

**UNHCR Comments on the**  
**Draft Agreement between Canada and the United States of America for**  
**“Cooperation in the Examination of Refugee Status Claims**  
**from Nationals of Third Countries”**

**I. Introduction**

The Office of the United Nations High Commissioner for Refugees (UNHCR) is very appreciative of the willingness of the Parties to consult with UNHCR on the draft Agreement between Canada and the United States of America “for cooperation in the examination of refugee status claims from nationals of third countries” (hereinafter “the Agreement”).

Overall, UNHCR recognizes as positive the ultimate objective of this Agreement, which is to ensure an appropriate allocation of State responsibility for determining refugee status. UNHCR shares the concern of States to avoid situations where responsibilities in this regard are unclear and hence not assumed, often leading to “orbit” situations for the concerned individuals. UNHCR also appreciates States’ concerns to limit unwarranted “forum shopping”. At the same time, UNHCR Executive Committee Conclusion 15 (XXX) provides that the intentions of the asylum seeker should “as far as possible be taken into account”. In this connection the Agreement’s provisions for family reunification and for the exercise of discretion by the Parties are particularly important.

UNHCR’s main interest is to ensure that persons seeking protection from persecution will have access to a full and fair procedure to assess their claims, either in Canada or the US, and that protection will be accorded to those in need of it. There are several scenarios which could arise under this Agreement which might put access to protection into question in the individual case. Our observations and recommendations in this respect are set out below.

Also by way of general observation, UNHCR notes with concern that this Agreement may have the unintended effect of encouraging clandestine border crossings, which runs counter to the interests of all parties, including individuals in need of protection. Because the Agreement applies only to persons making claims at land ports of entry, those who manage to cross the border (likely in an irregular manner) and make a claim inland will not be affected. An increase in the number of illegal entrants/stayers is often accompanied by exploitation of vulnerable individuals and can have a detrimental effect on public attitudes toward refugees and asylum-seekers, at a time when both UNHCR and States are endeavouring to ensure that public opinion remains favorable to refugees, and that public confidence and trust in the asylum system is maintained.

UNHCR does recognize that the impact of this Agreement will depend largely on the implementing regulations and policy guidance issued by the Parties. UNHCR is grateful for the Parties' willingness to provide texts of both to the Office for its review and comment, before they are finalized.

## **II. Application of US Expedited Removal Procedures**

Under current US law, "arriving aliens" with improper travel documents are placed in expedited removal proceedings. UNHCR has expressed concerns about how this expedited removal process functions, given the Office's view of the need for greater procedural guarantees to ensure that *bona fide* refugees are not inadvertently removed to a country of feared persecution (*refoulement*), that they have all "necessary facilities" to present their asylum claim, and that they are treated in a humane manner while their applications are pending.<sup>1</sup> It is unclear from the draft text of the Agreement to what extent persons subject to its provisions would be placed in expedited removal proceedings in the US.

*Recommendation: Given stated concerns about the expedited removal process, UNHCR recommends that such proceedings not apply to persons subject to this Agreement.*

## **III. Statutory Bars to Refugee Protection**

UNHCR has also raised questions about the consistency with international standards of certain statutory bars to the asylum procedure. Those at issue include the US bar for failure to meet a filing deadline and criminal and affiliation bars in both countries that are broad and automatic in nature. Refugee claimants subject to a US statutory bar that has no equivalent under Canadian law, and *vice versa*, may be required under the Agreement to make a claim in a jurisdiction where they would be ineligible for refugee protection. Under these circumstances, they may well be denied rights under the Convention and Protocol, which, except for the operation of this Agreement, would be available to them. To give one example, under US and Canadian law, persons who are ineligible for asylum/protected person status may still be eligible for protection from *refoulement* (withholding/stay of removal), but only if they satisfy a heightened legal standard. As a result, claimants who satisfy the refugee definition under the Convention and Protocol, but fail to meet this heightened legal standard, may be subject to *refoulement*.

*Recommendation: UNHCR recommends that where one country would bar an individual access to the asylum procedure or protection from refoulement and the other country would not, this should be an important factor in determining when the Parties will exercise their discretion under Article 6 to review the claim and examine it on the merits.*

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<sup>1</sup> For example, UNHCR has noted its concerns about applicable legal standard ("credible fear" of persecution), mandatory detention, inadequate access to legal assistance due to detention in remote locations, and application of expedited proceedings to vulnerable and at-risk groups.

#### **IV. Meaning of “to Adjudicate” a Refugee Claim**

UNHCR understands that the purpose of the agreement is to guarantee that one of the two Parties will properly examine a refugee status claim on its merits. Article 3 of the Agreement stipulates that one of the two countries must “adjudicate” the claim before removing the applicant to a third country. However, it does not define the term “adjudicate.” This could result in two problematic scenarios:

(1) *No clear responsibility to consider an applicant’s claim:* Neither the US nor Canada at present has any other safe third country agreement in effect. However, if “adjudicate” means “determine eligibility to apply for asylum”, then a future “safe third country” agreement concluded by Canada or the US with another country could possibly result in chain removals, without a consideration of the claim on the merits. The worst case result would be “refugees in orbit” and possible *refoulement*;

(2) *A claim on its merits is not considered:* While the US or Canada might accept responsibility to “adjudicate” the claim of an applicant, a bar to asylum or *non-refoulement* protection might apply such that a full consideration of the claim, on the merits under an appropriate international legal standard, never occurs.

