Dismantling the Safe Third Country Agreement

Introduction

There are increasing calls on the Canadian government to suspend, and then end the *Safe Third Country Agreement* between Canada and the United States. These calls have been prompted by recent developments in the United States regarding immigrants, asylum-seekers and refugees, and the increase in the number of asylum-seekers entering Canada irregularly.

If the government does not act to suspend or end the *Safe Third Country Agreement,* the *Agreement* could still be altered by the courts. Three families are challenging the *Agreement* as a violation of their rights under sections 7 and 15 of the Canadian *Charter of Rights and Freedoms*. This challenge will be heard by the Federal Court in January 2019.[1]

A Backgrounder – The Safe Third Country Agreement

The *Safe Third Country Agreement* (officially 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)**[2]** is an agreement between Canada and the United States requiring that an asylum seeker make their asylum claim in the first "safe" country they land in, after leaving their own. Therefore, an individual who has left their home country intending to make an asylum claim in Canada who has traveled through the United States, may not apply for asylum in Canada. They must do so in the United States (and vice versa).[3]

An asylum seeker is a person who has fled their home country due to a fear of persecution, but who has not yet had their claim heard by the country to which they have fled.[4] To make a claim in Canada or the United States, a claimant must show they have (1) a well-founded fear of persecution that is (2) based on their race, religion, nationality, membership in a particular social group or political opinion, and (3) that the government in their country is unable or unwilling to protect them.[5]

The purpose of a safe third country agreement is to reduce abuse of the system for processing asylum claims in both participating countries - to reduce "forum shopping" and duplication of asylum claims.[6]Canada wanted to reduce the number of asylum claims that it received, and with it, the amount of time and money spent adjudicating these claims. When the Agreement came into effect, the number of claims in Canada immediately dropped by almost half.[7]

The *Safe Third Country Agreement* between Canada and the United States was signed in the immediate aftermath of the 9/11 terrorist attacks on the United States and came into

force in 2004. The United States agreed to the *Agreement* in exchange for Canada implementing new border security measures aimed at improving American national security –*The Smart Border Action Plan*.[8]

SCTA Specifics

To designate a country as a safe third country, Canada requires that the country comply with Article 33 of the United Nations *Refugee Convention****[9]*** and Article 3 of the United Nations *Convention Against Torture*[10].[11] Both of these articles prohibit refoulment – sending a person back to their country of origin to face persecution.

The Agreement does not apply to unaccompanied minors, those with family in Canada, those who have valid travel documents to enter Canada, nor to public interest cases (cases where a person may face the death penalty in the United States or, should they be returned to the United States and then deported to their home country, in the country they are deported to).[12]

The *Safe Third Country Agreement* applies to only those at an official port of entry on a land border (between the United States and Canada) who do not meet an exception (such as for those who have family in the country, or who are unaccompanied minors).[13] It does not apply to air arrivals, nor to those making irregular crossings. For air travel, it is considered too difficult to know if a person flew through the United States or actually landed there and had any chance to make an asylum claim.[14] For irregular crossings, the government does not want to encourage human smuggling nor people hiding and living without legal status in the country.[15]

In Canada, the Agreement is interpreted as giving no discretion to border services officers – they are not allowed to decide when to apply it to an asylum applicant, even in exceptional circumstances. For example, border services officers have no discretion even where they know a claim will, in all likelihood, be accepted in Canada and will, in all likelihood, not be accepted in the United States.[16] If the asylum seeker is coming from the United States and traveling through a land border, they cannot have their claim heard. The United States interprets the Agreement as allowing their officials to exercise some discretion.[17]

Challenging the *Safe Third Country Agreement*

Some of those who call for abolishing the *Safe Third Country Agreement* argue the United States is no longer a safe country.[18] They point to the "Muslim ban,"[19] the "zero-tolerance" policy on irregular border-crossing leading to the separation of children from parents,[20] and threats to build a wall,[21] as examples of the increasing hostility towards immigrants in the United States that make it unsafe.

Others cite the futility of an Agreement that encourages asylum seekers to avoid it by entering Canada at irregular border crossings. Because the *Safe Third Country Agreement* does not apply to those making irregular border crossings between official ports of entry, asylum seekers are walking across the border at unmanned locations,[22] including

in the middle of winter, which can be especially dangerous on the Prairies. Once in Canada, these 'irregular' asylum-seekers can have their asylum claims heard, despite the existence of the STCA. This seems to make one of the central rationales for the STCA, to decrease the number of claims, futile.[23]

The Canadian government could suspend the Agreement immediately or terminate it with six months' notice without giving a reason.[24] However, this may not be a foreign policy decision the Canadian government is willing to make, given its relationship with the United States.

