SCC File number: 39749

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

Between:

The Canadian Council for Refugees, Amnesty International, The Canadian Council of Churches, Abc, De [By Her Litigation Guardian Abc], and Fg [By Her Litigation Guardian Abc], Mohammad Majd Maher Homsi, Hala Maher Homsi, Karam Maher Homsi and Reda Yassin Al Nahass and Nedira Jemal Mustefa

Appellants

And:

The Minister of Citizenship And Immigration and The Minister of Public Safety and Emergency Preparedness

Respondent

And:

Association québécoise des avocats et avocates en droit de l'immigration; the Canadian Civil Liberties Association; the National Council of Canadian Muslims and Canadian Muslim Lawyers Association (jointly); the Canadian Lawyers for International Human Rights and the Canadian Centre for the Victims of Torture (jointly); the Queen's Prison Law Clinic; the Rainbow Refugee Society; the British Columbia Civil Liberties Association; the Advocates for the Rule of Law; the David Asper Centre for Constitutional Rights, West Coast Legal Education and Action Fund Association, and Women's Legal Education and Action Fund Inc. (jointly); the HIV & AIDS Legal Clinic Ontario; the Rainbow Railroad; and the Canadian Association of Refugee Lawyers

Intervenors

MEMORANDUM OF ARGUMENT OF THE INTERVENER, CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS AND CANADIAN CENTRE FOR VICTIMS OF TORTURE

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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MEMORANDUM OF ARGUMENT OF THE INTERVENER, CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS AND CANADIAN CENTRE FOR VICTIMS OF TORTURE

PART I – FACTS & OVERVIEW

1. This appeal will address the constitutionality of s. 101(1)(e) of the *Immigration and Refugee Protection Act*[1] ("IRPA"), and in particular whether or not the implementation and ongoing application of the *Safe Third Country Agreement*[2] ("STCA") between Canada and the United States violates the *Canadian Charter of Rights and Freedoms*[3] ("Charter") and Canada's obligations under international treaties and conventions to which Canada is a signatory.

2. The STCA does not 'share' refugee responsibility with the United States according to any metric of distribution. It simply allocates refugees according to which state is easier to reach first by land. It permits Canada to leverage its geographic remoteness to reduce the number of refugee claimants travelling overland who can ask for Canada's refugee protection, because such claimants must first pass through the United States. Conversely, claimants seeking US protection need not pass overland through Canada to reach the US. Therefore, CLAIHR/CCVT submits that this Court should not readily accept genuine 'responsibility sharing' between states as the objective, purpose, or function of the STCA.

PART II – QUESTION IN ISSUE

3. CLAIHR/CCVT's submissions will assist this Court in determining whether the Governor-in-Council ("GIC") reasonably interpreted and applied its statutory duty under s. 102 to 'ensure continuing review' of the United States' 'human rights record' and its 'policies and practices' regarding refugee claimants' in light of Canada's international legal obligations.

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[1] Immigration and Refugee Protection Act, SC 2001, c 27, s 101(1)(e).

[2] Agreement between the Government of Canada and the Government of the United States of America For cooperation in the examination of refugee status claims from nationals of third countries, United States and Canada, 5 December 2002, Can TS 2004 No 2 art 1, s 1(a) (entered into force 29 December 2004) ["STCA"].

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

PART III – STATEMENT OF ARGUMENT

4. CLAIHR/CCVT adopts the submissions of the Appellant and CARL regarding the role of international law in interpreting the *Charter*.

5. IRPA s. 3(3)(f) requires this Court to 'construe and apply' the Act in a manner that "complies with international human rights instruments to which Canada is signatory".[4] CLAIHR/CCVT further submits that the construal of IRPA s. 102 concerns the interpretation of 'ensure continuing review,'[5] and its application concerns the actual process that that Respondent undertook to apply that definition.

