Date: 20080627

Docket: A-37-08

Citation: 2008 FCA 229

CORAM: **RICHARD C.J.**
NOËL J.A.
EVANS J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CANADIAN COUNCIL FOR REFUGEES,
CANADIAN COUNCIL OF CHURCHES,
AMNESTY INTERNATIONAL and
JOHN DOE

Respondents

Heard at Toronto, Ontario, on May 21, 2008.

Judgment delivered at Ottawa, Ontario, on June 27, 2008.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: RICHARD C.J.
CONCURRING REASONS BY: EVANS J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Phelan J. (the "Applications judge"), granting an application for judicial review by the Canadian Council of Refugees, the Canadian Council of Churches, Amnesty International and John Doe (the "respondents"), declaring invalid sections 159.1 to 159.7 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the "Regulations"), and 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 (otherwise known as the "Safe Third Country Agreement").

[2] In particular the Applications judge found that compliance with Article 33 of the *1951 Convention Relating to the Status of Refugees*, (July 28, 1951), 189 U.N.T.S. 137 (entered into force April 22, 1954) (the "*Refugee Convention*") and Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* (December 10, 1984), 1465 U.N.T.S. 85 (entered into force June 26, 1987) (the "*Convention against Torture*", together the "Conventions"), was a condition precedent to the Governor-in-Council's (the "GIC") exercise of its delegated authority under section 102 of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (the "IRPA") to designate the United States of America (the "U.S.") as a safe third country and that, on the evidence before him, the U.S. did not comply with either. Accordingly, he held that the Safe Third Country Agreement and the implementing provisions of the Regulations were *ultra vires* the enabling legislation, section 102 of the IRPA; violated sections 7 and 15 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "Charter") and were not saved by section 1 of the Charter.

[3] On appeal, Her Majesty the Queen (the "appellant") argues that the Applications judge erred in law by reviewing the Regulations as an administrative decision and that he erred in fact and in law in concluding that there was a real risk of *refoulement* where a refugee is returned to the U.S. Further, the appellant argues that the Applications judge erred in law in concluding that the Regulations violate the Charter.

RELEVANT FACTS

Background

[4] The Regulations at issue implement into domestic law a Safe Third Country Agreement between the Canada and the U.S. whereby if a refugee enters Canada from the U.S. at a land border point of entry, Canada will, subject to specified exceptions, send the refugee back to the U.S. The same applies for refugees crossing by land from Canada into the U.S.

[5] A "safe third country" clause first appeared in Canadian law in the 1988 amendments to the *Immigration Act, 1976*, R.S. 1976-77, c. 52, as amended by S.C. 1988, c. 35 and c. 36 (the "*Immigration Act*"). The provision allowed for the designation of another country as a "safe third country" such that refugee claimants seeking to enter Canada via such a country would not be permitted to claim protection in Canada.

[6] In 1989, the Canadian Council of Churches challenged the constitutionality of this clause, among others, however, the Federal Court of Appeal in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1990] F.C.J. No. 224 (F.C.A.) (QL)) held that the challenge was premature as no country had yet been designated under the clause. The Supreme Court of Canada in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236 at 253 (*Canadian Council of Churches*) also disallowed the challenge, however, on the ground that the Canadian Council of Churches lacked standing to bring the challenge as there was a more reasonable and effective way to bring it, i.e., by a refugee.

[7] Through the 1990s, the Government of Canada continued to negotiate with the U.S. regarding a Safe Third Country Agreement. On December 12, 2001, the U.S.-Canada Smart Border Declaration was issued, setting out a 30 Point Action Plan that included a new commitment to negotiate an agreement.

[8] On June 28, 2002, the IRPA came into effect and as part of the IRPA, Parliament granted the GIC authority to designate a country as “safe” that, based on its laws, practices and human rights record, complies with Article 33 of the *Refugee Convention* and Article 3 of the *Convention against Torture*. These provide:

Refugee Convention, Article 33 ***Prohibition of expulsion or return ("refoulement")*** 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the	***Convention et protocole relatifs au statut des réfugiers, Article 33*** ***Défense d’expulsion et de refoulement*** 1. Aucun des Etats Contractants n’expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques. 2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu’il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l’objet d’une

community of that country.	condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.
Convention against Torture Article 3	**Convention contre la torture**
1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.	**Article 3** 1. Aucun Etat partie n'expulsera, ne refoulera, ni n'extradera une personne vers un autre Etat où il y a des motifs sérieux de croire qu'elle risque d'être soumise à la torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.	2. Pour déterminer s'il y a de tels motifs, les autorités compétentes tiendront compte de toutes les considérations pertinentes, y compris, le cas échéant, de l'existence, dans l'Etat intéressé, d'un ensemble de violations systématiques des droits de l'homme, graves, flagrantes ou massives.

[9] Section 5 of the IRPA requires that a certain class of regulations involving matters of public interest be laid before the House of Parliament prior to promulgation. The Regulations in issue in the present proceeding come within that class and were placed before the House prior to promulgation.

[10] Further, the GIC's authority to enter into a Safe Third Country Agreement is found at sections 101 and 102 of 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	**101.** (1) La demande est irrecevable dans les cas suivants : [...] *e*) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle
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).	**102.** (1) Les règlements régissent l'application des articles 100 et 101, définissent, pour l'application de la présente loi, les termes qui y sont employés et, en vue du partage avec d'autres pays de la responsabilité de l'examen des demandes d'asile, prévoient notamment : *a*) la désignation des pays qui se conforment à l'article 33 de la Convention sur les réfugiés et à l'article 3 de la Convention contre la torture; *b*) l'établissement de la liste de ces pays, laquelle est renouvelée en tant que de besoin; *c*) les cas et les critères d'application de l'alinéa 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	(2) Il est tenu compte des facteurs suivants en vue de la désignation des pays : *a*) le fait que ces pays sont parties à la Convention sur les réfugiés et à la

Convention Against Torture;	Convention contre la torture;
(*b*) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;	*b*) leurs politique et usages en ce qui touche la revendication du statut de réfugié au sens de la Convention sur les réfugiés et les obligations découlant de la Convention contre la torture;
(*c*) its human rights record; and	*c*) leurs antécédents en matière de respect des droits de la personne;
(*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.	*d*) le fait qu'ils sont ou non parties à un accord avec le Canada concernant le partage de la responsabilité de l'examen des demandes d'asile.
(3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country.	(3) Le gouverneur en conseil assure le suivi de l'examen des facteurs à l'égard de chacun des pays désignés.

[My emphasis]

[11] The final text of the Safe Third Country Agreement with the U.S. was signed on December 5, 2002. The GIC formally designated the U.S. two years later, on October 12, 2004, by promulgating section 159.3 of the Regulations, which came into force December 29, 2004:

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.	**159.3** Les États-Unis sont un pays désigné au titre de l'alinéa 102(1)*a*) de la Loi à titre de pays qui se conforme à l'article 33 de la Convention sur les réfugiés et à l'article 3 de la Convention contre la torture et sont un pays désigné pour l'application de l'alinéa 101(1)*e*) de la Loi.

[12] Also promulgated on the same occasion were sections 159.1 to 159.7 of the Regulations, (these are reproduced as Appendix I to these Reasons) according to which refugee claimants who request protection at the U.S.-Canada border by land are denied access to the refugee determination process in Canada unless they meet one of the enumerated exceptions in the Regulations (section 159.5):

- family member of Canadian citizens,
- permanent residents and protected persons,
- unaccompanied minors,
- holders of Canadian travel documents,
- persons who do not need visas to enter Canada but need visas to enter the U.S.,
- persons who were refused entry to the U.S. without having their claim adjudicated or permanent residents of Canada being removed from the U.S.,
- persons who are subject to the death penalty and
- persons who are nationals of countries to which the relevant Minister has imposed a stay on removal orders.

[13] Throughout the negotiations leading to the execution of the Safe Third Country Agreement and its implementation by the promulgation of the Regulations, the United Nations High Commissioner of Refugees (the “UNHCR”) monitored the process in order to ensure that persons seeking protection from persecution would have access to a full and fair procedure to assess their claims (see Scoffield Affidavit, Appeal Book, Vol. 11, Tab 33, Exhibit B4, p. 3126; Scoffield Affidavit, Appeal Book, Vol. 11, Tab 33, Exhibit B5, p. 3135). Its monitoring role was formally recognized in Article 8(3) of the Safe Third Country Agreement, and extends to the ongoing review of the operation of the Agreement.

Leave and Judicial Review Application

[14] On December 29, 2005, the respondents launched an application for leave and judicial review seeking a declaration that the designation of the U.S. under section 102 of the IRPA was *ultra vires*, that the GIC erred in concluding that the U.S. complied with Article 33 of the *Refugee Convention* and Article 3 of the *Convention against Torture* and further, that the designation breached sections 7 and 15 of the Charter. For purposes of clarity, it is useful to set out in full the issues set out in the judicial review application filed before the Court:

> (1) The designation, under Paragraph 159.3 of the *Regulations Amending the Immigration and Refugee Protection Regulations* and Sections 5(1) and 102 of the *Immigration and Refugee Protection Act*, of the United States of America as a country that complies with Article 33 of the 1951 *Convention relating to the Status of Refugees* and Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* is an error of fact and law.
>
> (2) The designation, under Paragraph 159.3 of the *Regulations Amending the Immigration and Refugee Protection Regulations* and Sections 5(1) and 102 of the *Immigration and Refugee Protection Act*, of the United States of America, and the resulting application of the ineligibility provision under Section 101(1)(*e*) to such persons who do not meet one of the exceptions specified under Paragraphs 159.4, 159.5 or 159.6 of the *Regulations*:
>
> a. is patently unreasonable and is an error of fact and law;
>
> b. is contrary to the obligation set out in Section 3(3)(*f*) of the *Immigration and Refugee Protection Act* to apply the legislation in a manner that complies with international human rights instruments to which Canada is a signatory, and is therefore *ultra vires* the Governor-in-Council;
>
> c. is in breach of the rights to life, liberty, and/or security of the person of those subject to it and is not in accordance with the principles of fundamental justice, contrary to Section 7 of the Charter, and is not justified under Section 1 of the Charter; and
>
> d. is in breach of the rights to equality before and under the law and to equal protection and benefit of the law

> without discrimination, contrary to Section 15 of the Charter, and is not justified under Section 1 of the Charter.

[15] The remedies sought were a declaration that the designation of the U.S. is *ultra vires* the GIC and in breach of sections 7 and 15 of the Charter; that the delegation of authority to determine eligibility under paragraph 101(1)(*e*) of the IRPA to officers at ports of entry, and the failure to provide access to counsel during such eligibility determinations are contrary to the principles of natural justice and are in breach of section 7 of the – the second aspect of this remedy (access to counsel) was denied by the Applications judge (Reasons, paras. 288 and 289) and is no longer in issue – and any other relief as the applicants may advise and that the Court may permit (Appeal Book, Application for Leave and for Judicial Review, Vol. 1, p. 133).

[16] Leave to proceed with the application was granted on June 29, 2006.

[17] In the Supplementary Memorandum of Fact and Law, which the respondents filed in support of their judicial review application, after leave was granted, they also argued that the GIC had, since the time of promulgation, breached its obligation to ensure a continuing review pursuant to subsection 102(3) of the IRPA (Respondents' Supplementary Memorandum of Fact and Law, Appeal Book, Vol. 1, p. 200, paras. 89 to 97).

Standing

[18] The respondent organizations argued for public interest standing as organizations that advocate for refugee rights. In the context of this generalized attack on the Regulations, the involvement of John Doe, whose identity is protected by a confidentiality order, becomes relevant. John Doe is a U.S. refugee claimant who was denied refugee status in the U.S. and claimed that he would have sought asylum in Canada but for the Regulations (John Doe Affidavit, Appeal Book, Vol. 2, p. 390, para. 25).

