

# ImmQuest

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

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## New Immigration Rules in a Devastated Economy! Have we learned from the last recession twenty years ago?

Mario D. Bellissimo, C.S.

### Introduction - Can this Work?

In November 2008 retroactive to February 27, 2008 Citizenship and Immigration Canada (CIC) introduced new rules for Federal Skilled Worker (FSW) applications that include faster processing times and an attempt to repair a broken program. This is part of

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## Safe Third Country Agreement: Update

Edward C. Corrigan

The Canadian Federal Court of Appeal, on June 27, 2008, reversed the Federal Court decision that had struck down the Safe Third Country Agreement with the United States.<sup>1</sup> The Federal Court of

<sup>1</sup> *Her Majesty the Queen and Canadian Council for Refugees et al* 2008 FCA 229. For a more detailed discussion of this ruling see Edward C. Corrigan, "Federal Court of Appeal Overturns Federal Court Ruling on Safe Third Country Agreement," by Edward C. Corrigan, *71 Immigration Law Reporter (3d)*, pp. 48-51. See also "Safe Third Country Agreement Landmark Ruling Overturned by Federal Court of Appeal of Canada," by Edward C. Corrigan, *Bender's Immigration Bulletin*, Vol. 13, No. 16, August 15, 2008, pp. 1023-1025.

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Please send your questions to *ImmQuest* care of Mario D. Bellissimo at [mdb@obr-immigration.com](mailto: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.

## But back to the backlog...

How accurate is the government in marketing the new "Action Plan" as resulting in faster processing of applications, and as a solution to the backlog problem? It is true that if the immigration system is able to process new FSW applications in 6-12 months and eliminate skill wastage and redundancy in part by virtue of faster processing this will be a major step forward but what about the international stain of allowing long standing applicants to languish for years? Clearly there are no easy solutions but, as I have commented before, how we process the backlog will be as important as to how we process the new applicants. Should we encourage multiple FSW applications? Can we not look to the backlog more proactively and screen for in demand applications? Resources, functionality, optics etc . . . are real world limitations not always fully appreciated by all stakeholders but we require a feasible way to address our economic situation because instead of clearing up the backlog in our system the current approach may lead to larger clogging down the road.

## Conclusion

A piece of this length can only raise more questions than answers – answers that may take years to formulate. But from a practitioners point of view it is my respectful submission that we must remain proactive and look to our clients that find themselves in the backlog and breathe new life into their application by either bringing them forward under the new rules or seeking alternatives to terminal delays. We must also look to creativity and multi-disciplinary approaches in our submissions regarding new workers, be it permanent or temporary, and draw on economists and the latest data to ensure the officer reviewing a client's file fully appreciates not only the economic nuances of the application but the social and cultural aspects as well in these challenging times. As other countries slow the draw of immigrants this presents a wonderful opportunity to attract strong immigrants at all levels to further build and contribute to our country. I do hope Service Canada and Citizenship and Immigration Canada remain steadfast in moving forward and do not fall victim to doom and gloom statistics and view further immigration as part of the problem as they did in the late eighties rather than a key opportunity to assist in part, in the remedy.

# Safe Third Country Agreement: Update

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Canada had overturned the "Canada United States Safe Third Country Agreement" in a judgment issued on November 29, 2007.<sup>2</sup> In his 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 U.S.A., violated 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.<sup>3</sup>

The Safe Third Country Agreement severely restricted refugee claimants' rights in seeking protection in Canada if they first entered the United States. Refugee claimants who first entered Canada first were similarly restricted in the U.S.<sup>4</sup> Refugee advocates argued that the United States was not a safe country for refugees.<sup>5</sup> The Federal Court of Appeal ruling overturning the decision was appealed to the Supreme Court of Canada.<sup>6</sup>

## Leave to Appeal to the Supreme Court Denied

On February 5, 2009, the Supreme Court of Canada denied leave to appeal ending this legal challenge to the Safe Third Country Agreement.<sup>7</sup> The decision of the Supreme Court of Canada was met with regret by the Canadian Council for Refugees, Amnesty

2 *Canadian Council of Refugees et al v. Her Majesty the Queen IMM 7818-05*.

3 "Safe Third Country Agreement with United States Overturned by Federal Court of Canada," by Edward C. Corrigan, *ImmQuest*, Vol 4, Issue 1, January 2008, pp. 1-4.

4 For an outline of the Safe Third Country 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. Also published as "The Safe Third Country Agreement: Impact on Refugee Claimants: Part One," by Edward C. Corrigan, *ImmQuest*, Vol. 3, Issue 11, November 2007 p. 1, 4-5 and Part Two *ImmQuest*, Vol. 4, Issue 1 January 2008, pp. 8-9.

