Date: 20080131

Docket: A-37-08

Citation: 2008 FCA 40

Present: **RICHARD C.J.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

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

Respondents

Heard at Ottawa, Ontario, on January 30, 2008.

Order delivered at Ottawa, Ontario, on January 31, 2008.

REASONS FOR ORDER BY: RICHARD C.J.

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REASONS FOR ORDER

[1] The appellant, who was the respondent in the Federal Court, seeks an Order staying the Judgment of Justice Phelan dated January 17, 2008 allowing the respondents' application for a declaration invalidating 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*, also known as the *Safe Third Country Agreement* (STCA) between the Government of Canada and the Government of the United States of America (U.S.) (*Canadian Council for Refugees v. Canada*, [2007] F.C.J. No. 1583, 2007 FC 1262).

[2] The STCA is an agreement pursuant to subsection 102(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims. The essence of the STCA is expressed at article 4(1), which states that "[t]he Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry […] and makes a refugee status claim". Similar agreements between European Union (EU) member states have existed for many years.

[3] Justice Phelan held that the Governor in Council exceeded its jurisdiction when it adopted Regulations designating the U.S. a safe third country and putting into operation the STCA, as he was of the view that the U.S. did not comply with its non-refoulement obligations under article 33 of the *Convention relating to the Status of Refugee*, 189 U.N.T.S. 150 (April 22, 1954), or the *Refugee Convention* (RC), and article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (June 26, 1987) or *Convention against Torture* (CAT). He further held that the return of a refugee claimant from Canada for a refugee determination by the U.S. asylum and refugee system would violate sections 7 and 15 of the *Charter of Rights and Freedoms* (*Charter*) because of the U.S.'s apparent failure to comply with its non-refoulement obligations.

[4] Justice Phelan's judgment will become effective on February 1, 2008, at which point the STCA, which has been in effect since December 2004, will cease to operate in Canada.

[5] The appellant seeks an Order to stay Justice Phelan's judgment until such time as this Court has had an opportunity to consider and render its decision.

[6] The appellant submits that the requirements of a stay have been met as: there are serious issues to be determined, the appellant will suffer irreparable harm and the balance of convenience favours the appellant. The appellant also requests that this proceeding be expedited.

[7] A brief history of the STCA between Canada and the United States and its implementation in Canada is found in the affidavit of Bruce A. Scoffield sworn September 19, 2006 which was filed in the proceedings before Justice Phelan. Mr. Scoffield is the Director for Operational Coordination in the International Region, Citizenship and Immigration Canada.

> Canada and the U.S. have a long history of cooperation relating to the movement of persons across their shared border. A formal joint commitment to bilateral responsibility sharing came in 1995 through the adoption of the "Shared Border Accord" ("SBA"). In December 1995, a preliminary draft of a responsibility sharing agreement based on the Safe Third Country concept was made public. […] (para. 16)
>
> […]
>
> This joint commitment was reaffirmed on December 12, 2001 when the then Minister of Foreign Affairs, the Honourable John Manley, and the Director of the U.S. Office of Homeland Security, Governor Tom Ridge, announced the "Smart Border Declaration" and associated Action Plan. The Declaration and Action Plan committed the two governments to collaborative efforts to enhance the security of our shared border while facilitating the legitimate flow of people and goods. One of the thirty-two specific commitments agreed in the Action Plan was the negotiation of a bilateral safe third country agreement. (para. 19)
>
> […]
>
> Canada and the U.S. signed the Agreement on December 5, 2002. In its preamble, the two governments set out their objectives related to international cooperation, burden and responsibility sharing. The two governments recognized that the sharing of responsibility for

refugee protection must include access to a full and faire refugee status determination in order to guarantee the effective implementation of the Refugee Convention and the Convention against Torture. […] (para. 24)

The Agreement applies to situations where a refugee claim is made to one party by a refugee claimant who arrives at a land border port of entry directly from the territory of the other party. The Agreement generally assigns responsibility for adjudicating refugee claims in such cases to the "country of last presence". […] For the moment, the Agreement is limited in application to refugee claims made at ports of entry where the movement of refugee claimants across the border can easily be observed and the country of last presence can readily be established. […] (para. 25)

Following a final round of negotiations on the Agreement in the fall of 2002, authority was sought, further to ***IRPA*** s. 102(1)(a), to designate the U.S. as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention against Torture and approval of the Agreement and authority to sign it was al so requested. ***IRPA*** s. 102(2) required that the Governor in Council consider four factors when considering designating a country as safe. These are: (1) whether it is a party to the Refugee Convention and the Convention against Torture; (2) its policies and practices with respect to claims under the Refugee Convention and with respect to its obligations under the Convention against Torture; (3) its human rights record; and (4) 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. (para. 26)

