

The United States is not a Safe Third Country?

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By: James Hendry

On October 26, 2020, the Federal Court of Appeal ordered a stay (FCA2020) of the July judgment Canadian Council for Refugees (CCR) v. Canada (Immigration, Refugees and Citizenship) (FC2020) where McDonald J of the Federal Court struck down provisions of the Immigration and Refugee Protection Act (IRPA) and regulations that implemented the “Agreement between the Government of Canada and the Government of the United States of America For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries” (STCA) under s. 7 of the Charter but suspended her declaration for six months. This article will examine the context and reasoning in the FC2020 followed by the reasoning in the stay proceedings referred to here as FCA2020.

The purpose of the STCA is sharing responsibility for considering refugee claims (FC2020, para. 119) between Canada and the US. The STCA provides that individuals seeking asylum in Canada who enter at a land POE from the US cannot make their refugee claim in Canada but are diverted to the US which the implementing legislation designates a “safe third country”. It was part of a ‘Smart Border Declaration’ made by the Canadian and US governments after 9/11 which dealt with a number of border issues including reducing the number of refugees making their claims in Canada. However, refugee claimants arriving by air, sea or between Ports of Entry remain eligible to have the Refugee Protection Division (RPD) assess their claims.

For some time, there have been numerous newspaper headlines of accounts of the great hardships individuals and their families have endured in the cold Canadian winter to bypass a land Port of Entry (POE) in hopes of making their refugee claim in Canada because of the US anti-migrant stance (see for example here). The evidence in FC2020 was focused on the way claimants turned away by Canada have been treated in the US (see for example here).

The Applicants’ situations

The Applicants all wanted to make refugee claims in Canada fearing persecution in their home country but were unable to make their claims in Canada because of the STCA.

- A mother and two daughters from El Salvador escaped serious threats and gender-based violence from gangs. They made their way to the US where they were detained and subject to removal. When they were released, they tried to make a claim in Canada at a POE but were told they were ineligible. They managed to get a stay as part of the procedural history of this case.
- Another claimant, Ms Mustefa, was born in Ethiopia and had lived in the US pursuant to a visa for medical treatment but was unable to make an asylum claim there because she had arrived after the cut-off of the US Deferred Action for Childhood program. She sought to make a refugee claim in Canada because of Ethiopian state violence against her ethnic group. She was advised she was ineligible to make a claim at her POE. The CBSA returned her to the US where she was detained but later released on bond.
- A third family of claimants from Syria, where the mother suffered gender-based violence, was in the US where she applied for asylum but took her children to Canada when she became frightened of anti-Muslim hatred after the ‘Muslim Ban’. Canadian officials at a POE told her they were ineligible. They went back to the US and were stopped by police, put in separate police cars, fingerprinted, questioned, then taken back to a POE. They were able to get an emergency stay of removal. The family was granted Temporary Resident Permits and now are permanent residents.

The legislative framework for the STCA is in the IRPA:

“**101** (1) A claim is ineligible to be referred to the Refugee Protection Division if… (e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence.

102 (1) The regulations may govern matters relating to the application of sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions (a) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture; (b) making a list of those countries and amending it as necessary; and (c) respecting the circumstances and criteria for the application of paragraph 101(1)(e).

(2) The following factors are to be considered in designating a country under paragraph (1)(a): (a) whether the country is a party to the Refugee Convention and to the Convention Against Torture; (b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture; (c) its human rights record; and (d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

(3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country."

Section 159.3 of the *Immigration and Refugee Protection Regulations* provides:

"**159.3** The United States is designated under paragraph 102(1)(a) of the Act as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture, and is a designated country for the purpose of the application of paragraph 101(1)(e) of the Act."

The administrative law argument that s. 159.3 is *ultra vires*

The judge rejected the Applicants' argument that the regulation designating the US as a safe third country was *ultra vires*.

The Applicants argued that the reports they tendered showed that Canadian officials were aware of the US practice of detaining and punishing asylum seekers contrary to the Refugee Convention. The report from Amnesty International and CCR disclosed detention conditions. Other reports revealed the policy of separating parents and children in detention and that inhumane detention conditions continued in 2018. They also pointed out that the US enforced a 'zero tolerance policy' for 'illegal' entry (FC2020, paras. 61-5).