5 See for example "America no 'safe haven' for refugees," by Janet Dench, *Toronto Star*, 6 February 2007.

6 Canadian Council for Refugees, Media Release, 29 September 2008, "Supreme Court asked to review Canada's closing of the door on refugees," and see also "Advocates to appeal anti-refugee court ruling," by Lesley Ciarula Taylor, *Toronto Star*, July 12, 2008.

7 Supreme Court of Canada No. 32820, February 6, 2009, *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Her Majesty the Queen (F.C.) (Civil)* (by leave). Coram: McLachlin C.J. and Fish and Rothstein JJ. "The application for leave to appeal from the judgment of the Federal Court of Appeal, Number A-37-08, 2008 FCA 229, dated June 27, 2008, is dismissed."

International and the Canadian Council of Churches who had challenged the legality of the Safe Third Country Agreement.

The Federal Court of Appeal decision overturned the lower court ruling by Mr. Justice Phelan of the Federal Court of Canada. Justice Phelan had found 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*.<sup>8</sup> The Appellate Court, however, rejected the argument that the Safe Third Country Agreement was in violation of Canadian law. For the Federal Court of Appeal Justice John Evans held that the lower court exceeded its authority by pronouncing on "wide swaths of U.S. policy and practice."<sup>9</sup> The Federal Court of Appeal stated that the proper test was whether the Canadian federal cabinet acted in good faith when it negotiated the Safe Third Country Agreement and was satisfied that the U.S. granted sufficient protection to refugee claimants at the time the Agreement was signed.<sup>10</sup>

Elizabeth McWeeny, the President of the Canadian Council for Refugees (CCR) in a press release issued on February 5, 2009 stated, "This decision means that refugees will not have their day in court." She added, "The U.S. is not in fact safe for all refugees, so we deeply regret that the Supreme Court has not taken this opportunity to ensure that Canada provides refugees the protection they need from forced return to persecution."<sup>11</sup>

The refugee support organization in their press release noted that the Federal Court of Appeal did not dispute the lower court's finding of non-compliance and instead it ruled that the conclusion "that the U.S. does not 'actually' comply is irrelevant."<sup>12</sup>

The Press Release also stated, "The courts have therefore permitted the continued operation of the Safe Third Country Agreement, despite the fact that the only court to rule on the question found that the U.S. is in violation of its obligations not to send refugees back to persecution, or anyone back to torture."<sup>13</sup>

The organizations announced that they will "be seeking other avenues to challenge through the courts the unjust removal of refugee claimants to the U.S."<sup>14</sup>

8 Canadian Council for Refugees et al v. Her Majesty the Queen (IMM 7818-05) FC

9 *Her Majesty the Queen and Canadian Council for Refugees et al* 2008 FCA 229, para. 120

10 *Ibid.*, para 79.

11 Press Release from Canadian Council for Refugees, February 5, 2009.

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

For more information see the Canadian Council for Refugees' web page on the Safe Third Country Agreement at: <http://ccrweb.ca/S3C.htm>.

The final Text of the Safe Third Country Agreement that was signed by officials of Canada and the United States on December 5, 2002, as part of "the Smart Border Action Plan," can be found on the Government of Canada web site at: <http://www.cic.gc.ca/english/departement/laws-policy/safe-third.asp>

## Safe Third Country Agreement Exceptions

The U.S.-Canada Safe Third Country Agreement came into effect on December 29, 2004 and after the Federal Court of Appeal ruling remains in force. The agreement substantially changed the rules for people in the U.S. coming to Canada and making a refugee claim at the Canadian-United States border. The Agreement also applied to individuals in Canada who wanted to make an asylum claim in the United States.

For many refugees, the Safe Third Country Agreement means that if they are in the U.S. and applies at a land port of entry to Canada and make a claim for refugee status they will be denied admission by Canadian Immigration officials unless they fall under one of the exceptions to the Safe Third Country Agreement.

The Safe Third Country Agreement also applies to entry to Canada by train and also at airports, only if the person seeking refugee protection in Canada has been refused refugee status in the U.S. and is in transit through Canada after being deported from the U.S.

If the refugee claimant, however, qualifies for one of the exceptions to the Safe Third Country Agreement, they can still make a refugee claim in Canada.<sup>15</sup>

The Agreement does not apply to U.S. citizens or habitual residents of the U.S. who are not citizens of any country ("stateless persons"). American citizens accordingly can make asylum claim in Canada. This may be an important consideration in that many children who are born of refugee parents in the United States acquire American citizenship by right of birth. The same law

15 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.

applies to children born in Canada whose parents are not citizens or landed immigrants.

