"The Biggest Problem With You…": Racial profiling and Canada's program of extra-territorial migrant interdiction

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Introduction

On April 3, 2019, Andrea and Attila Kiss tried to board an Air Canada Rouge flight from Budapest to Toronto. Andrea's sister was ailing, and the couple planned to visit Canada for two months to support her family. Their travel was legitimate and lawful. Their documents were in order. But when they lined up to check in, Andrea made a mental note of a fact that was about to become relevant: as members of the Hungarian Roma community, they were the only racialized people in line.

Andrea and Attila did not reach the check-in counter. They were stopped and pulled out of line by a private security guard. They were questioned, their documents were photographed, and—minutes later—a Canadian immigration official forbade the airline from allowing them aboard the plane. And so, the only racialized people in line trying to get to Canada were profiled, turned around, and sent home without even a ticket refund. Later, they found out the official reason for their deboarding: Canada thought that there were enough "indicators" to conclude that they were not planning on staying temporarily, but permanently.

This deboarding was not an isolated incident. In 2004, the Judicial Committee of the United Kingdom House of Lords found that the Home Office authorities and their contractors were unlawfully profiling and deboarding Roma people bound for the United Kingdom.[5] More recently, human rights advocates,[6] scholars,[7] and journalists[8] report that Roma communities across Europe know that officials and airlines are trying to prevent their travel to Canada and have enlisted airlines to profile and identify them.

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[5] *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*, [2004] UKHL 55.

[6] Hungarian Deputy Commissioner for the Protection of the Rights of National Minorities in Hungary, "On the Preliminary Screening of Passengers of International Flights Prior to Boarding at the Airport for the Purpose of Compliance with Immigration Legislation of the Destination Country" (2016) [translated by Dr. Gábor Lukács] [Opinion on Preliminary Screening], included in *Kiss v Canada (Citizenship and Immigration)*, Court File IMM-2967-19, Application Record, pp 336-344.

[7] Patrick Ciashi, "Around and Around: The Politics of Mobility in Everyday Lives of Roma in Current Day Hungary" (2018) 4:2 Intersections 17; Judit Durst, "Out of the Frying Pan into the Fire? From Municipal Lords to the Global Assembly Lines – Roma Experiences of Social Im/Mobility Through Migration from North Hungary" (2018) 4:3 Intersections 4.

[8] See for example Nicholas Keung, "Roma say they're being barred from flights to Canada" *Toronto Star* (May 6, 2017), online: <https://www.thestar.com/news/immigration/2017/05/06/roma-say-theyre-being-barred-from-flights-to-canada.html> [https://perma.cc/3LMY-4RUH].

Andrea and Attila's case is, however, singular because of what happened next: one month after they were prevented from visiting Toronto, they took Canada to court. In May 2019, the couple asked the Federal Court of Canada to judicially review the decision barring them from the airplane bound for Canada. In 2023, the Court allowed their judicial review, though there were some disappointments: the Court granted their application on narrow grounds, rejecting many of their more substantive arguments. Nonetheless, the case is significant because it forced Canada to disclose reams of previously confidential and hidden documentation. People know that Roma travellers are racially profiled by Canada, but the new evidence shows how that profiling works behind the scenes.

Here is how that process works. Even though Canada says it welcomes refugees and people at risk, it actively works to identify and interdict asylum seekers on their way to Canada. Officials try to disrupt travel before a person can reach Canada and formally file a claim for protection. In some cases, disruption is as easy as imposing a visa requirement against a country's nationals. If each non-citizen needs pre-authorization to come to Canada, the government can choose who it will grant that authorization to. Recent political realignments, however, make visa requirements unworkable against the nationals of some European countries. To maintain free economic relations with the European Union, Canada must maintain a relaxed visa policy against citizens of member nations.

In the absence of a blanket exclusion, Canada has developed closer and more personal methods to detect potential refugees. As we will show in this article, Canada quietly modified pre-existing relationships with transportation companies in 2012 to make airline personnel and their security contractors legally responsible for assessing whether a traveller was likely to make a refugee claim. This was not, to be sure, a radical departure from past practice but a subtle and meaningful change designed to identify, intercept, and interdict potential asylum claimants. Canada equipped private security guards and airlines with a simple formula: some refugees flee race-based persecution, therefore private screeners ought to look out for and deboard people of persecuted races. To make the recommendations of private screeners stick, Canada then uses a seemingly innocuous tool, the electronic travel authorization ('eTA'), to functionally ban travellers who are otherwise entitled to visa-free travel to Canada.

There is no "smoking gun" document (to our knowledge, at least) in which Canada explicitly tells private actors to racially profile. Indeed, sometimes government lawyers remind Canadian officers that they are legally prohibited from discriminating on race-based grounds. But the case we present here, relying on the documents disclosed in the Kisses' litigation, creates a strong circumstantial case that Canada has winked and nodded its way into a program of extra-territorial racial profiling of travellers.

This article comes in three parts. In Part I, we return to Andrea and Attila. Our inquiry is horizontal. We look at the laws, policies, and agents that acted upon the couple to prevent them from boarding the plane. This is a story both about what happened to Andrea and Attila, and about the larger networks of law they found themselves in. Using the evidence obtained from their application for judicial review, we reconstruct what happened to them, over the course of about an hour, at the Budapest Airport when they tried to fly to Canada. In Part II, our inquiry turns vertical. To understand the racialized valances of the laws that Andrea and Attila interacted with, we explore their historical development to show how some of today's ostensibly race-neutral, refugee-agnostic border control measures emerged from explicitly racist and anti-refugee policies.

How did this program develop? In a recent article about Canada's perimeter policies and refugee interdiction measures, Christopher Anderson argues that Canada's border control measures have "largely been developed through bureaucratic interaction that limits public oversight."[9] We agree. The racial profiling policies that we discuss here were built by accretion, one step at a time. No one person or government designed and implemented a system of racial profiling overnight. It is only when we step back and view the matter holistically that we can see what the program is and where it came from. And, perhaps more importantly, we then also see how "facially neutral rules to restrict asylum" are, to follow Tendayi Achiume, "racially exclusive

[9] Christopher Anderson, "Out of Sight, Out of Mind: Electronic Travel Authorization and the Interdiction of Asylum Seekers at the Canada-US Security Perimeter" (2017) 47:4 American Rev of Can Studies 385. For a related study on how visa officers make and shape exclusion policy see Vic Satzewich, *Points of Entry: How Canada's Immigration Officers Decide Who Gets In* (Vancouver: UBC Press, 2015).

of nonwhite people"[10] and, joining Karla McAnders, we see how, in the Canadian context, law reinforces "racial divisions and hierarchy."[11]

This raises an important question that we discuss in Part III: is any of this legal? Thanks to the Kisses' persistence and advocacy, we have a clearer understanding of one part of Canada's refugee interdiction policy. Now with the benefit of a larger and more holistic understanding of its operation, we ask whether Canada's laws and practices in this area can withstand legal scrutiny. We focus on lawfulness at the level of international law because the interdiction scheme operates outside Canada in circumstances where international human rights law applies but where courts sometimes refuse to apply the *Canadian Charter of Rights and Freedoms*. Even though it may not have direct force in Canada law, international human rights law guides the exercise of administrative discretion by decision-makers and can create important norms that demand appropriate governmental responses. We conclude that racial profiling in Canada's interdiction program breaches customary international law, the *International Covenant on Civil and Political Rights*, and the *International Covenant on the Elimination of all Forms of Discrimination.*

In this context, we call for Canada to immediately realign its policies with both decency and basic legality. Racial profiling is wrong. While we do not need international law to tell us that, international law's clarity on this point is a useful impetus for reform. Andrea and Attilla are not only owed an apology, but they are also owed gratitude for helping to expose an odious practice by the Canadian government. And they are owed a ticket to Canada to visit their family.

Part I—The interdiction of Andrea and Attilla Kiss

Edit Kiss, Andrea's sister, was ailing. She was scheduled to have surgery in April 2019 to repair a ventral hernia.[12] This procedure is not complex—it is day surgery—but the recovery is not trivial. Edit would need help. Three months before the surgery was scheduled, Andrea and

[10] Tendayi Achiume, "Racial Borders" (2021) 110 Georgetown Law Journal 450 at 480 [Racial Borders].
[11] Karla McAnders, "Immigration and Racial Justice: Enforcing the Borders of Blackness" (2021) 37:4 Georgia State University Law Review 1139 at 1146.
[12] *Kiss v Canada (Citizenship and Immigration)*, IMM-2967-19, Federal Court of Canada (Application Record of the Applicants) at 34 [AR].

her husband, Attila, booked round-trip tickets from Budapest to Toronto. They would arrive in Toronto on April 3 and return to Hungary on June 3.[13]

For most citizens of European Union countries, travel to Canada for a temporary, non-work or study related reason is uncomplicated. Canadian immigration law groups all non-citizens into one of two categories: those who are *admissible* and those who are *inadmissible*. An admissible non-Canadian may enter the country; an inadmissible non-Canadian may not.[14] Preconditions to admissibility vary. Depending on the person's nationality,[15] their reason for travel,[16] and their personal and immigration histories,[17] they may be required to obtain special authorization to come after presenting personalized evidence. For example, a person who intends to permanently relocate to Canada must qualify for an immigration program and be granted a permanent resident visa before coming.[18] Similarly, non-citizens who intend to work in Canada must receive special authorization (i.e., a work permit) from an immigration officer.[19]

Despite the international human right to seek asylum, every refugee who comes to Canada and claims asylum is arguably in technical breach of the law. By definition, an asylum seeker is someone who intends to reside in Canada permanently but who has not been issued a permanent resident visa. Official Canadian documentation explains that "[r]efugee claimants are generally considered to be inadmissible for non-compliance."[20] Once a person presents themselves to a Canadian official to make a claim for protection, Canada issues that person a removal order but suspends its enforcement pending the adjudication of the claim for protection. If the claim is declined, the order becomes enforceable.[21] For people who need protection, obtaining it in Canada is no simple matter because getting to Canada is no simple matter. Without

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[13] *Ibid* at 45.
[14] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 21–22 [IRPA]; Immigration and Refugee Protection Regulations, SOR/2002-227, ss 6–7 [IRPR].
[15] IRPR, *ibid*, s 190, Schedule 1.1.
[16] *Ibid*, ss 21-22, 30.
[17] IRPA, *supra* note 14, ss 34–41.
[18] *Ibid*, s 21.
[19] *Ibid*, s 30.
[20] Immigration, Refugees, and Citizenship Canada, "Intake of claims for refugee protection at ports of entry" (25 January 2022), online: *Operational instructions and guidelines* <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/canada/intake-claims-refugee-protection-ports-entry.html> [https://perma.cc/4XFV-47X5].
[21] IRPA, *supra* note 14, s 49(2).

the permissions to come to Canada, people must find ways to circumvent the legal rules that inhibit their travel and prevent them from presenting themselves to Canadian officials.