6. CLAIHR/CCVT further submits that IRPA s. 3(3)(f) is not merely an ambiguity-resolving interpretative factor that can be displaced in favour of a contrary interpretation, but rather a mandatory direction to ensure that Canada's domestic law is aligned with the international legal obligations voluntarily assumed by Canada.[6] Absent clear legislative indication to the contrary, s. 102 cannot be construed or applied in a manner that would sustain the designation of the United States under IRPR s. 159.3, if that would result in Canada's non-compliance with binding international instruments.[7] CLAIHR/CCVT maintains that nothing in the legislation amounts to a clear legislative indication that Parliament has authorized that s. 102 may be exercised in a manner that derogates from Canada's international obligations.

7. CLAIHR/CCVT submits that that the STCA must be interpreted strictly, and in accordance with what this Court in *Pushpanathan* described as the 'overarching and clear human rights object and purpose of the [Refugee] Convention,' as confirmed by s. 3(3)(g) of IRPA[8].

8. The purpose of Division 2 of IRPA, which addresses Canada's protection obligations, is to provide a process whereby the government of Canada can comply with its international obligation of *non-refoulement*. States parties to the *Refugee Convention* ("Convention")[9] undertake not to *refoule* a refugee at or inside their border to their country of nationality or former habitual residence. In

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[4] Immigration and Refugee Protection Act, *supra* note 1, s 4.
[5] *Ibid,* s 102(3).
[6] See de Guzman v Canada (Minister of Citizenship and Immigration), 2005 FCA 436 at paras 82-92.
[7] *Ibid* at para 92.
[8] Pushpanathan v Canada (Minister of Citizenship and Immigration), [1998] 1 SCR 982 at para 57, 1998 CanLII 778 (SCC).
[9] Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

most cases this process obliges Canada to determine whether or not a person is in need of Canada's protection, before Canada may deport them.

9. If a state party to the Convention wishes to enact a process whereby refugee claimants at the border will be summarily returned without a hearing, the process must comply with the state's international obligations under the Convention. The Convention is silent about states disposing of their obligations by transferring refugee claimants under their jurisdiction to a third state. CLAIHR/CCVT submits that the State power to transfer, which is not found in the Convention's text, must be interpreted in a manner that does not diminish the protection obligations under the Convention.

10. Apart from the specific mention of Convention and the Convention Against Torture in IRPA s. 102(2), other international agreements are also relevant to assessing a state's human rights record and, in turn, whether Canada's transfer of refugee claimants to that state complies with Canada's own international human rights obligations and s. 7 of the *Charter*. Examples of such agreements, to which Canada is legally bound, include:

    - International Covenant on Civil and Political Rights: Article 6 – right to life.[10]
    - *International Covenant on Civil and Political Rights:* Article 7 – freedom from torture and cruel, inhuman or degrading treatment or punishment.[11]
    - International Covenant on Civil and Political Rights: Article 9 – liberty and security of the person.[12]
    - International Covenant on Civil and Political Rights: Article 10 – detention conditions.[13]
    - *Convention on the Rights of the Child,* Article 37 – obligation of the State to ensure children are protected against, *inter alia,* torture and arbitrary deprivation of liberty.[14]

11. CLAIHR/CCVT submit that s. 3(3)(f)[15] brings international law to bear on the requisite legal standards for assessing the safety of a third country (United States) under IRPA ss. 102(2)(b) and

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[10] International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 art 6 (entered into force 23 March 1976, accession by Canada 19 May 1976) ["ICCPR"].

[11] *Ibid*, art 7.

[12] *Ibid*, art 9.

[13] *Ibid*, art 10.

[14] Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into fore 2 September 1990), art 37.

[15] *IRPA supra note* 1, s 3(3)(f).

(c)[16], and those in turn determine whether the US meets the criteria for ongoing designation under s. 101.[17]

12. Article 2 of the ICCPR prohibits Canada from diluting (through appeals to comity) or deflecting (through appeals to jurisdiction) its own binding human rights obligations. Article 2 of the ICCPR requires states to 'respect and ensure' the rights enumerated in that Covenant to those on its territory and subject to its jurisdiction. Transfers of refugee claimants to the United States are exercises of Canadian jurisdiction on Canadian territory.[18] One implication is that compliance with international human rights the binding human rights obligations that Canada owes to individuals (including refugee claimants) under its jurisdiction cannot be subordinated or sacrificed to inter-state practice of comity (a non-legally binding practice of courtesy and mutual deference between states). Indeed, the preamble to the STCA cautions that the parties "must ensure in practice that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of non-refoulement are avoided…."[19]

