



Case in Brief: **Canadian Council for Refugees v. Canada**
(Citizenship and Immigration)

Judgment of June 16, 2023 | On appeal from the Federal Court of Appeal
Neutral citation: 2023 SCC 17

The Supreme Court holds the regulations designating the United States as a safe third country do not infringe refugee claimants' rights to liberty and security of the person.

In 2002, Canada and the United States concluded a bilateral treaty known as the “*Safe Third Country Agreement*” (STCA). As a general rule under the STCA, refugee claimants must seek protection in whichever of the two countries they first enter after leaving their country of origin. This rule is incorporated in section 101(1)(e) of Canada’s *Immigration and Refugee Protection Act* (the Act) and section 159.3 of the *Immigration and Refugee Protection Regulations* (the Regulation).

While there are some exceptions, someone is ineligible under the Act to claim refugee status in Canada if they arrive at a land port of entry from a “safe third country”. This designation is based on criteria including the country’s compliance with the principle of “*non-refoulement*”. The principle – which is the cornerstone of the international refugee protection regime – prohibits returning a person to a place where they would face torture, cruel or degrading treatment, or threats to their life or freedom. A “safe third country” is thus seen as an appropriate partner with which the responsibility for considering refugee claims can be shared. Section 159.3 of the Regulation designates the United States as such.

The appellants in this case are individual refugee claimants and public interest litigants advocating on their behalf. The refugee claimants all arrived in Canada in 2017 from the United States. They feared gender-based persecution and sexual violence committed by gangs or oppression in their countries of origin. Because they arrived at land ports of entry from the U.S., they were ineligible to claim refugee protection in Canada.

The refugee claimants argued the Regulation designating the U.S. as a safe third country violates the rights guaranteed under section 7 of the *Charter of Rights and Freedoms* because it results in Canadian immigration officers returning refugees to the United States without considering whether that country will respect their rights under international law, including those relating to *non-refoulement* and detention. They also allege the Regulation violates the *Charter* guarantee of equality under section 15 because women facing gender-based persecution are often denied refugee status in the United States and face the risk of *refoulement*.

In 2020, a Federal Court judge found the Regulation violated section 7 of the *Charter*. Based on her review of the evidence, the liberty and security of the person were threatened given the risks of *refoulement*, detention and the conditions of detention faced by refugee claimants who were returned to the United States. The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness appealed. The Federal Court of Appeal set aside the judgment. In its view, the *Charter* challenge should not have focused on the Regulation itself. Rather, it should have targeted Canada’s action or inaction in the continuing review of the United States’ designation as a “safe third country”. Neither court ruled on the section 15 claim. The refugee claimants then brought the case to this Court.

The Supreme Court has allowed the appeal in part.

Under Canadian law, refugee claimants may be exempted from return to the United States if their section 7 *Charter* rights are at risk.

Writing for a unanimous Court, Justice Kasirer said the Regulation designating the United States as a safe third country for the purposes of the STCA does not breach section 7 of the *Charter*. He agreed with some of the Federal Court judge’s findings relating to the treatment of refugee claimants in the United States, namely the risk of detention upon being returned there and some aspects of detention conditions. He also proceeded on the assumption that a risk of *refoulement* flowed from some of the United States’ policies. As such, he concluded the designation of the United States engages interests of liberty and security of the person set out in section 7.

However, the legislative scheme could stand because it contained ways for Canada to consider refugee status claims when ineligibility under the scheme would lead to deprivations of liberty or security of the person. These

legislative “safety valves” include for example discretionary exemptions on the basis of humanitarian and compassionate or public policy grounds. They ensure compliance with the principles of fundamental justice. As Justice Kasirer put it, “when the [Act]’s safety valves are activated, claimants can be exempted from return”. He added that it may well be that, in practice, administrative decision makers do not always construe or deploy the legislative safety valves appropriately. In such cases, the legislation itself remains valid, but administrative and *Charter* relief remains available on an individual basis. Yet this is not what the Court had been asked to provide here.

As a result, Justice Kasirer dismissed the appeal on the section 7 claim and returned the appellants’ section 15 claim to the Federal Court for determination, given the lack of factual findings on which the Supreme Court could rely, the complexity of the record and conflicting evidence, and the profound seriousness of the matter.

Breakdown of the decision: *Unanimous*: Justice [Kasirer](#) allowed the appeal in part (Chief Justice [Wagner](#) and Justices [Karakatsanis](#), [Côté](#), [Rowe](#), [Martin](#), [Jamal](#) and [O’Bonsawin](#) agreed)

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