[19] John Doe was initially denied refugee status in the U.S. after arriving with his wife from Colombia on June 18, 2000 on a tourist visa. Approximately 14 months later, on August 9, 2001, the U.S. commenced removal proceedings against John Doe and his wife. On December 14, 2001, John Doe submitted an application for asylum and, in the alternative, a withholding of removal based on a fear of persecution. His application was denied as a result of having failed to apply for refugee status within one year of arriving in the U.S and his application for withholding removal was refused because he failed to establish his claim on the standard of "a clear probability of persecution" required for withholding to be granted (John Doe Affidavit, Appeal Book, Vol. 2, p. 389, paras. 23 and 24). He did not appeal this decision and continued to live illegally in the U.S. He never approached the Canadian border as he had been informed (from an unknown source) that he was ineligible to make a claim in Canada (John Doe Affidavit, Appeal Book, Vol. 2, p. 390, para. 25).

[20] During the course of the proceedings before the Federal Court, counsel for the respondent organizations also represented John Doe as he had no independent counsel. On February 1, 2007, John Doe was arrested by U.S. authorities and faced imminent deportation. The respondents filed a motion for an injunction before the Federal Court to compel the appellant "to allow John Doe and his wife to enter Canada" pending the disposition of the judicial review application which they had brought, or in the alternative, an order "restraining the [appellant] from denying him and his wife entry to Canada" (Appeal Book, Vol. 15, p. 4588). Accompanying this motion were renewed allegations of threats by the Revolutionary Armed Forces of Colombia (the "FARCs") directed against John Doe.

[21] On February 7, 2007, the Applications judge issued a conditional order providing that if John Doe were to arrive at a Canadian port of entry, he was not to be removed by Canadian authorities (Appeal Book, Vol. 15, p. 4586). The Applications judge declined to provide any other relief until John Doe had exhausted all his remedies before the U.S. Courts (Appeal Book, Vol. 15, p. 4588). In the meantime, the U.S. Board of Immigration Appeals reopened John Doe's claim and remanded it to an Immigration Judge for reconsideration and John Doe was eventually released from custody. Consequently, Phelan J. dismissed the remaining aspects of the respondents' motion which he had kept in abeyance (Appeal Book, Vol. 15, p. 4610).

The evidence

[22] In support of their application for judicial review, the respondents filed a series of affidavits from U.S. academics and practitioners (Reasons, para. 106), covering various aspects of U.S.

asylum law and policy until the filing of the application. These affidavits attempt to establish the current state of U.S. asylum law and policy and generally allege an erosion of U.S. institutions, laws and practices including an expansion of exclusions from protection, the use of detention, restrictions on appeals and codification of questionable asylum laws. In particular, the affidavit evidence was adduced by the respondents to demonstrate:

> That persons who fail to make a claim within one year of their arrival in the U.S. are improperly barred from consideration for asylum contrary to the *Refugee Convention* and although a claimant would still be eligible for a withholding removal, the U.S. law imposes a higher risk standard in relation to withholding removals, being – more likely than not (Supplementary Memorandum, Appeal Book, Vol. 1, p. 200 at paras. 48-55);
>
> The U.S. exclusion from consideration for asylum or withholding of removal of serious criminals, those who are a danger to security or terrorists goes further than what is permitted by the Conventions (*idem* at paras. 56, 57);
>
> That the U.S. interprets too narrowly certain of the criteria under the Convention for granting protection. In particular, they contend that the U.S. fails to interpret the definition of refugee and that the U.S. errs in the risk standard for torture (*idem* at paras. 67-73);
>
> That the U.S. practices impeded the successful advancement of a protection claim, more particularly by the detention of persons who are without valid status in the U.S. and those who arrive without proper documents (expedited removal) as well as by the failure to provide state-funded legal representation at all stages of the refugee determination process (*idem* at para. 74 and Martin Affidavit, Appeal Book, Vol. V, p. 1210 at paras. 37, 38 and 191).

[23] The appellant also adduced expert affidavit evidence (Reasons, para. 106) covering the history and development of the safe third country concept in the European Union (the “E.U.”) member states, including the United Kingdom (the “U.K.”), information on the background, negotiations and terms of the Safe Third Country Agreement, the process leading to the designation of the U.S. as a safe third country and the adoption of implementing Regulations, the

compatibility of responsibility sharing agreements with the *Refugee and Torture Convention*, a description of the U.S. refugee determination system and analysis of the specific areas of U.S. refugee laws and practices and human rights record attacked by the respondents, comparisons of the U.S. approach with the various approaches taken in the E.U., U.K., Canada in the specific areas impugned by the respondents and the implementation of the Safe Third Country Agreement at the Canada-U.S. border.

[24] In addition, on cross-examination of Bruce Scoffield, lead Citizenship and Immigration Canada official in the negotiation of the Safe Third Country Agreement with the U.S., the appellant provided a copy of the "advice" that Cabinet had received regarding U.S. compliance with the factors set out in subsection 102(2) of the IRPA, dated September 24, 2002.

[25] The parties confirmed that the witnesses adduced their evidence by way of sworn statements and that all cross-examinations thereon took place outside the presence of the Applications judge.

The outcome

[26] In a lengthy decision comprising 340 paragraphs, the Applications judge allowed the application for judicial review, declaring that: the Safe Third Country Agreement and sections 159.1 to 159.7 of the Regulations were *ultra vires*; the GIC acted unreasonably in concluding that the U.S. was compliant with its Convention obligations; the GIC had failed to ensure continuing

review of the designation of the U.S. as a safe third country as required by subsection 102(2) of the IRPA; and sections 159.1 to 159.7 of the Regulations violated sections 7 and 15 of the Charter.

[27] The formal judgment delivered on January 17, 2008 certifies the following three questions for consideration by this Court:

> 1) What is the appropriate standard of review in respect of the Governor-in-Council's decision to designate the United States of America as a "safe third country" pursuant to s. 102 of the *Immigration and Refugee Protection Act*?
>
> 2) Are paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement between Canada and the United States of America *ultra vires* and of no legal force and effect?
>
> 3) Does the designation of the United States of America as a "safe third country" alone or in combination with the ineligibility provision of clause 101(1)(e) of the *Immigration and Refugee Protection Act* violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and is such violation justified under section 1?

[28] Although also asked to certify a question about whether the respondents had the standing to bring forth the application for the judicial review, the Applications judge declined to do so (Appeal Book, Vol. 15, p. 4616).

[29] The present appeal ensued and by order dated January 31, 2008, the Chief Justice stayed the operation of the Judgment until the present pronouncement.

FEDERAL COURT DECISION

[30] The Applications judge first determined that the three respondent organizations had the standing to bring the judicial review application. In particular, he held that they had successfully

established the third prong of the standing test i.e, the absence of any other reasonable and effective manner to have this matter brought before a court. The Applications judge noted that no refugee from within Canada, seeking entry, can bring the claim. Only a refugee from outside Canada, an already vulnerable individual, could bring the challenge (Reasons, paras. 43, 44 and 45). The Applications judge distinguished the decision of the Supreme Court in *Canadian Council of Churches, supra* on that basis (Reasons, para. 40). He went on to conclude that even without John Doe, these organizations bear recognition as legitimate applicants (Reasons, para. 51).

[31] In addressing John Doe's standing, the Applications judge reasoned that it is of no import that John Doe never approached the Canadian border as such a requirement would be wasteful, delaying and unfair (Reasons, para. 47). While the Applications judge acknowledged that the U.S. agreed to reconsider John Doe's claim, he did not accept that this was done in good faith. According to the Applications judge, this development can only be explained by the litigation undertaken before him (Reasons, para. 53). The Applications judge therefore reasoned that even though John Doe never showed up, he was to be considered as having presented himself at the border and as having been denied entry.

[32] The Applications judge begins his substantive analysis by referring to the promulgation on October 12, 2004 of section 159.3 of the Regulations designating the U.S. as a country that complies with Article 33 of the *Refugee Convention* and Article 3 of the *Convention against Torture* (Reasons, para. 26). He describes "this designation" as "the central point of contention in this judicial review" (*idem*).

[33] He later repeats (Reasons, para. 55) that the central issue is whether section 159.3 is *ultra vires* the power given by Parliament to make such Regulation (hereinafter, "the *vires* issue"). That in turns depends on whether the conditions precedent for the exercise of the delegated authority by the GIC were present when the designation was made.

[34] The Applications judge then begins exploring these conditions. He acknowledges that subsection 102(2) of IRPA sets out several factors which must be considered before designating a country and that the GIC considered these factors before designating the U.S. as a "safe third country" (Reasons, para. 78):

> … The wording of the [Regulatory Impact and Analysis Statement] establishes that the GIC considered the application of the four factors. Furthermore, the [Respondents] set out in detail the content of a memorandum to the GIC created on September 24, 2002, and signed by the relevant Minister at the time. This memorandum appears to be the basis upon which the GIC entered into the STCA. In reviewing the points the [Respondents] extract from that memorandum, it is clear that the GIC, in reading and reviewing the Minister's memorandum would have turned their mind to the four factors in the legislation, including the U.S. human rights record in general.

[35] However, beyond the conditions set out in subsection 102(2) of the IRPA, the Applications judge holds that the main condition is paragraph 102(1)(*a*) of the IRPA, which provides that the GIC is authorized to promulgate regulations "designating countries <u>that comply</u> with Article 33 of the *Refugee Convention* and Article 3 of the *Convention against Torture*" (Reasons, para. 79). According to the Applications judge compliance with the Conventions is a condition precedent to the exercise by the GIC of its delegated authority (*idem*). Although, the issue whether the U.S.

complies is, to some extent, a matter of opinion (Reasons, para. 80), the question to be decided is objective “compliance or not” (Reasons, para. 83).

[36] The Applications judge then addresses the standard of review. Later in his reasons he acknowledges that determining whether the conditions precedent to the exercise of the delegated authority are present is a simple matter that stands to be reviewed on a standard of correctness (Reasons, para. 75). However, the respondents also take issue with the “decision” of the GIC which led to the designation “an argument involving the standard of review and its application.” (Reasons, para. 54). After conducting a pragmatic and functional analysis (Reasons, paras. 88 to 105), the Applications judge holds that the applicable standard of review is reasonableness *simpliciter* (as it was then known).

[37] He then embarks on an extensive analysis to determine both whether the designation was *ultra vires*, and whether the GIC had failed to perform its statutory duty to review the designation thereafter as contemplated by subsection 102(2) of the IRPA. The Applications judge does not explain how this second issue came to be part of the judicial review application.

[38] With respect to the extensive expert evidence filed by the parties (he highlights six affidavits filed on behalf of the respondents and three on behalf of the appellant) expressing contradictory opinion on the issue whether the U.S. was compliant with the relevant Articles of the Conventions, the Applications judge rules in two swift paragraphs that the respondents’ evidence is to be preferred whenever there is a conflict in views (Reasons, paras. 108 and 109):

> **[108]** I find the [respondents'] experts to be more credible, both in terms of their expertise and the sufficiency, directness and logic of their reports and their cross-examination thereon. I also recognized and have given the appropriate weight to the fact that some of the [respondents'] experts could be said to speak for or have "constituencies" which means that their evidence may lean in a direction more favourably to the constituency. The same can be said for the [appellant's] experts who testify in support of either a process in which they have been engaged from the beginning or in support of a system they have worked in. Taking account of these subjective factors, I find the [respondents'] experts to be more objective and dispassionate in their analysis and report.
>
> **[109]** Therefore, I have been persuaded that, where in conflict, the [respondents'] evidence is to be preferred.

[39] The Applications judge then proceeds to review what he describes as "legal facts" to ascertain whether the U.S. protects refugees from *refoulement*. He notes that the issue is whether the U.S. offers "actual" protection (Reasons, para. 137). The Applications judge collapses into one his analysis of whether the designation was validly made and whether the GIC had subsequently failed to conduct an ongoing review as required by subsection 102(3) of the IRPA. He indiscriminately reviews evidence which precedes and follows the effective date of the designation before concluding both that the designation was *ultra vires* and that the GIC had thereafter failed to conduct the ongoing review as required by subsection 102(3) of IRPA (Reasons, para. 240). The formal judgment gives effect to both of these conclusions. [Although this is not said anywhere in the formal judgment or the reasons, both conclusions cannot stand at once. If the designation of the U.S. was *ultra vires* as was found, the GIC could not have breached its ongoing obligation to review it.]

