The Safe Third Country Agreement: Safe… For now?

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In *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17, the Supreme Court of Canada (SCC) unanimously[1] confirmed that the designation of the United States as a **safe third country** for the purpose of refugee claims does not violate section 7 of the *Charter of Rights and Freedoms* while remitting the claimants' undecided section 15 challenge to the Federal Court. The SCC also provides helpful clarification on how courts should conduct the section 7 analysis and on the proper appellate review of constitutional claims not decided at first instance.

I. Background

The United States and Canada share a bilateral treaty – the Safe Third Country Agreement (STCA). Under the STCA, refugee claimants are required to seek refugee protection in whichever of the United States or Canada they first enter after departing their country of origin. This treaty is designed to allow both countries to share the responsibility of refugee claims.

The STCA is implemented through section 101(1)(e) of the *Immigration and Refugee Protection Act* (IRPA) and section 159.3 of the *Immigration and Refugee Protection Regulations* (Regulations). Section 101(e) of the IRPA states that refugee claims are ineligible for consideration if the claimant arrived from a country designated by the Regulations as a safe country. Section 159.3 of the Regulations designates the United States as a safe country. Accordingly, refugee claimants arriving from the United States are unable to have their claims considered in Canada unless they fall into one of the statutory exceptions.

The claimants in this case each sought refugee protection due to a fear of persecution in their home countries. Each had first landed in the United States but ultimately sought protection in Canada due to procedural barriers to the asylum process in the United States or concerns about perceived American public hatred towards Muslims following the "Muslim ban". Because the claimants arrived from the United Sates (a safe third country) they were not eligible to claim refugee status in Canada.

The claimants each sought judicial review of their ineligibility decisions in which they asserted three constitutional challenges. First, they claimed that the Regulations are

ultra vires (i.e., beyond) the authority granted by the IRPA as the United States no longer meets the required factors of a safe third country. Second, they argued that the legislative scheme violates section 7 of the *Charter* due to the risk of detention and *refoulement* upon being returned to the United States. Finally, they argued that the scheme violates section 15 of the *Charter* because women are adversely affected by a return to the United States due to its disproportionate denial of refugee claims for women facing gender-based persecution and sexual violence.

II. Courts Below

A. Federal Court

The Federal Court rejected the *ultra vires* argument because the assessment of whether the Regulations (which deemed the United States a safe third country) are within the authority of the IRPA is to be based on the facts at the time of the designation, not at the time of a challenge. The Federal Court held that the scheme violates section 7 of the *Charter* as the United States' designation threatens liberty and security of the person given the risks of *refoulement* and the conditions of detention faced by claimants who are returned to the United States. The violation was found not to be justified under section 1. Given the Federal Court's conclusion on the section 7 claim, it did not rule on the section 15 claim.

B. Federal Court of Appeal

The Federal Court of Appeal unanimously set aside the Federal Court's section 7 decision on the basis that the causation requirements for a *Charter* claim were not met. In the Federal Court of Appeal's view, the claimants had improperly targeted the legislation, rather than administrative conduct, which in its view was the likely cause of the alleged violations. The Federal Court of Appeal declined to comment on the section 15 claim given that no factual findings had been made below.

III. Supreme Court of Canada

In a unanimous decision authored by Kasirer J., the SCC allowed the appeal in part, (i) rejecting the appellants' arguments that the Regulations (a) were *ulra vires* the IRPA or (b) breached section 7 of the *Charter,* while (ii) remitting to the Federal Court the issue of whether the *Regulations* breached section 15 of the *Charter*.

A. Post-promulgation *ultra vires* challenge of the regulations rejected

The SCC rejected the appellants' argument that the Regulations are *ultra vires* the IRPA, agreeing with the Federal Court that the factors set out in the Regulations for a country to be declared "safe" must be met before, not after, a designation. While the Regulations also obligate the government to ensure the continuing review of "safe" countries, these provisions were not challenged in the proceeding.

B. The section 7 *Charter* claim was properly constituted

The SCC confirm the well-known framework that to establish a section 7 *Charter* breach, a claimant must establish two elements:

i. That section 7 is engaged by at least a risk that the impugned legislation deprives the claimant of life, liberty, or security of the person.
ii. That the deprivation is not in accordance with the principles of fundamental justice.

Before embarking on this analysis, as a threshold matter, the SCC rejected the Court of Appeal's holding that the appellants' section 7 *Charter* claim was improperly constituted because it targeted the Regulations, rather than administrative conduct. As the legislation is the relevant basis of the ineligibility determinations, it was properly subject to constitutional scrutiny. Regardless of how claimants frame their claim, courts must consider legislative provisions in their entire statutory context, including provisions designed to prevent and cure potential rights infringements, such as administrative decisions. While the claimants here could also have challenged administrative decisions related to review of the United States' designation as a safe third country, the availability of exemptions, or the application of exceptions to the rule requiring refugee claimants to seek protection in the United States, this did not preclude challenges to the legislation itself.