Hungarian nationals do not need a visitor visa to temporarily visit Canada.[22] In terms of documentation, Hungarians—just like most citizens of European Union member nationals—only require a valid passport[23] and an electronic travel authorization ('eTA') to board a plane bound for Canada.[24] An eTA is an electronic mini visa. Almost all visa-exempt air travellers, excluding Americans, must apply for and obtain and eTA before boarding a plane for Canada.[25] The application costs $7.[26] Travellers fill out an online form. The form asks for biographical particulars (name, passport number, date of birth, etc.) and information about the person's life circumstances. For example, applicants may be asked about any criminal records, health conditions, marital status, employment status, and travel plans.[27] Once the form is complete, the information is sent to a Canadian data centre where an "automated system… compares [the] information against immigration and enforcement databases."[28] If "adverse information" is discovered, the eTA application may be denied. Some applications are sent to immigration officers for review.[29]

Most eTA applications are quickly granted. Canada reports that most travellers receive a positive confirmation "within minutes."[30] In 2019, the same year that Andrea and Attila tried to fly to Canada, over 99% of all eTA applications were approved. These approvals happened at scale: that year Canada granted an eTA every 8.1 seconds, totaling of 3,887,576 successful applications. Grant rates vary between nationals of different countries. Looking again at 2019

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[22] *Ibid*, s 190(1)(a), Schedule 1.1.
[23] IRPR, *supra* note 14, s 52(1)(a).
[24] *Ibid*, ss 7.1, 190.
[25] *Ibid*, s 7.1(3).
[26] *Ibid*, s. 294.1.
[27] Canada, "Electronic Travel Authorization (eTA)" (23 March 2022), online: *Visit Canada* <https://www.canada.ca/en/immigration-refugees-citizenship/services/visit-canada/eta.html> [https://perma.cc/89QJ-5GFR].
[28] *Regulatory Impact Analysis Statement*, SOR/2018-109, (2018) C Gaz II, 1893, online: <https://gazette.gc.ca/rp-pr/p2/2018/2018-06-13/html/sor-dors109-eng.html>.
[29] *Regulatory Impact Analysis Statement*, SOR/2017-53, (2017) C Gaz II, 747 online: <https://www.gazette.gc.ca/rp-pr/p2/2017/2017-05-03/html/sor-dors53-eng.html?wbdisable=true> [https://perma.cc/2LB6-7W54] [SOR/2017-53] [RIA (SOR/2017-53)].
[30] Canada, "How long will it take to process my eTA application?" (7 April 2022), online: *Help Centre* <https://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=1063&top=16> [https://perma.cc/78N9-ZMFE].

numbers, Hungarians had a comparatively low eTA application success rate. That year, 1,744 applications out of 16,829 total applications were denied (10.4%). It is difficult to understand precisely why so many applications were denied, but Canada's high level case tracking reports that 87% of the refusals turned on a negative assessment of the applicant's credibility (i.e. a conclusion that the person was untruthful in their application) or because the person could not establish that the purpose of their visit was temporary.[31]

But an eTA is not a guarantee of admission to Canada. Every person who arrives in Canada is legally obliged to present themselves to an immigration officer for an examination to determine "whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada."[32] At this examination, the officer is required to make a holistic examination of the person's circumstances, not just regarding the documents (legitimate or otherwise) that the person may or may not hold.[33] If the officer refuses the person's admission to Canada they may "allow them to leave"[34] or initiate formal removal/deportation proceedings.[35] In either case, the person's eTA (if they had one) will almost certainly be cancelled.[36] An eTA can also be cancelled before a person arrives in Canada. In some circumstances immigration officers may revoke an eTA if they determine it was improperly issued.[37]

The eTA's core function relates to airline boarding decisions. In a sense, Canadian officials "have no legal power"[38] in a foreign jurisdiction and officers cannot act internationally just as they would nationally. To manage who can get on a plane, Canada uses documents, like visas and eTAs to determine who may board. Unlike a visa, which is usually physically affixed to a passport,

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[31] Access to information request response from Immigration, Refugees, and Citizenship Canada (A-2021-06773), received 13 January 2022 (on file with authors).
[32] IRPA, *supra* note 14, s 18.
[33] For official guidance on how these examinations are to be conducted see Immigration, Refugees and Citizenship Canada, *ENF 4: Port of Entry Examinations* (Ottawa: Immigration, Refugees and Citizenship Canada, 2020) [ENF 4].
[34] *Ibid* at 122.
[35] IRPA, *supra* note 14, s 44.
[36] ENF 4, *supra* note 33 at 72.
[37] Canada Border Services Agency, "PRG-2017-20: Electronic Travel Authorization (eTA) Cancellation by CBSA Officials" (Ottawa: Canada Border Services Agency, 2017); IRPA, *supra* note 14, ss 12.06, 12.07.
[38] Canada Border Services Agency, "OPS-2012-05: The CBSA Liaison Officer's Role in Providing Advice to Transporters Concerning Improperly Documented, Visa-Exempt Foreign Nationals" (Ottawa: Canada Border Services Agency, 2012) [Liaison Officer].

the eTA is never issued to or held by a traveler. As an electronic document, it exists only in Government of Canada databases. The document's value is realized when someone presents themselves at a check-in counter. Each airline that brings people to Canada is asked to use Canada's Interactive Advance Passenger Information ("IAPI") system. Right before a person is processed for boarding, the airline is supposed to transmit information about that person to Canada through IAPI. IAPI automatically checks each person, checks whether the person requires an eTA, and verifies that it is valid. If no red flags are detected, IAPI returns a "board" message. If a problem is discovered, the system returns a "no board" message.[39]

Regardless of the direction, Canada insists that the airline remains "ultimately responsible for making the determination on whether or not to board the passenger."[40] Disregarding Canadian instructions, however, can be economically consequential. Canadian law makes carriers liable for removal costs[41] and an administrative charge of up to $3,200[42] for bringing improperly documented persons to Canada. Plainly, if a person needs an eTA, does not have one, and is brought to Canada, the airline faces financial costs that likely exceed the value of any ticket. It is for these reasons that Canada calls the IAPI system, combined with the country's system of carrier sanctions, "the eTA's main enforcement mechanism."[43]

It was not an enforcement mechanism that Andrea and Attila expected, directly or otherwise, to face. Both had valid eTAs, and in fact, Andrea had already successfully used hers before. In 2017, she visited Edit in Toronto for almost three months before doing exactly what Canadian law asked of her: she returned home.[44] And she had good reasons to. Attila owns property in Hungary and has a good job. He has worked for the same lightbulb factory since 1994 and is now a shift leader and safety officer. Attila's parents live in Hungary. They are established there.[45]

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[39] Canada Border Services Agency, "Advance Passenger Information / Passenger Name Record Data" (26 April 2022), online: *Canada Border Services Agency* <https://www.cbsa-asfc.gc.ca/security-securite/api_ipv-eng.html>.
[40] Liaison Officer, *supra* note 38.
[41] IRPR, *supra* note 14, ss 276–278.
[42] *Ibid,* ss 279, 280.
[43] RIA (SOR/2017-53), *supra* note 29 at 753.
[44] AR, *supra* note 12 at 12.
[45] *Ibid* at 73.

As Andrea and Attila queued for check-in, Andrea made a mental note of something that rightly ought not to have mattered: she and Attila were the only Romani people in line. The Roma are a European ethnic group that has endured centuries of persecution. During World War II, for example, between 500,000 and 1,500,000 Roma people were murdered by the Nazis in the holocaust (known in Romani as the *Porajmos*, or "the devouring"). The uncertainty of the exact figure is because, Cynthia Levine-Rasky explains, "[t]he Roma were a people uncounted, often classified among the 'remainder to be liquidated.'"[46] Anti-Roma racism surged after the collapse of the Soviet Union, and today Roma people continue to face particularly acute racism in Hungary. There, right-wing politicians stoke nationalist sentiment, neo-Nazi groups violently patrol Roma neighbourhoods, and widespread discrimination in work, education, and housing significantly limits choices and opportunities for Romani communities.[47]

This history is not academic for Andrea. Edit and her family were in Toronto because they fled Hungary in search of refuge. In 2016, after a hearing before the Canadian Immigration and Refugee Board, Edit and her family were recognized as protected persons because of the race-based persecution they faced in Hungary. Edit's husband, Bela, explained that the family was evicted from their house by the government for discriminatory reasons, that they were assaulted by police officers and paramilitary organizations, and that the state was not meaningfully protecting them from this race-based persecution.[48] This sort of claim is now routinely recognized

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[46] Cynthia Levine-Rasky, *Writing the Roma: Histories, Policies and Communities in Canada* (Nova Scotia: Fernwood Publishing) at 71.

[47] See Istvan Kemény, "History of Roma in Hungary" in Istvan Kemény, ed, *Roma of Hungary* (Boulder, Colo: Social Science Monographs, 2005) 1 at 1; Cynthia Levine-Rasky, *Writing the Roma: Histories, Policies and Communities in Canada* (Nova Scotia: Fernwood Publishing); Cynthia Levine-Rasky, "'They didn't treat me as a Gypsy': Romani Refugees in Toronto" (2016) 32:3 Refuge 54; Cynthia Levine-Rasky, "Designating Safety, Denying Persecution: Implications for Roma Refugee Claimants in Canada" (2018) 16:3 J Immigrant & Refugee Studies 313; Guenter Lewy, *The Nazi Persecution of the Gypsies* (New York: Oxford University Press, 2000); Human Rights Watch, "Hungary: Events of 2020" (2021), online: <www.hrw.org/world-report/2021/country-chapters/hungary> [https://perma.cc/K5WW-Y3B4]; Emma Townsend, "Hate Speech or Genocidal Discourse? An Examination of Anti-Roma Sentiment in Contemporary Europe" (2014) 11:01 J Multidisciplinary Intl Studies 1; Sean Rehaag, Julianna Beaudoin, and Jennifer Danch, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (2016) 52:3 Osgoode Hall LJ 705 [No Refuge].

[48] AR, *supra* note 12 at 21.

by Canadian officials: in 2020 and 2021, every single Hungarian (Romani or otherwise) refugee claimant whose case was decided on the merits was granted refugee protection.[49]

But if Romani persons are persecuted in Hungary, Andrea and Attila could reasonably have expected better treatment from a Canadian airline and Canadian government officials. If nothing else, Canadian state officials are legally prohibited from discriminating against anyone on race-based grounds (we return to this matter in Part III). More than that, Andrea's prior travel to Canada suggested that there was nothing to worry about: surely if there was no issue in 2017, there would be no issue in 2019?

Before the check-in counter, each passenger had to pass a pre-screening desk staffed by agents who quickly checked each traveler's documents. Andrea would later explain that every other person in line was "quickly allowed past" but that she and Atilla "were subjected to extensive and invasive questioning."[50] First, an agent asked basic questions: Where were they going, who were they visiting, how long they would stay, and did they have an invitation letter? Finally, the agent told them they could go check in their baggage, stuck a sticker to their passports, and wished them a "Bon Voyage."[51]

Only steps from the pre-screening desk, a second agent called after them and summoned them back. The second agent started to ask more questions. Later, the agent can be heard saying on a surreptitiously made recording that "I called you back because I thought that my colleague was not asking enough… That is why I wanted to assure myself."[52] When the second agent finished with her questions she took pictures of their passports, asked the couple to stand aside, and left to make a telephone call. Fifteen minutes later she returned with news: the Canadian "immigration office" decided to cancel both of their eTAs and they would not be allowed to board the plane.