13. This means that Canada cannot transfer refugee claimants to another state and disclaim accountability for *refoulement* or for foreseeable and fundamental human rights violations by the receiving state. As this Court stated in *Suresh* regarding a substantial risk of torture: "At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand" [Emphasis added].[20]

14. The duty to 'ensure' rights protection encompasses a duty to protect against rights violations by third parties, including private actors and other states. While Canada lacks jurisdiction to regulate the conduct of the United States, it does possess the jurisdiction: to not transfer refugee claimants to the United States; to suspend the operation of the STCA at any time; and to terminate the STCA on a year's notice where the United States' human rights record indicates that transfer

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[16] *Ibid,* s 102(2)(b)-(c).
[17] *Ibid,* s 101.
[18] ICCPR, *supra* note 10, art 2.
[19] *STCA*, *supra* note 2 at Preamble.
[20] Suresh v Canada (Citizenship and Immigration), 2002 SCC 1 at para 54.

would expose refugee claimants to the risk of *refoulement* or the infringement of international human rights obligations to which Canada is bound.

15. The UNHCR confirms that where the requisite treatment "cannot be agreed to *or met*, then transfer would not be appropriate" under the Convention.[21] Further, the "obligation to ensure that conditions in the receiving State meet these requirements in practice rests with the transferring State" and that "regular monitoring and/or review by the transferring State" must meet international standards.[22]

16. The monitoring and review obligation implements the broader international legal principle of due diligence. Due diligence ascribes responsibility on the basis of what a state reasonably ought to have known or monitored, and/or what the state reasonably ought to have done, within the capacities available to the state.23

17. Due diligence is an objective standard of reasonable conduct familiar in both domestic and international law that complements the deferential standard of reasonable interpretation in judicial review. A reasonable interpretation of 'ensuring the continuing review' of s. 102 factors will depends on the actual steps taken by the GIC that reveal the GIC's construal of s. 102(3).[24]

18. Due diligence in the context of *refoulement* means that 'states are required to actively collect', information regarding third party human rights risks.[25] Furthermore "once a state has knowledge of a certain risk, it is under an obligation to employ all reasonable means at its disposal to prevent harm or to mitigate its consequences".[26]

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[21] UN High Commissioner for Refugees (UNHCR), "Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers" (May 2013) at vii, online: <https://www.refworld.org/docid/51af82794.html>.

[22] *Ibid*, viii.

[23] Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge: Cambridge University Press, 2021) at 127-128. At 84 Monnheimer explains that, notably, alien protection law became the first area of international law in which it was commonly recognized that states had a duty to take reasonable measures in order to prevent and sanction harmful conduct on their territory.

[24] *Immigration and Refugee Protection Act*, *supra* note 1, s 102.

[25] Monnheimer, *supra* note 23 at 210.

[26] *Ibid* at 128. At 205 Monnheimer writes "[…] it is not it is not necessary to establish that state authorities "had specific prior knowledge" of a human rights risk. Foreseeability is sufficient to trigger an obligation to prevent, which recognizes the constructive knowledge standard, despite all difficulties in obtaining knowledge of human rights risks." At 208-209

19. These principles of due diligence should inform the interpretation and application of the duty of 'ensuring continuing review' of the factors listed under IRPA s. 102(2). A statutory obligation to 'ensure the continuing review' requires that the GIC ensure active collection of information regarding the United States' human rights record, and policies and practices regarding, *inter alia*, detention in breach of international human rights standards, formal and *de facto* denial of access to refugee determination, and interpretations of the refugee definition that deny protection to women and to claimants at risk from private actors.

