information provided by private security agent employed by transporter, combined with other information contained in system — This did not constitute examination of foreign nationals, but rather provision of assistance to air carrier in meeting its obligation to ensure travellers eligible to enter Canada — While parties agreed that requirements of Act, s. 12.07 not met in either of these cases, this did not mean that Officer was wholly without statutory authority to cancel eTAs — Regarding allegation of discriminatory practice,

discriminatory decisions are inherently unreasonable because they are premised on irrelevant considerations or are procedurally unfair because they betray reasonable apprehension of bias — Decision maker's reasons must be internally coherent, justified in light of relevant legal, factual constraints — Evidence not establishing existence of coordinated program by CBSA to interdict travellers abroad solely on ground that they are of Roma ethnicity or associated with Roma refugee claimants in Canada — Officer herein made no finding regarding applicants' ethnicities — Rather, Officer's focus was on immigration status of applicants' intended hosts — Burden was on applicants to demonstrate that CBSA's use of "indicators" in relation to Hungarian travellers, including immigration status of their intended hosts in Canada, amounted to discrimination in law — However, applicants failing to do so — In light of this conclusion, was unnecessary to consider applicants' argument that Officer's decisions contravened international human rights law; to consider applicants' Charter arguments — Applicants sought declaratory relief to end respondent's unlawful, discriminatory policy that may target them again in future — Declaratory relief is narrow discretionary remedy that is available only where Court has jurisdiction to hear issue, dispute is real, not theoretical, party raising issue having genuine interest in its resolution, and declaration will have practical utility (in that it will settle live controversy between parties) — In present case, no practical utility in issuing declaration respecting issue — Court found that Officer had statutory authority to cancel applicants' eTAs, although criteria for exercising that authority were not satisfied in either of these cases — While Court finding that CBSA's use of "indicators" not amounting to discriminatory practice, respondent must ensure that application of indicators to Roma travellers, or those who associate with Roma people, not inadvertently resulting in discriminatory decisions — Applications allowed; eTAs restored

KISS V. CANADA (CITIZENSHIP AND IMMIGRATION) (IMM-2967-19, IMM-5570-19, 2023 FC 1147, Fothergill J., reasons for judgment dated August 24, 2023, 32 pp.)