IMM-7818-05
2007 FC 1262

Canadian Council for Refugees, **Canadian Council of Churches**, **Amnesty International**, and **John Doe** (*Applicants*)

v.

Her Majesty the Queen (*Respondent*)

INDEXED AS: CANADIAN COUNCIL FOR REFUGEES V. CANADA (F.C.)

Federal Court, Phelan J.—Toronto, February 5 and 6; Ottawa, November 29, 2007.

Citizenship and Immigration — Exclusion and Removal — Removal of Refugees — Judicial review challenging 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 (STCA) deeming foreign nationals entering Canada from "designated country" ineligible to make refugee claim — STCA authorized by Immigration and Refugee Protection Regulations, ss. 159.1-159.7 — Immigration and Refugee Protection Act, s. 102(1)(a) requiring Governor in Council (GIC) designate only countries complying with United Nations Convention Relating to the Status of Refugees, Art. 33, Convention Against Torture, Art. 3 — Several issues in U.S. system identified as not complying with Conventions — Thus unreasonable for GIC to conclude U.S. "safe third country" — Application allowed.

Constitutional Law — Charter of Rights — Life, Liberty and Security — 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 (STCA), authorized by Immigration and Refugee Protection Regulations, ss. 159.1-159.7, providing foreign nationals entering Canada from "designated country" ineligible to make refugee claim — Entirely foreseeable genuine refugee claimants would be refouled if returned to U.S., thus sufficient causal connection between Canada, s. 7 rights deprivation — Fact STCA applying only to claimants arriving by land, Canadian immigration officers retaining no discretion to allow claim in Canada, leading to arbitrary results — Charter, s. 7 rights breached, not justified under s. 1.

Constitutional Law — Charter of Rights — Equality Rights — 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 (STCA), authorized by Immigration and Refugee Protection Regulations, ss. 159.1-159.7, providing foreign nationals entering Canada from "designated country" ineligible to make refugee claim — Designation of U.S. as safe third country leading to discriminatory result as having much more severe impact on those falling into areas where U.S. not compliant with international conventions, exposing such people to risk based solely on method of arrival in Canada — Charter, s. 15 rights breached, not justified under s. 1.

Construction of Statutes — 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 (STCA) deeming foreign nationals entering Canada from "designated country" ineligible to make refugee claim — Immigration and Refugee Protection Act (IRPA), s. 102(3) requiring Governor in Council ensure continuing review of factors having to be met for country to be designated — Although no specific time frame established, IRPA, s. 102(3) requiring review on reasonably continuous basis consistent with facts, circumstances as they develop from time to time.

This was an application for judicial review challenging 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* (STCA), which deems a foreign national who attempts to enter Canada at a land border from a "designated country" ineligible to make a refugee claim.

Paragraph 102(1)(*a*) of the *Immigration and Refugee Protection Act* (IRPA) provides that the Governor in Council (GIC) may designate a country that complies with Article 33 of the *United Nations Convention Relating to the Status of Refugees* (Refugee Convention) and Article 3 of the Convention Against Torture (CAT). In deciding to designate a country, the GIC is required under subsection 102(2) of IRPA to consider four factors. These factors include whether the country is a party to the Refugee Convention and CAT, its policies, practices and obligations with respect to these Conventions, its human rights record, and whether it is a party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to refugee claims. Subsection 102(3) requires ongoing review by the GIC of any country it designates as safe under the Act.

The applicants argued that sections 159.1 to 159.7 (as enacted by SOR/2004-217, s. 2) of the *Immigration and Refugee Protection Regulations* (Regulations), SOR/2002-227, which authorized the STCA, and the designation of the U.S. as a "safe third country" are invalid and unlawful because the preconditions to enacting the Regulations were not met as the U.S. does not comply with certain international conventions protecting refugees. The applicants also argued that the Regulations and the STCA offend the *Canadian Charter of Rights and Freedoms*, and that the decision to declare the U.S. a designated country is unlawful pursuant to administrative law principles, the Charter and international law.

