Federal Court of Appeal Overturns Federal Court Ruling on Safe Third Country Agreement

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The Canadian Federal Court of Appeal, on June 27, 2008, reversed the Federal Court decision that had earlier struck down the Safe Third Country Agreement with the United States.[1] Implemented on December 29, 2004, the Agreement severely restricted refugee claimants' rights in seeking protection in Canada if they first entered the U.S. Refugee claimants who first entered Canada were similarly restricted in the U.S.[2]

The "Safe Third Country Agreement" was designed to put an end to "asylum shopping" by individuals who had first entered the U.S. or were failed U.S. refugee claimants and wanted to seek the protection of Canada.[3]

This Federal Court of Appeal decision overturns the November 29, 2007 ruling by Mr. Justice Phelan of the Federal Court of Canada. He ruled that the Safe Third Country Agreement had violated Canada's *Charter of Rights and Freedoms*, the *1951 Geneva Convention on Refugees*, and the *Convention Against Torture*.[4]

The Appellate Court rejected the argument that the U.S. was not a safe country for refugees. Justice John Evans held that the lower court exceeded its authority by pronouncing on "wide swaths of U.S. policy and practice."[5] The Federal Court of Appeal stated that the proper test was whether the federal cabinet acted in good faith when it negotiated the Safe Third Country Agreement and was

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[1]*Canadian Council for Refugees v. R.*, 2008 FCA 229.

[2]For an outline of the Agreement see "The Safe Third Country Agreement: Impact on Refugee Claimants," by Edward C. Corrigan, 9 *Bender's Immigration Bulletin*, September 15, 2005, pp. 1406-1407.

[3]"Landmark refugee ruling overturned on appeal," by Janice Tibbets, *The National Post*, July 9, 2008; see also, "Yes, America is a safe haven," *Globe and Mail*, July 2, 2008.

[4]*Canadian Council for Refugees v. R.*, 2007 FC 1262, 69 Imm. L.R. (3d) 163.

[5]*Canadian Council for Refugees v. R.*, 2008 FCA 229, para. 120.

satisfied that the U.S. granted sufficient protection to refugee claimants at the time the Agreement was signed.

> [79] Two weeks before the effective date of the promulgation, Mr. Asadi, the UNHCR representative in Canada, reiterated before the House of Commons Standing Committee on Citizenship and Immigration that "we consider the U.S. to be a safe country" (Appeal Book, Vol. 11, p. 3247). Given the position of the UNHCR, the main supervisory body in relation to refugee protection, it cannot be suggested that the GIC was not acting in good faith, when it designated the U.S. as a country that complies with its Convention obligations.[6]

The decision was a bitter defeat for the Canadian Council of Refugees, Amnesty International, the Canadian Council of Churches, and a Colombian national identified as John Doe. Mr. Doe was denied the right to make a refugee claim in the U.S. and faced deportation to Colombia where he had a fear of being persecuted and tortured.[7]

The Federal Court of Appeal also concluded that the refugee advocacy groups that launched the legal action did not have a direct stake in the case and therefore did not have legal standing.

> [112] Counsel for the appellant did not pursue before us the question of standing. However, the fact that the respondent organizations are not affected by the outcome of the litigation cannot be altogether separated from the issues of prematurity and utility. The inclusion of John Doe as an applicant does not cure the latter difficulties, even though, having been denied asylum and a withholding of removal from the United States, he may wish to come to Canada to claim refugee protection. . .[8]

Justice Noel in a second set of Reasons for Decision ruled that a challenge to the designation of the U.S. as a safe third country could only be brought by a refugee who has been denied entry to Canada and returned to the U.S. and was facing a real risk of return to persecution and torture.

> [103] There is, in this case, no factual basis upon which to assess the alleged Charter breaches. The respondent organizations' main contention is directed at a border officer's lack of discretion to forgo returning a claimant to the U.S. for reasons other than the enumerated exceptions set out in section 159.5 of the Regulations. This challenge, however, should be assessed in a proper factual context - that is, when advanced by a refugee who has been denied asylum in Canada pursuant to the Regulations and faces a real risk of

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[6]*Ibid*., para. 79.