[…]

Draft implementing regulations were pre-published in the *Canada Gazette Part I* on October 26, 2002. During the public comment period, the government received input from academics, members of the legal community and NGOs. The UNHCR also provided comments relating to the draft regulations. […] In November 2002, the House of Commons Standing Committee on Citizenship and Immigration held hearings on the draft regulations, and subsequently released a report recommending a number of amendments. The government response to that report was tabled in the Hose of Commons on May 1, 2003, and noted that the Government accepted, in whole or in part, twelve out of seventeen recommendations made by the committee. […] (para. 28)

[…]

Final regulations were published in the *Canada Gazette Part II* on November 3, 2004. […] (para. 31)

Two additional rounds of consultations were undertaken by the Government prior to implementation of the Agreement, focusing on the development of operational instructions and manuals. […] (para. 32)

[…]

A monitoring plan for UNHCR staff in both Canada and the U.S. was jointly agreed upon by each government. UNHCR's mandate under this plan is to assess whether implementation of the Agreement is consistent with its terms and principles as well as with international refugee law. […](para. 34)

[…]

The UNHCR is presently engaged with the two governments in a review of the first year of the Agreement's implementation which addresses, *inter alia*, specific observations and recommendations made by UNHCR as a result of its monitoring activities. Although the review is not yet final, UNHCR's Representative did provide an overview of UNHCR's assessment of the Agreement's first year to the Standing Committee on Citizenship and Immigration when he appeared as a witness on May 29, 2006. In his remarks, Mr. Asadi noted that overall UNHCR's findings were positive. (para. 36)

[…]

In response to a question from a member of the Committee, Mr. Asadi went on to state that "We consider the U.S. to be a safe country. Otherwise we would have not agreed to do this monitoring and we would have said so at the very beginning." […] (para. 38)

[…]

Distinct from the monitoring and oversight of implementation of the Agreement itself is the Government's continuing review of the factors relevant to the designation of the U.S. as a safe third country. Prior to the signing of the Agreement and since its implementation, the Government has continued to monitor developments in U.S. law and policy which could have an impact on the integrity of the Agreement, as mandated by the November 2004 Order in Council on directives for ensuring a continuing review of factors set out in s. 102(3) of *IRPA* with respect to countries designated under s. 102(1)(a) of *IRPA*. The Government makes use of numerous sources of information to this end, including academic and NGO commentary, diplomatic reporting from Canadian missions in the U.S., our ongoing dialogue with the UNHCR, and regular exchanges with American officials. […] (para. 42)

[8] In summary, Canada and the United States entered into an agreement to share responsibility for the determination of refugee claims. The rationale for this agreement is to ensure that refugee claimants have access to one full and fair refugee status determination procedure and that refugee claims are handled in an orderly and efficient manner.

[9] The Governor in Council (GIC) promulgated regulations under the authority of subsections 102(1) and 5(1) of the *IRPA* to implement the STCA. Subject to express exceptions, the STCA requires refugee claimants to seek protection in whichever of the two countries they first enter.

[10] The respondents in this appeal, the applicants in the proceeding before Justice Phelan, three advocacy groups and one individual, challenged the validity of the GIC's designations of the U.S. as a safe third country.

[11] Justice Phelan declared the regulations *ultra vires* and contrary to sections 7 and 15 of the *Charter* on the ground that the U.S. is not a safe third country that complies with the non-refoulement requirements of article 33 of the *Refugee Convention* and article 3 of the *Convention Against Torture*.

[12] The result of invalidating sections 159.1-159.7 of the *Immigration Refugee Protection Regulations* is the termination of the operation of the STCA in Canada.

[13] In allowing the application, Justice Phelan certified the following questions:

1. 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?

2. 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*?

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?

[14] The appellant has appealed the judgment by a notice of appeal dated January 18, 2008. The appellant brings this motion under Rule 398(1)(*b*) of the *Federal Court Rules* for a stay of the Judgment pending the determination of the appeal, and seeks an Order expediting the appeal proceedings.

[15] This Court has authority to grant a stay pending an appeal before it, including the stay of an order that declares legislation to be invalid or that infringes the *Charter* pending a final determination of the issues.

[16] Rule 398(1)(*b*) of the *Federal Courts Rules*, SOR/98-106, as amended, permits this Court to stay an Order of the Federal Court:

398.(1) On the motion of a person against whom an order has been made,	**398.**(1) Sur requête d'une personne contre laquelle une ordonnance a été rendue :

(a) where the order has not been appealed, the court that made the order may order that it be stayed; or (b) where a notice of appeal of the order has been issued, a judge of the court that is to hear the appeal may order that it be stayed.	a) dans le cas où l'ordonnance n'a pas été portée en appel, la cour qui a rendu l'ordonnance peut surseoir à l'ordonnance; b) dans le cas où un avis d'appel a été délivré, seul un juge de la cour saisie de l'appel peut surseoir à l'ordonnance.