C. Section 7 of the *Charter* was engaged by the Regulations but no section 7 breach was established

The SCC found that the risks of detention upon return to the United States, as well as the conditions of detention in the United States, fell within the scope of liberty and security of the person protected by section 7 and engaged that provision. To draw the necessary causal connection between a potential infringement in the United States and Canadian state action, the claimants had to show that Canadian authorities knew, or ought to have known, that these harms could arise as a result of Canadian state action. While the SCC found that some of the potentially *Charter* violating conditions of detention were not foreseeable, it found that the risk of detention, the "one-year bar" (a rule under which asylum claims must be advanced within a year of arrival), the treatment of gender-based claims, and the widespread practice of medical isolation, were foreseeable consequences of returning claimants to the United States sufficient to engage section 7 of the *Charter*.

Having concluded that some of the harms alleged by the claimants engaged their right to liberty and security of the person, the SCC considered whether these harms were consistent with the principles of fundamental justice, specifically overbreadth and gross disproportionality. The SCC noted that when a legislative scheme contains safety valves, such as curative provisions and exemptions, a court's constitutional analysis must consider whether these mechanisms are sufficient to ensure that a claimant's rights are not infringed in a manner inconsistent with the principles of fundamental justice. Thus, these safety valves can cure an otherwise unconstitutional effect of the legislation.

The SCC held that the legislative scheme is not overbroad. The legislation's objective is sharing responsibility for refugee claims with the United States. Sharing responsibility with the United Sates will necessarily expose claimants to the United States' legal regime. While claimants face a risk of detention in the United States, there are

mechanisms in place for release and review by administrative decision makers and courts. Accordingly, the risk of detention is not overbroad. The scheme is also not grossly disproportionate because the risks of detention are not so disproportionate to the purpose of the legislation that they cannot be supported.

While a real risk of *refoulement* would have rendered the Regulations impermissibly overbroad, the legislative scheme contains safety valves such as deferrals of removal, temporary residence permits, humanitarian and compassionate exemptions, and public policy exemptions. These curative provisions and exemptions can exempt claimants from return to the United States where there is a real risk of *refoulement*, thereby bringing the legislation into *Charter* compliance.

The SCC rejected the Court of Appeal's view that the availability of judicial review is itself a safety valve. While judicial reviews ensure that public authorities respect the legal limits of their powers, they do not prevent or cure defects that would arise from the isolated operation of a general rule. Accordingly, the availability of judicial review cannot save otherwise unconstitutional legislation.

Notably, in conducting the principles of fundamental justice analysis, the SCC rejected Canada's argument that the constitutional standard applicable to the effects of removal to a foreign legal system is that they would "shock the conscience". The SCC clarified that while the "shocks the conscience" standard may apply to challenges of individual instances of government conduct, it is not relevant to challenging legislation, where the principles of fundamental justice set out in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 apply.

D. The section 15 *Charter* claim was remitted to the Federal Court

Finally, the SCC held that the claimants' section 15 claim — which had not been decided by the courts below — should be remitted to the Federal Court. While acknowledging the importance of judicial restraint in constitutional pronouncements, given the lack of factual findings, the complexity of the record, and the seriousness of the matter, the SCC held that it would be imprudent to dispose of the equality claim and leave the applicants with no avenue of appeal.

Key takeaways

- The availability of a challenge to an administrative decision does not preclude a challenge to the legislation itself. The SCC has made it clear that it is possible to challenge both legislation and administrative conduct within the same proceeding.
- No *Charter* hierarchy: The SCC noted concerns of a judicial "pattern of neglect with respect to section 15" in challenges based on multiple *Charter* rights and clarified that the *Charter* should not be treated as if it establishes a hierarchy of rights in which section 15 occupies a lower tier.
- The "shocks the conscience" standard in extraditions is not the relevant standard when challenging legislation under section 7 of the *Charter*. While in the past the SCC has applied the "shocks the conscience" standard to legislative challenges, it is now clear that the standard is only applicable to the review of individualised decisions.

- If an impugned legislative scheme contains safety valves, such as curative provisions and exemptions, the court's constitutional analysis must consider whether the safety valves are capable of curing the legislation's otherwise unconstitutional effects, thereby saving the legislative scheme from constitutional invalidity.
- Lower courts and appellate courts must seriously consider ruling on alternative bases for a constitutional challenge after finding constitutional invalidity under one ground. The SCC highlighted a tension between lower courts not making unnecessary constitutional pronouncements and permitting fair appellate review of all possible bases for a constitutional challenge. In light of this tension, lower courts must consider that further proceedings may require an appellate court to address alternative constitutional grounds. If the lower court has declined to consider these, appellate courts may have to remit claims. Appellate courts should hesitate to assume a fact finder role on constitutional issues not properly considered by the court below.
- The SCC did not provide any clarity on the applicable standard of review for regulations. Accordingly, uncertainty remains as to whether the "hyperdeferential" standard set out in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 has survived the robust standard of reasonableness developed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. This matter is left to be resolved in a later case. Perhaps, *Auer v Auer*, 2022 ABCA 375, for which leave to appeal to the SCC is pending.

If you have any additional questions about the SCC's decision regarding the Safe Third Country Agreement, please reach out to any of key contacts listed below.

[1] Justice Brown did not participate in the judgment although sat on the panel that heard the appeal.

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