

## **Why the US is not safe for refugees: challenging the Safe Third Country Agreement**

### **Backgrounder, July 2018**

“The only time I remember feeling hope in recent years was when we made the decision to come to Canada. We would seek safety there, since we could not do so in the U.S. We were hopeful about the future. But Canada turned us away and delivered us to our jailers. Now, there is no hope.” – A man in immigration detention in the US after being rejected by Canada under the Safe Third Country Agreement. He is separated from his wife who is also detained.

#### **Summary**

Since 2004, Canada has designated the United States as a safe country for refugees, under the Safe Third Country Agreement between the two countries. This closes the door on most refugee claimants presenting themselves at an official port of entry at the US-Canada border: instead of being allowed to enter Canada to make a refugee claim, they are sent back to the US, where many are put into immigration detention.

In July 2017, the Canadian Council for Refugees (CCR), Amnesty International (AI) and the Canadian Council of Churches joined an individual litigant and her children in a legal challenge of the Safe Third Country Agreement in the Federal Court. The challenge is based on the extensive evidence that the US is not safe for all refugees. Sending refugee claimants back to the US violates their basic rights and makes Canada complicit with refoulement (or forced return) when the US returns some of these individuals to face persecution, torture or even death in their home countries. In July 2018, the organizations completed filing their evidence.

Withdrawing from the Safe Third Country Agreement would lead to better management of refugee claims at the Canadian border, as well as respecting claimants' rights. Because the Safe Third Country Agreement does not apply other than at official ports of entry, people in need of safety in Canada have been crossing in increasing numbers irregularly, sometimes at peril of their lives, particularly in winter. If the Agreement was no longer in effect, people would be able to present themselves in an orderly way at ports of entry, ending irregular crossings and dangerous journeys.

#### **Why sending refugee claimants back to the US violates the Charter**

In their legal challenge to the Safe Third Country Agreement, the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches have presented extensive evidence that sending refugee claimants back to the United States violates their rights under the Canadian Charter of Rights and Freedoms.

The organizations have submitted thousands of pages of evidence showing that the US is not safe for all refugees. The evidence includes 21 affidavits from leading academics and practitioners, as well as affidavits from people who have been sent back under the Safe Third Country Agreement to detention in the US.

The evidence clearly shows that the US system fails in many ways to protect refugees, and therefore cannot properly be considered safe.

In particular, the organizations argue that sending refugee claimants back to the US violates their rights under Section 7 and Section 15 of the Canadian Charter of Rights and Freedoms.

### **Section 7 of the Charter**

“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

### **Section 15 of the Charter**

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

The organizations are arguing that these sections are violated as follows:

- Section 7 is violated because refugees are at risk of refoulement (or forced return) from the US to persecution, torture, death.
- Section 7 is also violated because claimants are unjustly detained in the US.
- Section 15 is violated because women are disproportionately badly affected by the shortcomings in the US refugee protection regime.

### **Why refugees sent back to the US are at risk of refoulement to persecution, torture, death**

The Canadian government has designated the US as a “safe third country” because it alleges that claimants who need refugee protection will receive it in the US. But the US is not safe for all refugees: many people who meet the international refugee definition are denied protection and refouled (or forcibly returned) to the home countries where they face persecution, torture and even death.

The following are some of the main ways the US fails to offer refugees protection, as argued in the litigation.

#### ○ **Interpretation of the refugee definition**

In some important ways, the US interprets the refugee definition more narrowly than international standards, and than Canada does. In particular, the US interpretation of “particular social group” limits the ability of women fleeing gender-based persecution to be protected. A **recent precedential decision** by Attorney General Jeff Sessions restricts even further women’s access to refugee protection.

Refugee determination in the US also varies widely geographically. In some regions almost all claims rejected (for example, in Atlanta, Georgia, there is a 2% acceptance rate, compared to 50% nationally). According to expert evidence filed, the US government has likely refouled thousands of refugees to face persecution in last twenty years and will continue to send other refugees to the same fate.

#### ○ **Procedural barriers to making an asylum claim**

In the US, people can be denied access to the asylum process altogether if they are put into the **expedited removal process**. This can affect people sent back from Canada under the Safe Third

Country Agreement. The US authorities are supposed to identify potential refugees through a “credible fear interview”, but numerous studies have shown widespread failures in the application of this screening interview. Use of expedited removal has expanded under the Trump administration, and could be increased still further in the future, under the terms of a **2017 Executive Order**.