## Family Exception

If you have a close family relative who is a citizen, a permanent resident, protected person or approved in principle for landing, you can qualify for an exception. You also may qualify if the relative is in the country on a legal work permit or student visa. You also may qualify if the relative is in the country and has a refugee claim that has not been rejected, withdrawn or abandoned. The relative must be:

- A spouse or common-law partner
- A legal guardian
- A child
- A father or mother
- A brother or sister
- A grandfather or grandmother
- A grandchild
- An uncle or aunt
- A nephew or niece

To qualify for an exception as a common-law partner the person (of the same or opposite sex) with whom the refugee claimant is cohabiting in a conjugal relationship must have cohabited for at least a year.

## Unaccompanied Minors Exception

Refugee claimants may qualify under this category of exceptions if they are minors (under the age of 18) who:

- are not accompanied by their mother, father or legal guardian
- have neither a spouse nor a common-law partner, and
- do not have a mother, a father or a legal guardian in Canada or the United States.

Accordingly if the claimant is a minor, or less than 18 years and is not accompanied by their father, mother or legal guardian, or if they are unmarried and their mother, father nor legal guardian

who is not in Canada, and not in the United States the minor refugee claimant will also qualify for an exception. If the parent or guardian is in Canada the claimant should qualify under the close family member exception.

## Public Interest or Suspended Removals Country Exception

A further qualification for exemption to the Safe Third Country rule is if the claimant is a citizen of a country to which Canada has temporarily suspended removals.

The Public Interest exception is for nationals of countries for which Canada has imposed a temporary suspension of removals. However, a temporary suspension of removals does not apply to individuals who are determined to be inadmissible to Canada on grounds of security, violating human or international rights, or criminality.

Currently, Canada has imposed a temporary suspension of removals on the following eight countries:

- Afghanistan
- Burundi
- Democratic Republic of the Congo
- Haiti
- Iraq
- Liberia
- Rwanda
- Zimbabwe

Note: This list of countries may be subject to change. This list should serve as a guide only and is not intended to be an official acknowledgment of country conditions

## Document Holder Exceptions

Refugee claimants may qualify under this category of exceptions if they:

- hold a valid Canadian visa (other than a transit visa)
- hold a valid work permit
- hold a valid study permit

- hold a travel document (for permanent residents or refugees) or other valid admission document issued by Canada, or
- are not required (exempt) to get a temporary resident visa to enter Canada but require an U.S. issued visa to enter the U.S.

Accordingly, the Safe Third Country exclusions do not apply if you have a valid visa to enter Canada, other than a transit visa. You can also qualify for the exception if you come from a country for whose citizens Canada does not require a visa but the U.S. does. These countries currently are Antigua and Barbuda, Barbados, Botswana, Cyprus, Greece, Malta, Mexico, Namibia, Papua New Guinea, Republic of (South) Korea, St. Kitts and Nevis, St. Lucia, St. Vincent, Solomon Islands, Swaziland, and Western Samoa.

## Stateless Exception

Individuals who are Stateless and who have no country also are exempt from the Safe Third Country Agreement. Only individuals who have countries are covered under the Safe Third Country Agreement and stateless individuals therefore are excluded from the Agreement and can make an asylum claim in Canada.

## To Qualify for Exceptions

When the refugee claimant arrives at the border, they must be able to prove that they qualify for one of the exceptions to be admitted. An Immigration officer will interview the claimant to see if they meet any of the exceptions. The Immigration officer will take into account what the claimant says and will look at any documents that are provided. The officer may also make inquiries if the claimant indicates that they have a family member in Canada. The officer will check the immigration databases and may try to speak to the family members on the phone. Claimants should bring documents that show that they qualify for an exception.

It is advisable that the claimant let the family member know that they are coming to the border and have contact information so that Immigration can reach them when a refugee claim is made. If the claimant cannot prove that they qualify for one of the Safe Third Country exceptions it is very unlikely that the claimant will be admitted to Canada and they will be returned to the United

States. It is very important to have the required proof to show that the refugee claimant qualifies for an exception.

Giving false information to an Immigration officer can have very serious consequences. If the claimant gives false information to meet one of the exceptions under Canadian law and Citizenship and Immigration Canada later finds out that the claimant did not give accurate information, they can take away the right to make a refugee claim under section 104(1)(c) of the *Immigration and Refugee Protection Act*.

## Only Applies at Land Entry

The U.S.-Canada Safe Third Country Agreement only applies to refugee claimants making a refugee claim at a land port of entry or entering by train. The exclusion rules do not apply if the claimant arrives by air (transit visas do not qualify) or by water. Claims made at an airport, port or ferry landing are not affected by the Safe Third Country Agreement, even though the claimant has arrived from the United States.

If the claimant enters Canada at a location that is not considered an "official" port of entry, the Safe Third Country Agreement does not apply if they make an Inland refugee claim. However, if the claimant is being removed from the United States under an order and is in transit at a Canadian airport they cannot make a refugee claim in Canada.