The judge noted that the Applicants argued that recent Supreme Court jurisprudence had emphasised the importance of the objective of the enabling statute in determining whether regulation were *ultra vires*. This meant that the s. 102(3) ongoing review of a designation of a safe third country was to ensure those objectives were met. They argued that Canada failed to carry out the meaningful analysis of US compliance with the Refugee Convention and international human rights standards that would have revealed on the evidence that the US no longer met the conditions precedent for the validity of the designation (FC2020, paras. 58-9, 66, 69, 70).

However, the judge held that the Federal Court of Appeal decision on these same issues in Canadian Council for Refugees v. Canada, 2008 (CCR2008) forced her to answer these arguments in the negative. The FCA had rejected the CCR's argument that the Governor in Council (GIC) had to be satisfied that the country to be designated under s. 102 'actually complied' in 'absolute terms' with the Refugee Convention and the Convention Against Torture as conditions precedent to exercising the designating power. Rather, the FCA had held that the factors were to be assessed on a 'general appreciation' of the country's policies, practices and human rights record (CCR2008, paras. 77-78). The FCA had noted that the designation had been based on a record that included the views of NGOs that the US did not meet its convention obligations but also on a statement of a UNHCR representative that the US, like Canada, meets its international obligations (CCR2008, para. 79). The FCA had held that the question was not that this standard of compliance was a condition precedent to the validity of the designation, but rather whether the GIC had duly considered the right factors and had come in good faith to the opinion to designate a country as a safe third. Once that had been shown, the FCA had held that there was nothing left to review (CCR2008, para. 78). The FCA had held that the ongoing review was not more exacting on the issue of the designated state's compliance with the conventions than the original designation (CCR2008, para. 92). Interestingly, the FCA had seemed to find comforting the conclusions of the UNHCR in 2005-6 set out at some length that the STCA was working properly and particularly that the policy of directing back refugees to the US where they were detained and prevented from attending interviews in Canada had been phased out in 2006 (CCR2008, 94-6). This arguably showed that the FCA had perhaps taken more than a mere look at whether Canada had considered the right factors, but that its review had drilled down into the actual practices of the parties to the STCA.

The judge held that following the FCA that the ongoing review was not more exacting on the issue of the designated state's compliance with the conventions than for the original designation. She wrote that the review provision in s. 102(3) does not refer to 'actual compliance' with conventions (FC2020, para. 76). In any event, she found that the evidence showed that there was sufficient continuous reporting to the extent required.

Section 7 of the Charter

The judge held that the actions of Canadian officials who apply the STCA caused predictable reactions from US authorities, particularly detention for administrative reasons, in breach of s. 7 contrary to the principles of fundamental justice and unjustifiable under s. 1.

The judge's first step was to consider whether a refugee claimant who was turned away could make a claim under the Charter in Canada and then to look at the consequences of the process that resulted in their denial.

Standing

First, the judge ruled that these refugee claimants were or had been physically present in Canada when they tried to make their claim, and even if turned away and detained in the US, continued to have standing to bring this action (FC2020, para. 87).

The causal connection between Canadian officials and the alleged harms under s. 7

Next, she noted that the STCA was applied by Canadian officials who determine eligibility under s. 101, including whether any STCA exceptions apply, which include the situation where refugee claimants have immediate family who are Canadian citizens or permanent residents, and unaccompanied minors. The official files a report and a Minister's Delegate reviews it and informs the refugee claimant of the result. If eligible, the individual can file their claim with the Immigration and Refugee Board, and if not eligible, the Minister's Delegate orders removal which takes places as soon as possible. There is no discretion under the STCA (FC2020, para. 90). Canadian officials arrange for removal of ineligible claimants to the US by either providing their US counterparts with a notice that the failed claimant is being returned or by driving them to the US (FC2020, para. 91).