[40] In addressing the Charter challenge, the Applications judge first determines that the applicable standard of review for determining whether the designation of the U.S. as a safe third

country violates the Charter is correctness (Reasons, para. 276). According to the Applications judge, if Canadian officials return a refugee claimant to the U.S., pursuant to the Safe Third Country Agreement, this action must be in compliance with the Charter (Reasons, para. 281; relying on *Singh v. Canada (Minister of Citizenship and Immigration)*, [1985] 1 S.C.R. 177 and *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283). He then proceeds to address the Charter challenge based on his earlier finding that the U.S. is not compliant with the Conventions.

[41] According to the Applications judge, a refugee's right to life, liberty and security is clearly put at risk when he or she is returned to the U.S. under the Safe Third Country Agreement, if the U.S. does not comply with the Conventions (Reasons, para. 285). In considering whether the deprivation of a person's right to life, liberty and security is nevertheless in accordance with the fundamental principles of justice, he finds that the lack of discretion for a Canadian immigration officer to allow a claimant to remain in Canada after determining that the claimant does not fall within the enumerated exceptions to the Safe Third Country Agreement, violates the principles of fundamental justice (Reasons, paras. 304 and 307).

[42] While recognizing that his conclusion is based on his findings under the *vires* analysis that the U.S. is not a safe country, the Applications judge suggests that the Regulations may violate the Charter even if the U.S. was a safe country (Reasons, paras. 311 and 312).

[43] Turning to the section 15 Charter challenge, the Applications judge finds, following an examination of the relevant factors (*Law v. Canada (Minister of Employment and Immigration),*

[1999] 1 S.C.R. 497 at paragraph 51), that there is discrimination. According to the Applications judge, women and Colombian nationals have suffered a pre-existing disadvantage and the use of limited exceptions to the Safe Third Country Agreement does not address the specific needs of these individuals (Reasons, paras. 325 to 333). Furthermore, this unequal treatment cannot be justified under section 1 of the Charter (Reasons, paras. 335 and 336).

POSITION OF THE PARTIES

[44] Dealing with the *vires* issue, the appellant contends that the Applications judge erred by reviewing the promulgation of section 159.3 of the Regulations, which designates the U.S. as a safe third country, as if it was an administrative decision to be assessed on a standard of reasonableness. According to the appellant the matter before the Applications judge was a pure *vires* issue, and his only task was to verify whether the conditions precedent for the exercise of the delegated authority were present at the time of the promulgation.

[45] The appellant contends that the Applications judge erred in finding that compliance with the relevant Articles of the Conventions in an absolutist sense is a condition precedent to the exercise of the delegated authority. Paragraph 102(1)(*a*) of the IRPA sets out the statutory objective which is to designate countries that comply with the Conventions and the means of ascertaining compliance are set out in subsection 102(2) of the IRPA. By finding that “compliance” in an absolutist sense is a condition precedent, the Applications judge second guessed the promulgation of the designation. As such he usurped the authority which Parliament had expressly delegated to the GIC.

[46] In the alternative, the evidence establishes that the U.S. complies with the relevant Articles of the Convention. The conclusion reached by the Applications judge that the U.S. is not compliant is based on a "perverse" approach to the evidence as revealed by his one sided assessment of the expert evidence, and his failure to confront the position of the UNHCR that the U.S. like Canada, is a "safe" country (Scoffield Affidavit, Appeal Book, Vol. 11, Tab 33, Exhibit B-10, p. 3247).

[47] Finally, with respect to the Charter violations found to have taken place, the appellant argues that Charter litigation does not involve administrative law standards of judicial review. Rather, a person alleging Charter violations has the burden of demonstrating infringement on a balance of probabilities. The appellant submits that the Applications judge ignored these fundamental principles and erred in undertaking a Charter analysis in the context of a purely hypothetical situation.

[48] The respondents, for their part, contend that the Applications judge came to the correct conclusion for the reasons that he gave with respect to all the issues that he was called upon to decide. They further submit that it would be "absurd" to construe the relevant provisions of IRPA as allowing the GIC to designate a country that does not "actually" comply with the relevant Articles of the Conventions.

[49] The respondents add that this appeal is an attempt to re-litigate factual issues. The findings made by the Applications judge on the U.S. protection system and human rights record cannot be reviewed in the absence of a palpable or overriding error, none of which has been established.

[50] At the hearing of the appeal, Counsel for the respondents indicated that, rather than striking down sections 159.1 to 159.7 of the Regulations, the Applications judge could have limited his Charter remedy to a declaration that the Regulations were in breach of the Charter only to the extent that they fail to give border officers the discretion to allow a refugee claimant to remain in Canada on grounds other than those enumerated in section 159.5 of the Regulations (see para. 12 above). According to counsel, this absence of discretion is what creates a real risk of *refoulement* for a class of refugees, contrary to section 7 of the Charter.

ANALYSIS AND DECISION

First certified question: standard of review

[51] The first question certified by the Applications judge deals with the *vires* issue and seeks to identify the appropriate standard of review in respect of the GIC's "decision" to designate the U.S. as a safe third country. In this respect, a preliminary issue arises as to whether the promulgation of the designation is a "decision" subject to judicial review pursuant to section 18 of the *Federal Courts Act*, R.S. 1985, c. F-7, (the "*Federal Courts Act*").

[52] When served with the application for judicial review, the GIC had the obligation pursuant to the *Federal Courts Rules*, S.O.R./98-106 to forward to the Federal Court Registry the reasons for the "decision" to promulgate the designation. The position taken by the GIC in this regard is set out in a letter forwarded to the Registry on February 4, 2006, the body of which reads:

> This is in response to a request pursuant to Rule 9 of the *Federal Court Immigration and Refugee Protection Rules, 1993*.

> While there is no decision as such in this case, the *Regulations Amending the Immigration and Refugee Protection Regulations*, S.O.R./2004-217, constitute the decision and reasons.
>
> Pursuant to Rule 9(2)(*a*) of the *Federal Court Immigration and Refugee Protection Rules, 1993*, I certify the enclosed two copies as correct copies of the original.

[53] This response with which the respondents do not take issue (Notice of Application, Appeal Book, Vol. I, pp. 133 to 135) conforms with the generally accepted view that the "decision" of the GIC to promulgate regulations, just like the "decision" by members of Parliament to enact legislation, is not subject to review by the courts (as to the later, note subsection 2(2) of the *Federal Courts Act* (originally introduced by S.C. 1990, c.8, s.1) which provides that "For greater certainty", the House of Commons is not a Federal Board and therefore not subject to judicial review). That said, the legality or *vires* of a regulation promulgated under the authority of Parliament has always been open to challenge before the courts and to that extent, the actions of the GIC are subject to judicial review. This distinction between what can be reviewed and what falls outside the purview of the courts is highlighted by the Supreme Court in *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at page 111:

> The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] *2* S.C.R. *735* at p. *748*. I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with: *R. v. National Fish Co.*, [1931] Ex. C.R. *75; Minister of Health v. The King (on the Prosecution of Yaffe)*, [1931] A.C. 494 at p. *533*. Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order in council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case.

[54] The dividing line was succinctly identified by Strayer J.A. in *Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 at page 602:

> It goes without saying that it is not for a court to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences. The essential question for the court always is: does the statutory grant of authority permit this particular delegated legislation? [Footnote omitted]

[55] Until 1990, the procedure for attacking the *vires* of a regulation promulgated under the authority of Parliament was by way of declaratory action initiated by way of a statement of claim (David Sgayias et al., *Federal Court Practice, 1991-92* (Scarborough: Thomson Professional Publishing Canada, 1991) at p. 89). Since then (see the amendment to the *Federal Court Act* brought by S.C. 1990, c. 8, s. 4), the procedure for controlling the legality of subordinate legislation has been streamlined, and judicial review under section 18 of the *Federal Courts Act* (as renamed in 2002) became the means of controlling decisions of administrative bodies as well as the *vires* of subordinate legislation (*Saskatchewan Wheat Pool v. Canada (Attorney General)*, 107 D.L.R. (4th) 190, at paras. 11 to 15).

[56] This modification was procedural in nature. An attack on the legality of subordinate legislation, on the ground that the conditions precedent prescribed by Parliament were not met at the time of the promulgation, remains what it has always been; an attack on the impugned regulation *per se* and not on the “decision” to promulgate it.

[57] Understanding precisely what is in issue in a judicial review application is important when it comes time to determine the standard of review as well as the scope of the review that can be

conducted by the Court. An attack aimed at the *vires* of a regulation involves the narrow question of whether the conditions precedent set out by Parliament for the exercise of the delegated authority are present at the time of the promulgation, an issue that invariably calls for a standard of correctness. As was stated by this Court in *Sunshine Village Corp. v. Canada (Parks)*, 2004 FCA 166, [2004] 3 F.C.R. 600 (at para. 10):

> … Reviewing whether subordinate legislation is authorized by its enabling statute does not require application of the pragmatic and functional approach. Rather, the *vires* of subordinate legislation is always to be reviewed on a correctness standard. See, for analogous circumstances in respect of municipal by-laws, *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, at paragraph 5.

[58] The Supreme Court recently reiterated in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 59, that "true questions of *vires*", such as the one here in issue, always call for a standard of correctness without the need to conduct a pragmatic and functional analysis.

[59] In this case, there was confusion as to whether the issue raised by the application for judicial review is one of *vires* or whether the subject matter of the application is a challenge of the GIC's "decision" to promulgate the designation. The confusion appears to have arisen from the manner in which the respondents presented their case (Reasons, para. 54):

> This judicial review has been argued from two perspectives. The first is an attack on the legitimacy of the Regulations -- an argument as to "*vires*". The second is an attack on the GIC decision which led to the Regulation -- an argument involving the standard of review and its application.

The Applications judge in his reasons refers at times to a review of "the GIC's determination" (Reasons, para. 88); a review of the "initial conclusions leading to" the promulgation of the Regulation (Reasons, para. 105) and his certified question seeks to identify the standard of review applicable to the GIC's "decision" to designate the U.S.

[60] Despite this language, the matter raised by the application is a pure *vires* issue (see the relevant part of the application for judicial review quoted at paragraph 15 above). This is not controversial as counsel for the respondents (Mr. Waldman) acknowledged that they were out of time to challenge the "decision" to promulgate the Regulation even if they had wanted to. Nevertheless, the Applications judge chose to conduct a pragmatic and functional analysis in order to identify the standard of review. He said (Reasons, para. 88):

> Unlike many cases of review of the *ultra vires* of a regulation, the parties had access to some of the material before the GIC in its consideration of the relevant factors. Therefore, there is a record upon which the Court can apply a standard of review to the GIC's determination. …

Applying the framework of analysis developed by the Supreme Court in *Suresh v. Canada (Minister of Citizenship and Immigration*, 2002 SCC 1, [2002] 1 S.C.R. 3 – because "*Suresh* most closely approximates the contextual circumstances of this case" (Reasons, para. 92) – the Applications judge concluded that reasonableness was the appropriate standard (Reasons, para. 105).

[61] With respect, the Applications judge did not need to conduct a pragmatic and functional analysis and he identified the wrong standard. Having access to part of the record before the GIC has no impact on the standard since there is in this case no decision to review. In *Suresh, supra*, the

Supreme Court was confronted with the judicial review of a decision of an Immigration official to issue a deportation order. Hence the Supreme Court began its analysis stating (*Suresh, supra*, para. 29):

> The first question was what standard should be adopted with respect to the Minister's decision that a refugee constitutes a danger to the security of Canada.

[62] No such issue arises here again because there is no decision to review.

[63] The Applications judge therefore misspoke when he directed his question to the standard of review applicable to the "decision" of the GIC. In my respectful view, the first certified question should have been directed at the standard of review applicable to the review of the *vires* issue, and the standard applicable in such a case is correctness.

Second certified question: the vires of the designation

[64] The second certified question should therefore be read as asking whether– applying a standard of correctness – the impugned Regulations and the Safe Third Country Agreement are *ultra vires* the IRPA. This requires the Court to identify the conditions precedent to the GIC's exercise of its delegated authority and determine whether these conditions were satisfied at the time of promulgation.