*Recommendation: UNHCR recommends that the Parties include a definition of adjudication which ensures that the claim is considered properly on its merits by one of the two Parties. This would clarify that the Agreement creates a “closed system.”*

#### **V. Detention**

Detention of asylum-seekers world-wide remains a serious concern. In the US, detention of asylum-seekers, including children, is an issue on which UNHCR has frequently pronounced itself. During the recent surge of asylum-seekers at the US-Canada border in June 2002, the US indicated that it would retain the right to detain any person in unlawful status who was “directed-back” from Canada to the US. Presumably, the position will be the same for claimants returned to the US from Canada under this Agreement.

*Recommendation: As a general principle, asylum-seekers should not be detained. Detention should be resorted to only in exceptional cases. The fact that asylum-seekers have often had traumatic experiences should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence. UNHCR encourages both Parties to limit the detention of asylum-seekers subject to this Agreement to the greatest extent possible, and to avoid the use of local, state or county jails.*

#### **VI. Family Unity**

UNHCR welcomes the Parties’ willingness to establish exceptions for asylum-seekers who have family connections already established in one of the two countries.

A. Family Members

UNHCR appreciates the broad definition of “*family member*”, as it includes spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece and nephew. Common law spouse, however, is not included in this definition, but rather is subject to national interpretation under Article 1(2).

For the exception in Article 4(2)(a) to be invoked, the person seeking entry must have at least one family member who has “lawful permission to remain indefinitely” in the receiving country, or who was granted refugee status there. The term “lawful permission to remain indefinitely” is not defined.

The exception under Article 4(2)(b) takes a more narrow approach to family membership, and as a result would bar parents and grandparents from entering to join children under 18 who are asylum-seekers. It would also bar claimants from joining extended and “*de facto*” family members who serve or have served as their primary support mechanism.

*Recommendations: UNHCR recommends that the Parties include common law spouses in the definition of “family member”. It is also recommended that consideration be given to how extended and “de facto” family members can also be included, regardless of relationship to the refugee claimant, if they serve or have served as the claimant’s primary source of emotional and/or material support.*

*UNHCR further recommends that the Parties define in the Agreement the phrase “lawful permission to remain indefinitely” to include those allowed to remain in the US or Canada under withholding of removal or relief under the UN Convention Against Torture (in the US) or a stay of removal after a Pre-Removal Risk Assessment (in Canada).*

*UNHCR also encourages the Parties to extend the scope of Article 4(2)(a) to include persons with lawful permission to remain for “humanitarian reasons.” This would include, for example, beneficiaries of Temporary Protected Status (TPS) (in the US) and those from moratoria countries (in Canada) who may remain in either country for an extended period of time due to continued instability in their countries of origin. These individuals can generally work and provide asylum-seeking relatives with necessary support.*

*Consistent with the spirit of Articles 9 and 10 of the Convention on the Rights of the Child, UNHCR recommends that the 18-year age limit for qualifying relatives be dropped from Article 4(2)(b). Moreover, UNHCR recommends that extended and “de facto” family members also be included under this exception, if they serve or have served as the claimant’s primary support mechanism.*

B. Unaccompanied Minors

UNHCR welcomes the generous exception to the Agreement for “unaccompanied minors.”

UNHCR is concerned that a child wishing to apply for asylum in the receiving country may be intercepted during outbound inspections in the country of last presence, and taken into custody. Unless the country of last presence permits the child to proceed to the receiving country to lodge his/her refugee claim, the child would not benefit from this exception.

Under the Agreement's definition of "unaccompanied minor", a child would not be considered "unaccompanied" if s/he had a parent in either Canada or the US. In that case, and if the exceptions under Articles 4(2)(a) or 4(2)(b) did not apply, the child would not be able to join his or her parent.

Finally, the Agreement does not ensure that unaccompanied minors will not be detained in the receiving country, absent exceptional circumstances.

*Recommendations: UNHCR recommends that the cases of unaccompanied minors be processed in a priority manner. Because age assessment is not an exact science, UNHCR hopes that separated children will receive the benefit of the doubt when age determinations are made.*

*UNHCR recommends that the Parties ensure that unaccompanied minors are permitted to apply for asylum in the receiving country if apprehended during an outbound inspection.*

*UNHCR urges that children be permitted to apply for asylum in the receiving country if a parent or legal guardian resides there.*

*UNHCR urges that separated children not be detained and proper care arrangements also be made pending determination of a claimant's age, if age assessment is deemed necessary.*

## **VII. Validly Issued Visas**

For exception 4(2)(d) to operate, the individual must have a "validly issued visa" or other "valid admission document, other than for transit", issued by the receiving country, or be from a country for which only the receiving country does not impose visa requirements. However, the term "validly issued visa" is not defined.

