

Stay Granted by Federal Court of Appeal on Safe Third Country Agreement

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On January 17, 2008, the Federal Court of Canada issued its order regarding the Safe Third Country Agreement (IMM-7818-05). Mr. Justice Phelan, following his Reasons for Judgment of November 29, 2007, ordered that “this application for judicial review [be] granted and the designation of the United States of America as a ‘safe third country’ [be] quashed.” Justice Phelan ruled that:

1. paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement between Canada and the United States of America are *ultra vires* and of no legal force and effect;
2. the Governor-in-Council acted unreasonably in concluding that the United States of America complied with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;
3. the Governor-in-Council failed to ensure the continuing review of the designation of the United States of America as a “safe third country” as required by paragraph 102(2) of the *Immigration and Refugee Protection Act*; and
4. paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the operation of the Safe Third Country Agreement between Canada and the United States of America violates sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and are not justified under section 1 thereof.

Justice Phelan ordered that “this Order shall take effect on February 1, 2008.”

Three legal questions were also certified by the Federal Court “as questions of general importance”:

1. Are paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement be-

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tween Canada and the United States of America *ultra vires* and of no legal force and effect?

2. What is the appropriate standard of review in respect of the Governor-in-Council's decision to designate the United States of America as a "safe third country" pursuant to s. 102 of the *Immigration and Refugee Protection Act*?

3. Does the designation of the United States of America as a "safe third country" alone or in combination with the ineligibility provision of clause 101(1)(e) of the *Immigration and Refugee Protection Act* violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and is such violation justified under section 1?

Due to the fact that three questions were certified "as serious questions of general importance," the Canadian government was given the option to appeal the Federal Court's Judicial Review of the Safe Third Country Agreement to the Federal Court of Appeal.

The government of Canada appealed the decision to the higher court. The Canadian government also sought a stay of the decision until the matter had been finally decided by the Federal Court of Appeal.

The Canadian government argued that ending the agreement abruptly would lead to a flood of people making refugee claims at Canada's "land borders from the U.S. and cause 'irreparable harm' to the Canadian public."

"Given the volumes of refugee eligibility claims would increase dramatically, an influx would overwhelm the ports of entry and would result in increased pressure on available staff," George Bowles, a director with the Canada Border Services Agency, said in an affidavit.¹

"Other immediate problems that would likely arise... include long waiting times; shortages in food, shelter, and transportation; and health and safety concerns."²

If the agreement is suspended, more refugee claimants may show up at the border. Refugee advocacy groups, however, argued that there is "no evidence the border was unmanageable before the agreement was implemented on Dec. 29, 2004."³

¹"Key court ruling today for border pact: Asylum seekers deal could be suspended," by Nicholas Keung, Toronto Star, January 31, 2008.

²Ibid.

³Ibid.

Stay Granted by Federal Court of Appeal on Safe Third Country Agreement 125

On January 31, 2008, the Federal Court of Appeal granted the Canadian government's request and stayed the ruling that overturned the refugee pact between Canada and the U.S. Chief Justice John Richard of the Federal Court of Appeal said "there should be a full airing of arguments before the Safe Third Country Agreement is suspended" (FCA A-37-08).⁴

Under the Safe Third Country Agreement, which took effect on December 29, 2004, Canada and the U.S. recognized each other's countries as safe places to seek protection. Refugees were required to make their claims for asylum in the first country that they arrived in and could not transit that country and make a refugee claim in the second country. There were a number of exemptions to this rule, primarily the requirement that you had a close family relative in the second country.

Canadian refugee advocates opposed the deal, arguing that the U.S. is not always a safe country for people fleeing persecution. Opponents of the agreement noted that refugee claimants, including children, were often imprisoned for months or even years in the U.S. while their asylum claims were being processed. Critics also pointed out that the American rules and interpretation of who qualified as a refugee were more restrictive. Many claimants who were rejected by the U.S. were later granted the protection of Canada as Convention refugees.

The Canadian Council for Refugees, the Canadian Council of Churches and Amnesty International and an unidentified Columbian refugee claimant in the U.S. named "John Doe" successfully contested the agreement in Canada's Federal Court.

