



**Ottawa, April 15, 2021** – Today, the Federal Court of Appeal released its judgment and reasons for judgment in file A-204-20: *Canada (Minister of Citizenship and Immigration) et al. v. Canadian Council of Refugees et al.*, 2021 FCA 72. Justice Stratas wrote the unanimous reasons of the Court; Chief Justice Noël and Justice Laskin concurred.

Before the Court was an appeal and cross-appeal from the July 22, 2020 decision of the Federal Court: 2020 FC 770. The Federal Court of Appeal allowed the appeal, dismissed the cross-appeal, and dismissed the legal challenges brought against Canada's Safe Third Country refugee regime.

This is an unofficial summary of the Court's reasons for judgment. References to paragraphs in the Court's reasons for judgment appear in square brackets.

## Background

In 2004, the federal Cabinet designated the United States a safe country in which to make a refugee claim [25]-[29]. As a result, many coming from the United States are not eligible to claim refugee protection in Canada. Most are returned to the United States to claim refugee protection there [2]-[3], [19]-[21].

Canadian law requires that the designation of the United States as a safe country be continually reviewed and assessed to ensure the United States complies with certain requirements, including human rights standards [30-42]. Based on the results of these reviews and assessments, the federal Cabinet, among other things, may revoke the designation.

Since 2004, reviews and assessments have taken place. The designation of the United States has not been revoked.

In 2017, the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches as well as eight individual refugee claimants challenged the designation in the Federal Court. They alleged that the designation violated the *Canadian Charter of Rights and Freedoms*. They also alleged that the *Immigration and Refugee Protection Act* did not authorize the designation [48]-[55], [176].

The Claimants restricted their challenge to the validity of the legislation designating the United States and its effects. Although the reviews and assessments over the last seventeen years have left the designation of the United States in place, the Claimants did not challenge them [52]-[53].

The Federal Court agreed with part of the Claimants' challenge. It found that the effects of the designation violated refugee claimants' rights to liberty and security of the person under section 7 of the Charter.

## The Federal Court of Appeal's decision

The Federal Court of Appeal set aside the decision of the Federal Court. It dismissed the Claimants' challenges based on the Charter and the authorization for the designation.

Over the years, the Supreme Court of Canada has laid down three "immutable principles" of Charter litigation. It has applied them consistently ever since. The Claimants' Charter challenge offended all three of these principles [56]-[58], [79]:

- "Courts deciding constitutional cases with big public impact do not deal with strawmen" [62]. The Claimants created a "strawman" by "pluck[ing] two provisions [relating to the designation of the United States seventeen years ago] out of the complex legislative scheme and...singl[ing] them out for attack" [62]. The Claimants artificially left out important provisions that require the designation to be reviewed and assessed on a continual basis [58(a)], [61-73].
- Courts must focus on the true cause of an alleged Charter violation [57], [58(b)]. The Claimants' challenge failed to address the true cause of any rights violation here: the review and assessment process, including any decisions in that process [47]-[54], [70], [84]-[90].
- Courts must not decide constitutional cases unless there is sufficient evidence "to permit the Court to adjudicate properly the issues raised" [76]. By failing to attack the review and assessment process, the Claimants left the Court with only bits and pieces of important evidence, the usefulness of which was undermined by significant omissions and redactions that went unchallenged [54], [74]-[83]. In this case, "[r]ight where any Charter assessment must focus" was "a great big hole" [75].

It was not possible for the judges hearing this appeal to cure these fatal defects. They cannot "go beyond the challenge [brought by the Claimants] and address a different challenge" nor can they "help themselves to evidence as if they are a roving commission of inquiry" [59]. Nor can they follow "whatever procedures they wish" [56].

The Court rejected submissions from both sides that the reviews and assessments cannot be the subject of judicial review [92]-[93]. To the contrary, judicial review is available and can be prosecuted and defended effectively and fairly [94]-[97]. To that end, the Court set out certain special tools that can be used [98]-[122].

As for the Federal Court's conclusion that section 7 of the Charter was infringed, the Federal Court of Appeal identified several reasons why it had to be set aside [132]-[168]: the drawing of systemic conclusions from evidence of individual incidents [135]-[142], [146]; the application of "Canadian constitutional standards to foreign legal systems and administrations as if they were Canadian" [155]; and the ignoring of certain powers and discretions that can "alleviate harsh effects" on refugee claimants [143]-[145]. It also criticized the parties' over-reliance on media

reports: “Charter cases with wide implications should not depend on what one finds in a newspaper” [150].

Finally, the Court dismissed the Claimants’ argument that the *Immigration and Refugee Protection Act* did not authorize the designation of the United States [177]. Here, the Court found that its earlier decision on this point, *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136, leave to appeal to SCC refused, 32820 (5 February 2009), had not been overtaken by later case law.

Even though the Court held that the designation of the United States as a safe country was to be maintained based on the case and record put to it, it emphasized the importance of refugee protection and the importance of continuing to assess the situation with “anxious scrutiny” [174].

### **Next steps**

The challengers can apply to the Supreme Court of Canada for permission to appeal from the Court’s decision. They have sixty days from today to apply.

### **Source documents**

The reasons for judgment of this Court dismissing the challenges:

<https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/495606/index.do> (ENG)

<https://decisions.fca-caf.gc.ca/fca-caf/decisions/fr/item/495606/index.do> (FR)

The reasons for judgment of the Federal Court:

<https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/482757/1/document.do> (ENG)

<https://decisions.fct-cf.gc.ca/fc-cf/decisions/fr/482757/1/document.do> (FR)