20. Fulfilling a due diligence requirement has procedural implications. As Prof. Carla Ferstman adds,

> [t]he due diligence principle has also been used as a management tool or fact-finding process … to gain knowledge, assess, manage, and mitigate a variety of legal and operational risks, and help determine whether certain actions should be pursued or discontinued.[27]

21. The due diligence principle requires that the Respondent take reasonable steps to ensure that it is apprised of the continuing compliance of a listed state with the criteria justifying initial designation under s. 102.[28] There may be more than one duly diligent method of executing the statutory duty of 'continuing review.' CLAIHR/CCVT submits that international legal sources assist in identifying the following relevant features of a duly diligent review mechanism.

22. First, the Executive Committee of the UNHCR has identified the following desiderata for 'effective protection' in the context of return to third countries:

> [. . .] There will be respect for fundamental human rights in the third State in accordance with applicable international standards, including but not limited to the following:
>
> - there is no real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the third State;
> - there is no real risk to the life of the person in the third State;

Monnheimer describes the instances in which knowledge of human rights risks can be positively established or assumed: a) potential victims inform states of looming human rights risk or such information is made available by experts or government institutions; b) states themselves engage in or allow activities that bear the potential of human rights infringements; and c) constructive knowledge in case of consistent patterns of human rights violations in a particular region or toward a particular group of individuals.

[27] Carla Ferstman, "Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent 'Irregular' Migration: European Union and United Kingdom Support to Libya" (2020) 21:3 German LJ 459 at 468, online: <http://dx.doi.org/10.1017/glj.2020.29>.

[28] *Immigration and Refugee Protection Act*, *supra* note 1, s 102.

- there is no real risk that the person would be deprived of his or her liberty in the third State without due process."[29] [Emphasis added]

23. CLAIHR/CCVT note that the threshold for unacceptable risk in the context of due diligence is a 'real risk' of rights violations, and *not*, as the Federal Court of Appeal asserted, policies or practices by the receiving state that "shock the conscience."[30] This Court has invoked that standard in extradition and counter-terrorism cases. It is inapt to the context of human rights protection under the Refugee Convention.

24. Second, delegation of the 'continuing review' function does not entail the delegation of the GIC's statutory duty to *ensure* 'continuing review.' A policy requiring delegated review 'as circumstances warrant,' does not ensure continuing review in the absence of criteria defining those circumstances that warrant review; nor does it ensure an adequate and transparent review process. In other words, the GIC cannot transfer to a delegate the GIC's legal responsibility to articulate the very substantive and procedural criteria necessary for the GIC to discharge its duty of ensuring that it is apprised of changing circumstances that may require it to re-consider a state's designation under s. 102(1)(b).[31]

25. CLAIHR/CCVT adopts the account of the review process set out at paras 7-10 of the Appellants' factum. The GIC has not received a report under s. 102 since 2009. CLAIHR/CCVT observes that the Respondent provided no evidence demonstrating how the GIC would ensure the continuing review by, for example, communicating to the Minister the type of circumstances that would warrant review, the methodology or process of review, and the standard against which the factors listed in s. 102 would be measured.[32] In the absence of such guidance, a delegation of review 'as circumstances warrant' cannot ensure a meaningful continuing review.

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[29] UN High Commissioner for Refugees (UNHCR), "Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable*, 9-10 December 2002)*" (February 2003) at page 3, para 15, online: <https://www.refworld.org/docid/3fe9981e4.html>.

[30] Canada (Citizenship and Immigration) v Canadian Council for Refugees, 2021 FCA 72 at paras 158-161; see Canadian Council for Refugees v Canada, 2008 FC 229 at para 128, Evans JA, dissenting.

[31] Immigration and Refugee Protection Act, *supra* note 1, s 102(1)(b).

[32] Canada (Citizenship and Immigration) v Canadian Council for Refugees, 2021 FCA 72 (Cross-examination of André Baril). Mr. Baril testified that the Refugee Affairs Branch does not monitor whether Safe Third Country Agreement returnees are detained when they are sent back to the United States. When asked about the standard against which the policies and practices of the United States are monitored for the purpose of s. 102 of the IRPA, Mr. Baril testified that the standard is that a safe third country must comply with article 3 of the Convention Against Torture and article 33 of the

26. In *Vavilov,* this Court admonished that an administrative decision maker cannot "expect that its decision would be upheld on the basis of internal records that were not available to the affected parties.[33] CLAIHR/CCVT submits that *Vavilov* teaches that in the absence of any guidance or reasons from GIC on the interpretation of 'ensure the continuing review', this Court must consider for itself the reasonableness of an interpretation of 'ensure the continuing review' that would result in GIC receiving no s. 102 review for a decade. The Respondent cannot expect a court to draw positive inferences about evidence that the Respondent chose not to disclose by invoking privilege.