[7]"Rights Groups Express Dismay with Appeal Court Ruling on Safe Third Country," Canadian Council for Refugees, Canadian Council of Churches and John Doe Media Release, 2 July 2008.

[8]*Canadian Council for Refugees v. R.*, 2008 FCA 229, para. 112.

> *refoulement* in being sent back to the U.S. pursuant to the Safe Third Country Agreement.[9]

"It is completely unrealistic for a prospective refugee to launch a Canadian court challenge because they are turned away at the U.S.-Canada border within minutes or hours," said the Executive Director of the Canadian Council for Refugees, Janet Dench.[10]

In the majority reasons for the Federal Court of Appeal, Justice Noel ruled that the Federal Court's finding "that the US does not 'actually' comply is irrelevant." Noel concluded that so long as Cabinet had "considered" the human rights situation in the U.S. and was not acting in bad faith when signing the agreement, the circumstances facing the refugees affected by the agreement was not important.

> [80] It follows that the fact that the respondents believe, and that the Applications judge agreed, that the U.S. does not "actually" comply is irrelevant since this was not the issue that the Applications judge was called upon to decide (compare *Telecommunications Workers Union v. Canadian Radio-Television and Telecommunications Commission*, 2003 FCA 381, [2004] 2 F.C.R. 3 at paras. 39 to 43). What is relevant is that the GIC considered the subsection 102(2) factors and, acting in good faith, designated the U.S. as a country that complies with the relevant Articles of the Conventions and was respectful of human rights.
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> [81] I should add as an aside that even if "actual compliance" was a condition precedent, the conclusion reached by the Applications judge to the effect that the U.S. did not meet that requirement at the time of promulgation could not stand since it is largely based on evidence which postdates the time of the designation (see paras. 87 and 88 below).
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> [82] In short, it was not open to the Applications judge to hold on any of the alleged grounds that the designation of the U.S. as a safe third country and the related Regulations were outside the authority of the GIC or that the Safe Third Country Agreement between Canada and the U.S. was illegal. I would therefore answer the second certified question in the negative.[11]

Andrew Brouwer, one of the lawyers representing the refugee advocacy organizations said, "This decision is deeply troubling." Brouwer also argued,

> The Court of Appeal has not addressed the fundamental human rights issues at stake in this case, and has largely insulated the government from review

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[9]*Ibid*., para 103.

[10]"Landmark refugee ruling overturned on appeal," by Janice Tibbets, *The National Post*, July 9, 2008.

[11]*Canadian Council for Refugees v. R.*, 2008 FCA 229, paras. 80-83.

> by the Court. The Court's finding on public interest standing is likewise a step backwards. In effect, the Court of Appeal is demanding that before a court can hear a challenge to the legality of the agreement a refugee must put her life at risk by coming to the border, getting refused and handed over to US authorities for likely deportation to torture or persecution. This requirement is both impractical and dangerous.[12]

President of the Canadian Council for Refugees, Elizabeth McWeeny, said "We are deeply disappointed that the Court condones the Canadian government disregarding US practices that place refugee lives in danger." McWeeny added, "This judgment fails to give life to the promise of protection in the Charter and in international human rights agreements which Canada has signed."[13]

Gloria Nafziger, Refugee Coordinator for Amnesty International Canada, commented, "Sadly the court chose to focus on the scope of the review and questioned the right of the petitioners to bring forward such a challenge, rather than on the human rights issues at stake for refugees." She also said that "[t]he evidence shows that United States falls short of its responsibilities to protect refugees under international law. It fell short of those responsibilities on the day the Agreement was signed, and has continued to fall short of these responsibilities to this day."[14]

This ruling is going to be appealed to the Supreme Court of Canada.[15]

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[12]"Rights Groups Express Dismay with Appeal Court Ruling on Safe Third Country," Canadian Council for Refugees, Canadian Council of Churches and John Doe Media Release, 2 July 2008.

[13]*Ibid*.

[14]*Ibid*.

[15]"Advocates to appeal anti-refugee court ruling," by Lesley Ciarula Taylor, *Toronto Star*, July 12, 2008.