UNHCR's understanding of current US law is that an "arriving alien" will be considered inadmissible and placed in expedited removal proceedings if s/he arrives at a port of entry with purportedly false documents or no documents. In this context, "false" documents would include tourist or business visas if the person's true intention was to apply for asylum. It is not clear in the draft Agreement if such a standard would also apply to "validly issued" documents under Article 4(2)(d).

This provision is silent with regard to refugee claimants from countries for which neither Party maintains a visa requirement, as well as claimants who obtained visas for travel to both the US and Canada.

*Recommendations: UNHCR recommends that the Agreement or its regulations/rules, define “validly issued visa” in a manner which does not link validity of issue to the presumed subjective intentions of the asylum seeker.*

*UNHCR further recommends that claimants with visas for both countries, as well as claimants who do not need visas for either country, be allowed to choose where to lodge their claim.*

### **VIII. Status of Applicants Seeking Entry**

Article 4(3) stipulates that the country of last presence is not required to take back a claimant until a final determination is made by the receiving country on whether one of the Agreement’s exceptions apply. Determination of family links may be difficult to establish at the port of entry. Interviews may be lengthy and claimants may require many days to obtain proof of relationship. It is not clear from the Agreement how claimants will be treated during this period -- will they be admitted, required to wait at ports of entry, asked to wait in the other country, or detained pending determination of family links? In Canada, it is unclear whether the determination of relationship will be part of the eligibility decision, which, under the Immigration and Refugee Protection Act must be taken within 72 hours.

*Recommendations: UNHCR urges the receiving country to admit an applicant into its territory while it determines whether s/he falls under one of the Agreement’s exceptions. UNHCR further urges the Parties not to detain asylum-seekers during this period.*

### **IX. Effective Review Procedures**

In UNHCR’s view, determinations under “safe third country” agreements must be reviewable, with such reviews having suspensive effect.

It is unclear if a review procedure will exist for decisions made under the Agreement (e.g., whether one of the exceptions applies to the applicant).

*Recommendation: UNHCR encourages the Parties to include in the Agreement a provision for an effective review procedure.*

### **X. Discretion**

UNHCR welcomes the language of Article 6, which allows each Party the discretion to examine a refugee claim when it is in its public interest to do so. However, issues regarding how claims will be made, how they will be adjudicated, and by whom, are not addressed.

*Recommendation: UNHCR recommends that the exercise of discretion under Article 6 be approached broadly in cases of humanitarian concern, and that the process be delineated in regulations. Gender-based claims, which are currently assessed quite differently by the Parties, should be given particular consideration.*

## **XI. Exchange of Information**

The intended scope of Article 7(a) is unclear. UNHCR is concerned that information about individual asylum-seekers should not be disclosed to third parties, especially to the individual's country of origin.

*Recommendation: UNHCR recommends that the Parties make clear that this article refers only to exchange of information between the Parties.*

## **XII. Implementation**

In June 2002, there was a large surge in the number of asylum-seekers approaching the Canadian border from the US, resulting in significant accommodation and public health concerns. Some were seeking to enter Canada before the new immigration law (IRPA) went into effect on 28 June, but others were seeking entry due to unfounded rumors that the Agreement was due to go into effect that same day. UNHCR anticipates that there may be a similar "rush to the border" after the final text of the Agreement is signed, but before it is implemented.

*Recommendation: In anticipation of a possible surge of asylum applicants at the border once the final text is announced, UNHCR hopes adequate resources will be made available to process asylum claims in a timely and humane manner.*

## **XIII. Monitoring and Periodic Review**

UNHCR welcomes the opportunity given in Article 8(3) to participate in reviews of the Agreement and its implementation, the first of which is to occur within 12 months of the Agreement's date of entry into force. UNHCR notes that ongoing monitoring of the Agreement's implementation will be vital to make these periodic reviews meaningful. UNHCR is prepared to play a role in this monitoring, as part of its advisory responsibilities. NGOs could also have an important role to play in this regard. Involvement of NGOs would provide greater breadth of geographic coverage. NGOs also have the most direct contact with the affected asylum-seekers.

*Recommendation: UNHCR recommends that the Parties include in the Agreement a provision for the monitoring of its implementation, which could involve both UNHCR and NGOs in the two countries.*

#### **XIV. Resettlement**

In Article 9, the Parties agree to “endeavor to assist” each other in the resettlement of persons determined “to require protection in appropriate circumstances.” It is unclear how this relates to the subject of the Agreement, *i.e.*, cross-border asylum applications.

*Recommendation: UNHCR recommends that this article be omitted from the Agreement, given that it does not deal with cross-border applications for asylum. In any case, in view of UNHCR’s overall statutory responsibility for helping governments to provide refugees with durable solutions, UNHCR hopes to be kept informed of the actions of the two governments under this provision.*

UNHCR  
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