The Constitutional Challenge

The three families who are challenging the *Agreement* as a violation of their rights under the Canadian *Charter of Rights and Freedoms* are alleging that the agreement violates section 7 and 15 of the Charter. Section 7 of the *Charter* protects the right to life, liberty, and security of person.[25] Section 15 of the *Charter* protects equality rights and prohibits discrimination based on grounds such as race, national or ethnic origin, sex, and others.[26]

These constitutional challenges centre on the greater risk faced by these families in the United States that they will be sent back to their home countries where they will have their life, liberty, and security of person threatened; and on how the treatment of asylum seekers within the United States is an infringement on the life, liberty, and security of person of asylum seekers. The families are also challenging the disproportionate effect of certain policies on women as a violation of their section 15 rights not to be discriminated against on the basis of gender.

The fact that Canada is not the country conducting the actual violation of these *Charter* rights is not an issue. In the case, *Suresh v Canada Minister of Citizenship and Immigration)* (2002), the Supreme Court ruled that, at least for section 7 violations, "where the deprivation is an entirely foreseeable consequence of Canada's participation," the government is still liable.[27]

Changing Standard of Proof – A Section 7 Challenge

In the United States, asylum seekers claims are adjudicated on a standard of "reasonable fear of persecution." After one year, a person who does not have legal status in the United States and who is trying to make an asylum claim will be subject to a removal order. This removal order can be stayed (made inactive) if the claimant can establish on the standard of "more likely than not" that they will be persecuted if they are returned to their home country.[28]

This difference in standard of proof after one year - from "a reasonable fear or persecution" to more likely than not going to be persecuted - could be a breach of section 7.[29] The risk of refoulment (being sent back to where one will be persecuted) appears to increase when the standard changes. Canada may be violating the section 7 rights of asylums seeker who present themselves at the Canadian border after spending more than a year in the United

States because they stand a greater chance of being deported to their country of origin.

If the asylum seeker is facing persecution that could lead to their death, like gang violence, the right to life is engaged. If they are facing imprisonment, for example, for their political opinions, then their right to liberty is engaged. And if they are facing psychological trauma and fear, their right to security of person is engaged.

Domestic Violence Claims – A Section 7 and Section 15 Challenge

United States Attorney General Jeff Sessions announced in June 2018 that gang violence and domestic violence would no longer be grounds on which an asylum claim could be made.[30] Therefore, anyone making a claim on those grounds would be sent back to their home country.

It is possible to make a claim based on domestic abuse in Canada. Canada recognized women fleeing domestic abuse as a "particular social group" in 1995.[31] To prove the well-founded fear based on domestic abuse remains challenging - the claimant still must show that their country is unwilling or unable to protect women who face domestic abuse.[32]

In a 2014 case called *Matter of A-R-C-G et al*, the American courts began to recognize married women fleeing domestic abuse as a particular social group.[33] Sessions' announcement, if integrated into policy, could undo this case precedent.

This change in United States policy could make the risk of refoulment higher for women trying to make a claim based on domestic abuse in the United States rather than Canada. If the United States does, in fact, stop considering women facing domestic abuse as a "particular social group," and Canada does not make an exception in the application of the STCA, this could be a violation of the section 7 rights of women fleeing domestic violence. If the woman is facing physical abuse, her right to life is engaged. If she is facing emotional abuse, her right to security of person is engaged.

Further, this policy disproportionately will affect women and could therefore be a violation of section 15 as well as section 7. Section 15 prohibits discrimination based on gender – if women are disproportionately affected by a policy that makes no distinction based on gender, then a court may find that they are they being discriminated against based on their gender.[34]

Separating Families in the United States – A Section 7 Challenge

In April 2018, the President of the United States announced that more people who cross the border between ports of entry would be prosecuted for making illegal border crossings. Attorney General Jeff Session described it as a "zero-tolerance" policy for "illegal" (irregular) border crossings.[35]

The change in policy took effect in May 2018 and resulted in parents and children being separated. The children are sent to shelters while the parents are detained to await criminal prosecution before their asylum claims will be heard. There is evidence that even those that

do not cross the border irregularly are being separated from their children.[36]

Since May 2018, the President has since signed an executive order to end the separations and hold the children in custody with their parents. A judge has ordered that all children must be reunited with their parents. The US border agency has also refused to send new cases for prosecution citing a lack of resources and unclear instructions.[37]

The effects on parents, and particularly the effects on children, of being separated from their family members and detained are well documented.[38] Adults, and especially children, can develop post-traumatic stress disorder (PTSD), and their risk of developing depression and anxiety disorders increases. The family separations could be found to be a breach of the section 7 rights to security of the person of asylum seekers, and in particular of their children.

