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"Qui bene interrogat bene docet" "He who questions well teaches well"

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A Very Happy New Year from all of us at ImmQuest!

Safe Third Country Agreement with United States Overturned by Federal Court of Canada

Edward C. Corrigan

In a surprise ruling, the Federal Court of Canada has overturned the "Canada United States Safe Third Country Agreement" in a judgment issued on November 29, 2007 (*Canadian Council for*

Full story on page 2

How to Better Prepare Your Case in Light of Recent Jurisprudence

Mario D. Bellissimo

Introduction

I often lecture on the issue of "case law is not just for litigators". In our busy practices, it is often difficult to be kept apprised of recent trends and it is difficult to organize our library to make it

Full story on page 4

INSIDE

Focus – 2008 and Beyond!

- **The Safe Third Country Agreement with United States Overturned 1**
  The Federal Court of Canada issues a surprise ruling
  — *Edward C. Corrigan*
- **How to Better Prepare Your Case in Light of Recent Jurisprudence 1**
  The importance of keeping up with recent trends in case law
  — *Mario D. Bellissimo*
- **Breast Augmentation Surgery 6**
  Part II – The Canadian perspective and financial data
  — *Mario D. Bellissimo*
- **The Safe Third Country Agreement 8**
  Part II – Qualifications for exceptions for refugees coming to Canada from the U.S.
  — *Edward C. Corrigan*
- **Case Tracker .10**
  Cases you should know!
  — *Mario D. Bellissimo*

Please send your questions to *ImmQuest* care of Mario D. Bellissimo at mdb@obr-immigration.com. If you have any questions you would like asked of either Citizenship and Immigration Canada or the Canada Border Services Agency send it along and we will ask on your behalf.

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34

Safe Third Country Agreement with United States Overturned by Federal Court of Canada

continued from page 1

Refugees v. R., 2007 CarswellNat 4598, 2007 FC 1262). In a 124 page decision, Mr. Justice Michael Phelan ruled that the Safe Third Country Agreement which came into effect on December 29, 2004 and regulated refugee movement between Canada and the United States violates refugee rights and that the United States did not meet the conditions required to be considered a "Safe Country" under the terms of the Agreement.

The Agreement was also held to be contrary to the *Canadian Charter of Rights and Freedoms.* "The interest at stake is highly important to an individual's life, safety and dignity", wrote Justice Phelan. The Judge stated,

> I would therefore conclude that the designation of the U.S. as a safe third country leads to a discriminatory result, in that it has a much more severe impact on persons who fall into the areas where the U.S. is not compliant with the Refugee Convention or CAT (Convention Against Torture), as well as discriminating and exposing such people to risk based solely on the method of arrival in Canada. [para. 333]

> For the reasons outlined in this judgment, the United States' policies and practices do not meet the conditions set down for authorizing Canada to enter into a Safe Third Country Agreement (STCA). The U.S. does not meet the Refugee Convention requirements nor the Convention Against Torture prohibition (the Maher Arar case being one example.) Further, the STCA does not comply with the relevant provisions of the *Charter.* [para. 7]

The Court ruled that a one-year deadline to file refugee claims in the U.S. was inconsistent with the international conventions because it increased the risk that claimants would be sent back to countries where they faced danger or torture.

Justice Phelan also noted that the U.S. definition of terrorist activities can include those who never had any intention of contributing to terrorism.

> It is difficult to imagine how the [Governor-in-Council] could have reasonably concluded that the U.S. complies with the Refugee Convention when the law allows the exclusion of claimants who *involuntarily* provided support to terrorist groups. The terrorist exclusions are extremely harsh and cast a wide net which will catch many who never posed a threat. In returning claimants to the U.S. under these circumstances, the weight of the evidence is that Canada is exposing refugees to a serious risk of *refoulement* (return to danger) and torture which is contrary to the applicable articles of the Refugee Convention and the Convention Against Torture. [para. 191]

In his ruling, Justice Phelan said concerns over the American authorities' use of expedited removals and use of detention, combined with concerns over the United States' rigid application of the one-year bar to refugee claims, the provisions governing security issues and terrorism based on a lower standard, all called into question whether the U.S. is safe for asylum seekers and met the requirements of the Safe Third Country Agreement.

The Canadian government also ignored a section in the regulations that required the government to conduct reviews of the Agreement and to assess the conditions for refugee claimants in the United States. Justice Phelan noted that the Minister has not established a review process as required under the law.

The Federal Court specifically ruled that:

> (a) that the paragraphs 159.1 to 159.7 of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement are *ultra vires* in that the conditions to the enactment of the Regulations specified in IRPA s. 102(1) had not been met;
>
> (b) that the Governor-in-Council acted unreasonably in concluding that the United States complied with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;
>
> (c) that the Governor-in-Council has failed to ensure the continuing review, particularly of the practices and policies of the United States, as required by IRPA s. 102(2); and

(d) that the Regulations and the operation of the Safe Third Country Agreement are contrary to the sections 7 and 15 of the *Charter of Rights and Freedoms* and are not saved by section 1. [para. 338]

Article 33 of the 1951 Geneva Convention is a prohibition against *refoulement* or return of a refugee to country where there was a genuine risk of torture. Section 7 of the *Canadian Charter of Rights and Freedom* states that, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Section 15(1) states, "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

This ruling of the Federal Court will not immediately change the restrictions on the right of entry of refugee claimants coming to Canada from the United States. The Agreement will continue to apply until the issue is finally decided by the Federal Court. "The parties have until December 17, 2007 to make submissions on questions for certification and form and content of the Judgment." The Replies from the parties are due on January 14, 2008. After these submissions are received the Federal Court will makes its final Order in accordance with the reasons issued on November 29, 2007.