[65] If I have correctly stated the issue to be decided, the Court has before it all the elements required to address it, and I do not see how I could avoid dealing with the question certified by the Applications judge on this point. As we have seen, the respondents have raised *vires* as a self

standing issue and the Applications judge dealt with it on that basis (Reasons, paras. 61 to 87; 106 to 236 and 241 to 263). Contrary to the Charter challenge (see discussion below), the question whether the GIC has in this case acted in conformity with the conditions precedent prescribed by law is neither hypothetical nor theoretical.

[66] On a plain reading of sections 101 and 102 of the IRPA, the conditions precedent for the exercise of the delegated authority are those set out in subsection 102(2) of the IRPA. The reasoning of the Applications judge for concluding that beyond those, the country must "comply" with the relevant Articles of the Conventions is as follows (Reasons, paras. 78 and 79):

> **[78]** With respect to what is authorized in terms of regulation-making, there are several conditions precedent that accompany the authority of the GIC to designate the U.S. a safe third country. First, section 102(2) sets out several factors which must be considered before designating a country. There are no strict standards established for the consideration of the four factors but their consideration is phrased in mandatory language. …
>
> **[79]** The main condition at issue in this case is section 102(1)(a), which states that the GIC is authorized to enact regulations that include provisions "designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture." The provision requires that compliance with the non-*refoulement* provisions of the Refugee Convention and the CAT is a necessary pre-condition to designation. It was my conclusion earlier that if a country did not comply with the relevant articles of the two Conventions, the GIC had no power to designate the country as "safe". It is my further conclusion that in reaching this determination, the GIC must base its decision on the practices and policies of that government in respect of claims under the Refugee Convention and the obligations under the Convention Against Torture.

[67] The earlier conclusion to which he refers are the following (Reasons, paras. 56 and 57):

> **[56]** However, read as a whole, s. 102 gives to the GIC the discretion to enter into a STCA only upon specific conditions, a fundamental condition is compliance with the specific articles of the *Refugee Convention* and *Convention against Torture*. I do not

> interpret the provision as giving the GIC the power to enter into a STCA where the country does not comply with those preconditions. It simply gives the GIC the discretion to set up a regulation to designate a country as "safe" if the country meets the conditions of compliance.
>
> **[57]** To interpret s. 102(1) as giving the GIC discretion to enter into such agreements with countries that did not comply with the *Refugee Convention* and *Convention against Torture* would make a mockery of Canada's international commitments, of the very purpose of our domestic laws and even of the internal logic of s. 102(1). There would be no need to consider whether the country is a party to the *Refugee Convention* and *Convention against Torture* (s. 102(2)(a)), nor that country's policies and practices with respect to claims under the *Refugee Convention* or its obligations under the *Convention against Torture* – both factors are compulsory factors to be considered. Nor would there be any merit in requiring an ongoing review of these factors (s. 102(3)) which is a requirement phrased in directory terms "must ensure the continuing review".
>
> [My emphasis]

[68] In so saying, the Applications judge accepted the respondents' submission that "actual" compliance was a condition precedent to the exercise of the delegated authority. According to the Applications judge, what had to be shown is "actual" protection from *refoulement* (Reasons, para. 136). He puts the matter this way earlier in his reasons (Reasons, para. 60):

> In my view, the issue is whether the conditions for passing the Regulation have been met on an objective basis. The conditions are framed in terms of legal criteria and address the matter in absolute terms of compliance with international law; not in terms of the GIC's opinion or reasonable belief in such compliance.
>
> [My emphasis]

[69] His lengthy analysis of the evidence focuses on whether "actual" compliance or compliance "in absolute terms" with the respective conventions had been demonstrated (Reasons, paras. 106 to 236 and 241 to 263). With respect to Article 33 of the *Refugee Convention*, he held that the

"instances of non-compliance" were such that the U.S. could not be said to comply (Reasons, para. 240). With respect to the *Convention against Torture*, he finds that the respondents' evidence that the U.S. does not comply with Article 3 "more credible" than the appellant's since it was supported by "real life examples" that the U.S. does not comply (Reasons, para. 262). The Applications judge, applying a standard of reasonableness to what he perceives as a "decision", concludes that the U.S. does not comply with either Conventions, and that the designation of the U.S. as a safe country, was *ultra vires* the IRPA.

[70] I note in passing that in reaching this conclusion the Applications judge did not concern himself with the fact that much of the evidence that he reviewed was not in existence when the GIC designated the U.S. since it relates to cases, events and legislative modifications, which are subsequent to the date of the promulgation. More is said about this later.

[71] I agree with Counsel for the respondents that the question whether the Applications judge properly construed the conditions precedent to the exercise of the delegated authority raises a pure issue of statutory construction:

> … The words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament (*Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27 at para. 21).

[72] Paragraph 101(1)(*e*) of the IRPA provides that a person entering Canada from a "designated country" is ineligible to have his or her claim for refugee protection considered by the Immigration and Refugee Board. For the purpose of giving effect to this provision, subsection 102(1) of the

IRPA gives the GIC the power to promulgate regulations governing the treatment of such claims which may include provisions designating countries that comply with Article 33 of the *Refugee Convention* and Article 3 of the *Convention against Torture*; and respecting the circumstances and criteria applicable to a claimant who comes to Canada from such a country. This is a broad grant of authority intended to give effect to Parliament's clearly expressed intent that responsibility for the consideration of refugee claims be shared with countries that are respectful of their Convention obligations and human rights.

[73] In this respect, subsection 102(2) of the IRPA requires that the GIC consider, prior to designating a country, the country's policies and practices with respect to the *Refugee Convention* and the *Convention against Torture* as well as its human rights record. In recognition of the fact that such policies, practices and record can evolve over time, subsection 102(3) of the IRPA requires the GIC to conduct an ongoing review of these factors once a country has been designated. Where the GIC concludes by reasons of the evolution of those factors that the designation is no longer warranted, section 159.7 of the Regulations allows the Government of Canada to unilaterally suspend or terminate the Safe Third Country Agreement.

[74] Significantly, subsection 102(1) of the IRPA provides that a designation may be made "for the purposes of this Act" and section 3 of the IRPA provides amongst others the following two:

3 (2) The objectives of this Act with respect to refugees are …	3 (2) S'agissant des réfugiés, la présente loi a pour objet : …
(*b*) to fulfill Canada's international legal obligations with respect to refugees and affirm Canada's	*b*) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux

commitment to international efforts to provide assistance to those in need of resettlement; … (*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;	personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller; … *d*) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités;

Also relevant is paragraph 3(3)(*f*) of the IRPA which sets out Parliament's requirement that the Act be construed in a manner which "complies with international human rights instruments to which Canada is a signatory".

[75] As I read the relevant provisions, the scheme implemented by Parliament has, as its objective, the sharing of responsibility for the consideration of refugee claims with countries that are signatory to and comply with the relevant Articles of the Conventions and have an acceptable human rights record. The factors to be considered before designating a country are expressly set out in subsection 102(2) of the IRPA. The consideration of these factors is framed as a condition precedent to the designation of a country as the introductory words make clear: "the following factors are to be considered"; "il est tenu compte des facteurs suivants".

[76] Keeping in mind that the statutory objective is to designate countries that comply with the relevant Articles of the Conventions and are respectful of human rights, the GIC could not designate a country if it was not satisfied that the country's policies, practices and record indicate compliance. I take issue with the Applications judge's suggestion that unless "compliance" is made a condition precedent, the GIC would have discretion to designate a country that does not comply (Reasons, para. 56). It seems clear that the GIC would be acting for an improper purpose if it was to designate a country which it considers not to be compliant.

[77] This misapprehended concern that the GIC would have the discretion to designate a country that does not comply appears to be what led the Applications judge to transform the statutory objective of designating countries "that comply" with the respective Conventions, into a condition precedent (Reasons, para. 57). The error is compounded by the Applications judge's further conclusion that what must be established is "actual" compliance or compliance "in absolute terms".

[78] Subsection 101(2) does not refer to "actual" compliance or compliance "in absolute terms" nor does it otherwise specify the type and extent of compliance contemplated. However, Parliament has specified the four factors to be considered in determining whether a country can be designated. These factors are general in nature and are indicative of Parliament's intent that the matter of compliance be assessed on the basis of an appreciation by the GIC of the country's policies, practices and human rights record. Once it is accepted, as it must be in this case, that the GIC has given due consideration to these four factors, and formed the opinion that the candidate country is compliant with the relevant Articles of the Conventions, there is nothing left to be reviewed

judicially. I stress that there is no suggestion in this case that the GIC acted in bad faith or for an improper purpose.

[79] Indeed, no such suggestion could be made based on this record. The *Regulatory Impact Analysis Statement* (the "RIAS"), published 60 days prior to the effective date of the promulgation, indicates that the GIC consulted with a number of non-governmental organizations who felt that the U.S. did not meet its Convention obligations. These views were considered together with those of others. In particular, the RIAS notes that the UNHCR expressed the view that the U.S. (like Canada), meets its international obligations (Appeal Book, Vol. 11, p. 3160). 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.

[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.

The failure to conduct the ongoing review

[83] In their memorandum, at paragraph 95, the respondents state that they "originally sought a declaration that both the original and the **ongoing** designation of the U.S. as a safe third country *via* the continuing operation of the Regulations was unconstitutional and *ultra vires*" (emphasis by the respondents). They assert earlier in their Memorandum (para. 12) that they sought a declaration that the appellant had erred by failing to meet "her statutory continuing review obligation". The record does not bear this out. The application filed by the respondents is aimed at the alleged illegal designation of the U.S. and nothing else. No mention is made of the alleged failure to review and no declaratory relief (or any other type of relief) is sought in that regard. This is how the Applications

judge saw the application based on his own description of the matter before him (Reasons, paras. 1 and 2), and there is no indication that an amendment to the application brought by the respondents was sought or obtained in the course of the proceedings. I note, however, that both the respondents and the appellant made submissions on this issue, although there is no discussion as to the remedy which would flow from the alleged failure to review (see the parties' respective Supplementary Submissions, Appeal Book, Vol. 1, pp. 242 to 245 and pp. 357 and 358).

[84] In his reasons, the Applications judge conducts a judicial review of this issue (Reasons, paras. 264 to 275) and the formal judgment that he gives declares "that the Governor-in-Council failed to ensure the continuing review of the United States as a "safe third Country" as required by subsection 102(2) of IRPA".

[85] It is not clear how this discrete issue became part of the judicial review application. When asked whether an amendment was obtained, counsel for the respondents (Ms. Jackman) could not point to one but gave a stern response about how things are done by the Immigration bar. She suggested that an amendment can in effect be made without anyone speaking to it (by "osmosis" is the description that I used), and that a notice to the profession would be required, if this Court was to find that the amendment which took place in this case was somehow inappropriate.

[86] I do not believe that I am advocating a return to procedural formalism if I suggest that an amendment of the type here in question required, at the very least, that the matter be brought to the attention of the Applications judge so that he could put his mind to the distinct issues which flowed

from it. The failure to do so in this case has given rise to significant difficulties, which do not assist anyone.

[87] First, the Applications judge never alludes to the fact that this additional issue becomes relevant only if the designation was validly promulgated in the first place. His conclusion was that the designation was void *ab initio.* Second, the Applications judge reviews the matter of the alleged failure to perform the ongoing review as a decision subject to a standard of reasonableness (Reasons, para. 105). There was, on the record before the Applications judge, no suggestion that the GIC was asked to perform this duty and refused to do so. Absent a decision, the remedy which flows from a failure to perform a statutory duty is a *mandamus* compelling the government actor to perform the duty.

[88] More importantly, the issue raised by the purported amendment allowed the Applications judge to have regard to an extensive body of evidence, adduced by both sides, which postdates the designation. The Applications judge relied on this evidence indiscriminately to support both his conclusion that the GIC had failed to conduct the ongoing review and that the designation was *ultra vires*. [This is evident throughout the reasons, but see for example paragraphs 7, and 260 to 262 where the Applications judge relies on the Maher Arar report to support his view that the designation was illegal when made in 2004 although the report was only released in 2006.]

[89] There is one key date that the Applications judge had to be mindful of: December 29, 2004 when the Regulations came into force, the last relevant date for the assessment of the *vires* issue.