27. CLAIHR/CCVT acknowledge that there may be more than one reasonable way to effectuate the statutory duty 'ensure the continuing review' under IRPA s. 102(3), but submit that the mechanism actually employed by the Respondent is not among them.

28. To the extent that the review obligation is an alternative to an individualized assessment of the risk of *refoulement* or human rights violations by the receiving country – a mechanism which is unavailable and non-viable under the existing STCA – the failure of the actual reviews conducted under s. 102 further evinces its unreasonableness.

29. In light of the failure of the Governor-in-Council to fulfil its statutory duty, certain consequences follow. If continuing review is a condition precedent to the legality of designation, then the court may conclude that the designation is *ultra vires* as long as statutory conditions for its legality are not met.

Refugee Convention. When asked about the meaning of the phrase "when circumstances warrant" Mr. Baril testified that "[…] there would be circumstances that could lead to potential de-designation, suspension or possible public policies." Mr. Barile testified that it is the Minister alone who makes the determination about when to report to the GIC. Mr. Barile further testified that under the current framework, it is possible that the Minister will not receive any of the monitoring reports, and that if the Minister does not receive a monitoring report, the GIC will not receive the monitoring report unless the GIC requests it.

[33] Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 95.

PART – IV COSTS & PART V – ORDER SOUGHT

30. CLAIHR/CCVT make no submissions on costs. The Intervener does not seek a particular order pursuing the disposition of the Appeal; and given that that Court has already disposed of requests to present oral arguments, CLAIHR/CCVT does not seek any order in this regard.[34]

ALL OF WHICH IS RESPECTFULLY SUBMITTED in Toronto this 16th day of June, 2022 by:

PER "STEVEN BLAKEY"

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Lorne Waldman, C.M., Audrey Macklin and
Steven Blakey, Counsel for the Intervener:
CLAIHR/CCVT

[34] Rules of the Supreme Court of Canada, SOR/2002-156, ss 42(2)(e)(ii), 42(3).

PART VII: TABLE OF AUTHORITIES. INCLUDING AUTHORITIES LISTED, WITH HYPERLINKS

Jurisprudence	Cited at para(s)
Canada (Citizenship and Immigration) v Canadian Council for Refugees, 2021 FCA 72.	23, 25
Canadian Council for Refugees v Canada, 2008 FC 229	23
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.	26
de Guzman v Canada (Minister of Citizenship and Immigration), 2005 FCA 436.	6
Pushpanathan v Canada (Minister of Citizenship and Immigration), [1998] 1 SCR 982, 1998 CanLII 778 (SCC).	7
Suresh v Canada (Citizenship and Immigration), 2002 SCC 1.	13
Legislation	**Cited at para(s)**
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, United States and Canada, 5 December 2002, Can TS 2004 No 2 (entered into force 29 December 2004).	1, 12
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.	1
Immigration and Refugee Protection Act, SC 2001, c 27.	1, 5, 7, 11, 17, 19, 21, 24-25
International Sources	**Cited at para(s)**
Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into fore 2 September 1990).	10
Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).	8-10, 15, 23
International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).	10

UN High Commissioner for Refugees (UNHCR), "Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers" (May 2013) at vii, online: (pdf): *Refworld* <https://www.refworld.org/docid/51af82794.html>.	15
UN High Commissioner for Refugees (UNHCR), "Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable*, 9-10 December 2002)*" (February 2003), online: (pdf) *Refworld* <https://www.refworld.org/docid/3fe9981e4.html>.	22
Secondary Material	**Cited at Para(s)**
Carla Ferstman, "Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent 'Irregular' Migration: European Union and United Kingdom Support to Libya" (2020) 21:3 German LJ 459.	20
Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge: Cambridge University Press, 2021).	16, 18