The agent insisted that she was not the one making the cancellation decisions, instead, it was someone from the same office from which the "gentleman [in Canada] who either stamps in

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[49] Immigration and Refugee Board, "Refugee Claims Statistics" (26 May 2021), online: *Immigration and Refugee Board* <https://irb.gc.ca/en/statistics/protection/Pages/index.aspx>.
[50] AR, *supra* note 12 at 76.
[51] *Ibid* at 77.
[52] *Ibid* at 60.

that you can go or says that you have to go back."[53] Andrea demanded to know why the agent stopped them. "I thought… Many things… For example, that you do not have checked luggage, but for me it is really, more, umm, multiple factors, but mostly small things."[54] [ellipses in original] "The biggest problem," she added, "is that the person whom you are travelling to does not have status."[55] This was not true and Andrea tried to tell as much to the agent. Then, the agent realized that she was being recorded and exclaimed "No! You do not have a right to [record me]. No!" The recording ends with Andrea calling after the agent:

> Why? What is this then? What is it if not discrimination? Even here too? It blows my mind, seriously. Do you understand this? I was allowed to go two years ago and now I am not allowed to go?*[56]*

Andrea and Attila returned home. In their email inboxes there were formal noticed from the Government of Canada cancelling their eTAs. They received no refund for their tickets. They were (and remain) $CAD 1,617.67 out of pocket.[57]

One month later, Andrea and Attila took Canada to court, asking a judge of the Federal Court of Canada to review the decision revoking their eTAs. By June, Canada conceded that there had been a mistake in the eTA cancellation process and asked the Court to summarily grant the Kisses' application and remit their matter to a different officer for reconsideration. Andrea and Attila opposed this motion. They did not want a new officer to decide their matter anew. Instead, they wanted the Court to order the reinstatement of their original eTAs. Justice Heneghan allowed the couple to continue with their proceeding.[58]

In October 2019, the government moved to redact a large portion of the written reasons produced by the officer who decided to revoke their eTAs. Relying on a rarely invoked section of the *Immigration and Refugee Protection Act*, Canada said that telling the Kisses the full reasons for the decision could compromise national security. To the couple, this effort was an example of the "government's tendency to exaggerate claims of national security confidentiality." The

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[53] *Ibid* at 61.
[54] *Ibid* at 60.
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid* at 16.
[58] *Kiss v Canada (Citizenship and Immigration)*, 2019 FC 1247 (CanLII).

effect, they said, was prejudicial. From their limited access to the reasons, they could tell that the officer revoked their eTAs because they exhibited to the agent "indicators" of being "immigrants without visas" or, in lay terms, people pretending to be visitors while intending to stay permanently. Keeping these indicators secret, the Kisses said, would prevent them from understanding "the root cause of the present case, namely, the legality of the 'indicators' used by the decision-maker, which appear to single out travellers who are themselves Roma and/or associated with Roma people."[59]

Again, the Court largely agreed with the Kisses. After looking at documents already in the public domain, the Court determined that most of the information the government sought to redact was not secret but was generally known. It ordered the disclosure of an almost complete version of the reasons issued by the decision-maker.[60]

Through these reasons, now largely unredacted, important facts come into view. The officer wrote that after being contacted by a private document screener and being advised of the Kisses, they decided to cancel their eTAs. The officer cites the following 'indicators' that they were not visitors, but "immigrants without a visa:"

- stated purpose of visit is tourism, can identify Niagara Falls and CN Tower but unable to explain what else they will do for three months
- employed in manual labour, provided letter from employer dated December 2018 indicating employment at that time, but unable to explain how they can take three months off work
- weak ties to home country, do not own a home or hold a long-term rental lease
- travelling with $2000 CAD in cash, no access to other funds
- no checked bags for three-month trip;
- stated sister has purchased everything on their behalf
- wife previously travelled to Canada for three months for tourism purpose in 2017 but unable to explain what she did

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[59] *Kiss v Canada (Citizenship and Immigration)*, IMM-2967-19, Federal Court of Canada (Respondent's motion record, 9 January 2020) at 1.
[60] *Kiss v Canada (Citizenship and Immigration)*, 2020 FC 584 (CanLII).

- first trip for husband.
- hosts identified as [redacted] and [redacted] convention refugees who arrived in Canada via irregular means in 2015 and 2016 respectively.[61]

One final indicator remains redacted. Much of this information, the Kisses point out, is inaccurate. This is not surprising: the officer who cancelled their eTAs never spoke directly to them and instead relied exclusively on the hearsay evidence of the agent who pulled them out of the line. There is no indication in the record about why the officer declined to speak to the Kisses themselves.

The evidence received to date, although incomplete, presents a strong circumstantial case that Canada is instructing its agents and partners to racially profile Roma travellers. Important features of how the profiling works are visible in this evidence. The agents who stopped and questioned Andrea and Attila were neither Government of Canada staff nor Air Canada Rouge employees. Rather, they worked as "document checkers" for a security company, BudSec, contracted by the airline.[62] BudSec is a corporate subsidiary of the Budapest Airport, generally responsible for conducting security screenings. In addition to the services it provides to the airport, it is also available to individual transportation companies to provide additional security services.[63]

Air Canada Rouge is not the only Canadian company to use BudSec, nor is it the only company accused of helping Canada profile Roma travellers. A 2016 report by the Deputy Commissioner for the Protection of the Rights of National Minorities in Hungary, investigating similar allegations that BudSec screeners retained by Air Transat were profiling Roma travellers, determined that Canadian government officials, employed by the CBSA, directly trained the BudSec staff on behalf of the screeners.[64]

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[61] AR, *supra* note 12ƒ at 8.
[62] *Kiss v Canada (Citizenship and Immigration)*, IMM-2967-19, Federal Court of Canada (Rule 9 Reasons). Also see *Kiss v Canada (Citizenship and Immigration)*, 2020 FC 584 (CanLII), paras 35, 37.
[63] Budapest Airport, "BUD Security Kft.: Five years in aviation security," (20 July 2018), online: *Budapest Airport* <https://www.bud.hu/en/passengers/tips_and_offers/tips/news/bud_security_kft_five_years_in_aviation_security.html> [https://perma.cc/W66U-9XAE].
[64] Opinion on Preliminary Screening, *supra* note 6.

It appears that both Air Transat and Air Canada Rouge employ BudSec for the same reason. Information obtained through access to information requests confirms that both airlines entered memorandums of understanding with Canada to reduce the maximum administrative penalty levelled against them for bringing improperly documented passengers.[65] A blank template agreement sets out that each transporter will ensure "that travel documents of all persons destined for Canada are screened by trained personnel." In exchange, Canada agreed to provide "fraudulent document detection and fraud prevention training to Transporter personnel, external agents, or third parties who act on the Transporter's behalf." To support that training and airline efforts, Canada additionally agreed to "maintain a network of designated officers abroad for consultation and to support the efforts of the Transporter personnel and any third party or external agent acting on behalf of the Transporter."[66] If the transporter's performance exceeds expectations, the standard $3,200 administrative penalty for transporting improperly documented passengers can be entirely waived for an individual breach.[67]

To understand what Canada may have said during training such that trained personnel would profile Roma passengers, the Kisses sought disclosure of the material Canada provided during training sessions. To date, six partial slide decks and one redacted handout have been disclosed. Most of this material is related to document integrity, to teaching staff how to detect fraudulent passports and visas, or to imposter detection.[68]

One heavily redacted training document, entitled "Immigrants Without a Visa,"[69] teaches staff how to look for people pretending to be temporary visitors, when in fact they intend to work, study, or stay permanently—the basis that Canada cancelled the Kisses eTAs. The deck begins with a map of Eastern Europe.[70] No script was disclosed so we cannot know what the Canadian trainers said while the map was on the screen.

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[65] Access to information request response from the Canada Border Services Agency (A-2020-13556), received 12 March 2021 at 217 (on file with authors).
[66] Access to information request response from the Canada Border Services Agency (A-2015-08903), received 18 November 2021 (on file with authors).
[67] IRPR, *supra* note 14, s 280(2).
[68] *Kiss v Canada (Citizenship and Immigration)*, IMM-2967-19, Federal Court of Canada (Certified Tribunal Record).
[69] *Ibid* at 258 and ff.
[70] *Ibid* at 259.

To help screeners identify "immigrants without a visa" the materials prepared by the Canada Border Services Agency ('CBSA') set out a variety of "indicators" staff can watch out for. The documents are heavily redacted, but in non-redacted portions, security staff are instructed to make inquiries regarding a person's reason for travel, information about their hosts, the cost of travel, their employment history, and their luggage. The CBSA suggests, for example, that a person who plans to stay in Canada for three months and only visit Niagara Falls or a person who is "overly eager to provide details of their trip" might not be a genuine visitor.[71] When screeners become suspicious of a traveller, they are given a clear direction: "please refer any pax [passenger] with indicators of being immigrants without visas to CBSA."[72] The Kisses have relentlessly sought disclosure of the 'indicators' used by the CBSA. In May 2022, the Federal Court of Canada ordered the partial disclosure of indicators and, of perhaps greater interest, explained that all indicators can be grouped into roughly six categories: clothing, language and passport, travel behaviour, income and employment, host information, and documentation.[73]

At trainings, officers must say more than is contained in the slide deck. Recall, the Kisses were the only people in line subject to questioning. Recall, they were called back even after one agent cleared them. The agent told the Kisses that the main reason their eTAs were cancelled is because they were staying in Canada with someone without status. Yet, the Canadian officer (correctly) notes in their reasons that the hosts have been accepted as convention refugees. This means that even though that there is no slide telling agents to watch out for racialized people or people associated with refugees, the agent knew to screen for these associations. The Federal Court of Canada has ruled there is no evidence that Canada keeps indicators hidden "to evade accountability" and blocked the Kisses from questioning CBSA about why some indicators are included in the written training materials while others are not.[74] Canada's motivations aside, the fact remains that Canada trains private security agents and airlines on the importance of the "association with refugees" indicator but excludes this indicator from its written training materials and the list of "suspicious" indicators shared with airlines.

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[71] *Ibid* at 261-265.
[72] *Ibid* at 266.
[73] *Kiss v. Canada (Citizenship and Immigration)*, 2022 FC 373 (CanLII).
[74] *Kiss v. Canada (Citizenship and Immigration)*, 2022 FC 133 (CanLII), para 33.

As much is acknowledged by senior Canadian officials. Under cross-examination, in related litigation, the manager in charge of supporting immigration officers abroad, acknowledged that there "[t]here is no one exhaustive list" of indicators and that while some appear in training materials, others "been identified from previous history of the Agency."[75] An example of such an indicator is an association with a:

> failed refugee claimant or [] a refugee claimant, period, there was a good chance that when they arrived in the country they did so irregularly, that is to say they did not seek out a permanent resident visa and they would have when they arrived claimed or originally stated that they were here to remain in Canada for a temporary purpose only, a short stay only.[76]

Later, he agreed that "being a refugee claimant at some point serve[s] as an indicator that a person seeking to visit the former refugee claimant are themselves irregular immigrants."[77]

This touches on a fundamental tension within the law of asylum. According to the dominant interpretation of international refugee law, states are only required to provide protection to people already subject to the jurisdiction of that state. Put differently, on this understanding, Canada is under no legal obligation to offer any sort of assistance to refugees in another country. It is only when that person presents themselves as an asylum seeker to a Canadian official in Canada, that the protective duties are engaged. This legal configuration encourages states to develop "non-entrée" policies to minimize their exposure to asylum liabilities. By stopping asylum seekers from reaching Canada through identification and interception *en route* to the country, the government can prevent asylum seekers from approaching Canadian immigration officials, and thus prevent them from making refugee claims.[78] This is, of course, a well-known practice Canada uses to circumvent its obligations to

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[75] *Dr. Gábor Lukács v Canada (Minister of Public Safety and Emergency Preparedness)*, T-320-20/T-321-20, Federal Court of Canada (Cross-examination of Arthur Nause, 28 August 2020) at 31 [Cross-Examination of Arthur Nause].
[76] *Ibid* at 29–30.
[77] *Ibid* at 30.
[78] Andrew Brouwer and Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide" (20030) 21:4 Refuge 6.

refugees that scholars have studied extensively.[79] But the novelty in the Kiss case is the presence of crass, up-close, individualized racial profiling to interdict perceived asylum seekers.