Regardless of the conditions precedent which one wishes to apply, the *vires* of the Regulations could not be assessed on the basis of facts, events or developments that are subsequent to the date of the promulgation. The Applications judge seems to recognize so much at paragraph 273 of his reasons, where he says that the third country must be shown to have complied with the relevant Articles of the Conventions before the Regulation is passed. However, he reviewed the evidence without regard to this date (Appendix II to these reasons sets out, from a cursory review, the body of evidence before the Applications judge which postdates the date of promulgation as well as that which he specifically considered in support of his conclusion that the Regulations were *ultra vires*).

[90] In my respectful view, the Applications judge's failure to focus on the relevant date (as well as the other issues which went unaddressed) can only be attributed to the fact that the purported amendment to include the alleged failure to conduct the ongoing review was never spoken to. The respondents' contention that an amendment of the type here in issue can take place without being spoken to is ill advised and serves no one. If the respondents wanted to enlarge their judicial review application, it was incumbent upon then to bring the appropriate motion.

[91] That said, because the parties conducted their case on the basis that some form of amendment took place, I will nevertheless address the Applications judge conclusion that the GIC failed to conduct the ongoing review.

[92] In my respectful view, the conclusion reached by the Applications judge suffers from the same fundamental flaw as his initial conclusion: it assumes that the GIC had an ongoing obligation

to monitor “actual” compliance or compliance “in absolute terms”. That is not how the obligation to review is framed. The obligation is directed at the review of the four factors identified in subsection 102(2) of the IRPA, and is intended to ensure that the GIC continues to monitor these factors so as to be in a position to reassess the opportunity of maintaining the designation should the evolution of the factors so require.

[93] In this respect, the record shows that Directives were adopted as early as October 12, 2004, to ensure “… a continuing review of factors set out in subsection 102(2) of the *Immigration and Refugee Protection Act* with respect to countries designated under paragraph 102(1)(*a*) of that Act” (Scoffield Affidavit, Appeal Book, Vol. 11, Tab 33, para. 42 and Exhibit B-11). These Directives require the Minister of Citizenship and Immigration to undertake a review “on a continuous basis” of those factors and report to the GIC on a regular basis, or more often should circumstances warrant.

[94] The record reveals that on May 29, 2006, the UNHCR’s representative in Canada again appeared before the House of Commons Standing Committee on Citizenship and Immigration regarding the UNHCR’s one year review of the Safe Third Country Agreement and expressed the view that both countries continue to qualify as safe third countries (see Scoffield Affidavit, Appeal Book, Vol. 11, Tab 33, p. 3101, para. 36 and Exhibit B10, p. 3247).

[95] Further, in June 2006, pursuant to Article 8(3) of the Safe Third Country Agreement, the UNHCR released a report, assessing the first 12 months of the Safe Third Country Agreement’s

operation (Tom Heinze Affidavit, Appeal Book, Vol. 12, Tab 34, Exhibit TH2, p. 3382). The crux of the report's conclusions is as follows (Tom Heinze Affidavit, Appeal Book, Vol. 12, Tab 34, Exhibit TH2, p. 3387):

> It is the UNHCR's overall assessment that the Agreement has generally been implemented by the Parties, according to its terms, and, with regard to those terms, international refugee law. The Agreement appears to be functioning relatively smoothly. Individuals who request protection are generally given adequate opportunity to lodge refugee claims at the ports of entry and eligibility determination decisions under the Agreement have generally been made correctly.
>
> UNHCR notes, however, particular concern with respect to the Parties' continued use of the direct back policy. This has been especially problematic for asylum-seekers directed back from Canada to the United States, as a number were detained in the United States and unable to attend their scheduled interviews….

"The direct back policy" refers to the process whereby an asylum seeker approaches a port of entry at a time when border officials are unable to process his or her claim and is returned to U.S. after having been given a scheduled time for an interview. The UNHCR criticism was that many claimants were not allowed to re-enter Canada to attend their scheduled interviews.

[96] The Canadian Government, in conjunction with the U.S. and the UNHCR, released a further report in November 2006. As part of this report, the Canadian authorities indicated that they had phased out the use of "direct back policies" as of August 31, 2006 (Canada – United States Safe Third Agreement, Year One Review, Appeal Book, Vol. 12, p. 3337)

[97] In my respectful view, the record does not support the Applications judge's conclusion that the GIC is in breach of its obligation to conduct the ongoing review mandated by subsection 102(3) of the IRPA.

Third certified question: the Charter challenge

[98] At the hearing, counsel for the respondent organizations insisted on the fact that their public interest standing was not being challenged in this appeal. As previously noted, the Applications judge refused to certify the question proposed by the appellant challenging their standing. However, the Applications judge's refusal to certify a question with respect to standing does not immunize this issue from review on appeal. Once a question has been certified, and an appeal is launched, the Court's appellate jurisdiction is not limited by the certified question(s) (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 25; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 12).

[99] Relying on their public interest standing, the respondent organizations successfully challenged the validity of the Regulations on Charter grounds, based on evidence (the same evidence that formed the basis of the *vires* challenge) that a class of refugees would be subject to a real risk of *refoulement* as a result of the Safe Third Country Agreement and that therefore, their section 7 and section 15 Charter rights were violated. To this end, they maintained, and the Applications judge agreed, that their challenge is not dependent on John Doe's (Reasons, para. 51), but concerns a class of refugees, which they say would be treated in a certain way if they were to present themselves at a Canadian land border point of entry (*idem*).

[100] In my respectful view, this hypothetical approach, which the Applications judge entertained, goes against the well established principle that a Charter challenge cannot be mounted in the abstract. The only exception is where it can be shown that the impugned legislation would otherwise be immune from challenge (*Canadian Council of Churches, supra* (S.C.C) at para 42):

> **42** From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the Court. On this ground the applicant Council must fail. I would hasten to add that this should not be interpreted [page256] as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging the legislation. Thus the very rationale for the public interest litigation party disappears. …
>
> [My emphasis]

The Applications judge distinguishes the present situation from the one confronting the Supreme Court in the above case on the basis that in the matter before him, a refugee would have to bring the challenge from outside of Canada (Reasons, para. 43).

[101] With respect, there is no evidence that a refugee would have to bring a challenge from outside Canada. Refugees must present themselves at a Canadian land border port of entry in order for an officer to determine whether, on the balance of probabilities, they fall within one of the enumerated exceptions and whether the claim should be referred to the Immigration and Refugee Board. During this time, the refugee claimant remains in Canada, as according to the Canadian Government's one year report alluded to earlier (para. 95), Canadian authorities phased out the "direct send back policy" as of August 31, 2006. During this time, the refugee claimant can be

represented by counsel (Reasons, para. 288). Furthermore, in its one year report, the Canadian Government encourages non-governmental organizations to assist in maintaining the well-being of refugees throughout the process (Affidavit of Tom Heinze, Appeal Book, Vol. 12, Tab 34, Exhibit TH2, p. 3336). It follows that once it is determined that a claimant cannot remain in Canada by reason of the Safe Third Country Agreement, nothing prevents the claimant from challenging this determination on Charter grounds.

[102] Consequently, in this case, the ability of the respondent organizations to bring the Charter challenge depends on John Doe. However, John Doe never presented himself at the Canadian border and therefore never requested a determination regarding his eligibility. Following the renewed evidence regarding the threat that the FARC poses to his life, U.S. Immigration authorities agreed to reconsider his claim and he remains in the U.S. The Applications judge's conclusion that John Doe should nevertheless be considered as having come to the border and as having been denied entry runs directly against the established principle that Charter challenges cannot be mounted on the basis of hypothetical situations.

[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.

[104] It follows that the Charter challenge should not have been entertained by the Applications judge. I would therefore decline answering the third certified question.

[105] For these reasons, I would allow the appeal, set aside the decision of the Applications judge and answer the certified questions as follows:

1) What is the appropriate standard of review in respect of the Governor-in-Council's decision to designate the United States of America as a "safe third country" pursuant to s. 102 of the *Immigration and Refugee Protection Act*?
   Answer: correctness;
2) Are paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement between Canada and the United States of America *ultra vires* and of no legal force and effect?
   Answer: no;

3) Does the designation of the United States of America as a "safe third country" alone or in combination with the ineligibility provision of clause 101(1)(*e*) of the *Immigration and Refugee Protection Act* violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and is such violation justified under section 1?
   Answer: no answer can be given at this stage.

By agreement, the parties will assume their respective costs.

"Marc Noël"

J.A.

"I agree,
J. Richard C.J."

EVANS J.A. (Concurring Reasons):

A. INTRODUCTION

[106] I have had the advantage of reading the reasons of my colleague, Noël J.A., and gratefully adopt his careful review of the facts. I agree that the appeal should be allowed. I agree also that the Applications Judge should not have entertained the respondents' request for declarations that the Regulations are invalid because they are in breach of sections 7 and 15 of the Charter.

[107] However, in my opinion, the reasons for concluding that the Applications Judge erred in determining the merits of the Charter challenges to the Regulations are, for the most part, equally applicable to the administrative law challenge. To grant the declaratory relief sought by the respondents would be premature and serve little useful purpose. Since the application for judicial review should have been dismissed without a determination of the substantive issues raised, no questions should have been certified, and none should be answered by this Court.

[108] I would only add that my colleague's reasons do not persuade me that the issues of statutory interpretation and the scope of judicial review raised by the respondents' application are so clear and incontrovertible that they warrant a departure from the guiding principle of judicial restraint that it is generally better to say less than more.

B. LIMITS ON THE AWARD OF DECLARATORY RELIEF

[109] The declaration is a flexible public and private law remedy, unencumbered with historical and technical baggage. Nonetheless, a declaration that the exercise of a statutory power is invalid

will not be granted before the issues have ripened sufficiently to make them appropriate for adjudication. It may serve little useful purpose to grant a declaration prematurely, in the absence of concrete facts about an individual whose rights are or may be at stake.

[110] While courts have entertained requests for declarations in respect of questions which may arise and affect individuals in the future, they must be satisfied that the benefits of making a legal determination outweigh the disadvantages of pronouncing in the abstract. In my opinion, the balance in this case clearly favours judicial restraint.

[111] Litigants seeking declaratory relief have also sometimes been barred by a lack of standing. Before the Applications Judge the appellant had argued that the application should be dismissed on this ground. However, the Judge exercised his discretion to confer public interest standing on the respondents in part because he found that there was no effective alternative method of bringing the validity of the Regulations before the Court. Claimants, he said, could not realistically be expected to make a claim at the Canadian border, only to be sent back to the United States to face the possibility of *refoulement*. Accordingly, the Applications Judge distinguished *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R 236, on the ground that the potential refugee claimants in that case had an effective alternative remedy because they would be within Canada.

[112] Counsel for the appellant did not pursue before us the question of standing. However, the fact that the respondent organizations are 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. I note that, at the time of this litigation, John Doe's claim not to be removed from the United States was being reassessed and he had not applied at the border for refugee protection in Canada.

[113] True, a declaration of invalidity of the Regulations on Charter or administrative law grounds might well assist people like John Doe, who believe that they have a better chance of establishing their claim for protection in Canada than in the United States, but are reluctant to come to the border for fear that they will be summarily turned back, and then promptly removed by United States' authorities. If the Regulations were declared to be invalid, of course, they would be assured of access to Canada's refugee determination system.

[114] However, Canadian law respecting refugee protection is only engaged when claimants seek protection from Canadian officials in Canada, including a port of entry. The provisions of neither the international Conventions relied on in this litigation, nor the Charter, require Canada to abstain from enacting regulations which may deter nationals of third countries in the United States from coming to the Canadian border to claim refugee protection or protection from torture. Article 33 of the Refugee Convention ("RC") and Article 3 of the Convention Against Torture ("CAT") impose a negative obligation not to *refoule*, not a positive obligation to receive potential claimants: James C.

Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) at p. 301.