The Safe Third Country Agreement also does not apply to claims made inside Canada. Accordingly, if the claimant enters Canada from the U.S. and later makes a refugee claim at an Inland Immigration office they are exempt from the Safe Third Country Agreement and rules. The claimant is also exempt if they are a foreign national who is seeking to re-enter Canada in circumstances where they have been refused entry into the United States without having a refugee claim adjudicated there.

If the claimant meets one of the exceptions to the Safe Third Country Agreement they can make a claim in Canada even if they have applied for asylum in the U.S. and that claim has not been finalized and even if they have been rejected. Accordingly if the refugee claimant has made a claim for asylum in the United States, they can still make a claim in Canada provided they qualify under one of the exceptions.

## Pre-Removal Risk Assessment

Note that even if you meet an exception to the Safe Third Country Agreement you may still be ineligible to make a refugee claim in Canada. For example if you have previously made a refugee claim and have withdrawn it or have been rejected. However, you still may be able to enter Canada and make a Pre-Removal Risk Assessment or PRRA Application. This procedure gives failed refugee claimants a second chance at obtaining the protection of Canada.

You are also not eligible if you have been granted refugee protection by another country, or if you are inadmissible on criminality or security grounds.

The link to the Canadian Government web page on the Safe Third Country Agreement is: <http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html>

## Where to Get Help

There are a number of agencies that can help refugee claimants who may want to come to Canada for protection or make an asylum claim in the United States. In Detroit they can contact Freedom House, Detroit, Tel. 313-964-4320 ext\*833. Their email is [freedomhousemi@sbcglobal.net](mailto:freedomhousemi@sbcglobal.net). Their web site is, [www.freedomhousedetroit.org](http://www.freedomhousedetroit.org). In Buffalo claimants can contact VIVE, Buffalo, Tel. 716-892-4354, [www.vivelacasa.org](http://www.vivelacasa.org). In Vermont they can contact Vermont Refugee Assistance: Tel. 802-223-6840, email [vtrefuge@together.net](mailto:vtrefuge@together.net) or [jenness@accessvt.com](mailto:jenness@accessvt.com), [www.vermontrefugeeassistance.org](http://www.vermontrefugeeassistance.org).

In Toronto Canada refugees can contact Hamilton House, Toronto, Tel. 416-469-9754, email [fcjhamilton@on.aibn.com](mailto:fcjhamilton@on.aibn.com) (for people destined to Toronto), or visit their website: [www.fcjsisters.ca/HamiltonHouse](http://www.fcjsisters.ca/HamiltonHouse)

Arabic speaking refugee claimants in Toronto can contact the Arab Community Centre 555 Burnamthorpe Road Suite 209, Etobicoke, Ontario, telephone 416-231-7746 or contact Palestine House 3195 Erindale Station Road Mississauga, Ontario, telephone 905-270-3622.

In Quebec claimants can contact the Committee to Aid Refugees, Montreal, Tel. 514-272-6060, ext 5, email [carmtl@cam.org](mailto:carmtl@cam.org).

The information above is a brief summary of the main provisions of the Safe Third Country Agreement. For full details, con-

sult the *Canadian Immigration and Refugee Protection Act and Regulations*, and the text of the *Safe Third Country Agreement* signed on December 5, 2002 or the *United States Immigration and Naturalization Act* and related *Regulations* or consult an Immigration and refugee lawyer.

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## Case Tracker: Cases You Should Know!

Mario D. Bellissimo

### FCA (PRRA)

**Case:** *Parshottam v. Canada (Minister of Citizenship & Immigration)*

**Decider:** Evans J.A., K. Sharlow J.A., Ryer J.A.

**Court:** Federal Court of Appeal

**Citation:** 2008 CarswellNat 4154, 2008 FC 355

**Judgment:** November 14, 2008

**Docket:** A-73-08

### Issue 1: Permanent residence: time of determination

[10] In my view, the question certified by Justice Mosley is not dispositive of the appeal and should not be answered. It is clear from the extract from the PRRA officer's reasons which I quoted in paragraph 5 above that she determined Mr Parshottam's permanent residence status in the United States as of the date of her assessment. Counsel for Mr Parshottam submits that this is the correct date. However, because I would dismiss the appeal on other grounds, I am prepared to assume for present purposes that counsel is right to say that an applicant's permanent residence in a third country is determined as of the date of the PRRA.

[11] I would only add that, with all respect to Justice Mosley, I do not share his view that it is "settled law" that whether a claimant for protection in Canada is a permanent resident of a third country for the purpose of Article 1E and section 98 of IRPA is invariably determined as of the time of the claimant's arrival in