Traditional non-entrée tools, like the visa, let states presumptively deny all non-nationals, only authorizing a few preferable would-be travelers. Without a visa, that dynamic flips and those responsible for administering eTAs are tasked with making snap decisions to screen out some profiles. This explains why some people get asked questions, get pulled out of lines, and are denied access to Canada, while people with different racial profiles breeze through lines. As the agent said, "it is really, more, umm, multiple factors, but mostly small things."[80] These multiple factors, mostly small things, obtain clearer meaning when we examine their origins. Their history is the matter to which we now turn.

Part II—The origins of Canada's migrant interdiction program

Canada's pre-screening programs for migrants are surprisingly young. At the beginning of the twentieth century, most direct migrant screening conducted by Canadian officials took place at Canadian ports. Each prospective immigrant or tourist was required to submit to an examination, which was largely used to screen out indigent and diseased persons. But early on, officials looked to transportation companies to implement Canadian immigration policy objectives. Companies were made liable for all detention and deportation costs associated with any immigration rejection; a measure designed to incentivize carriers to bring only "desirable" migrants.[81] Metrics of desirability were telegraphed to carriers through both subtle and non-subtle means.

Some racist anti-Asian measures, for example, were explicit. Beginning in 1885, each Chinese migrant was required to pay a "head tax" before entering Canada. If a person was brought to Canada without sufficient funds to pay the tax, Canadian legislation allowed

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[79] *Ibid*; James Hathaway and Alexander Neve "Fundamental Justice and the Deflection of Refugees from Canada" (1996) 34:2 Osgoode Hall LJ 213; Efrat Arbel, "Bordering the Constitution, Constituting the Border" (2016) 53:3 Osgoode Hall LJ 824.

[80] AR, *supra* note 12 at 61.

[81] Simon Wallace, "'Police Power is Necessary:' the Origins of the Power to Detain and Deport" (2023) 48 Queens LJ 101; Ninette Kelley and Michael Trebilocock, *Making the Mosaic* (Toronto: University of Toronto Press, 2010) at 135-145 [Making the Mosaic].

inspectors to level fines against the carrier. Shipping companies were also subject to specific Chinese-only restrictions on the number of passengers they could transport.[82]

In other cases, the signal to the transportation company was less explicit. In 1908, Canada passed the "continuous journey" regulation, requiring all travellers to come directly from their country of residence to Canada without a stopover. Officially, the measure was implemented to ensure that undesirable immigrants could be deported if Canada ordered them removed from the country: steamships usually had set routes and would only return a person to the place "from whence they came" and not necessarily to a place that would accept the return of the person. Unofficially, the measure was designed to screen out migrants from the Indian sub-continent. Within days of the regulation's passage, Canada prevailed on Canada Pacific (the only company to run an India to Canada route) to cancel its service and immigration officers were directed to make exceptions for European immigrants coming to Canada by indirect means.[83]

The First World War and a series of new immigration rules slowed migration but, in the 1920s, when the Canadian economy re-established its pre-war footing, many rules were relaxed to help support the movement of some European workers. During this decade, however, Canada introduced its first formal visa requirement. In 1923, the Governor-in-Council issued an Order requiring immigrants (except those from the United States, the United Kingdom, and White British colonies) to obtain pre-authorization to travel from a Canadian or Imperial official before immigrating.[84] The impact of this policy was, however, only briefly felt. During the depression and the second world war, immigration stalled.[85] Canada, too, sought to prevent the travel of people, including (and especially) Jews fleeing the Nazis.[86]

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[82] Daniel Ghezelbash, "Legal Transfers of Restrictive Immigration Laws: A Historical Perspective" (2017) 66:1 Int'l & Comp LJ 235 at 243; Making the Mosaic, *supra* note 82 at 95-99.
[83] Audrey Macklin, "Historicizing Narratives of Arrival: The Other Indian Other" in *Storied communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011) 40 at 49-50. Also see Renisa Mawani, *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (Durham: Duke University Press, 2018).
[84] PC 1923/0185, (1923) C Gaz, 4107.
[85] See Making the Mosaic, *supra* note 82 at 191-193.
[86] See Irving Abella and Harold Troper, *None is Too Many: Canada and the Jews of Europe (1933-1948)* (Toronto: University of Toronto Press, 2017).

Fresh life was breathed into the idea that immigrants needed pre-authorization to travel to Canada after peace was brokered in 1945. The European refugee crisis, and Canada's need for labour, prompted Canadian officials to fan out across Europe to receive and process immigration applications. Before a person could travel to Canada, they needed to present medical and immigration pre-clearances.[87] The idea of the visa, however, remained ill-defined and poorly understood. In 1952, while Parliamentarians studied a new Immigration Act, one Member of Parliament explained that "[s]ince visa is not an everyday term, I think it should be defined, so that people may know exactly what they are talking about when they speak of a visa."[88]

As the visa became more common, it began to cause friction between Canada and the newly established airline industry. A representative of Trans-Canada Air Lines told Parliamentarians that his company was unhappy that it had to pay the detention and deportation costs for some properly documented passengers rejected by Canadian officials. He explained that his airline transported people between Canada and British colonies in the Caribbean. Increasingly, Canadian officials were granting visas to "many Italians" who were subsequently denied admission to Canada when they landed. Trans-Canada Air Lines resented the idea that they should be responsible for paying to return someone to Italy, when they only brought them from, for example, Bermuda on the strength of documents issued by a Canadian official. This complaint signalled the power of economic incentives and disincentives. It was one thing, the airlines said, for ships that carried thousands of people to be responsible for detention and deportation costs of a few passengers. It was quite another for an airline that only carried a few dozen people to be saddled with the expense.[89]

The threat of expense was used increasingly by the government to discipline transportation companies. On top of holding the companies liable for detention and deportation costs, new fines were implemented for bringing some classes of migrants. A 1953 regulation required carriers to pay a $300 fine for certain classes of undocumented persons: each

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[87] *Commission of Inquiry on War Criminals in Canada: Report (Part I: Public)*, (Ottawa: Minister of Supply and Services Canada, 1986) at 217–224; Making the Mosaic, *supra* note 82 at 348.
[88] Canada, House of Commons, Special Committee Appointed to Consider Bill No. 305 (An Act Respecting Immigration), "Evidence", *Official Report of the Debates (Hansard)*, (18 June 1952) at 92.
[89] *Ibid* at 119.

undocumented "mentally defective," "diseased," or "physically defective" person brought to Canada.[90] In 1962, the law was amended to allow the government to criminally prosecute carriers who ran afoul of the rule.[91] In 1976, this law was broadened, so that companies could be fined for each undocumented migrant they brought, not just those who fell into specific categories.[92]

At the same time, however, the scope of carrier sanction was narrowed. The same law relieved carriers of the costs of deportation for properly documented persons rejected at the border or later ordered deported. This change, Canadian officials said, would encourage carriers to ensure that only documented persons were given passage: "transportation companies will have very material savings because if passengers are carried with a visa, of course, the company is absolved of responsibility."[93]

A change in migration patterns, in response to the rise of the visa, meant that this change in the law did not eliminate the tension between the airlines and the government, but increased it. Increasingly, Canadian officials and airlines reported that people started to travel on high-quality fake documents or using other peoples' documents. When improperly documented people arrived in Canada, the government took the position that they were the financial responsibility of the carrier. The liabilities could be large. The *Globe and Mail* reported that in 1982 Air Canada was required to pay $850,000 "to feed and accommodate 1,200 passengers who decided to stay without first asking permission." Even though "[w]here the refugee flow has been particularly heavy, Ottawa has reacted by requiring visas before departure," the carriers were still stuck with expense because "[t]here is no way the carrier can be sure the stay is not intended to be permanent."[94]

The airlines complained to Parliamentarians that the law was unfair because the transportation companies had no control over who they could board: "As long [as] they have their transportation, their fare, their passport and that type of thing, we are obliged to carry

[90] SOR 53-220, s 18(6).
[91] SOR 62-36, s 29(3)
[92] SOR 76-389, s 1.
[93] Canada, House of Commons, Standing Committee on Labour, Manpower and Immigration, "Evidence", *Official Report of the Debates (Hansard)*, 3:50 (12 July 1977) at 25.
[94] Carey French, "Airlines seek end to refugee burden," *Globe and Mail* (1 December 1984) T8.

them."[95] The airlines articulated three main arguments in support of this proposition. First, they said that they had neither the ability nor the expertise to detect high-quality forgeries of Government of Canada documents. Second, many 'non-genuine' travellers were detected because they destroyed their documents, or handed them off to another person, mid-flight. The airlines thought it was unfair to make the companies responsible when individuals were actively trying to defraud them and the government. Finally, the companies said that the costs in Canada were too high. Canadian refugee adjudicative processes, the airlines said, took too long to conclude, leading to significant detention costs.[96] One airline official explained that "[i]n many countries, including the United States, the cases (of detainees) are generally reviewed within two or three days, for a decision to be made about their status."[97]

In 1984, some airlines reached a breaking point and engaged in a form of corporate collective action. To protest ballooning detention charges, some carriers simply declined to pay any detention or deportation charge. The protest was successful, in part, because a convoluted dispute resolution process in the law made it difficult for Canada to enforce judgments against the airlines. When airlines objected to a charge, the government could only enforce payment if it initiated a quasi-criminal prosecution within six months of the unauthorized arrival. This process was costly and unwieldy. If "in every case you have to go to court," an official explained years later, "… you spend an awful lot of money and tie up a lot of court time just trying to pursue this."[98] By 1987, over $3 million in detention and deportation charges had gone unpaid.[99]

That same year, 174 Sikh refugees landed in Nova Scotia after travelling by ship from European refugee camps. The unexpected arrival of irregular migrants on boats prompted a political crisis. Prime Minister Brian Mulroney recalled Parliament to debate Bill C-84, the

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[95] Canada, House of Commons, Standing Committee on Labour, Manpower and Immigration, "Evidence", *Official Report of the Debates (Hansard)*, 2:30 (2 June 1922) at 81.
[96] *Ibid*, 81–96.
[97] Dorothy Lipovenko, "Ottawa and airlines meeting to discuss cost of detainees," *Globe and Mail* (24 January 1985) M1.
[98] Canada, House of Commons, Legislative Committee on Bill C-86, an Act to amend the Immigration Act and other Acts in consequence thereof, "Evidence", *Official Report of the Debates (Hansard)*, 3:14 (30 October 1992) at 39.
[99] See Canada, House of Commons, Legislative Committee on Bill C-84, an Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof, "Evidence", *Official Report of the Debates (Hansard)*, 1:2 (18 August 1987) at 13.

Deterrents and Detention Bill. It, along with companion legislation reforming refugee adjudication, was designed to deter unauthorized refugee arrivals. The government explained that its goal was to reduce the number of refugee claims made each month from 2,000 to 800.[100]

To help achieve this goal, the government looked to increase the pressure on airlines. Penalties for bringing undocumented persons to Canada increased and Parliament imposed a specific statutory obligation on carriers to check the documents of each traveller. This proposal provoked familiar protests from the transporters:

> We feel we should not be held responsible when we comply with all requirements prescribed by government. We cannot interrogate; we have no powers of interrogation. We are not mind-readers; we do not know what the person is going to say. And we certainly do not know what the immigration officer is going to detect from the conversations. [101]

The government did implement one new policy to address the airlines' concerns. In 1989 it established the Immigration Control Officer Network, "which aimed at better protecting the integrity of the refugee determination process and the immigration program as a whole."[102] Canada posted ten officers overseas and gave them a core task: to help airlines screen documents, detect forgeries, and identify imposters. Nonetheless, some airlines continued their protests refusing to pay detention and deportation costs.

