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IMPLEMENTATION OF SAFE THIRD COUNTRY AGREEMENT HELD TO VIOLATE CANADIAN CHARTER OF RIGHTS AND FREEDOMS—SO WHY WILL PRIOR U.S. ASYLUM CLAIMANTS BE DENIED A HEARING AT THE REFUGEE PROTECTION DIVISION IN CANADA EVEN AFTER THIS TAKES EFFECT?

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In *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770 (July 22, 2020), the Federal Court of Canada recently ruled that the statute and regulations implementing the Safe Third Country Agreement (STCA) between Canada and the United States regarding the processing of asylum and refugee claims were of no force or effect because they violated section 7 of the *Canadian Charter of Rights and Freedoms*. This is good news for those in the United States who may want to claim refugee status at a Canadian land port of entry in the future, which the STCA ordinarily prohibits, but it is not as good as it may seem at first glance. The ruling was suspended for six months, so the STCA rules remain in effect at least until January 22 (possibly longer if the suspension is extended pending appeal). The ruling also does not affect a different restriction on making refugee claims in Canada if one has previously applied for asylum in the U.S. or certain other countries, section 101(1)(c.1) of the Immigration and Refugee Protection Act (IRPA), which was recently upheld against a Charter challenge. As I will explain, however, the reasoning in *Canadian Council for Refugees* severely undermines the policy basis for section 101(1)(c.1), suggesting that it should be repealed even if it is not void as violative of the Charter.

The STCA, which I have discussed in prior posts, ordinarily precludes asylum-seekers who are present in one of the United States or Canada from making a

claim for asylum or refugee status at a land border port of entry of the other country. Some claimants with qualifying family members may still make refugee claims at a Canadian port of entry, as may unaccompanied minors and a few other categories of people. (The STCA does not apply to those who enter between ports of entry, although such entries in order to apply for refugee status are currently forbidden during the COVID-19 pandemic by an Order in Council under the Quarantine Act.) In general, however, one who comes to a Canadian land port of entry to make a refugee claim, and is not exempt from the STCA, will be sent back to the United States.

Upon being sent back to the United States, however, such claimants are often detained under unacceptably harsh conditions, just like other asylum claimants at a U.S. port of entry. As the Court in *Canadian Council for Refugees* explained of one such claimant returned to the United States, who was an applicant in the case and had provided an affidavit:

> Ms. Mustefa, upon being found ineligible . . . was returned to the US by CBSA officers and immediately taken into custody by US authorities. She was detained at the Clinton Correctional Facility for one month and held in solitary confinement for one week. She was released on bond on May 9, 2017.
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> Ms. Mustfa's imprisonment evidence is compelling. In her Affidavit she explains not knowing how long she would be detained or how long she would be kept in solitary confinement. She describes her time in solitary confinement as "a terrifying, isolating and psychologically traumatic experience." Ms. Mustefa, who is Muslim, believes that she was fed pork, despite telling the guards she could not consume it for religious reasons. Ms. Mustefa describes skipping meals because she was unable to access appropriate food, and losing nearly 15 pounds. Ms. Mustefa also notes that after she was released from solitary confinement, she was detained alongside people who had criminal convictions. She explains the facility as "freezing cold" and states that they were not allowed to use blankets during the day. Ms. Mustefa states that she "felt scared, alone, and confused at all times" and that she "did not know when would be released, if at all."

Canadian Council for Refugees, 2020 FC 770 at ¶¶ 95-96. There were also similar, although anonymized, affidavits provided by other rejected asylum claimants,

further confirmed by "affidavit evidence of lawyers who provide assistance to those detained." *Id.* at ¶ 98.

Because this deprivation of liberty and the hardship resulting from detention result when refugee applicants covered by the STCA are returned to the United States under the implementing statute and regulations and are handed over to U.S. officials by Canadian officials, they were held to engage Section 7 of the Charter, which 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." They were also found not to be justified under Section 1 of the Charter, which provides that "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The Court therefore held that the STCA implementing provisions, "s. 101(1)(e) of the *IRPA* and s. 159.3 of the *Regulations* are of no force or effect pursuant to section 52 of the *Constitution Act, 1982*, because they violate s. 7 of the *Charter*." *Canadian Council for Refugees*, 2020 FC 770 at ¶ 162. This holding was not made immediately effective, however. Rather, the Court stated in the conclusion of its opinion that "To allow time for Parliament to respond, I am suspending this declaration of invalidity for a period of 6 months from the date of this decision." *Id.* at ¶ 163.

Even if the declaration of invalidity takes effect, however, this unfortunately will not mean that all those coming to Canada from the United States to seek protection will be entitled to the full refugee status determination process. Under section 101(1)(c.1) of IRPA, enacted just last year,

> A claim is ineligible to be referred to the Refugee Protection Division if
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> . . . .
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> the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws;

IRPA s. 101(1)(c.1). There are several countries with which Canada has such

information-sharing agreements, including the United Kingdom, Australia, and New Zealand as well as the United States, but the creation of IRPA section 101(1)(c.1) appears to have been primarily targeted at people who had previously made asylum claims in the United States.