Evidence filed shows that there are serious violations in the expedited removal process, including people being interviewed by officers without interpreters, being forced to sign forms in a language they do not understand, and not being asked about their fear of return.

If they are not subject to expedited removal, people may be excluded from the asylum process by the **one year bar**. In the US, people seeking refugee protection must make their asylum claim within one year of arrival. Due to lack of information and legal representation, many people miss this deadline.

“Studies have shown that particularly vulnerable groups of migrants are more frequently impacted by the one-year bar. Survivors of gender-based violence [...] are frequently denied asylum based on their failure to adhere to the one-year deadline [...] Similarly, individuals fleeing persecution on account of their sexual orientation are also more likely to be barred by the one-year filing requirement due to social stigma, shame, and reticence to come forward and share their experiences.” Professor Deborah Anker

- **Barriers preventing refugees from properly presenting their claim**

Of those people not excluded through the expedited removal process or by the one-year bar, many are still wrongly denied protection because they are unable to present their claim properly. This is particularly the case for people who are in immigration detention or are not represented by a lawyer (or both, as often occurs).

Many people seeking refugee status in the US are held in **immigration detention**, which makes it significantly more difficult for them to win their asylum claims. In 2014 alone, 44,228 asylum seekers were detained, which accounted for 77% of all asylum seekers in immigration court removal proceedings. Use of detention has expanded massively in recent years, and it has become harder to be released.

“From what I have seen in my time here in detention, many people have to try to make their asylum claims from detention because so few are granted release. But many asylum claims are then denied because it is impossible to build an asylum claim from inside detention.” Man detained in the US after being sent back by Canada under Safe Third Country Agreement.

“Many experts have found that detention may cause irreparable harm to asylum seekers, especially where they have experienced past trauma, including gender-based violence. [...] “We have seen many women give up their opportunity to seek asylum or to appeal an adverse decision because they cannot bear continued detention, choosing instead to return to danger.” Professor Karen Musalo

Seeking asylum is a complex legal process and should not be attempted without a lawyer, especially when people don't speak English. Yet, **many people are unable to find a lawyer to**

**represent them**, leading to a much greater chance that their refugee claim will be rejected. This is particularly the case for people in detention.

“Although many organizations are working to meet the desperate need for representation in detention centers, only 14% of detained immigrants obtain legal representation [...] asylum seekers without legal representation are almost five times less likely to win their cases than those with representation.” Professor Deborah Anker

### **Why rights are violated when refugees claimants are sent back to detention in the US**

People sent back from Canada to the US under the Safe Third Country Agreement face a high risk of being arbitrarily detained in conditions that violate international norms.

Expert evidence filed reveals the abusive nature of detention throughout the US. Detention is arbitrary and politically motivated, families are separated, conditions are appalling, medical care is inadequate and detainees are subject to sexual abuse.

“The Committee notes with concern that, under certain circumstances, **the State party continues to use mandatory detention to hold asylum seekers and other immigrants on arrival in prison-like detention facilities, county jails and private prisons ...** the Committee remains concerned by reports of **substandard conditions of detention in immigration facilities and the use of solitary confinement. It is also concerned about reports of sexual violence by staff and other detainees.**” UN Committee against Torture, 2014 periodic review of the United States.

Decisions to detain are “often made not based on an individualized assessment of risk to public security or flight risk, but instead due to political decisions to prioritize anyone crossing the border – even those lawfully seeking protection [...] or simply due to the availability of detention space”. Katharina Obser, Women’s Refugee Commission

There has been increasing separation of families, including where border officials allegedly intentionally separated family members in order to punish or deter. There are “documented instances where one family member would repeatedly inquire as to the well being or location of another and would instead be told nothing, or, worse, threatened with further detention.” Katharina Obser, Women’s Refugee Commission

One person who was seeking asylum from persecution based on his sexual orientation was detained for nearly nine months because he was unable to pay the \$5,000 he had been set as bond. While in detention, he was sexually assaulted by another detainee. Anwen Hughes, Human Rights First

The evidence filed includes statements from 10 individuals detained in the US after approaching the Canadian border to make a refugee claim. Four of the ten had been detained at least for at least 5 months (one at least 15 months). There are as well as affidavits from lawyers and advocates familiar with the immigration detention situation at the US’ northern border.