Remedies in Case of a Successful Constitutional Challenge

If the constitutional challenges are successful, there are various remedies that the court can order – many of which will not result in the *Safe Third Country Agreement* being dismantled.

If a court finds a breach of a Charter right, then it could "read in" a number of exceptions to the existing Agreement. For example, if could add a discretionary role for the border services officers. In compelling cases, the border services officer could make an exception and not apply the *Safe Third Country Agreement*. In that case, the asylum seeker would not be sent back to the United States and would be allowed to make an asylum claim in Canada.

If a particular type of claim is obviously being rejected in the United States but would not be in Canada, then the court could read in an exception for these types of claims (for example, claims in which the type of persecution is domestic violence).

It is highly unlikely that the courts would strike down the entire Agreement. Courts order remedies only so far as is necessary to bring the offending legislation into line with the *Constitution*.[39]

Conclusions

The Safe Third Country Agreement is criticized by those who feel that the United States is no longer a safe third country. Critics believe that the United States is putting asylum seekers at risk and that is it increasing the number of irregular asylum seekers at the Canadian border.

There are political reasons why the government would not want to suspend and terminate the *Safe Third Country Agreement*. It has been successful in achieving its purpose - reducing the number of asylum claims adjudicated in Canada.

In the absence of political action to suspend or terminate the *Safe Third Country Agreement*, a constitutional challenge is an option for making changes to the application of

the *Agreement* – and is in the works. Three families are challenging the *Safe Third Country Agreement* as a violation of sections 7 and 15 of the *Charter*.

Should the constitutional challenges to the *Safe Third Country Agreement* be successful, the courts would likely make changes to aspects of the existing Agreement such as providing a discretionary role for border services officers to decide on the legitimacy of claims. Those calling for the *Safe Third Country Agreement* to be ended should not be too hopeful that this constitutional court challenge will get rid of the *Agreement* in its entirety.

[1] *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2018 FC 396, 2018 FC 2018 (CanLII).

[2] *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,* Canada and United States of America, 5 December 2002, Can TS 2004 No 2 (entered into force 29 December 2004) .

[3] *STCA, supra* note 2.

[4] "Asylum Seekers," *UNHCR*, online: < http://www.unhcr.org/pages/49c3646c137.html>.

[5] Maciej Lipinski, "Can domestic Abuse Victims Qualify as Refugees? – A Comment on Matter of A-R-C-G et al," *theCourt.ca* (29 September 2014), online: < http://www.thecourt.ca/can-domestic-abuse-victims-qualify-as-refugees-a-comment-on-matter-of-arcg-et-al/>.

[6] Richard Warnica, "Toronto faces having to close community centres, cancel programs to house migrant tide from US," *National Post* (26 June 2018), online: <https://nationalpost.com/news/canada/toronto-faces-having-to-close-community-centres-cancel-programs-to-house-migrant-tide-from-u-s>.

[7] Mark Gollom, "Would scrapping Safe Third Country Agreement lead to influx of asylum seekers? Not Necessarily," *CBC News* (26 June 2018), online <https://www.cbc.ca/news/canada/safe-third-country-agreement-trump-canada-asylum-refugee-1.4721151>.

In the 11-year period after the first year of the Agreement being in effect, the drop in number of asylum claims was 23%, rather than the initial 54%.

[8]Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement," (2005) 36:2 Colum HRLR 365 at 370.

[9]*Convention Relating to the Status of Refugees*, 25 July 1951, 189 UNTS 137.

[10]*Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85.

[11]*Immigration and Refugee Protection Act*, SC 2001, c 27 s 102.

[12]*STCA*, *supra* note 2 art 6; Canada, Immigration, Refugees and Citizenship Canada, "Canada-U.S. Safe Third Country Agreement," (last updated 23 June 2016), online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html>.

[13]*STCA*, *supra* note 2 art 4.

[14]Macklin, *supra* note 8 at 373.

[15]Arron Hutchins, "Donald Trump is Canada's nest hope for solving its border crisis," *Maclean's* (17 July 2018), online: <https://www.macleans.ca/politics/canada-border-crisis-donald-trump/>.

[16]*Canadian Council for Refugees v R*, 2007 FC 1262 at para 28, [2008] 3 FCR 606 .

[17]*CCR 2007*, *supra* note 16 at para 299.