The judge held that this evidence of Canadian officials' active involvement in returning refugee claimants who are found ineligible under the STCA provides a 'sufficient connection' between their handing these claimants over to US officials with the foreseeable consequence of automatic detention for lengthy periods (FC2020, paras. 103, 128) and that this involvement amounted to an infringement of the claimants' liberty interests under s. 7 (FC2020, para. 101). The judge relied heavily on Suresh where the threat of refoulement to torture engaged s. 7. This 'sufficient connection' was further demonstrated by the treatment of Ms Mustefa who was detained as soon as she was returned to the US and became traumatised. She was confined in solitary for a week and remained in criminal detention for three more weeks without being advised how long she would have to remain there where her religious dietary requirements were ignored and she suffered in extremely cold conditions (paras. 95-6). Other affiants gave similar evidence that claimants returned from Canada were detained, supported by evidence from US attorneys who worked with these refugee claimants (FC2020, paras. 97-8).

The judge also held that the action of Canadian officials returning claimants to detention in poor living conditions in the US under the STCA infringed the claimants' right to security of the person under s. 7 contrary to the principle in *Suresh*. The judge made it clear that the security of the person infringements that could be attributed to Canadian officials concerned the conditions of detention where ineligible refugee claimants were removed to which included physical barriers to making asylum claims thereby increasing the likelihood of refoulement (FC2020, paras. 94, 106, 113, 138). The El Salvador claimants who were ordered out of Canada under the STCA by Canadian officials (though the judge had ordered a stay of their removal) feared refoulement to their country where serious gang violence awaited them. The judge considered evidence about the conditions of detention which included many barriers to advancing an asylum claim in the US such as lack of access to legal advice, lack of counsel at hearings resulting in a substantial decrease in successful claims, inability to obtain necessary documents, the lack of communication with counsel and family, the loss of evidence

between detention centres and the lack of translators (FC2020, paras. 105-9). The removal of claimants from Canada to the US to conditions of detention that included immediate solitary confinement and poor conditions of detention, including lack of basic amenities of life and health, engaged their security of the person interests (FC2020, paras. 110-112).
The judge also heard argument that US asylum law is inconsistent with the Refugee Convention including the interpretation of ‘particular social group’ and the burden of proof on claimants of their persecutors’ motives, making it harder to establish their claim (FC2020, para. 105).

Principles of fundamental justice under s. 7

The judge held that the infringements of s. 7 did not accord with the principle of fundamental justice of overbreadth because the impugned legislation implementing the STCA has no connection to the ‘mischief contemplated by the legislature’ which was ‘sharing responsibility for refugees with a country that complies with the Conventions‘ (FC2020, para. 131, citing Carter at para. 85). The purpose of the STCA was sharing responsibility for processing refugee claims (FC2020, para. 119). The judge held that because the claimants had no evaluation in Canada of the risks at the basis of their claim, but were returned under the STCA to the US and detention ‘solely for having attempted to make a refugee claim in Canada’, this fell short of the purpose of sharing responsibility which should entail some guarantee of access to a fair refugee process (FC2020, para. 128). Arbitrariness, the lack of connection between government action and purpose was not argued (FC2020, para. 122).

The judge held that the impugned legislation was grossly disproportionate to the law’s purpose (FC2020, paras. 132, 136). She stated the test was whether the impact of the STCA shows the Charter infringement ‘was out of sync’ with the purpose (FC2020, para. 135). The automatic imprisonment of claimants who are turned away from Canada, without regard to their circumstances, moral blameworthiness or their actions could not be justified by ‘administrative efficiency’ (FC2020, para. 135). She held that detention and loss of security of the person facilitated by the STCA are grossly disproportionate to the ‘administrative benefits’ of the STCA which was intended to share responsibility for refugees in compliance with the Refugee Convention. She added that the impact of a finding of ineligibility under the STCA is grossly disproportionate and ‘out of sync’ with the purpose of the impugned legislation (FC2020, para. 136). She wrote that the sharing of responsibility could not be positively balanced against imprisonment, ‘cruel and unusual’ detention conditions, solitary confinement and heightened risk of refoulement. This would be “entirely outside the norms accepted in our free and democratic society” (FC2020, para. 136). Ms Mustefa’s case alone showed gross disproportionality and ‘shocked the conscience’ (para. 137).

The judge added in her summary of her s. 7 analysis that penalising someone for making a refugee claim was not consistent with the spirit or intention of the STCA or the Conventions it was based on (FC2020, para. 139).