Common themes from these affidavits include reports of abusive treatment by officials and guards, lack of privacy (including open toilets), extreme cold, detention in solitary confinement or in mass cells, commingling with criminal inmates, inadequate and inedible food, difficulties

communicating with the outside world, challenges finding a lawyer, and psychological distress as a result of detention.

“In the U.S. vehicle, they attached our handcuffs to the bench in front of us, like we were criminals. I started crying. One of the American officials began laughing at me. It was inhumane.”

“When I was brought to XXX, all of my possessions were taken away from me. I was given a uniform, and placed directly into solitary confinement. I was all alone in a boxed cell with a locked door. I cried, as I did not understand why I was there.”

“I estimate that there are about 60 of us that sleep in that room together, all men, on bunk beds [...] You have to use the bathroom in full view of all the other detainees and the guards.”

“The guards did not treat us well. They would treat us as though we were less than human.”

“The jail was cold for everyone, all the time. If we ever shared blankets, or huddled for warmth, the guards would pull the blankets off of us, and leave us in the cold again.”

“I went hungry many times because I could not bring myself to eat the food. I was not the only one who could not eat it.”

“The worst part for me is that I am only allowed to see my husband once a week.”

It is expensive to make phone calls. “I am lucky because I had a bit of cash on me when I was detained. Also my uncle can put money on my account [...] I don't know what other people do if they don't have any money and don't have family to load money onto their account. Those people just don't have access to the phone at all.”

“Being in detention made it very difficult to navigate the legal system. In addition to my mental state, the language barrier and the strict detention rules made it very difficult to put together my application for asylum in the US.”

“At first I thought that if I presented my story to the authorities they wouldn't deport me, but my lawyer explained to me that it is very difficult to get asylum in the US, even if the judge accepts that I am telling the truth.”

“I have a very difficult time understanding how you can take a group of people who have already suffered great traumas, arrest those people and then traumatize them again [...] In this whole process, nobody took into account my history or my trauma.”

“When I look at the photos of their lives they send me after they left Clinton County, they seem like entirely different people. They look as though they have come back to life, after having been denied their community and womanhood.” A Montrealer who has been volunteering as an interpreter and supporter of detainees in Clinton County.

## **Why women are disproportionately harmed by being sent back to the US**

Section 15 of the Charter is violated when women are sent back to the US under Safe Third Country Agreement because women are disproportionately badly affected by the one-year bar and by the restrictions on recognizing gender-based claims in the US. In June 2018, Attorney General Jeff Sessions issued a **precedential decision in Matter of A-B-**, which significantly reduces women's ability to win refugee status in the US when they are making claims based on domestic violence or other forms of gender-related persecution.

Barriers such as lack of access to counsel and widespread detention compound the gap in protection for women seeking asylum in the United States.

The United States interprets and applies the refugee definition in numerous ways that disadvantage women making claims for asylum based on domestic violence and other forms of gender-based persecution. Professor Deborah Anker

Ms. Rivera Barrientos was kidnapped, brutally raped and repeatedly threatened with death when she refused to join the Salvadoran MS-13 gang, but she was denied asylum in the United States on the grounds that she did not fit the refugee definition as interpreted by the US. Professor Karen Musalo

Magdalena and her six-year old daughter Maria fled Guatemala to escape severe abuse by Magdalena's husband. On arrival in the US, Magdalena was separated from her daughter and criminally prosecuted for illegal entry. Maria was taken to a facility for unaccompanied minors in New York. Magdalena applied for asylum, but after enduring five months in detention separated from her daughter, during which she was unable to find a lawyer to represent her, she gave up her claim and was deported back to Guatemala where she remains in hiding from her abuser. The government eventually released Maria to live with a family member and pursue her asylum case. Professor Karen Musalo

## **The experience of "Morgan", sent back to the US under Safe Third Country**

Morgan (not her real name) came to the Canadian border in 2015 to make a refugee claim. To her dismay, Canadian officers did not ask her about why she had fled her home country (where she faces threats to her life for speaking out against political corruption). She was instead asked whether she had any family in Canada, to which she answered no. She was then sent back to the United States, exhausted, confused and frightened.

Like many other refugee claimants sent back from the Canadian border under the Safe Third Country Agreement, she was detained by the US authorities. She was sent to Clinton County Prison. Her crime? She was accused of having obtained her US visa fraudulently, on the basis that she said she claimed to be visiting the United States, but her real goal was to seek asylum.