In 1992, the airlines and Canada reached a compromise to address the fact that "certain transportation companies followed a strategy of systemic objection" to fine payment.[103] Canada agreed to solely assume the direct liabilities for detaining migrants pending the resolution of their matters while airlines remained responsible for removal/deportation costs. In place of the unwieldy quasi-criminal method to enforce payment, a new administrative penalty regime for bringing improperly documented arrivals was implemented. Each carrier that brought an

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[100] Richard Cleroux, "Power of new migrants law shocks critics," *Globe and Mail* (12 August 1987) A1.
[101] Canada, House of Commons, Legislative Committee on Bill C-84, an Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof, "Evidence", *Official Report of the Debates (Hansard)*, 1:8 (24 August 1987).
[102] Citizenship and Immigration Canada, *Review of the Immigration Control Officer Network – Final Report*, (Ottawa, 2001), online: *Internet Archive*, <https://web.archive.org/web/20130627185102/http://www.cic.gc.ca/english/resources/audit/ico/11background-e.asp> [https://perma.cc/8MU5-UQ5V] [ICON Report].
[103] *Regulatory Impact Statement*, SOR 93-44, (1993) C Gaz II, 630 at 642.

improperly documented person to Canada would be required to pay a set fee (equal roughly to the cost of three-day-long detention). Critically, airlines could reduce the administrative fees if they entered into an agreement with Canada to implement enhanced screening methods. To support carriers in developing enhanced document screening, Canada in turn agreed to increase funding for the Immigration Control Network so that Canadian officers could provide on-the-spot training and support to "assist with document screening abroad."[104] To put it simply, the more policing measures the airlines took on, the fewer economic penalties they would be exposed to.

Refugee advocates opposed this new arrangement, believing that it was designed to waylay people in danger. David Matas, the President of the Canadian Council for Refugees, said that carrier sanctions were preventing people who needed protection from arriving in Canada. He advocated for the elimination of all carrier penalties:

> We would say at the very least, all of the provisions in the bill that make it harder for airlines and increase the severity of the sanctions, that decrease the level of the threshold that has to be crossed in order for a violation to occur by the airlines, should be deleted. We would go even further and say that the act itself about carrier sanctions should be deleted.[105]

Alex Neve of Amnesty International told Parliamentarians that "unless governments can demonstrate that provisions such as visa requirements and transportation company liability do not obstruct the possibility of an individual's seeking protection from persecution, such measures should not be enacted."[106] The government was not moved by this advocacy.

By 2000, the Immigration Control Network was entrenched. Its staff complement had grown from ten officers to forty-three and the program enjoyed the widespread support of the airlines.[107] In testimony before the *Standing Committee on Citizenship and Immigration*, a representative from the Air Transport Association of Canada explained that of all the reforms his association sought, he planned to "push hardest" on:

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[104] *Ibid* at 649.
[105] Canada, House of Commons, Legislative Committee on Bill C-86, an Act to amend the Immigration Act and other Acts in consequence thereof, "Evidence", *Official Report of the Debates (Hansard)*, 2:5 (30 July 1992) at 39.
[106] *Ibid*, 1:4 (29 July 1992).
[107] ICON Report, *supra* note 103.

> the increased use of immigration control officers abroad. We find they demonstrably improve our performance in interdiction. They easily pay for the cost of additional personnel by the reduction of demand on the refugee determination or immigration process for illegal migrants.[108]

This framing showed that for Canada and the airlines the visa, and programs designed to protect its integrity, remained "the most explicit blocking mechanism for asylum flows."[109]

This confidence in the visa is partly explained by experience related to visa relaxations in the 1990s. Three years after the Czech Republic was established in 1993, Canada eliminated the temporary visa requirement for Czech nationals. But within a year, the visa was reimposed. The point of the reimposition was unambiguous:

> After the imposition of the visa requirement on Czechs, which came after 1,285 refugee claims were made in the first nine months of 1997, the number of claims dropped dramatically. An Immigration Department official said the drop was proof that the visa requirement was working to deter asylum-seekers.[110]

Canada followed a similar pattern with respect to Hungary. In 1994, Canada dropped its visa requirement against Hungarians, only to reimpose it in 2001, citing a surge in Roma refugee claims.[111]

In 2004, however, changing political imperatives started to make the visa a less attractive option for managing refugee migrations, at least with respect to European nationals. On May 1, 2004, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia all joined the European Union. One political objective of the bloc is to secure visa reciprocity for all EU citizens. This means that the EU works to "achieve visa-free travel for citizens of all Member States… to every non-EU country whose citizens can travel to the EU/Schengen area without a visa."[112] Beginning immediately after the 2004 enlargement, EU officials

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[108] Canada, House of Commons, Standing Committee on Citizenship and Immigration, "Evidence", *Official Report of the Debates (Hansard)*, (9 February 2000) at 1719.
[109] John Morrison and Beth Crosland, "The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy" (2001) UNHCR Working Paper No 39 at 28.
[110] Estanislao Oziewicz, "Repeat refugees strain system," *Globe and Mail* (30 November 2000) A20.
[111] No Refuge, *supra* note 47 at 720-729.
[112] "EU visa reciprocity mechanism - Questions and Answers" (13 July 2016), online: *European Commission* <https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_16_2506> [https://perma.cc/2BLQ-R5WY].

"reiterated at the highest political level at all the EU-Canada summits"[113] the importance of this objective.

Canada again dropped the visa requirement against Czech nationals in 2007 and against Hungarian nationals in 2008. History started to repeat. In 2009, the Czech restriction was reimposed after an increase in refugee claims. Again, one ethnic group was cited as the reason for the reimposition, with one anonymous immigration official telling the *Globe and Mail* that the "minority Roma community – once called Gypsies – are behind the spike in claims."[114]

The political and economic reaction was swift. The European Parliament adopted a resolution calling on Canada to re-lift the restrictions. Prague recalled Canada's ambassador and imposed its own visa restriction on Canadian diplomatic passport holders. The European Union Commission likewise advised the Canadian government that it might impose a general visa requirement on all Canadian diplomatic and service passport holders for EU travel.[115] More importantly, the Czech government indicated that it would stand in the way of Canadian economic objectives. In 2009, negotiations between Canada and the EU on a comprehensive free-trade agreement kicked off. Immediately, the Czech government indicated that visas would be a major issue during the negotiations. Each member of the EU bloc must ratify and sign off on major economic arrangements and, unless the visa issue was resolved, Prague said it would withhold its signature. In 2013, Canada lifted the visa requirement with Canada's immigration Minister explaining "[t]his obviously relates to the conclusion of the Canada-Europe comprehensive trade agreement."[116]

The incident with the Czech Republic demonstrated that, with respect to European Union countries, visa restrictions on small countries—with the weight of the EU behind them—could become major diplomatic irritants. As players in the larger Canada-Europe relationship, small countries like the Czech Republic and Hungary could use EU policy and heft to significant effect.

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[113] Alejandro Eggenschwiler, "The Canada-Czech Republic Visa Affair: a test for visa reciprocity and fundamental rights in the European Union" (2004) CEPS Paper in Liberty and Security in Europe at 8 [Visa affair].
[114] Jane Taber and Steven Chase, "Canada aims to curb flow of Czech asylum seekers," *Globe and Mail* (7 May 2009) A4.
[115] Visa affair, *supra* note 114 at 6.
[116] Josh Wingrove, "Canada lifts Czech travel visa, smoothing wrinkle in EU trade deal," *Globe and Mail* (14 November 2013) online: <https://www.theglobeandmail.com/news/politics/canada-lifts-czech-travel-visa-smoothing-wrinkle-in-eu-trade-deal/article15440977/> [https://perma.cc/SL7G-JWPQ].

By the mid-2000s, this meant that visa restrictions and pre-authorization to temporary travel were largely off the table for dealing with refugee migrant flows from EU countries.

This shifted new pressure onto Canada's existing refugee identification and interdiction efforts. As with the Czech Republic, after the visa requirement against Hungarians was lifted, the number of persons making refugee claims increased significantly. Between 2008 and 2012, over 11,000 Hungarians sought protection in Canada. Most of the claimants were Romani and the government's response to the increase in claims had troubling racial overtones. The Minister of Citizenship and Immigration, Jason Kenney, complained that Hungarian refugee claims were "bogus" and that claimants were in Canada to "benefit from the generosity of Canada's social welfare system."[117]

Various options to deter the movement of Hungarians were considered, from a visa-imposition to a policy of mass detentions for Roma claimants. Ultimately the government's primary response was to reform the refugee determination system by reducing the substantive and procedural protections available to the nationals of some countries. Citizens of specific "designated countries of origin" were denied access to health and social welfare benefits and found their procedural and substantive rights in the refugee adjudicative process watered down.[118] Eventually, Canadian courts struck down all these measures for unconstitutionally discriminating against some classes of refugees.[119]

Beyond these legislative innovations, Canadian officials also used other tactics to deter Roma Hungarian migration. For example, in 2013, Canada launched an advertising campaign focused on the Hungarian town of Miskolc, home to a large Romani population, warning people against coming to Canada to claim protection.[120]

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[117] Cited in No Refuge, *supra* note 47 at 721.
[118] *Ibid* at 726-728.
[119] See *YZ v Canada (Citizenship and Immigration)*, 2015 FC 892 (CanLII), [2016] 1 FCR 575 (striking down limitations on appeal rights); *Feher v Canada* (Public Safety and Emergency Preparedness), 2019 FC 335 (CanLII), [2019] 3 FCR 207 (striking down an extended bar against applying for a pre-removal risk assessment).
[120] Nicholas Keung, "Roma refugees: Canadian billboards in Hungary warn of deportation" in *The Toronto Star* (1 February 2013) online: <https://www.thestar.com/news/canada/2013/01/25/roma_refugees_canadian_billboards_in_hungary_warn_of_deportation.html> [https://perma.cc/PHH8-LFNQ].

In 2012, CBSA officials reported internally on an intelligence operation known as Project SARA,[121] which has been condemned for invoking racist and anti-Roma stereotypes.[122] This operation focused on Hungarian refugee claimants and looked to verify the "widely accepted assumption that many of these individuals are taking advantage of Canada's refugee processing system, social assistance, and other benefits."[123] This government report explains, betraying its racism, that Romani people that "[t]hey are known to engage in petty theft, break and enter, possession of property obtained by crime, fraud and forgery, and assault, and many engage in similar activities while in Canada."[124] The Project SARA report (which is partially redacted) summarizes Canadian efforts to understand and manage the migration of Roma Hungarians to Canada. While noting that a visa reinstatement would be "controversial," the report suggests that "it may be the most effective way to control the movement of Hungarian nationals."[125]

As an alternate measure, the Project SARA authors note that the CBSA gave its International Control Officers (rebranded as Liaison Officers ['LO']) a new remit, tasking them "with screening some Hungarian travellers to determine if they are properly documented."[126] The report explains that the CBSA issued new "written guidance" to help Liaison Officers understand "their authorities to advise the airlines not to carry improperly documented passengers."[127]

The internal Project SARA report is noteworthy for its directness. It explains that the CBSA's objective is to "mitigate this threat"[128] and "mitigate this irregular migration movement" of Roma Hungarians.[129] In contrast, the "written guidance" the Project SARA document refers to is notable for its vagueness. Despite being written in response to "recent developments,"[130] it

