

# SAFE THIRD COUNTRY AGREEMENT LANDMARK RULING OVERTURNED BY FEDERAL COURT OF APPEAL OF CANADA

BY EDWARD C. CORRIGAN

On June 27, 2008, the Canadian Federal Court of Appeal reversed the earlier landmark Federal Court decision that had struck down the Safe Third Country Agreement with the United States.<sup>1</sup> The Agreement — implemented on December 29, 2004 — severely restricted refugee claimants from seeking protection in Canada if they first had entered the United States. Claimants who had first entered Canada were similarly denied the right to make an asylum claim in the United States.<sup>2</sup> The agreement was designed to put an end to "asylum shopping" by individuals who had entered the United States or were failed U.S. refugee claimants and wanted to make a refugee claim in Canada.<sup>3</sup>

This ruling overturns the November 29, 2007, decision by the Federal Court of Canada, which found that the Safe Third Country Agreement had violated the 1951 Geneva Convention on Refugees, the Convention Against Torture and Canada's Charter of Rights and Freedoms.<sup>4</sup>

The Federal Court of Appeal rejected the argument that the United States was not a safe country for refugees. Justice John Evans wrote that the lower court overstepped its authority by attempting to pronounce

on "wide swaths of U.S. policy and practice."<sup>5</sup> The Federal Court of Appeal ruled that the proper test was whether the federal cabinet had acted in good faith when it negotiated the Safe Third Country Agreement and was satisfied that the United States granted sufficient protections to refugee claimants.

[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.<sup>6</sup>

The Federal Court of Appeal decision was a bitter defeat for the Canadian Council of Refugees, the Canadian Council of Churches, Amnesty International, and a Colombian man identified as John Doe. Mr. Doe was denied the right to make an asylum claim in the United States and faced deportation to his home country, where he alleged he had a fear of being persecuted and tortured.<sup>7</sup>

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

[112] Counsel for the appellant did not pursue before us the question of standing. However, the fact that the respondent organizations are

---

<sup>1</sup> Her Majesty the Queen v. Canadian Council for Refugees, 2008 FCA 229. The lower court decision is discussed in the companion article following this one.

<sup>2</sup> For an outline of the Agreement see Edward C. Corrigan, *The Safe Third Country Agreement: Impact on Refugee Claimants*, 10 Bender's Immigr. Bull. 1406 (Sept 15, 2005). The Agreement is available at <http://www.uscis.gov/files/article/appendix-c.pdf>.

<sup>3</sup> Janice Tibbets, *Landmark refugee ruling overturned on appeal*, Nat'l Post, July 9, 2008; see also *Yes, America is a safe haven*, Globe & Mail, July 2, 2008.

<sup>4</sup> Canadian Council for Refugees v. Her Majesty the Queen, 2007 F.C. 1262, [2007] F.C.J. No. 1583, 2007 Fed. C.C. LEXIS 1550, *rev'd*, 2008 FCA 229, [2008] F.C.J. No. 1002, 2008 Fed. C.C. LEXIS 1026; see also David L. Cleveland, David L. Cleveland on *Canadian Council for Refugees v. Queen*, 2007 F.C. 1262 (Nov. 29, 2007), LexisNexis® Expert Commentary (Jan. 2008), at <http://www.lexis.com/research/xlink?source=326678>.

<sup>5</sup> Her Majesty the Queen v. Canadian Council for Refugees, 2008 FCA 229, ¶120.

<sup>6</sup> *Id.* ¶79.

<sup>7</sup> Media Release, Canadian Council for Refugees, Canadian Council of Churches & John Doe, Rights Groups Express Dismay with Appeal Court Ruling in Safe Third Country, July 2, 2008.

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....<sup>8</sup>

Justice Noel also ruled that a challenge to the designation of the United States as a safe third country could be brought only by a refugee who has been denied entry to Canada and is facing a real risk of return to torture or persecution.

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

Janet Dench, Executive Director of the Canadian Council for Refugees, "said 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."<sup>10</sup> The individual would be immediately returned to the United States, placed in detention, and perhaps quickly deported to the country where he or she feared persecution and torture.

Justice Noel, in his majority statement of reasons for the Federal Court of Appeal, wrote that the lower court's conclusion "that the US does not 'actually' comply is irrelevant." He determined that so long as Cabinet had "considered" the human rights situation in the United States and was not acting in bad faith in entering into the agreement, the reality facing refugees affected by the agreement does not matter.

<sup>8</sup> 2008 FCA 229, at ¶112.

<sup>9</sup> *Id.* ¶103.

<sup>10</sup> Janice Tibbets, *Landmark refugee ruling overturned on appeal*, Nat'l Post, July 9, 2008.

[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.

[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).

[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.<sup>11</sup>

"This decision is deeply troubling," said Andrew Brouwer, one of the lawyers representing the groups.

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 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

<sup>11</sup> 2008 FCA 229, ¶¶80-83. The question related to the Agreement's validity.

or persecution. This requirement is both impractical and dangerous.<sup>12</sup>

Elizabeth McWeeny, President of the Canadian Council for Refugees, said, "We are deeply disappointed that the Court condones the Canadian government disregarding US practices that place refugee lives in danger." She 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."<sup>13</sup>

"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," commented Gloria Nafziger of Amnesty International. "The 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."<sup>14</sup>

The organizations are going to appeal the decision to the Supreme Court of Canada.<sup>15</sup>

---

**Edward C. Corrigan**, B.A., M.A., LL.B., is a lawyer certified as a Specialist in Citizenship and Immigration Law and Immigration and Refugee Protection by the Law Society of Upper Canada in London, Ontario, Canada. He can be reached at [corriganlaw@edcorrigan.ca](mailto:corriganlaw@edcorrigan.ca) or at (519) 439-4015.

#### SERVICE QUESTIONS?

If you have any questions about the status of your subscription, please contact your Matthew Bender representative, or call our Customer Service line at:

**1-800-833-9844**

---

<sup>12</sup> Media Release, Canadian Council for Refugees, Canadian Council of Churches & John Doe, Rights Groups Express Dismay with Appeal Court Ruling in Safe Third Country, July 2, 2008.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Lesley Ciarula Taylor, *Advocates to appeal anti-refugee court ruling*, Toronto Star, July 12, 2008.