[18]See, for example: Amanda Dipaolo, "Canada must end its safe third country agreement with the US," *Globe and Mail* (20 June 2019), online: <https://www.theglobeandmail.com/opinion/article-canada-must-end-its-safe-third-country-agreement-with-the-us/>; Vicky Mochama, "The Safe Third Country Agreement doesn't work. Just ask the thousands of people walking over across the Canada-US border," *The Star* (30 April 2018), online <https://www.thestar.com/opinion/star-columnists/2018/04/30/the-safe-third-country-agreement-doesnt-work-just-ask-the-thousands-of-people-walking-across-the-canada-us-border.html>; Gabrielle Giroday, "Repeal Safe Third Country Agreement, says Manitoba Lawyer," *Canadian Lawyer* (6 February, 2017); "Law professors call for suspension of the Safe Third Country Agreement" *Osgoode Hall Law School, York University*, online: <https://www.osgoode.yorku.ca/news/law-professors-call-suspension-safe-third-country-agreement/>.

[19]Meridith McGraw, "A timeline of Trump's immigration executive order and legal challenges," *abc News*(29 July 2017), online: < https://abcnews.go.com/Politics/timeline-president-trumps-immigration-executive-order-legal-challenges/story?id=45332741>.

[20]Globe and Mail, "Families separated, children detained: What we know so far about Trump's 'zero-tolerance' policy," *Globe and Mail* (18 June 2018, updated 27 June 2018), online: <https://www.theglobeandmail.com/world/us-politics/article-trump-family-separation-detention-camps-explainer/>.

[21]Darlene Superville, "Trump says he's willing to shut down government over immigration," *Globe and Mail* (29 July 2018), online: <https://www.theglobeandmail.com/world/us-politics/article-trump-says-hes-willing-to-shut-

down-government-over-immigration/>.

[22]Hutchins, *supra* note 15.

[23]Michelle Zilio, "Number of asylum seekers crossing into Canada from U.S. continues to rise, feds say," *Globe and Mail* (3 May 2018), online: <https://www.theglobeandmail.com/politics/article-number-of-asylum-seekers-crossing-into-canada-from-us-continues-to/>; Bryce Hope, "Asylum seeker suffers frostbite crossing borders as feds' U.S. campaign discourages irregular migration," *CBC News* (10 January 2018), online: <https://www.cbc.ca/news/canada/manitoba/manitoba-emerson-border-town-asylum-seeker-refugees-1.4480884>.

[24] *STCA, supra* note 2 art 10; Anna Desmarais, "Analysis: Debunking Canada's responsibility under the Safe Third Country Agreement," iPOLITICS (16 July 2018), online: <
https://ipolitics.ca/2018/07/16/analysis-debunking-canadas-responsibility-to-the-united-states-under-the-safe-third-country-agreement/>.

[25]*Canadian Charter of Rights and Freedoms*, s 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 .

[26]*Charter*, *supra* note 28 s 15.

[27] *Suresh v Canada (Minister of Citizenship and Immigration),* 2002 SCC 1 at para 54, [2002] 1 SCR 3.

[28]*CCR 2007, supra* note 16 at para 142.

[29] In a 2007 case, Justice Phelan of the Federal Court of Canada found it to be a breach (*CCR 2007*, *supra* note 16 at para 154). His judgment was later overturned on appeal for unrelated reasons (*CCR 2007*, *supra* note 16 at para 285).

[30] Tal Kopan, "Trump admin drops asylum protections for domestic violence victims," *CNN Politics* (11 June 2018), online: <https://www.cnn.com/2018/06/11/politics/jeff-sessions-asylum-decision/index.html>.

[31]*Narvaez v Canada (Minister of Citizenship and Immigration),* [1995] 2 FC 55, 1995 CanLII 3575 (FC).

[32] Lipinski, *supra* note 5.

[33] *Matter of A-R-C-G et al*, 26 I&N Dec. 388 (BIA 2014).

[34] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1.

[35]Globe and Mail, *supra* note 20.

[36]For a list of instances, see Emma Stein, "Asylum Seeking Families, Too, Are Being Separated," *human rights first* (04 June 2018), online: <https://www.humanrightsfirst.org/blog/asylum-seeking-families-too-are-being-separated>.

[37]Globe and Mail, *supra* note 20.

[38] Kevin Loria, "Trump now claims migrant children will be reunited with their families. Here are the lifelong psychological consequences these kids face.," *Business Insider* (21 June 2018), online: < https://www.businessinsider.com/how-family-separation-and-detention-affect-children-2018-6>.

[39]*Schachter v Canada*, [1992] 2 SCR 679 at 695, 93 DLR (4th) 1.