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[121] Canada Border Services Agency, "Project SARA: International and Domestic Activities: Final Report" (Ottawa: CBSA, 31 January 2012) [Project SARA].
[122] Louise Elliott, "Hungarian Roma refugee claimants targeted in CBSA report" in *CBC News* (17 October 2012) online: <https://www.cbc.ca/news/politics/hungarian-roma-refugee-claimants-targeted-in-cbsa-report-1.1212569> [https://perma.cc/BB56-CM9U].
[123] Project SARA, *supra* note 122 at 12.
[124] *Ibid* at 6.
[125] *Ibid* at 54.
[126] *Ibid* at 54.
[127] *Ibid* at 22.
[128] *Ibid* at 8.
[129] *Ibid* at 5.
[130] *Ibid* at 22.

neither refers to refugees nor to Roma Hungarians. Rather, it addresses "foreign nationals in possession of visa-exempt passports travelling to Canada to remain on a permanent basis but who have not been issued a permanent resident visa or who intend to work or study and have not been issued a work permit or study permit."[131] The document instructs Liaison Officers to watch for "indicators" that a person is not properly documented and, if present, to "advise a transporter that a foreign national is improperly documented."[132]

This document marks a major transformation in the role of Liaison Officers and in airline boarding decisions. When established, the ICO network was designed to help airlines screen for imposters and non-genuine documents. Now, airlines and Liaison Officers were tasked with assessing whether visa-exempt travellers were, in the context of the migration of Roma Hungarian refugees, visitors or not. The government officials who drafted the document, however, insisted that this was not the guidance's purpose:

> Transporters have no legal responsibility with respect to determining that a foreign national is or may be inadmissible to Canada as a non-genuine or non-bona fide visitor. That determination is made by an examining officer at a Port of Entry. Therefore, the LO's advisory role does not include recommending that a foreign national be denied boarding based on assessment of their bona fides. To do so would be to advise the transporter to act outside of its legal responsibilities.[133]

The distinction between assessing a person's *bona fides* and determining whether a person is "improperly documented" is, Canada now admits, a meaningless one. In 2020, when asked under cross-examination what the difference between the two concepts is, a senior CBSA official in charge of supporting Liaison Officers explained: "Honestly in this case it's semantics."[134] In fact, the official reasoned, transportation companies are duty bound to make assessments regarding the admissibility of their passengers:

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[131] Canada Border Services Agency, "OPS-2012-05: The CBSA Liaison Officer's Role in Providing Advice to Transporters Concerning Improperly Documented, Visa-Exempt Foreign Nationals" (Ottawa: CBSA, May 2012). [Providing Advice to Transporters]
[132] *Ibid*.
[133] Providing Advice to Transporters, *supra* note 132 at 2.
[134] Cross-Examination of Arthur Nause*, supra* note 76 at 35.

> Q: …are you suggesting that the airlines have such a responsibility to ensure that a person boarding a Canada-bound flight who states as the purpose of their travel a visit may actually intend to come to Canada for a different purpose?
>
> A. If they observe certain indicators, if they observe indicators that the person is travelling for that purpose, then yes.
>
> Q. So is the airline actually legally responsible for determining the purpose of a passenger's travel to Canada?
>
> A. Under that description, yes, like I said [transporters] have to be ensured [sic]… that they are boarding people who are properly documented.[135]

This expanded understanding of airline responsibility, and the role of CBSA officers abroad, was, the authors of the Project Sara report candidly acknowledged, insufficient to address the problem of Roma Hungarian migration because airline and Liaison Officer boarding decisions were easily circumvented. If a person was denied boarding on one plane, sometimes they "used alternate transit points" to make "their way to Canada, thereby shifting the problem elsewhere."[136] Put differently, Canada could not easily recognize a person denied access to one aircraft when they presented themselves in another airport. But even so, complaints accumulated that this project was racist. In 2016, after receiving complaints that Canada-bound Roma travellers were being deboarded (even before the eTA came online), the Hungarian Minority Rights Commissioner investigated and found that screenings were "conducted in a manner that violates the requirement of equal treatment."[137]

Evolving joint efforts with the Americans, however, meant that Canada only stepped up its interdiction program and allowed for blanket exclusions, not just one-off deboarding orders, at one gate, at one airport. After 9/11, interest in technological solutions to perceived border security problems increased. The American *Enhanced Border Security and Visa Entry Reform Act of 2002*, for example, required countries to upgrade the quality of their passports: all countries seeking to maintain the visa-exempt status of their citizens for travel to the United States had to

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[135] *Ibid* at 38.
[136] Project Sara, *supra* note 122 at 8.
[137] Opinion on Preliminary Screening, *supra* note 6 at 341.

issue machine-readable and tamper-resistant passports to their nationals.[138] More importantly, Canada worked with the United States during this period to develop a technologically advanced continental security perimeter. By 2004, Canada largely harmonized its visa rules with the United States, developed standards for secure documentation "involving common technologies and information protocols," and both countries increased their complement of overseas border officials, instructing the officers to work together.[139]

In 2011, as part of the *Beyond the Border Action Plan* with the US Canada agreed to consolidate its migrant screening mechanisms even more by using:

> a common approach to screening methodologies and programs, including pre-travel screening and targeting, "board/no-board" perimeter screening and decision processes, and technology.

This system, which became the eTA, was promised to "mirror measures taken in the United States."[140] In 2008, the Americans established the *Electronic System for Travel Authorization*: an automated system that visa-exempt travellers needed to use prior to boarding a flight to the United States.

In Parliament, the eTA was hailed not just as a security measure but as an important refugee interdiction tool. Under questioning, an Assistant Deputy Minister of the Department of Citizenship and Immigration acknowledged that the "idea with the ETA is to do [… checking] offshore, so that before the individuals actually get to a port of entry and then have access to Canada to make a refugee claim." Upon this view, the eTA would have "advantages from a refugee perspective, which is that we will get fewer refugee claims." This would lead to cost savings because if "an eTA is refused, then that's a cost avoidance of $30,000 per refugee claimant." He singled out Hungary as a country for which the eTA would usefully identify and interdict refugee claimants: "particularly from countries that are visa free—Hungary for one,

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[138] Enhanced Border Security and Visa Entry Reform Act of 2002, Pub L No 107-173 (2002), §§ 303, 307.
[139] Anderson, Christopher, "Out of Sight, Out of Mind: Electronic Travel Authorization and the Interdiction of Asylum Seekers at the Canada-US Security Perimeter" (2017) 47:4 American Review of Canadian Studies 385 at 391.
[140] Public Safety Canada, "Beyond the Border Action Plan" (Ottawa: Public Safety, 2011).

where we do have a large influx or have had a large influx of refugee claimants from a country without a visa—the eTA is another tool to help us manage those pressures as well."[141]

In 2016, the eTA came online. With it came a new ability: the power to cancel an eTA so that a person could not board a plane to Canada anywhere in the world. The first effect was to universalize a no-board decision and make its bite felt beyond the single boarding gate. The secondary effect was to consolidate the role of airlines and their private contractors in immigrant screenings.

Taken together, over a few decades, Canada transformed airlines from companies that were only responsible for ensuring that a person had the requisite travel documents, to private actors that screen for and assess a person's *bona fides* for travelling to Canada – all with an aim of blocking the arrival of refugees and preventing access to Canada's refugee determination system. This history is central for understanding that the Kisses were not randomly pulled out of the check-in line. Canada built a program and trained screeners to spot potential refugees. Because some groups of refugees face persecution on account of their race, private actors responsible for enforcing eTAs will attempt to identify potential refugees by reaching to racial profiling. This is particularly likely in contexts where the Canadian government has made repeated and extensive efforts to deter the arrival of refugees from visa-exempt countries who face persecution on account of their race, efforts that no doubt filter into how the Canadian government trains these private actors.

This long history of the eTA and the way that history is intertwined with the Canadian government's efforts to block perceived Roma asylum seekers helps us understand what exactly was going on at the airport in Budapest on 3 April 2019. To put it bluntly, the system was operating as intended: spotting people who look like Andrea and Attila and preventing them from travelling to Canada.

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[141] Canada, House of Commons, Standing Committee on Citizenship and Immigration, "Evidence", *Official Report of the Debates (Hansard)*, (12 November 2012) at 1049.

Part III – The legality of eTA interdiction under international law

In this part, we review how international human rights law (specifically customary international law, the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*)[142] applies to Liaison Officer decisions and discuss what international human rights protect migrants from discrimination. We also discuss how international law has been interpreted and applied to the United Kingdom's interdiction program.

We focus on international human rights law for several reasons. Most importantly, Canada's refugee interdiction policy operates overseas, where Canadian courts have sometimes held that the *Charter* may not apply, but where international human rights law does clearly apply.[143] Even if Liaison Officer decisions and conduct overseas were recognized as government action attracting *Charter* scrutiny—a finding that we believe is properly available given the governmental nature and control of the interdiction policy—Canadian courts have been loath to extend *Charter* protections to non-citizens.[144] The federal courts have occasionally gone further, reading in a citizenship requirement for the mere assertion of *Charter* rights outside Canada even though Parliament has instructed that all immigration decisions must be "consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination."[145]

The problem with focusing on international human rights law is that this body of law has limited application or force in Canadian courts. It can play a supportive or confirming role when

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[142] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976 [*ICCPR*]; *Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, Can TS 1970/28 (entered into force 4 January 1969, accession by Canada 14 October 1970 [*CERD*]

[143] *R v Hape*, 2007 SCC 26 at para 101; *R v McGregor*, 2023 SCC 4; See also *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FC 336, aff'd 2008 FCA 401, leave to appeal to the SCC denied, 2009 CanLII 25563.

[144] Catherine Dauvergne, "How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill Law Journal 663.

[145] See eg *Slahi v Canada (Justice)*, 2009 FC 160 at para 48, aff'd *Slahi v Canada (Justice)*, 2009 FCA 259; IRPA, *supra* note 12, ss. 3(3)(d) and (3)(3)(f).

interpreting rights, according to some jurists, but it does not directly create obligations.[146] While conceding that many Canadian judges are hostile to international human rights law, there are two avenues for using international human rights law that can have substantial force domestically. First, international human rights law limits what is a reasonable exercise of discretion in immigration decision-making. Second, international human rights law creates norms that demand justificatory responses from policy makers.

A. The domestic application of international law in Canada.

Customary international law applies automatically in Canada via the doctrine of adoption, which treats international norms rising to the level of custom as automatically part of the law of Canada absent legislation to the contrary.[147] International human rights law treaties to which Canada is a party are binding on Canada in relation to other states, but do not immediately become part of domestic law. Precisely how binding international human rights law treaties apply in domestic law is a matter of some complexity.[148]

The orthodox view is that Canada's constitutional order and dualist approach to international law require transformation or implementation of international treaties for them to have the force of domestic law.[149] Scholars of international law, however, suggest that "implementation" may need be given a broad and purposive interpretation where implementation is subtle or where implementation is non-existent because Canada considers domestic law to already fully comply with international law.[150]

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[146] *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 28; *contra Nevsun Resources Ltd v Araya*, 2020 SCC 5.

[147] *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 94. [Nevsun]

[148] See Gib Van Ert, *Using International Law in Canada Courts*, 2nd ed (Toronto: Irwin Law, 2008), pp 325-326 (discussing the "uncertainty that besets the reception of international human rights law in Canada" on account of inconsistent judicial decision-making and a lack of a coherent theory to explain judicial reliance on some international sources). [Using International Law]

[149] Nevsun, *supra* note 148 at para 159; *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 23; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras 78-80, leave to appeal to the SCC granted, 2021 CanLII 32434.

[150] Phillip M Saunders et al, *Kindred's International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed (Toronto: Emond, 2019), p 207; See also Global Affairs Canada (Treaty Law Division), "Policy on Tabling of Treaties in Parliament", online: https://treaty-accord.gc.ca/procedures.aspx?lang=eng (noting at s 6.2 that "government can accept the obligations within many treaties without new legislation [but] [i]n other cases, Canada must amend its domestic law before undertaking treaty obligations").