[17] Stays pending the disposition of an appeal are granted on the same bases as interlocutory injunctions.

[18] A three-stage test is applied to applications for interlocutory injunctions and for stays in private law and *Charter* cases. At the first stage, the applicant must demonstrate a serious question to be tried. The threshold to satisfy this test is a low one. At the second stage, the applicant must establish that it will suffer irreparable harm if the relief is not granted. The third stage requires an assessment of the balance of inconvenience and it will often determine the result in applications involving *Charter* rights. The same principles apply when a government authority is the applicant. However, the issue of public interest will be considered at both the second stage as an aspect of irreparable harm to the government's interests and the third stage as part of the balance of convenience (*RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311).

Serious Issue

[19] Justice Phelan certified three serious questions of general importance which I have referred above in paragraph 13.

[20] In addition to the certified questions, the applicant for a stay raises other issues concerning the judge's findings of fact.

[21] The respondents do not dispute that there are serious issues raised in this case based on the questions certified by Justice Phelan. However, they do not accept the further issues raised by the appellant.

[22] The issues raised on appeal are not frivolous or vexatious. Therefore, the applicant has satisfied the first stage of the three-fold test for a stay.

Irreparable Harm

[23] Irreparable harm refers to the nature of the harm suffered rather than its magnitude.

[24] The issue of public interest, as an aspect of irreparable harm to the interest of the government, will be considered at the second stage as well as the third stage (*RJR-MacDonald*, above, at para. 81).

[25] The Supreme Court of Canada has held that the public interest is to be widely construed in *Charter* cases:

> 71. In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned

> legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> 72. A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights (emphasis added) (*RJR-MacDonald*, para. 73).

[26] As noted by the Supreme Court of Canada in *RJR-MacDonald*, above, the public interest considerations will weigh more heavily in a suspension case than in an exemption case where the public interest is more likely to be detrimentally affected. Since the operation of the STCA would be suspended by the operation of the judge's order, this is clearly a suspension case.

[27] The applicant for a stay alleges that the appellant will suffer irreparable harm in other respects, which can be summarized as the likelihood of an influx of refugees into Canada from the United States and the corresponding negative impact on border services. This allegation is supported by the affidavit of George Bowles sworn on December 17, 2007.

[28] The respondents claim that irreparable harm does not exist merely when there will be administrative inconvenience or expense.

[29] The respondents submit that the appellant will not suffer irreparable harm if Justice Phelan's declaration is permitted to take effect. In the alternative, the respondents submit that irreparable

harm will be suffered on both sides, but that the harm to the respondents outweighs any alleged harm claimed by the appellant. However, at this second stage of the test, the Court is called upon to consider the harm that the applicant will suffer if the stay is not granted.

[30] I am satisfied that the applicant for a stay has satisfied the second requirement of the three-stage test.

Balance of convenience

[31] Since the applicant is a government institution, the Court must consider the applicant's inconvenience as well as the respondents' convenience.

[32] Once there is some indication that the impugned legislation, regulation, or activity was undertaken pursuant to the government's responsibility for promoting the public interest, a legislative scheme under attack is presumed to benefit the public interest, *RJR-MacDonald*, above, at paras. 71-80.

[33] These principles were subsequently reiterated in *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, at para. 9:

> It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law – in this case the spending limits imposed by s. 350 of the Act – is directed to the public good and serves a valid [page 771] public purpose. This applies to violations of the s. 2(b) right of freedom of expression; indeed, the violation at issue in RJR—MacDonald was of s. 2(b). **The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult**

> **matter.** It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed (emphasis added).

[34] I do not accept the respondents' contention that the presumption that the STCA Regulations are in the public interest has been displaced by the judgment of the Federal Court. This judgment is under appeal and the presumption of public interest remains pending complete constitutional review.

[35] The public interest groups, who are the respondents in this application for a stay, will suffer no personal harm. The respondent, John Doe, has been living in the United States since 2000 and his claim for protection is still pending.

[36] However, "public interest" includes both the concerns of society generally and the particular interests of identifiable groups (*RJR-MacDonald*, above, at para. 66).

[37] When a private applicant alleges that the public interest is at risk, that harm must be demonstrated (*RJR-MacDonald*, above, at para. 68).

[38] The respondents relied on three affidavits (the Moreno affidavit, the Giantonio affidavit and the Benatta affidavit) to demonstrate the public interest component of their position.