C. BARS TO RELIEF IN THE PRESENT CASE

[115] There are two essential problems with the declarations of invalidity sought in the respondents' application for judicial review with respect to the validity of the Safe Third Country Agreement ("STCA") Regulations. First, they do not match the allegations that, with respect to some categories of claimant, the policy and practice of the United States concerning refugee protection do not comply with international law. Second, they are not tailored to meet the proper concern of Canadian law, namely that claimants for refugee protection in Canada are not returned to a country to face a real risk of removal in contravention of Article 33 of the RC and Article 3 of the CAT. In short, to grant the declarations sought would serve no legitimate purpose and would require the Court to embark on inadequately focussed and abstract inquiries.

(i) ***Declarations of invalidity too broad***

[116] The respondents allege that the policy and practice of the United States are non-compliant with Article 33 of the RC and Article 3 of the CAT only with respect to certain categories of claimant. However, to declare the Regulations implementing the STCA to be invalid in their entirety, as the Applications Judge did, seriously overshoots the mark.

[117] It is not a satisfactory solution of this difficulty to limit the scope of a declaration of invalidity to the categories of claimant for whom it is alleged that the United States is not a safe

third country. The respondents' evidence does not purport to show that there is a real risk that every member of these categories, or significant numbers of them, are, in fact, at real risk of being *refouled*.

(ii) *Timing*

[118] Whether a country complies with its international obligations may change over time. If, as the respondents allege, the validity of the Regulations depends on the reasonableness of findings made by the Governor in Council about compliance at the time of their promulgation, it would seem very odd to declare them to be invalid, if, at the time of the litigation, the situation had changed and the United States was in compliance. On the other hand, delegated legislation surely cannot be invalid one day and valid the next, or *vice versa*.

[119] For the purpose of ensuring that Canada is not implicated in a *refoulement*, the only relevant time for determining compliance by the United States is when an individual claims refugee status or protection from torture at the Canadian border and alleges that, if sent back, there is a real risk that she will *refouled* by the United States.

(iii) *Unwieldy nature of the inquiry*

[120] The inquiry that the respondents say is required by this application for judicial review is another indication that it is misconceived. The Court is asked to examine, at large, wide swaths of U.S. refugee policy and practice in order to determine whether it was reasonable for the Governor in Council to conclude that it complied with international law.

[121] The nature and breadth of this inquiry is unlike the more focussed inquiries typically undertaken through the judicial process. Its inherently problematic nature strongly suggests that a court should only be prepared to embark upon it if necessary to protect individuals from being indirectly *refouled* by officers of the Canadian Border Services Agency in breach of the Charter and Canada's international obligations. As I now seek to demonstrate, it is not necessary.

(iv) ***Alternative avenue of recourse***

[122] I start with two premises. First, unless clearly inconsistent with the statutory text, the IRPA and any regulations made pursuant to it must be construed and applied so as to be consistent with Canada's international obligations in Article 33 of the RC and Article 3 of the CAT. IRPA, paragraph 3(3)(*f*) expressly says so. Second, regulations cannot be applied to an individual at Canada's border in a manner that breaches their Charter rights.

[123] Article 33 of RC and Article 3 of the CAT proscribe indirect as well as direct *refoulement*. Hence, refugee claimants at the Canadian land border may not be turned back to the United States pursuant to the STCA Regulations if they can establish that, if returned, they would face a real risk of their removal by the United States to a country where they have a well founded fear of torture, or persecution on a Convention ground. Such a risk assessment must be made in respect of individual claimants, in light of the United States' law and practice at that time as it pertains to them. A denial of access to Canada's refugee determination system would be subject to an application for leave and for judicial review. These propositions would seem to flow inexorably from *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

[124] Claimants for refugee status at the Canadian land border must already be examined to determine if they are eligible for access to Canada's refugee determination system as falling within one of the categories excluded from the STCA: the presence of a close relative in Canada, for example. The two-level administrative process established for enabling a person claiming a statutory exemption from the STCA is, according to the Applications Judge, generally completed within a day. This process could equally well be used to determine whether a person was eligible for a refugee determination in Canada, on the ground that, as a person facing a real risk of *refoulement* if returned to the United States, the Regulations may not validly be applied to her.

[125] Of course, adding a risk assessment in some cases may increase the time and resources needed to make a decision on eligibility, even though, until a risk of *refoulement* was established, a full refugee determination would not be required. Nor could a claimant be returned to the United States pending an eligibility determination, unless the United States' authorities provided an assurance that the claimant would not be removed until the eligibility decision had been made. However, I see no viable alternative if refugee claimants are not to be subject to indirect *refoulement* in violation of their Charter rights and IRPA. No doubt guidelines will be developed to assist officers in making these eligibility determinations.

[126] In this context, the decision of the House of Lords in *Reg. v. Secretary of State for the Home Department, ex. p. Yogathas*, [2002] UKHL 36 is illuminating. Pursuant to the Dublin Convention, an agreement among members of the European Union with broadly similar principles and objectives as the STCA, the Secretary of State had decided to return the applicants, nationals of Sri Lanka, to

Germany, their country of first arrival in the European Union, without a determination in the United Kingdom of their refugee claims. The applicants argued that, contrary to Article 33 of the RC, German law did not recognize refugee claims based on persecution by non-state agents and that consequently it would be unlawful for the Secretary of State to return them to Germany to face *refoulement*.

[127] The House of Lords recognized the existence of a tension between the need to ensure the efficient implementation of international "burden sharing" arrangements for the accelerated return of refugee claimants, and the need to protect fundamental human rights, including those created by Article 33: see paras. 58 and 74.

[128] Thus, it was said, there is a heavy burden on claimants to establish that they face a real risk of *refoulement* from a country which was considered safe by the Secretary of State and was a party to the relevant international human rights instruments: para. 74. The fact that the law of the "safe country" may not in theory comply with Article 33 of the RC is not in itself sufficient to prevent a lawful return to that country. The question, rather, is a practical one: is there <u>in fact</u> a real risk that the claimant would be *refouled* if returned: para. 47.

[129] The House of Lords also made it clear that, if satisfied that there were substantial grounds for believing that a claimant would be at risk of *refoulement* if sent back to the country of first arrival, the Secretary of State could not simply return the claimant to that country because of the

existence of the "country of first arrival" agreement: paras. 11 and 74. A claimant who establishes a risk of *refoulement* would then be eligible for a refugee determination in the United Kingdom.

[130] In short, a declaration of invalidity of the STCA Regulations is not required in order to ensure that they are not applied to claimants for protection at the land border in breach of either Canada's international obligations not to *refoule*, or the Charter.

D. CONCLUSIONS

[131] For these reasons I would allow the appeal.

"John M. Evans"
J.A.

APPENDIX I

Impugned Regulations

159.1 The following definitions apply in this section and sections 159.2 to 159.7.

"Agreement"
« Accord »
"Agreement" means the Agreement dated December 5, 2002 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. (*Accord*)

"claimant"
« demandeur »
"claimant" means a claimant referred to in paragraph 101(1)(*e*) of the Act. (*demandeur*)

"designated country"
« pays désigné »
"designated country" means a country designated by section 159.3. (*pays désigné*)

"family member"
« membre de la famille »
"family member", in respect of a claimant, means their spouse or common-law partner, their legal guardian, and any of the following persons, namely, their child, father, mother, brother, sister, grandfather, grandmother, grandchild, uncle, aunt, nephew or niece. (*membre de la famille*)

159.1 Les définitions qui suivent s'appliquent au présent article et aux articles 159.2 à 159.7.

« Accord »
" Agreement "
« Accord » L'Entente entre le gouvernement du Canada et le gouvernement des États-Unis d'Amérique pour la coopération en matière d'examen des demandes d'asile présentées par des ressortissants de tiers pays en date du 5 décembre 2002. (*Agreement*)

« demandeur »
" claimant "
« demandeur » Demandeur visé par l'alinéa 101(1)*e*) de la Loi. (*claimant*)

« États-Unis »
" United States "
« États-Unis » Les États-Unis d'Amérique, à l'exclusion de Porto Rico, des Îles Vierges, de Guam et des autres possessions et territoires de ce pays. (*United States*)

« membre de la famille »
" family member "
« membre de la famille » À l'égard du demandeur, son époux ou conjoint de fait, son tuteur légal, ou l'une ou l'autre des personnes suivantes : son enfant, son père, sa mère, son frère, sa soeur, son grand-père, sa grand-mère, son petit-fils, sa petite-fille, son oncle, sa tante, son neveu et sa nièce. (*family member*)

“legal guardian”
« tuteur légal »
“legal guardian”, in respect of a claimant who has not attained the age of 18 years, means a person who has custody of the claimant or who is empowered to act on the claimant's behalf by virtue of a court order or written agreement or by operation of law. (*tuteur légal*)

“United States”
« États-Unis »
“United States” means the United States of America, but does not include Puerto Rico, the Virgin Islands, Guam or any other United States of America possession or territory. (*États-Unis*)

« pays désigné »
“ *designated country* ”
« pays désigné » Pays qui est désigné aux termes de l’article 159.3. (*designated country*)

« tuteur légal »
“ *legal guardian* ”
« tuteur légal » À l’égard du demandeur qui a moins de dix-huit ans, la personne qui en a la garde ou est habilitée à agir en son nom en vertu d’une ordonnance judiciaire ou d’un accord écrit ou par l’effet de la loi. (*legal guardian*)

159.2 .Paragraph 101(1)(*e*) of the Act does not apply to a claimant who is a stateless person who comes directly or indirectly to Canada from a designated country that is their country of former habitual residence.

159.2 L’alinéa 101(1)*e*) de la Loi ne s’applique pas au demandeur apatride qui arrive directement ou indirectement au Canada d’un pays désigné dans lequel il avait sa résidence habituelle.

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.

159.3 Les États-Unis sont un pays désigné au titre de l’alinéa 102(1)*a*) de la Loi à titre de pays qui se conforme à l’article 33 de la Convention sur les réfugiés et à l’article 3 de la Convention contre la torture et sont un pays désigné pour l’application de l’alinéa 101(1)*e*) de la Loi.

159.4 (1) Paragraph 101(1)(*e*) of the Act does not apply to a claimant who seeks to enter Canada at

159.4 (1) L’alinéa 101(1)*e*) de la Loi ne s’applique pas au demandeur qui cherche à entrer au Canada à l’un ou l’autre des endroits suivants :

(*a*) a location that is not a port of entry;

(*b*) a port of entry that is a harbour port, including a ferry landing; or

(*c*) subject to subsection (2), a port of entry that is an airport.

In transit exception

(2) Paragraph 101(1)(*e*) of the Act applies to a claimant who has been ordered removed from the United States and who seeks to enter Canada at a port of entry that is an airport while they are in transit through Canada from the United States in the course of the enforcement of that order.

a) un endroit autre qu'un point d'entrée;

b) un port, notamment un débarcadère de traversier, qui est un point d'entrée;

c) sous réserve du paragraphe (2), un aéroport qui est un point d'entrée.

Exception — transit

(2) Dans le cas où le demandeur cherche à entrer au Canada à un aéroport qui est un point d'entrée, l'alinéa 101(1)*e*) de la Loi s'applique s'il est en transit au Canada en provenance des États-Unis suite à l'exécution d'une mesure prise par les États-Unis en vue de son renvoi de ce pays.