In the November 29, 2007 decision, Justice Michael Phelan ruled the federal cabinet exceeded its jurisdiction in designating the U.S. as a "safe country." The Federal Court ruled that the U.S. does not comply with United Nations conventions concerning the protection of refugees and the prohibition of returning refugees to countries where they faced torture.

The Federal Court also ruled that the return of a refugee claimant to the U.S. from Canada violated the *Charter of Rights and Freedoms* guarantees of equality, life, liberty and security.

Two of the applicants who challenged the Safe Third Country Agreement, the Canadian Council for Refugees and Amnesty International Canada, expressed deep dismay at the decision of the Federal Court of Appeal to stay the Federal Court ruling that struck down the Safe Third Country Agreement.

⁴"Court puts hold on refugee pact ruling," by Jim Bronskill and Bruce Cheadle, The Canadian Press, January 31st, 2008.

In a press release dated February 1, 2008, Gloria Nafziger, Refugee Coordinator for Amnesty International, stated, "This decision gives higher priority to the government's administrative convenience than to the risk of persecution, torture and even death faced by refugees".⁵

Janet Dench, the Executive Director of the Council for Refugees, was also dismayed by the decision to grant the stay. She said, "Obviously we're extremely disappointed and actually shocked that the court would put the administrative convenience of the government over the lives of refugees."⁶ Dench also said, "We know that people do come up to the border, are turned back and end up deported to their country of origin."⁷

Among the submissions to the Federal Court was an affidavit from a woman whose husband was killed in Honduras after being detained at the Canadian border, sent back to the U.S. and deported. Justice Richard noted in his ruling, however, that there was no evidence that the man made a refugee claim in the U.S. or of the circumstances surrounding his deportation.⁸

Dench said there are good reasons to be worried. "The stakes are really high," she said; "We don't know for sure in coming months whether this will happen to other people. But there's certainly a very real possibility that people will end up being sent back to face persecution, torture or even death."⁹

"Every day that the Agreement remains in effect, refugees are at risk of being sent back to face persecution," said Elizabeth McWeeny, President of the Canadian Council for Refugees. "It is shocking to find that the court accepted the government's claim that the 'public interest' is better served by preventing refugees from claiming Canada's protection, than by preventing refugees from being forced back to persecution."¹⁰

In 2006, some 400 people were turned away at the Canadian border based on the Safe Third Country provisions.¹¹ Many more were dissuaded from trying to make a claim in Canada, as they knew they were excluded.

⁵"Stay of Safe Third Country Decision puts refugees' lives at risk," Canadian Council for Refugees and Amnesty International Media Release, 1 February 2008.

⁶Ibid.

⁷Ibid.

⁸"Court puts hold on refugee pact ruling," by Jim Bronskill and Bruce Cheadle, The Canadian Press, January 31st, 2008.

⁹"Stay of Safe Third Country Decision puts refugees' lives at risk," Canadian Council for Refugees and Amnesty International Media Release, 1 February 2008.

¹⁰Ibid.

¹¹"Court puts hold on refugee pact ruling," by Jim Bronskill and Bruce Cheadle, The Canadian Press, January 31st, 2008.

Stay Granted by Federal Court of Appeal on Safe Third Country Agreement 127

The Court of Appeal has agreed to an expedited review of the decision, but a hearing is likely some months away and a decision would not be released for many months after the hearing of the appeal.

The organizations who initiated the legal challenge are considering whether to appeal the decision to grant the stay.¹²

After the Federal Court of Appeal ruling granting the stay, New Democrat MP Olivia Chow said she would put a motion before the Commons Immigration Committee to end the Safe Third Country Agreement. If successful, the motion would then go to the Canadian parliament for a vote, potentially pre-empting the coming Federal Court of Appeal hearing. The conservative government of Stephen Harper does not have a majority in the Canadian House of Commons and the other Canadian parties could potentially pass a resolution revoking the Safe Third Country Agreement with the U.S.

The following is the official notice posted on the website of Citizenship and Immigration Canada:

On January 31, 2008, the Federal Court of Appeal granted the Government's request for a stay of the decision. As a result, the Safe Third Country Agreement between Canada and the United States remains in effect. Under this agreement, people making refugee claims are required to seek protection in whichever of the two countries they enter first.

¹²“Stay of Safe Third Country Decision puts refugees’ lives at risk,” Canadian Council for Refugees and Amnesty International Media Release, 1 February 2008.