[39] The Moreno affidavit states that she was granted refugee status in Canada but that her common-law partner was not and was returned to the U.S. and detained. He was subsequently

deported to Honduras and three months later he was killed. There is no evidence that he made a refugee claim in the U.S. or of the circumstances surrounding his deportation.

[40] Patrick Giantonio is the Executive Director of the Vermont Refugee Assistance. He gave three examples of individuals who sought refugee status in Canada but were found ineligible due to the STCA and were deported back to Columbia by the U.S. There is no information concerning the proceedings followed in the U.S.

[41] The Benatta affidavit establishes that, on the same day Mr. Benatta's U.S. asylum claim was rejected in December 2001, he was indicted for possession of false documents. These charges were subsequently dropped by a judge who described them as "a shame". However, Mr. Benatta remained in detention until 2006 when he was allowed to return to Canada to resume his claim for refugee protection.

[42] A further affidavit filed by the applicant for a stay (the Soskin affidavit) discloses that Mr. Benatta did get a hearing for his asylum application in the U.S. on two occasions. By Statement of Claim dated July 16, 2007 filed in the Ontario Superior Court of Justice, Mr. Benatta commenced an action against The Queen in Right of Canada and various government agencies claiming damages arising out of his alleged illegal transfer to authorities in the U.S. This claim has yet to be adjudicated.

[43] The affidavit of David Martin, a professor of law at the University of Virginia, with over 27 years of experience in the study and practice of U.S. immigration and refugee law, sworn July 31, 2006 and filed on behalf of the applicant for a stay, states as follows:

> 229. Therefore, although there have been some unfortunate and misguided steps taken by the U.S. government or certain of its personnel in the treatment of prisoners in government custody, the U.S. legal system ultimately responded and has now set forth explicit laws and rulings both forbidding cruel, inhuman, and degrading treatment and dictating that detainees are covered, at a minimum, by common Article 3 of the Geneva Conventions.

[44] The three affidavits filed by the respondents do not establish that the public interest is at risk in accordance with the standard established by the Supreme Court of Canada.

[45] In his reasons for judgment, Justice Phelan identified three issues, which individually and collectively undermine the reasonableness of the GIC's conclusion of U.S. compliance: 1) the rigid application of the one-year bar to refugee claims; 2) the provisions governing security issues and terrorism based on a lower standard, resulting in a broader sweep of those caught up as alleged security threats/terrorists; and the absence of the defence of duress and coercion; 3) the vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country (Reasons for Judgment, para. 239).

[46] The respondents argue that, for the time being at least, this decision represents the law. However, it is this very decision that is the subject of an appeal and constitutional review in this Court.

[47] At the hearing, counsel for the respondents suggested as an alternative to a stay of the Order of Justice Phelan that the Court consider granting a stay exempting the groups referred to by Justice Phelan in paragraph 239 of his reasons from the application of the STCA.

[48] Counsel for the applicant for a stay argued that this proposal would have the same effect as a suspension of the Regulations.

[49] Counsel for the applicant for a stay noted that the STCA has been in effect now for more than three years (December 29, 2004 to January 18, 2008).

[50] Applying the principles enunciated in the decisions of the Supreme Court of Canada and without pre-judging the outcome of any appeal, I am satisfied that the public interest in maintaining in place the Regulations made pursuant to legislative authority pending complete constitutional review outweighs any detriment.

[51] I find that the balance of convenience favours granting the stay pending the appeal from the judgment of the Federal Court.

Disposition

[52] I conclude that the issues in this appeal deserve full appellate review on their merits before ordering a suspension of the *Safe Third Country Agreement* between the Government of Canada and

the Government of the United States of America (U.S.) and that the application for a stay should be granted.

[53] Accordingly, the Judgment of Justice Phelan dated January 17, 2008 (Reasons for Judgment 2007 FC 1262, November 29, 2007) invalidating the Regulations implementing the *Safe Third Country Agreement* between the Government of Canada and the Government of the United States of America (U.S.) will be stayed until such time as this Court has heard and determined the appeal.

[54] The respondents agree with the appellant that it would be in the interest of justice to expedite this appeal and the Court so orders. Accordingly, counsel for the parties to the appeal will provide the Court with a schedule for the timely completion of the steps in the appeal together with a requisition for a hearing.

"J. Richard"

Chief Justice

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-37-08
(APPEAL FROM A JUDGMENT OF JUSTICE PHELAN DATED JANUARY 17, 2008.)	
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CANADIAN COUNCIL FOR REFUGEES, CANADIAN COUNCIL OF CHURCHES, AMNESTY INTERNATIONAL, and JOHN DOE
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DATE OF HEARING:	January 30, 2008
REASONS FOR ORDER BY:	Richard C.J.
DATED:	January 31, 2008

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