159.5 Paragraph 101(1)(*e*) of the Act does not apply if a claimant who seeks to enter Canada at a location other than one identified in paragraphs 159.4(1)(*a*) to (*c*) establishes, in accordance with subsection 100(4) of the Act, that

(*a*) a family member of the claimant is in Canada and is a Canadian citizen;

(*b*) a family member of the claimant is in Canada and is

(i) a protected person within the meaning of subsection 95(2) of the Act,

(ii) a permanent resident under the Act, or

159.5 L'alinéa 101(1)*e*) de la Loi ne s'applique pas si le demandeur qui cherche à entrer au Canada à un endroit autre que l'un de ceux visés aux alinéas 159.4(1)*a*) à *c*) démontre, conformément au paragraphe 100(4) de la Loi, qu'il se trouve dans l'une ou l'autre des situations suivantes :

a) un membre de sa famille qui est un citoyen canadien est au Canada;

b) un membre de sa famille est au Canada et est, selon le cas :

(i) une personne protégée au sens du paragraphe 95(2) de la Loi,

(ii) un résident permanent sous le régime de la Loi,

(iii) a person in favour of whom a removal order has been stayed in accordance with section 233;

(*c*) a family member of the claimant who has attained the age of 18 years is in Canada and has made a claim for refugee protection that has been referred to the Board for determination, unless

(i) the claim has been withdrawn by the family member,

(ii) the claim has been abandoned by the family member,

(iii) the claim has been rejected, or

(iv) any pending proceedings or proceedings respecting the claim have been terminated under subsection 104(2) of the Act or any decision respecting the claim has been nullified under that subsection;

(*d*) a family member of the claimant who has attained the age of 18 years is in Canada and is the holder of a work permit or study permit other than

(i) a work permit that was issued under paragraph 206(*b*) or that has become invalid as a result of the application of section 209, or

(ii) a study permit that has become invalid as a result of the application of section 222;

(*e*) the claimant is a person who

(i) has not attained the age of 18

(iii) une personne à l'égard de laquelle la décision du ministre emporte sursis de la mesure de renvoi la visant conformément à l'article 233;

c) un membre de sa famille âgé d'au moins dix-huit ans est au Canada et a fait une demande d'asile qui a été déférée à la Commission sauf si, selon le cas :

(i) celui-ci a retiré sa demande,

(ii) celui-ci s'est désisté de sa demande,

(iii) sa demande a été rejetée,

(iv) il a été mis fin à l'affaire en cours ou la décision a été annulée aux termes du paragraphe 104(2) de la Loi;

d) un membre de sa famille âgé d'au moins dix-huit ans est au Canada et est titulaire d'un permis de travail ou d'un permis d'études autre que l'un des suivants :

(i) un permis de travail qui a été délivré en vertu de l'alinéa 206*b*) ou qui est devenu invalide du fait de l'application de l'article 209,

(ii) un permis d'études qui est devenu invalide du fait de l'application de l'article 222;

e) le demandeur satisfait aux exigences suivantes :

(i) il a moins de dix-huit ans et n'est pas accompagné par son père, sa mère ou son tuteur légal,

(ii) il n'a ni époux ni conjoint de fait,

years and is not accompanied by their mother, father or legal guardian,

(ii) has neither a spouse nor a common-law partner, and

(iii) has neither a mother or father nor a legal guardian in Canada or the United States;

(*f*) the claimant is the holder of any of the following documents, excluding any document issued for the sole purpose of transit through Canada, namely,

(i) a permanent resident visa or a temporary resident visa referred to in section 6 and subsection 7(1), respectively,

(ii) a temporary resident permit issued under subsection 24(1) of the Act,

(iii) a status document referred to in subsection 31(3) of the Act,

(iv) refugee travel papers issued by the Minister of Foreign Affairs, or

(v) a temporary travel document referred to in section 151;

(*g*) the claimant is a person

(i) who may, under the Act or these Regulations, enter Canada without being required to hold a visa, and

(ii) who would, if the claimant were entering the United States, be required to hold a visa; or

(iii) il n'a ni père, ni mère, ni tuteur légal au Canada ou aux États-Unis;

f) le demandeur est titulaire de l'un ou l'autre des documents ci-après, à l'exclusion d'un document délivré aux seules fins de transit au Canada :

(i) un visa de résident permanent ou un visa de résident temporaire visés respectivement à l'article 6 et au paragraphe 7(1),

(ii) un permis de séjour temporaire délivré au titre du paragraphe 24(1) de la Loi,

(iii) un titre de voyage visé au paragraphe 31(3) de la Loi,

(iv) un titre de voyage de réfugié délivré par le ministre des Affaires étrangères,

(v) un titre de voyage temporaire visé à l'article 151;

g) le demandeur :

(i) peut, sous le régime de la Loi, entrer au Canada sans avoir à obtenir un visa,

(ii) ne pourrait, s'il voulait entrer aux États-Unis, y entrer sans avoir obtenu un visa;

h) le demandeur est :

(i) soit un étranger qui cherche à rentrer au Canada parce que sa demande d'admission aux États-Unis a été refusée sans qu'il ait eu l'occasion d'y faire étudier sa demande d'asile,

(*h*) the claimant is

(i) a foreign national who is seeking to re-enter Canada in circumstances where they have been refused entry to the United States without having a refugee claim adjudicated there, or

(ii) a permanent resident who has been ordered removed from the United States and is being returned to Canada.

(ii) soit un résident permanent qui fait l'objet d'une mesure prise par les États-Unis visant sa rentrée au Canada.

159.6 Paragraph 101(1)(*e*) of the Act does not apply if a claimant establishes, in accordance with subsection 100(4) of the Act, that the claimant

(*a*) is charged in the United States with, or has been convicted there of, an offence that is punishable with the death penalty in the United States;

(*b*) is charged in a country other than the United States with, or has been convicted there of, an offence that is punishable with the death penalty in that country; or

(*c*) is a national of a country with respect to which the Minister has imposed a stay on removal orders under subsection 230(1) or a stateless person who is a former habitual resident of a country or place with respect to which such a stay has been imposed, and if

(i) the stay has not been

159.6 L'alinéa 101(1)*e*) de la Loi ne s'applique pas si le demandeur démontre, conformément au paragraphe 100(4) de la Loi, que, selon le cas :

a) il est mis en accusation, aux États-Unis, pour une infraction qui pourrait lui valoir la peine de mort dans ce pays, ou y a été déclaré coupable d'une telle infraction;

b) il est mis en accusation dans un pays autre que les États-Unis pour une infraction qui pourrait lui valoir la peine de mort dans ce pays, ou y a été déclaré coupable d'une telle infraction;

c) il a la nationalité d'un pays — ou, s'il est apatride, avait sa résidence habituelle dans un pays ou un lieu donné — à l'égard duquel le ministre a imposé un sursis aux mesures de renvoi aux termes du paragraphe 230(1) dans la mesure où :

(i) le sursis n'a pas été révoqué en

cancelled under subsection 230(2), and

(ii) the claimant is not identified in subsection 230(3).

vertu du paragraphe 230(2),

(ii) le demandeur n'est pas visé par le paragraphe 230(3).

159.7 (1) For the purposes of paragraph 101(1)(*e*) of the Act, the application of all or part of sections 159.1 to 159.6 and this section is discontinued, in accordance with subsections (2) to (6), if

(*a*) a notice of suspension of the Agreement setting out the period of suspension is publicized broadly in the various regions of Canada by the Minister via information media and on the website of the Department;

(*b*) a notice of renewal of the suspension of the Agreement setting out the period of renewal of suspension is published in accordance with subsection (6);

(*c*) a notice of suspension of a part of the Agreement is issued by the Government of Canada and the Government of the United States; or

(*d*) a notice of termination of the Agreement is issued by the Government of Canada or the Government of the United States.

159.7 (1) Pour l'application de l'alinéa 101(1)*e*) de la Loi, il est sursis à l'application de l'ensemble ou de toute partie des articles 159.1 à 159.6 et du présent article, conformément aux paragraphes (2) à (6), dans l'un ou l'autre des cas suivants :

a) un avis de suspension de l'Accord prévoyant la période de suspension est diffusé par le ministre sur l'ensemble du territoire canadien par le truchement des médias d'information et du site Web du ministère;

b) un avis de continuation de la suspension de l'Accord prévoyant la période de suspension est publié conformément au paragraphe (6);

c) un avis de suspension partielle de l'Accord est délivré par le gouvernement du Canada et le gouvernement des États-Unis;

d) un avis de dénonciation de l'Accord est délivré par le gouvernement du Canada ou le gouvernement des États-Unis.

Paragraph (1)(*a*) — notice of suspension of Agreement

(2) Subject to subsection (3), if a notice of suspension of the Agreement is publicized under paragraph (1)(*a*),

Alinéa (1)*a*) : avis de suspension de l'Accord

(2) Sous réserve du paragraphe (3), dans le cas où un avis de suspension de l'Accord est diffusé aux termes de

sections 159.2 to 159.6 are rendered inoperative for a period of up to three months that shall be set out in the notice, which period shall begin on the day after the day on which the notice is publicized.

Paragraph (1)(*b*) — notice of renewal of suspension of Agreement

(3) If a notice of renewal of the suspension of the Agreement is published under paragraph (1)(*b*), sections 159.2 to 159.6 are rendered inoperative for the further period of up to three months set out in the notice.

Paragraph (1)(*c*) — suspension of part of Agreement

(4) If a notice of suspension of part of the Agreement is issued under paragraph (1)(*c*), those provisions of these Regulations relating to the application of the Agreement that are referred to in the notice are rendered inoperative for a period that shall be set out in the notice. All other provisions of these Regulations continue to apply.

Paragraph (1)(*d*) — termination of Agreement

(5) If a notice of termination of the Agreement is issued under paragraph (1)(*d*), sections 159.1 to 159.6 and this section cease to have effect on the day set out in the notice.

Publication requirement — *Canada Gazette*

(6) Any notice referred to in paragraph (1)(*b*), (*c*) or (*d*) shall be published in the *Canada Gazette*, Part I, not less than seven days before the day on which the renewal, suspension in part or termination provided for in

l'alinéa (1)*a*), les articles 159.2 à 159.6 sont inopérants à compter du jour suivant la diffusion de l'avis, et ce pour la période d'au plus trois mois prévue dans l'avis.

Alinéa (1)*b*) : avis de continuation de la suspension de l'Accord

(3) Dans le cas où un avis de continuation de la suspension de l'Accord est publié aux termes de l'alinéa (1)*b*), les articles 159.2 à 159.6 sont inopérants pour la période supplémentaire d'au plus trois mois prévue dans l'avis.

Alinéa (1)*c*) : avis de suspension partielle ou totale de l'Accord

(4) Dans le cas où un avis de suspension partielle de l'Accord est délivré aux termes de l'alinéa (1)*c*), les dispositions du présent règlement portant sur l'application de l'Accord qui sont mentionnées dans l'avis sont inopérantes pour la période qui y est prévue. Les autres dispositions du présent règlement continuent de s'appliquer.

Alinéa (1)*d*) : avis de dénonciation de l'Accord

(5) Dans le cas où un avis de dénonciation de l'Accord est délivré aux termes de l'alinéa (1)*d*), les articles 159.1 à 159.6 et le présent article cessent d'avoir effet à la date prévue dans l'avis.

Exigence de publication — *Gazette du Canada*

(6) Tout avis visé aux alinéas (1)*b*), *c*) ou *d*) est publié dans la *Gazette du*

the notice is effective.	*Canada* Partie I au moins sept jours avant la date de prise d’effet de la mesure en cause.

APPENDIX II

Evidence cited in Respondents' Supplementary Memorandum of Fact and Law that post-dates the designation of the U.S. as a safe third country (Appeal Book, Vol. 1, p. 210 and following)

- Situation of Detainees at Guantanamo Bay, Report of the Rapporteurs, UN Commission on Human Rights E/CN.4/2006.120, Feb. 15, 2006 (paras. 27, 86)
- Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (April 2005) (para. 27)
- *De Guzman v MCI*, [2005] F.C.J. No. 2119 (C.A.) (para. 31)
- L. Khandwala, K. Musalo, S. Knight and M.A.K. Hreschyshyn, "*The One-Year Bar: Denying protection to bona fide refugees, contrary to congressional intent and violative of international law*," Immigration Briefings (August 2005) (paras. 49, 50, 55)
- *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 affirming the difference in standards between the U.S. and Canada regarding the risk of persecution (para 53(a))
- *Executive Office of Immigration Review Statistical Yearbook* 2005, cited for statistics on acceptance rates in the U.S (para. 53(b))
- *Benslimane v. Gonzales*, 430 F. 3d 828, 830 (7th Cir. 2005), cited for the proposition that the U.,S. adjudication of refugee cases at the administrative level has fallen below the minimum standards of legal justice (para. 53(e))
- *Arias v. Ashcroft* 143 Fed. Appx. 464 (Aug 2, 2005)
- *Bermudez v. MCI* [2005] F.C.J. No. 345 (para. 56(c))
- *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006) for the proposition that the REAL ID Act (May 2005), diverges from previous adopted standards regarding credibility (para. 63)
- Conclusions and recommendations from the Committee against Torture: Canada, July 7, 2005 (para. 76)
- *European Parliament*, Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners 2006/2027 (INI) Final A6-9999/2006, June 2006 (para. 79).
- *Parry, Hohin T.*, The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees (2005) Melbourne JIL 516 (paras. 79, 86)
- *2006 American Civil Liberties Union Documents* (para. 81)
- *Detainee Treatment Act of* 2005 (para. 81).
- *Title X; Military Commissions Act*, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) (para. 81).