Section 1

The judge held the impugned legislation was not justified under s. 1. She considered a somewhat broader legislative purpose than the one accepted in the s. 7 analysis saying that the government's best case was the sustainability of the refugee system in Canada if unable to share responsibility for processing claims under the STCA (FC2020, para. 147). However, she found that the government had failed to prove that Canada could not adjust to increased numbers of refugee claims as it had in the past (FC2020, para. 147). There was no evidence that there was a need to treat the narrow category of refugee claimants who come in through land POEs differently from others when the result of their ineligibility was detention in the US (FC2020, para. 148). She rejected the government's argument that most of the claimants in the case were eventually released from US detention was evidence of minimal impairment (FC2020, para. 146). Finally, the deleterious effects of detention and other infringements of the security of the person of claimants were not proportional to the administrative efficiency offered by the STCA (FC2020, para. 149).

The stay

Stratas JA of the Federal Court of Appeal granted the stay of the judgment of McDonald J until the parties' appeals were decided.

To obtain a stay, the government had to show that the appeal is arguable and not destined to fail, that irreparable harm would follow the refusal of a stay, and that the balance of convenience, that is, a comparison of hardships of letting the judgment stand outweighed the hardships of granting a stay: RJR-MacDonald Inc. v. Canada.

The parties agreed that there was an arguable case (FCA2020, para. 19).

Stratas JA noted that the FCA had granted a stay in the similar 2008 CCR decision where it found irreparable harm. Further, the CCR was party to the 2008 case and so was presumptively barred from relitigating this issue (FCA2020, paras. 21-2). The FCA was satisfied that the government had proved irreparable harm in this case without reciting the evidence. Stratas JA wrote that the government also benefited from the lower burden in establishing irreparable harm accorded a public authority charged with the duty of protecting the public interest in issue and 'some indication' that the legislation was made in pursuance of that duty citing RJR MacDonald Inc. p. 346 (where the SCC had also stated that courts should not generally determine whether there would be actual harm from the stay sought by a public authority).

Stratas JA noted that the issue turned on the balance of convenience which favoured granting the stay. He observed that the FCA had expedited matters so a stay would only extend the operation of the STCA for a short time after the suspension would have ended. He inferred that the lack of an appeal of the six-month suspension meant that there was no disagreement that the balance of convenience lay in the government's favour for at least six months and reasoned that this showed that a short extension afforded by the stay would be 'reasonably consistent' with the lower court's suspension (FCA2020, para. 33). The FCA empowered a future appeal panel to vary or terminate the

stay if there were ‘significant new developments’ or ‘a marked change in circumstances’ before a decision on appeal is made in case of delay (FCA2020, para. 31). Though he recognised that the legislation suspending time limits under Acts of Parliament due to the pandemic did not apply to the suspension made by McDonald J, Stratas JA held that public policy had recognised the practical exigencies created by COVID-19, such as the slowing of the legislative process, which had apparently not been considered in ordering the suspension (FCA2020, paras. 36-9). He took judicial notice of the practical exigencies of the pandemic and of the fact that Parliament had prorogued for a month, which weighed in favour of the government on the balance of convenience, and observed that there was no opposing evidence that the government had taken no action in response to the judgment (FCA2020, paras. 39-48). Stratas JA gave significant weight to the government’s argument that legislative action could make the appeal moot (presumably depriving it of the FCA’s guidance) and that it sought to complete the appeal before legislating (FCA2020, paras. 49-51). Though the claimants provided substantial evidence of the continuing harms of detention in the US resulting from the operation of the STCA, Stratas JA held that the only relevant harm that the FCA could consider in the balance of convenience was the harm suffered by refugee claimants turned away from Canada between the end of the six-month suspension period and the end of the stay granted by the FCA which had been ‘precipitously’ reduced by the closure of the US-Canada border (FCA2020, paras. 56-7). All of these considerations tilted the balance of convenience in favour of granting a stay until the appeals were decided.

Conclusion

This is a case where the government is defending its allocations of resources to the refugee determination system in the face of the fears and hopes of refugee claimants who are not only escaping horrible conditions in their countries of origin, but also in Trump’s America. The Federal Court held that Canada is in breach of the Charter by acting pursuant to legislation implementing the STCA. The question of the continued existence of the STCA is being left to the courts to resolve as a question about the allocation of resources when this is a matter that calls for humane and generous political action.

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