For example, in the case of the *ICCPR* and the *ICERD*, like the other main United Nations human rights treaties, no express implementing legislation was ever tabled in Parliament.[151] Yet Canada has represented to the United Nations Human Rights Committee, during the *ICCPR* periodic review process, that Canada has "statutes, policies and practices that implement the Covenant [and that] many of the rights contained in the Covenant are constitutionally protected by the *Canadian Charter of Rights and Freedoms*."[152]

Regardless of Canada's stated position, there are additional reasons to conclude that binding international human rights treaties apply in the context of Canada's eTA regime. First, the presumption of conformity is a statutory principle that encourages judges to avoid constructions of domestic law that would bring Canada into non-compliance with international law; however, this presumption can be rebutted and does not permit judges to use international law to alter clear legislative intent.[153] The *Immigration and Refugee Protection Act* entrenches this presumption by instructing that the "Act is to be construed and applied in a manner that … complies with international human rights instruments to which Canada is signatory."[154] This leaves no doubt that the *ICCPR* and *ICERD* determine how the *Act* is interpreted and applied unless Parliament has expressed an unambiguous contrary intention.[155]

Second, beyond statutory interpretation, there are also principled reasons to apply international human rights law to the actions of Canadian officials operating overseas. Such officials cannot undertake activities sanctioned by foreign law that "would place Canada in violation of its international obligations in respect of human rights" as protected by treaty or custom.[156] International law also informs and constrains the exercise of discretion by administrative decision-makers who operate overseas.[157]

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[151] Using International Law, *supra* note 149 at 330.
[152] Department of Heritage (Human Rights Program), "International Covenant on Civil and Political Rights, Sixth Report of Canada" (Ottawa: Public Works, 2013), para 8.
[153] *R v Hape*, 2007 SCC 26 at para 53; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 60
[154] IRPA, *supra* note 12, s 3(3)(f).
[155] *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para 87; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 49; *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 at para 55-57; and *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 72, 106.
[156] *R v Hape*, 2007 SCC 26 at para 101; See also *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FC 336, aff'd 2008 FCA 401, leave to appeal to the SCC denied, 2009 CanLII 25563.
[157] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 114.

Together, customary international law and these treaty-related principles of statutory interpretation and extra-territorial application combine to place two important legal constraints on Canada's eTA regime and the overseas Canada Border Services Agency Liaison Officers who exercise administrative discretion. First, the authorizing statutory scheme must be interpreted and applied in a manner that conforms with international human rights law unless that scheme expressly derogates from what international law requires. Second, the investigations and decisions of Liaison Officers must also accord with international human rights law.

In addition to constraining immigration decision-making, international human rights law can also create norms that demand justificatory responses from domestic policy makers, including in the context of interdiction policy and racial profiling. For example, the Standing Committee on Citizenship and Immigration recently studied allegations that immigration decision-making "systematically and unjustifiably disadvantage certain populations based on characteristics such as race and country of origin."[158] The Committee made several recommendations to address what it found was evidence of differential and discriminatory treatment that resulted from individual and systemic racism, including in the context of artificial intelligence supported decisions.[159] The Committee's work to end direct and indirect racial profiling in immigration decision-making is consistent with federal and provincial policy efforts to address racial bias and profiling more generally in a variety of public policy areas.[160] What is remarkable about the Committee's report is that it called for a policy response to overseas racial

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[158] Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, *Promoting Fairness in Canadian Immigration Decisions: Report of the Standing Committee*, 44th Parl, 1st Sess, No 12 (November 2022) (Chair: Salma Zahid), p 1. [CIMM, *Promoting Fairness*]

[159] CIMM, *Promoting Fairness*, pp 47-52, 75.

[160] See e.g. Canada, Canadian Heritage, *Departmental Results Report, 2019-2020* (Ottawa: Canadian Heritage, 2020) (describing the federal government's Anti-Racism Strategy and development of the Federal Anti-Racism Secretariat); Canada, Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Systemic Racism in Policing: Report of the Standing Committee*, 43rd, 2nd Sess, No 6 (June 2021) (Chair: John McKay); Michael H Tulloch, *Report of the Independent Police Oversight Review* (Toronto: Province of Ontario, 2017); Wanda Phillips-Beck et al, "Confronting Racism within the Canadian Healthcare System: Systemic Exclusion of First Nations from Quality and Consistent Care" (2020) 17 International Journal of Environmental Research and Public Health 8343; Akwasi Owusu-Bempah et al, "Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada" (2023) 13:4 Race and Justice 530; Angela Lee, "Open Your Eyes: Teaching and Learning about Anti-Asian Racism and the Law in Canada" (2023) 46:1 Dalhousie Law Journal 111.

discrimination in immigration decision-making even though some federal court decisions appear to place such decisions beyond judicial scrutiny. This suggests that international human rights law can create or contribute to norms that lead to a domestic policy response even where Canadian courts have said that such laws do not create domestic legal obligations.

B. Customary international law

Customary international law prohibits racial discrimination.[161] In 1970, the International Court of Justice identified protection from racial discrimination as an obligation *erga omnes* that all states have an interest in protecting.[162] The prohibition of racial discrimination is also one of eight norms recognized as *jus cogens* or peremptory from which no derogation is permitted.[163] The special nature of peremptory norms and the related principle of non-derogation mean that other social goals may be insufficient to justify a limitation of the prohibition even in the context of an emergency.[164]

In its general comment on non-discrimination, the United Nations Human Rights Committee defined discrimination as:

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[165]

This includes both direct discrimination where the purpose of a law is to treat a person or group differently based on an enumerated ground, and indirect discrimination where a seemingly neutral law nonetheless treats a person or group differently based on an enumerate ground.

The challenge with applying this type of abstract definition of discrimination in the context of migration is that international law, at least in its present conception, also recognizes a fundamental distinction between nationals and non-nationals (or citizens and non-citizens) and

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[161] Malcolm Shaw, *International Law* 6th ed (Cambridge: Cambridge University Press, 2008) at 286.
[162] *Barcelona Traction, Light and Power Company,* Limited, [1970] ICJ Rep 3 at para 34.
[163] Report of the International Law Commission, 71st Sess, UN Doc A/74/10 at 147.
[164] Nevsun, *supra* note 148 at para 103.
[165] UN Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, 37 Sess of the HRC (10 November 1989).

the sovereign right of nation states to treat the latter category differently in appropriate cases.[166] This can create opportunities for states to make distinctions based on citizenship that are a pretext for discrimination based on other grounds.[167]

Canadian law also permits governments to expressly derogate from customary international law to the extent it exists. For example, in *Mack v Canada (Attorney General)*, the Ontario Court of Appeal held that the prohibition of racial discrimination, even if it was found to have existed before 1950, was ousted by immigration legislation that required immigrants of Chinese origin to pay a "head tax" to migrate to Canada and later effectively barred this group altogether.[168] Although the law may be changing. Recent jurisprudence from the Supreme Court of Canada, albeit not discussing derogation, suggests that peremptory norms may be treated differently and that a "human-centric" lens is required for interpreting international law.[169] In any event, the *Immigration and Refugee Protect Act* includes no derogation provisions that authorize officers to treat any permanent or temporary resident applicant differently based on race.

The customary prohibition against racial discrimination has been recognized and applied to interdiction programs in other jurisdictions, most notably in the United Kingdom. Like Canada's interdiction program, the United Kingdom targeted nationals of Romani ethnic origin in response to an influx of asylum seekers of this ethnicity. In *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, a majority of the High Lords found that "Roma were, simply because they were Roma, routinely treated with more suspicion and subjected to more intensive and

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[166] Richard Perruchoud, "State Sovereignty and Freedom of Movement" in Brian Opeskin et al, eds, *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012), pp 123-151; See also, infra, subsections c) and d) of this Part, discussing permissible citizen/non-citizen distinctions in the context of the *ICCPR* and *CERD* respectively; See also Vincent Chetail, "Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel" (2016) 27:4 European Journal of International Law 901-922 (discussing the international rule of hospitality in historical context and its juxtaposition with the more recent emergence of migration control premised on state sovereignty); Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67:4 The Modern Law Review 588.

[167] Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination" (1985) 79 American Journal of International Law 283 at 312.

[168] *Mack v Canada (Attorney General)* (2002), 60 OR (3d) 756, 2002 CarswellOnt 2927 at para 33 (CA)

[169] *Nevsun*, *supra* at note 148 paras 103-113.

intrusive questioning than non-Roma" and that this differential treatment was contrary to customary international law.[170]

C. International Covenant on Civil and Political Rights

Racial discrimination is also prohibited by Article 26 of the *International Covenant on Civil and Political Rights* (*ICCPR*).[171] In *Williams Lecraft v Spain*, a police officer asked the author (complainant), a dual American/Spanish national, for her identity document when she exited a train. She was the only passenger questioned. When she "asked the police officer to explain the reasons for the identity check; the officer replied that he was obliged to check the identity of people like her, since many of them were illegal immigrants."[172] He advised further that police were under instructions to "carry out identity checks of 'coloured people' in particular."[173]

The United Nations Human Rights Committee considered whether this type of immigration enforcement was contrary to Article 26. The Committee held that such checks were permissible to control "illegal immigration" and that differential treatment will not amount to discrimination where it is based on "reasonable and objective" criteria that are designed to "achieve a purpose which is legitimate under the Covenant."[174] However, the Committee also held that these checks could not be executed in a way that amounted to racial profiling:

> [W]hen the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics.[175]

Acting otherwise, the Committee reasoned, would impugn the dignity of the person stopped and spread xenophobia in the general public.[176] In the particular case, the Committee found that the

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[170] *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*, [2004] UKHL 55 at paras 97-98. [*Immigration Officer at Prague Airport*]
[171] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976/47, accession by Canada 19 May 1976.
[172] UNHRC, Rosalind Williams Lecraft v Spain, Comm No 1493/2006, UN Doc CCPR/C/96/D/1493/2006 (27 July 2009), para 2.1.
[173] *Ibid.*
[174] *Ibid*, paras 7.2 and 7.4.
[175] *Ibid*, para 7.2.
[176] *Ibid.*

author was the only person stopped for identification and that race was a decisive factor in the stop. This did not satisfy the reasonable and objective requirement. Accordingly, Article 26 was found to be violated.[177] Likewise, in *Immigration Officer at Prague Airport*, a majority of the UK High Lords concluded that the British procedures for interdicting prospective refugee claimants were inconsistent with Article 26 of the *ICCPR*. The Court held that "[a] scheme which is inherently discriminatory in practice is just as incompatible as is a law authorising discrimination."[178]

D. International Convention on the Elimination of All Forms of Discrimination

Unsurprisingly, the *International Convention on the Elimination of All Forms of Discrimination* (*ICERD*) also prohibits discrimination, including racial discrimination.[179] There is a two-step process for analyzing discrimination under the *ICERD*. A complainant must first show that they are a "victim" of discrimination in the sense that they have been treated differently based on an enumerated ground (race, colour, descent, or national or ethnic origin). If this is established, the analysis shifts to asking what specific obligations in the *ICERD* where breached.[180]

The distinction, exclusion, restriction or preference that constitutes differential treatment can be direct or indirect. Accordingly, a complainant need not establish that the purpose of a law or practice is to discriminate, it is enough that the effect of a law or practice results in differential treatment based on an enumerated ground. Where discriminatory effect is asserted, the question is whether the law or policy has "an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin."[181] The UN Committee for the Elimination of Racial Discrimination analyzes the full context of the claim to assess whether discrimination occurred. For example, where resolutions adopted by a municipal council are

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[177] *Ibid*, para 7.4.
[178] *Immigration Officer at Prague Airport*, *supra* note 171 at para 103.
[179] *International Covenant on the Elimination of All Forms of Racial Discrimination,* 21 December 1965, 660 UNTS 195, Can TS 1970/28 (entered into force 4 January 1969, accession by Canada 14 October 1970). [*ICERD*]
[180] UNCERD, L.R. et al. v Slovak Republic, Comm No 31/2003, UN Doc CERD/C/66/D/31/2003 (10 March 2005), para 10.2.
[181] UNCERD, General Recommendation No 14: On Article 1, Paragraph 1, of the Convention, 42nd Sess, UN Doc A/48/18 (1993) at paras 1-2.

facially neutral, but the petition that instigated these resolutions was "advanced by its proponents on the basis of ethnicity," the Committee has found discrimination.[182]

Applying this framework to distinctions between citizens and non-citizens is complex. International borders are "inherently racial" in the sense that the exclusion or inclusion they enforce is often racially disparate.[183] Article 1(2), however, expressly provides that the "Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."[184] Moreover, the meaning of "national origin" within the *ICERD*, according the International Court of Justice, does not include "current nationality".[185] This means that states may be able to make some distinctions based on nationality without offending the *ICERD*.