She spent 10 days in solitary confinement in Clinton County (it should be only 3 days, pending the results of a tuberculosis test, but she was somehow forgotten). The cell wall is of glass so the guards can see inside, including when she used the toilet which is in the open.

The conditions in the prison are extremely severe. It is very cold and the uniforms that the inmates are forced to wear are very thin. The guards are aggressive and gratuitously cruel. For

example, when Morgan and other prisoners were watching the Sunday mass, a guard repeatedly turned off the television.

Immigration officers came to visit her and pressured her to complete a number of forms. However, they were in English and Morgan did not understand what to do. She was given a list of lawyers, but how could she be expected to find herself a lawyer when she does not speak English and can only call collect?

She went to immigration court and was set a bond of \$10,000. Again, no one asked why she had fled her home country. “I came for one specific thing, which was protection, and instead I got so much disrespect and pain.”

Finally, after 51 days, she was released after her family found her a competent lawyer and raised enough money for her bond. But she left behind her other women. Morgan remembers these women: “They were mothers or young women who had fled their countries of origin for various reasons. They prayed day and night not to be deported to their country where they feared death or persecution. Alas, they remained stuck in a country that did not care about their rights, and in addition they had no one to pay their bond that could buy them more time or enable them to get competent lawyers.”

After her release, she continued her efforts to gain asylum, but she lost hope following the election of President Donald Trump, given the upsurge in anti-immigrant sentiments.

In August 2017, following the example of thousands of others, she crossed the border at Roxham Road. She is now in Canada, but the impact of the Safe Third Country Agreement continues to prevent her from moving forward. She cannot make a refugee claim as the law allows a person to make one claim in their life. A moratorium on removals to her country of origin protects her from deportation, but she remains in a legal vacuum, without official status.

### **Why the US seems likely to be less and less a safe country**

According to recent [reporting by Vox](#), the Trump administration is considering a regulation that would “likely stop most Central Americans from winning asylum in the US”. If implemented, the regulation would deny asylum to people who crossed into the US between ports of entry and were prosecuted for illegal entry, add presumptions against claims and codify further restrictions on asylum for people fleeing domestic violence or criminal gangs.

Amnesty International has issued an [Urgent Action](#) for Alejandra, a transgender woman seeking asylum in the US. Alejandra is in detention and facing deportation, following a 15 June 2018 decision by an immigration judge denying her request for asylum. Alejandra is in urgent need of adequate medical care, which she is denied in detention.

### **Why withdrawing from the Safe Third Country Agreement makes good practical sense**

Because the agreement only applies to people entering from the US at official ports of entry, many individuals understand that the only way to reach safety in Canada is to cross the border outside of a port of entry, sometimes making journeys that can be dangerous, particularly in winter.

Since 2017, Roxham Road in Quebec has emerged as the well-known place where people can make a refugee claim without being thrown back to the US. While this route has enabled thousands to reach safety, the fact that they are irregular crossings has fueled public concerns, heightened when they are erroneously termed “illegal” border crossings. It has also created stresses on the system as claimants are now disproportionately arriving in one region.

Withdrawing from the Agreement would not only allow Canada to meet its human rights commitments, it would also have the advantages of:

- Making dangerous journeys unnecessary and thereby saving life and limb.
- Allowing refugee claimants to present themselves in a regular fashion at official border crossings where their cases could be dealt with in an orderly and efficient manner.
- Allow refugee claimants to enter Canada at any port of entry along the border, rather than overwhelmingly at Roxham Road, making reception and processing easier to handle because arriving claimants will be more evenly distributed across regions.

Given that Roxham Road is already well-known as a point at which people can make a refugee claim without being barred by the Safe Third Country Agreement, it is not clear that withdrawing from the agreement would lead to a significant increase in the overall number of claimants.

#### **What Canadians can do:**

- Contact your local Member of Parliament (MP) over the summer. Attend a summer BBQ or set up a meeting to share your personal concerns about the Safe Third Country Agreement (STCA) and urge them to support Canada’s withdrawal from the Agreement.
- Write a letter to your local MP or/and to the Minister of Immigration, Refugees and Citizenship Ahmed Hussen. Here are sample letters:
  - [Amnesty International Canada](#)
  - Citizens for Public Justice’s resource “[Reclaiming Protection](#)” June, 2018
- Email or tweet your local MP and the [Minister of Immigration, Refugees and Citizenship](#)
- Host an event to raise awareness about the STCA and its impact on refugees. CCR, CCC and AI can help direct you to relevant speakers and resources