As I discussed in a previous blog post, the measure that became IRPA section 101(1)(c.1) was based on the incorrect premise (publicly stated by a spokesman for the then-Immigration Minister) that the U.S. and Canadian asylum systems were "similar enough" that an application rejected by the U.S. would likely be rejected by Canada as well. Claimants covered by section 101(1)(c.1) will, under IRPA section 113.01, have access to a somewhat enhanced version of a Pre-Removal Risk Assessment (PRRA) that comes with a right to an oral hearing, but the PRRA process is a poor substitute for a full Refugee Protection Division hearing and traditionally has a lower approval rate.

Unfortunately, in a decision the day after the *Canadian Council for Refugees* ruling that received less publicity, a judge of the Federal Court upheld IRPA section 101(1)(c.1) against a Charter challenge. In *Seklani v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 778 (July 23, 2020), the Court held that section 101(1)(c.1) did not violate Section 7 of the Charter, because Section 7 was only engaged at the point of actual removal and a possible application to defer this removal, not an earlier stage when access to Refugee Protection Division proceedings was being determined. Those subject to section 101(1)(c.1) would not be immediately removed to the United States, or anywhere else, when their claims were found ineligible to be referred to the Refugee Protection Division. Rather, they would still have access to the PRRA process before removal (although the applicant in *Seklani* did not immediately have such access because his home country of Libya was subject to an Administrative Deferral of Removals and so he was not subject to imminent removal in any event), would still be able to seek a deferral of removal from the Canada Border Services Agency (CBSA), and would be able to seek judicial review and a stay of removal in connection with a denial of the PRRA or the deferral of removal. Their Section 7 rights were thus found not to be engaged by the ineligibility determination.

Whether or not the holding in *Seklani* that section 101(1)(c.1) does not violate the Charter is correct, the judgment regarding the STCA in *Canadian Council for Refugees* further supports the argument that section 101(1)(c.1) is bad policy and should be repealed. The U.S. policy regarding detention of asylum-seekers

at the border that underlay the judgment in *Canadian Council for Refugees* is itself a substantial distinction between the U.S. asylum system and the Canadian refugee system—one that further undercuts the suggestion in support of section 101(1)(c.1) that the two systems are the same and failure in the U.S. asylum system would likely portend failure in the Canadian refugee system.

If an asylum applicant is detained upon reaching the United States in the way that Ms. Mustefa was, and in the way that many other asylum applicants are when they seek to enter the United States, this can significantly impact their chances of success on their asylum claim. It is more difficult to find counsel, gather evidence, or contact potential witnesses when one is in detention. It is not even merely an issue of a one-month detention such as Ms. Mustefa experienced, although that is bad enough; being released from detention has become sufficiently difficult that it has inspired a number of class-action lawsuits, such as *Damus v. McAleenan*, which addressed the extremely low rates of parole from custody by several ICE field offices around the United States, and *Velesaca v. Wolf*, which addressed the near-universal denial of release on bond by the ICE New York City Field Office.

The *Canadian Council for Refugees* judgment itself recognized the difficulties in pursuing an asylum claim that are caused by detention, in the course of finding an increased risk of return to harm for one of the applicants that implicated the Section 7 interest in security of the person. As the Court explained:

> In the case of ABC, I am satisfied that the evidence supports a finding that the risk of *refoulement* for her is real and not speculative had she been detained in the US. I find this based upon the evidence documenting the challenges in advancing an asylum claims for those detained. There is evidence of the barriers in accessing legal advice and acquiring the necessary documents to establish an asylum claim in the US.
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> Professor Hughes describes the difficulties faced by those who are detained including: detainees not being able to afford phone calls, people from outside the detention facility not being able to contact detainees because they cannot call them, evidence being lost due to transfers between detention centres, and detainees not having access to translators they may need to fill in the necessary forms.
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> Mr. Witmer, a lawyer working with detainees, describes issues with “basic

> communication" as an impediment to the making of an asylum case. He notes that detainees are unable to leave messages with a call back number. He also notes that while many detainees are accustomed to communicating with family using email, social media and internet-based communication apps, they do not have access to these services in detention.
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> Further, lawyer Timothy Warden-Hertz estimates that, at the detention centres his organization services, the Northwest Detention Center (NWDC), 80-85% of those detained do not have a lawyer and must represent themselves. He estimates that 75% of asylum claims from the NWDC are denied as compared to the national average of 52% of claims being denied.

Canadian Council for Refugees, 2020 FC 770 at ¶¶ 106-109.

Those who make refugee claims under Canadian law at a port of entry (if exempt from the STCA) or otherwise, in contrast, are not generally automatically detained as in the United States. They may obtain counsel, communicate with friends and relatives to gather evidence, and prepare for their hearings without being hindered in these efforts by incarceration.

In this regard, as in the other respects discussed in my previous post, U.S. asylum proceedings are simply not "similar enough" to Canadian refugee proceedings. Accordingly, it is inappropriate to presume, as IRPA section 101(1)(c.1) does, that those whose U.S. asylum claims are denied, would have little chance of succeeding in Canadian refugee claims. Section 101(1)(c.1) should be repealed, and those whose claims were denied under the inappropriately detention-intensive U.S. asylum system should be given a full opportunity to pursue their refugee claims in Canada.