Nonetheless, in its General Comment No. 30, the Committee instructs that distinctions between citizens and non-citizens can constitute discrimination where they are not in pursuit of a legitimate aim or are not proportional to this aim.[186] Distinguishing between legitimate and illegitimate distinctions is not a simple task.[187] "[B]orders structurally exclude and discriminate on a racial basis as a matter of course often through facially race-neutral law and policy."[188] But one form of differentiation against non-nationals for which there is clear guidance is racial profiling.

In its General Recommendation No. 36, the Committee defines racial profiling as "law enforcement relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in [unlawful] activity."[189] Based on its experience, the Committee recognizes that migrants, asylum seekers, and ethnic minorities, such as the Roma, are some of the "most

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[182] UNCERD, L.R. et al. v Slovak Republic, Comm No 31/2003, UN Doc CERD/C/66/D/31/2003 (10 March 2005) at paras 10.4-10.5.
[183] Racial Borders, *supra* note 10 at 448.
[184] *ICERD*, Article 1(2).
[185] Qatar v United Arab Emirates, Judgment on preliminary objections, ICJ (4 February 2021).
[186] UNCERD, General Recommendation No 30: On Discrimination Against Non-Citizens, 65th Sess (2005) at para 4.
[187] E. Tendayi Achiume, "Governing Xenophobia" (2021) 51 Vanderbilt Law Review 333.
[188] Racial Borders, *supra* note 10 at 449.
[189] UNCERD, General Recommendation No 36: On Preventing and Combating Racial Profiling by Law Enforcement Officials, 92nd Sess, UN Doc CERD/C/GC/36 at para 18.

vulnerable to racial profiling."[190] Racial profiling need not be explicit. It can arise, for example, with algorithmic decision-making which may exacerbate racial profiling against these vulnerable groups where: (1) the data used relies on protected characteristics, (2) proxy information is used that is associated with a protected characteristic, (3) "the data used are biased against a group," and (4) the data suffers from poor quality control.[191]

In addition to being discriminatory, racial profiling in the context of immigration decision-making violates two provisions of the *ICERD*.[192] Article 2 requires states to condemn racial discrimination, including by taking effective measures to modify government policies that are discriminatory. Article 5 requires states to guarantee the right to leave any country, including one's own, without distinction as to race. A direct or indirect policy of racial profiling in immigration decision-making is the opposite of condemnation. It also results in race becoming a determinative factor for who can leave a country.

In *Immigration Officer at Prague Airport*, a majority of the UK High Lords held that the *ICERD* permits differentiation between citizens and non-citizens but does not allow states to "discriminate between non-citizens on racial grounds,"[193] reasoning that the Roma were routinely treated differently and subject to more intensive questioning.[194] This was contrary to Article 2 of the *ICERD*.[195]

Conclusion

Does Canada's interdiction program that targeted the Kisses through racial profiling withstand international legal scrutiny? One of the main purposes of Canada's eTA regime is to prevent asylum seekers from reaching Canada. A careful review of the genealogy of the eTA regime, however, shows how this technology was created, at least in part, to interdict asylum

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[190] *Ibid* at para 11.
[191] *Ibid* at para 32; See also Anupam Chander, "The Racist Algorithm" (2017) 115:6 Michigan Law Review 1023; Megan Garcia, "Racist in the Machine" (2016) 33:4 World Policy Journal 111; Petra Molnar and Lex Gill, *Bots at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada's Immigration and Refugee System* (Toronto: International Human Rights Program and the Citizen Lab, 2018).
[192] UNCERD, General Recommendation No 36: On Preventing and Combating Racial Profiling by Law Enforcement Officials, 92nd Sess, UN Doc CERD/C/GC/36 at para 23.
[193] Immigration Officer at Prague Airport, *supra* note 171 at para 101.
[194] *Ibid* at para 97.
[195] *Ibid* at paras 100-103.

seekers, most notably the Roma. Like in *Immigration Officer at Prague Airport*, a key factor in the establishment of the eTA regime was an influx of Roma refugee claimants from Hungary. While the screening factor employed to target this group ("association with refugees") is arguably facially neutral, the factor functions as a proxy for ethnic origin when it is applied in the context of Hungary (and other eastern European countries).

Once an eTA is granted, Canada relies on third-party security agents to select which travellers should be subjected to additional screening in overseas airports and potential deboarding. The documents obtained by the Kiss family through painstaking litigation reveal that agents are trained to identify potential refugee claimants. But the related training materials make no mention of how they should identify such people. Like in *Williams Lecraft v Spain*, Andrea Kiss's firsthand account is that they were the only travellers pulled from the line for additional scrutiny, which suggests that agents are using racial profiles to identify whom to question.

There is both a customary and treaty-based prohibition of this type of racial profiling. The prohibition applies extra-territorially. It applies if the purpose of Canada's eTA regime is to exclude the Roma or if the effect is to exclude the Roma. This type of targeting based on ethnic origin harms the dignity of the people, like the Kisses, who are prevented from enjoying freedom of movement, and it also spreads xenophobia in the general public by institutionalizing racism. For those who believe that racism is a grave evil, the harm caused is disproportionate to any benefit that Canada may obtain from keeping potential refugee claimants out of the country. It is contrary to customary peremptory norms, Article 26 of the *ICCPR*, and Articles 2 and 5 of the *ICERD*, all of which is binding on Canada in the context of eTA cancellation decisions.

Recall, we argued that Canada developed this race-based program of interdiction in fits and starts. No one, as far as we can tell, set out one day to install liaison officers overseas, who directed airlines, who hired private security so that they would racially profiled travellers. Rather, over decades and differing political moments, the logic of refugee exclusion congealed as a racist program. Is this a controversial claim? We do not think so. The regime we described here is no different than the one the British House of Lords described as discriminatory and wrong. The same international law that is good for the United Kingdom is, we show, good for Canada.

No one needs international law to tell them that racial profiling is wrong. But international law's clarity on this point—elevating the prohibition against racial discrimination to a peremptory norm—is useful against racist policies that develop slowly and incrementally. If the eTA and the racial profiling program it enables is the production of many small steps, some that were explicitly discriminatory and others that had discriminatory effects, international law can arrest its momentum and demand a roll back. This is the point: the Convention's purpose is to eradicate racism. As a signatory, Canada must take the initiative and evaluate its own programs for unintended racism and root out its programs that discriminate based on race. At best, in this case, Canada has not paid enough attention to the discriminatory effects of this program of migrant interdiction. It is past time to look closely.

Which returns us to the Kisses. The Kisses deserve redress and the opportunity to travel to Canada without discrimination. But the more important remedy, and indeed what animates the Kisses, is a desire to end racial profiling in Canada and elsewhere. Racism is no "small thing" and confronting racial discrimination must take precedence over other policy objectives. Accordingly, Canada must end the racial profiling in its policies that prevented the Kisses from boarding their plane to Canada.

Epilogue

Following acceptance of this article, the Federal Court, per Fothergill J, issued a decision in the Kisses' case.[196] The Court granted the application on the narrow grounds that the Liaison Officer had acted unreasonably, but rejected the Kisses' claims that they had been discriminated against. The Court reviewed and cited numerous documents in the record establishing that Canada has an interdiction policy that applies in Hungary to keep refugees from reaching Canada.[197] The Court also reviewed uncontested evidence establishing that the majority of refugee claimants from Hungary will be people of Roma ethnicity and that the Roma people are a historically disadvantaged group.[198]

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[196] *Kiss v Canada (Citizenship and Immigration)*, 2023 FC 1147.
[197] *Ibid* at paras 58-60.
[198] *Ibid* at paras 61, 66.

The Court did not identify any particular test for discrimination that it applied in the circumstances, whether from domestic law or international human rights law. The Court also did not discuss the difference between direct discrimination and indirect discrimination. Instead, the Court proceeded directly to concluding that the applicants' "evidence does not establish the existence of a coordinated program by the CBSA to interdict travellers abroad solely on the ground that they are of Roma ethnicity or associated with Roma refugee claimants in Canada."[199]

The Court accepted that there could be instances, none of which were identified by the Court, where screening travellers because of their "association with refugees" would not be arbitrary or discriminatory. As a result, the Court concluded that discrimination at law was not established, either in general or with respect to the specific facts raised in the case.[200] Based on this finding, the Court reasoned that it did not have to consider whether Canada's interdiction policy was contrary to the *Charter* or international human rights law.[201] The Court refused to certify a question of general importance, which immunizes the Court's reasoning from appellate scrutiny. However, the Court did caution Canada to take steps to ensure that its interdiction policy does not result in discrimination:

> The Minister maintains that the immigration status of a traveller's intended hosts in Canada may in some circumstances be a relevant consideration in assessing the traveller's *bona fides*. As Baroness Hale remarked in *Prague Airport*, the implementation of policies in response to 'an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group requires enormous care if it is to be done without discrimination' (at para 97). While this Court has not found that the CBSA's use of 'indicators' amounts to a discriminatory practice, the Minister must ensure that the application of indicators to Roma travellers, or those who associate with Roma people, does not inadvertently result in discriminatory decisions.[202]

It is unclear what the Court meant by this passage. In our view, the record before the Court established that screening for "association with refugees" in the context of Hungary, at least inadvertently, screened travellers based on race. In any event, the Court did not engage

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[199] *Ibid* at para 69.
[200] *Ibid* at para 74.
[201] *Ibid* at paras 75-76.
[202] *Ibid* at para 81.

with this evidence of indirect discrimination or with domestic and international tests for indirect discrimination. In fact, the Court's reasons reveal no test for discrimination whatsoever. Instead, the Court focused only on whether the Liaison Officer's decision was based primarily or solely on Roma ethnicity.

What is clear is that the Court was unwilling to articulate why screening travellers for their "association with refugees" is permissible and rationally connected to a legitimate government objective. The Court was also unwilling to engage in any analysis of whether this is permissible under the *Charter* or international human rights law.[203] As a result, this aspect of Canada's interdiction policy will continue to operate to the ongoing detriment of the Kisses and people similarly situated until such time as policy makers or another court, perhaps drawing on our analysis of international law, addresses the issue.

[203] The Supreme Court of Canada recently held in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 116-117 that international legal arguments cannot be ignored when analyzing exercises of discretion made pursuant to the *Immigration and Refugee Protection Act*.