Respondents' Affiants considered by the Applications judge

**** All the affidavits seek to establish the state of U.S. law as of when they were filed – e.g. on or after December 29, 2005**

Georgetown Affidavits

- Covers the period from October 1999 to June 2005 (Appellant's Compendium, Tab 3 para. 19; most articles and case law covered relates to 2005, including the Real ID Act)
- *Diaware v. Gonzales*, 2006 WL 37047 (S. Ct. Jan. 9, 2006); *Sukwanputra v. Gonzales*, 2006 U.S. App. Lexis 1178 (3d Cir. Jan. 19, 2006)
- *In re Budy Santoso* A 79 494 698 at 1 (BIA, May 23, 2005) (footnote 31)

Karen Musalo, Supplementary Affidavit

- BIA decision in *Matter of Kasinga* (June 2006) (Appellant's Compendium)

Morton Sklar

- Refers to *Auguste v. Ridge*, 395 F 3d 123 (3rd Cir. 2005) for narrow conception of torture for purposes of intent analysis in U.S. law (para 7)
- Nina Bernstein, *Deportation Case Focuses on Definition of Torture*, N.Y. Times, March 11, 2005 (para. 9)
- Real ID Act (May 2005)

Deborah Anker, (Affidavit & Supplementary Affidavit)

- Bill Freelick, "US Detention of Asylum Seekers: What's the Problem? What's the solution?" 10 Bender's Immigration Bulletin, 564, 570 (April 1, 2005).
- Department of Homeland Security, *Homeland Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security* (July 13, 2005) to support present lack of general counsel with jurisdiction over all aspects of asylum law and policy in the U.S. ; Marcia Coyle, *A swamped DOJ farms out immigration cases; The Workload spread to other divisions and U.S. attorneys nationally* (National Law Journal, Feb 28, 2005); *Tomas v. Ashcroft*, 409 F. 3d 1177 (9th Cir. 2005); Jonathan Nelson, *Staking the Pillars of Asylum Law*, 83 Interpreters Releases 1 (2006), Ralph Blumenthal, *Chinese Boy Asks for Stay of Deportation, Citing Fear*, N.Y. Times, June 7, 2005 (forced return) (para. 4)
- Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (para. 5)
- Adam Liptak, *Courts Criticize Immigrations Judges' Handling of Asylum cases*, N.Y. Times Dec. 26, 2005; *Pasha v. Gonzales*, 2005 U.S. App. LEXIS 28899, 1 (7th Cir. Dec. 29, 2005) in support of jurisprudential problems (para 5)
- Real ID Act, (May 2005) (para. 15)
- *Zhen Li Iao v. Gonzales*, 400 F.3d 530, 533-535 (7th Cir. 2005) dealing with challenges of establishing credibility (para. 20)
- *Kanchaeveli v. Gonzales*, 2005 U.S. App. LEXIS 11122 (3rd Cir. 2005) (para. 20)
- *Bocova v. Gonzales*, 412 F.3d 257 (1st Cir. 2005) (para. 26)
- See para. 28, footnote 61 for extensive references to case law in 2005 regarding discretionary nature of persecution analysis

Eleanor Acer

- United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (February 2005) (paras. 3, 13)
- Bill Freelick, U.S. Detention of Asylum Seekers and Human Rights, March 1, 2005 (para. 8) for statistics on detention and 2006 President's fiscal budget, which includes a 19 percent increase for the Detention and Removal Office of Department of Homeland Security (para. 13)

Victoria Neilson

- The Real ID Act (May 2005) (para. 8)

Susan Akram

- Real ID Act (para. 5)
- Susan Akram and Maritza Karmely, *Immigration and Constitutional Consequences of Post 9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?* 38 U.C. Davis L. Rev. 609 (2005)

Evidence cited in Appellant's Supplementary Memorandum of Fact and Law, countering the respondents' contention that the U.S. does not comply with the relevant Articles of the Conventions, that post-dates the designation of the U.S. as a safe third country (Appeal Book, Vol. 1, p. 311 and following)

- Senate Report 109-273 – Department of Homeland Security Appropriations Bill, 2007 (report issued June 29, 2006) (bill ultimately enacted as Pub. L. 109-295 (Oct 4, 2006) regarding immigration detentions) (para. 120)
- *Gao v. Gonzales* C.A. 2nd Cir, Docket No. 04-1874-ag (March 3, 2006) recognizing that forced marriage in China is persecution (para. 131)
- *Roozbahani v. Canada (M.C.I.),* [2005]. F.C.J. No. 1867; *Quevedo c. Canada (M.C.I.),* [2006] A.C.F. no 1585; *P.K. v. Canada (M.C.I.),* [2005] F.C.J. No. 130, for criticisms of Canada's administrative decision makers (para. 134)
- *Aslam v. Canada (M.C.I.),* [2006] F.C.J. No. 264 (QL); *El Balazi v. Canada (M.C.I.),* 2006 FC 38 in support of the proposition that filing delay in Canada is a significant factor in the assessment of a claimant's well founded fear of persecution if there is no justification for the delay (para. 167)
- *Herrera v. Canada (M.C.I.)* 2005 FC 1233; *Laszlo v. Canada (M.C.I.),* 2005 FC 456, *Ortiz Juarez v, M.C.I.*, 2006 FC 288; *Lubega v, Canada (M.C.I.)* 2006 FC 303; *Sy v. Canada (M.C.I.)* (2005) 271 F.T.R. 242; *Khan v. Canada (M.C.I.)* 2006 FC 839; *Karanja v. Canada (M.C.I.)* 2006 FC 574; *Kim v. Canada (M.C.I.)* 2005 FC 1168; *Allafzadeh v. Canada (M.C.I.),* 2006 FC 1173; *C.P.H. v. Canada (M.C.I.),* 2006 FC 367; *Jara v. Canada (M.C.I.)* 2006 FC 973 in support of the proposition that in Canada, the Immigration and Refugee Board, the Federal Court and Federal Court of Appeal have

addressed in a similar, if not identical manner as in the U.S., the issues of credibility, documentary corroboration, nexus, persecution and gender persecution (para. 176).

Appellant's Affiants

David Martin

- Real ID Act, May 11, 2005
- Principal U.S. Regulations Relevant to Asylum, Withholding and CAT protection, From Title 8, Code of Federal Regulations (2006) (Appellant's Compendium, tab. 8)
- Asylum Officer Basic Training Course Manual, draft dated March 3, 2005 (Appellant's Compendium, tab. 10)
- *Immigration and National Act of 1952*, as amended through July 24, 2006 (Appellant's Compendium, tab 19)
- *In re A-H- Respondent*, decided January 26, 2005 (Appellant's Compendium, Tab 21)
- *Matter of S-K-, Respondent* (March 11, 2008) BIA Tab 25(c)
- *Interpretation of the Convention Refugee Definition in the Case Law*, December 31, 2005 (Appellant's Compendium, Tab 32) – draws on case law up to December 31, 2005
- *Comprehensive statistics on U.S. Protection Decisions FY* 2001-2005 (Martin Affidavit, Appeal Book, Vol. 6, Tab A)
- *Detainee Treatment Act* of 2005, published December 30, 2005
- Supplementary Affidavit, Exhibit U – unpublished BIA Decisions reversing an immigration judge's determination regarding corroboration (2005)
- Supplementary Affidavit, Exhibit V – unpublished BIA Decisions reversing an immigration judge's determination in mixed motive cases (2005)
- Supplementary Affidavit, Exhibit X - UNHCR, Asylum Levels and Trends in Industrialized Countries, Second Quarter, 2006
- Asylum Officer Basic Training Course Manual, May 2006 (Appeal Book, p. 1665)

Evidence referred to by the Applications judge postdating the designation of the U.S. as a safe third country

The Safe Third Country Agreement was executed in 2002 and it was given effect by the promulgation of sections 159.1-159.7 of the Regulations, which were published on November 3, 2004, with an effective date of December 29, 2004.

I) One year time bar & withholding removal

- David Martin Affidavit – 2005 statistics (Reasons, para. 147)
- *El Balazi v. Canada (Minister of Citizenship and Immigration)* 2006 FC 38 for the proposition that Canadian judges have discretion to look at the reasons for the delay in determining whether it will be a factor (Reasons, para. 156)
- Anker and Musalo anecdotal evidence – no date (Reasons, para. 164)

II) Categorical Exceptions for Criminality and Terrorism

- *Re A.H..,* 23 I&N Dec 774 (A.G. 2005) January 26, 2005 whereby the court concluded that it was clear that a person could be *refouled* if there was a potential belief that a person may pose a danger and interprets broadly the exclusions for terrorist activities (Reasons, para. 174)
- *Matter of S-K-*, 23 I&N Dec. 936 (BIA June 8, 2006) affirms the fact that the intent to contribute to a terrorist organization is unnecessary to qualify as providing material support to terrorist activity (Reasons, paras. 177, 178)
- *Arias v. Ashcroft* 143 Fed. Appx. 464 (Aug 2, 2005), standing for the proposition that duress is not a defence (Reasons, para. 180)
- *Kathirgamu v. Canada (Minister of Citizenship and Immigration),* 2005 FC 300 (Reasons, 189) lower bar in Canada for exclusions due to criminality (Reasons, para. 189)

III) Interpretation of Term "Persecution" and claims based on particular social group

- Department of Homeland Security briefs filed in *Matter RA*, February 2004 and February 22, 2005 (Reasons, para. 200-201) (from Musalo affidavit – although Phelan J. concludes insufficient citation to verify this)
- *Bocova v. Gonzales,* 412 F. 3d 257 (June 24, 2005) recognizing that persecution is not defined and held that it had to look to the Board of Immigration Appeal decisions to determine the true meaning (Reasons, para. 210). This, however, does not support unreasonableness of the decision
- Real ID Act, May 11, 2005 (Reasons, para. 214)

IV) Corroboration and Credibility

- Real ID Act, May 11,2005 (Reasons, para. 219)

V) Torture under the CAT

- *Li v. Canada (Minister of Citizenship and Immigration),* 2005 FCA 1 (Reasons, para. 243)
- *Immigration Law and Practice*, 2nd ed., looseleaf (Toronto: Butterworths, 2006)
- *Maher Arar* report, 2006 (Reasons, para. 260)

NOTE:

USA Patriot Act 115 Stat. 272 (Oct. 26, 2001) – broadened scope of the definition of "terrorist activities", however, many of the act's provisions were to sunset beginning December 31, 2005, approximately 4 years after its passage. In addition, the Act has since been amended, the most recent amendments having passed Congress on March 2, 2006 and having been signed into law on March 9, 2006.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-37-08
(APPEAL FROM A JUDGMENT OF JUSTICE PHELAN OF THE FEDERAL COURT, DATED NOVEMBER 29, 2007, NO. IMM-7818-05.)	
STYLE OF CAUSE:	Her Majesty the Queen and Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 21, 2008
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	RICHARD C.J.
CONCURRING REASONS BY:	EVANS J.A.
DATED:	June 27, 2008

APPEARANCES:

David Lucas Greg G. George Matina Karvellas	FOR THE APPELLANT
Barbara Jackman Andrew Brouwer Leigh Salsberg	FOR THE RESPONDENTS, Canadian Council for Refugees, Canadian Council of Churches and John Doe
Lorne Waldman	FOR THE RESPONDENT, Amnesty International

SOLICITORS OF RECORD:

JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANT
JACKMAN & ASSOCIATES Toronto, Ontario	FOR THE RESPONDENTS, Canadian Council for Refugees, Canadian Council of Churches and John Doe
WALDMAN & ASSOCIATES Toronto, Ontario	FOR THE RESPONDENT, Amnesty International