It is very likely that legal representatives of the Government of Canada will submit a question for certification so that the decision can be appealed to the Federal Court of Appeal.

The ruling came about after the Canadian Council for Refugees, the Canadian Council of Churches, Amnesty International and John Doe, a failed refugee claimant from Columbia, went to the Federal Court for a ruling on the legality of the Agreement. They argued that the Agreement violated the rights of refugee claimants and that the United States did not comply with the legal requirements to protect refugees to qualify as a "safe third country".

The Safe Third Country Agreement closed the border to the majority of refugee claimants who came through the United States and wanted to make a claim for protection in Canada. The agreement required that all refugee claimants who did not meet the limited exclusion provisions set out in the Agreement (primarily that they had a close family relative in Canada or were stateless) were denied the right to make a refugee claim in Canada. These refugees were required to make a claim for asylum in the United Sates. Similarly most refugees who entered Canada were required to make a claim in Canada and not in the United States.

The Canadian Council for Refugees, the Canadian Council of Churches, Amnesty International and John Doe, in launching this court challenge, "argued that this approach would be acceptable if the U.S. asylum system met recognized international standards for the protection of human rights, including refugee rights, but it did not".

The Federal Court judgment found that it was unreasonable to conclude that the United States complies with the *United Nations Convention Against Torture* and the UN Refugee Convention and pointed to serious shortcomings in the U.S. asylum system including:

- deportations of individuals from the United States to countries where they are at risk of torture;
- concerns that women who are fearful of gender-based violations such as domestic violence are often denied protection;
- broad categories that exclude individuals from refugee status.

Alex Neve, Secretary General of Amnesty International Canada, said, "In Canada, in the United States and around the world, refugees and refugee claimants are among the most vulnerable members of any society and regularly experience harsh treatment and systematic disregard for their most basic human rights". The representative for Amnesty International also commented, "This decision is an eloquent reaffirmation of how important it is that governments scrupulously ensure the safety of refugees and uphold the full range of their human rights. This is a message that will and must be heard around the world".

"We are pleased that the Court condemned the failure of the federal Cabinet to review the status of the U.S. as a safe third country. When human lives are at stake, as they are in the safe third country agreement, Cabinet has a serious obligation to monitor changes, an obligation that they have neglected for the last three years", said Janet Dench, Executive Director of the Canadian Council for Refugees.

The three organizations that initiated the court challenge called on the Canadian and U.S. governments to immediately suspend the operation of the Safe Third Country Agreement.

A spokesperson for Canadian Citizenship and Immigration Minister Diane Finley said the Safe Third Country Agreement is still in effect and the government was reviewing its options.

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How to Better Prepare Your Case in Light of Recent Jurisprudence

continued from page 1

meaningfully accessible. At the risk of beating a drum on the issue, it is critical to stay apprised and of recent case law if we can; it will make you a better practitioner, more marketable and in the end more successful. I have taken three diverse areas of law—Pre-Removal Risk Assessments, Skilled Workers and Temporary Resident Permit Requests—as a glimpse of how recent case law makes a difference.

Pre-Removal Risk Assessment (PRRA)

Two recent trends that emerged in the area of PRRA applications are the questions of "what is new evidence" and "when is an oral hearing required?"

The relevant legislative provision on the issue of "new evidence" for the purposes of a PRRA application is found at s. 113 of the *Immigration and Refugee Protection Act* (IRPA), which states:

> 113. Consideration of an application for protection shall be as follows:
> (a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

The current state of the law on the interpretation and application of this section is found in the recent decision in *Elezi v. Canada (Minister of Citizenship & Immigration)*,[1] in which Mr. Justice de Montigny states:

> Only evidence that existed before the Board's negative decision requires an explanation before it can be admitted with a PRRA application. As for evidence that arises after the Board's decision, there is no need for an explanation. The mere fact that it did not exist at the time the decision was reached is sufficient to establish that it could not have been presented earlier to the Board.
>
> That being said, a piece of evidence will not fall within the first category and be characterized as "new" just because it is dated after the Board's decision. If that were the case, a PRRA application could easily be turned into an appeal of the Board's decision. A failed refugee applicant could easily muster "new" affidavits and documentary evidence to counter the Board's findings and bolster his story. This is precisely why the case law has insisted that new evidence relate to new developments, either in country conditions or in the applicant's personal situation, instead of focusing on the date the evidence was produced. [paras. 26-27]

Relevant questions to pose in your submissions are: is the evidence probative and does it refute the Board's negative credibility finding against the Applicant? Had the applicant submitted this evidence at her hearing before the Board, the Board may have written a very different decision. So while these documents do not raise any "new" risks *per se*, it is submitted that the officer should have considered them pursuant to the first branch of subsection 113(a) of the IRPA. Were supporting letters written after the Board's decision? More importantly, however, it is submitted that the officer should consider new letters because they contain information that goes beyond a mere repetition of what was already in front of the Board.

As stated in *Elezi*:

> In other words, the nature of the information, its significance for the case, and the credibility of its source, are all factors that

1 2007 CarswellNat 577, 2007 FC 240, 62 Imm. L.R. (3d) 66.