Held, the application should be allowed.

Sections 159.1 to 159.7 of the Regulations and the STCA are *ultra vires* as the conditions to the enactment of the Regulations, set out in subsection 102(1) of IRPA were not met.

Case law from the United Kingdom and the European Union established the following principles: (1) a party cannot merely rely on the existence of the agreement but must be open to reviewing compliance of the third country; (2) there is a presumption of compliance by the third country; (3) the focus of the Refugee Convention is on protection against refoulement and as long as the third party protects in practice against refoulement, other distinctions will not bar return; (4) the protection need not be refugee status so long as there is protection; and (5) even if the other country applies different burdens of proof, as long as the practical results are attainable in the same way, the distinction is unimportant. With these principles in mind, the American refugee determination system was analyzed to determine whether that country's practices and policies violate the Refugee Convention (Article 33) or CAT (Article 3) prohibitions against refoulement. A number of issues in the U.S. system were identified as not complying with the Conventions. First, forms of protection available in the U.S. include asylum and withholding of removal based on fear of torture. When a claim for asylum is barred because it was filed later than one year after arrival in the U.S., the only recourse (subject to some exceptions) to protect against refoulement is an application for withholding of removal. The evidence established that there is a higher standard for withholding, and that this standard combined with the one-year bar may put some refugees returned to the U.S. in danger of refoulement. Second, the U.S. terrorist exclusions are extremely harsh, and cast a wide net which will catch many who never posed a threat. In returning claimants to the U.S. under these circumstances, the weight of the evidence is that Canada is exposing refugees to a serious risk of refoulement and torture. Third, there is a real risk of refoulement for women subject to domestic violence because of the uncertainty in U.S. law on that matter. For these reasons, it could not be said that the U.S. was compliant with Article 33 of the Refugee Convention or Article 3 of CAT. It was thus unreasonable for the GIC to conclude that the U.S. is a "safe country."

With respect to the interpretation and application of CAT, Article 3 of that Convention is an absolute bar against removal to torture where torture is reasonably likely to occur. That prohibition is also part of Canadian law. However, neither U.S. law nor its practice considers deportation to a country where torture is a likely occurrence to be an absolute bar to deportation. It was unreasonable for the GIC to conclude that the U.S. meets the standards of Article 3 of CAT.

Subsection 102(3) of IRPA provides that the GIC must ensure the continuing review of factors with respect to each designated country. Although no specific time frame is established, this subsection requires a review on a reasonably continuous basis consistent with the facts and circumstances as they develop from time to time. The GIC failed to do so herein.

Several aspects of U.S. law put genuine refugees at risk of refoulement to persecution or torture. Section 7 of the Charter applies to torture inflicted abroad if there is a sufficient causal connection with Canadian government acts. Here, based on the evidence, it was "entirely foreseeable" that genuine claimants would be refouled. The life, liberty and security of refugees is therefore put at risk when Canada returns them to the U.S. under the STCA. As such, there is a sufficient causal connection between Canada and the deprivation of section 7 rights. The fact that a Canadian immigration officer, after determining that a claimant does not fit one of the exceptions to the STCA, retains no discretion to allow a claimant who may be placed at risk if sent back to the U.S. to make a claim in Canada, leads to arbitrary results that do not take the individual claimant's circumstances into account. The fact that the STCA only applies to those arriving by land is also arbitrary. With respect to section 15 of the Charter, the designation of the U.S. as a safe third country leads to a discriminatory result in that it has a much more severe impact on persons who fall into the areas where the U.S. is not compliant with the Refugee Convention or CAT. It also discriminates against and exposes such people to risk based solely on the method of arrival in Canada. There was insufficient evidence of a section 1 justification.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

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, December 5, 2002, [2004] Can. T.S. No. 2, Art. 4(1), 6, 8(3).

Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal

Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, signed 14 June 1985 in Schengen, Luxembourg. (Schengen Agreement).

An Act to amend the Immigration Act and to amend other Acts in consequence thereof, R.S.C., 1985 (4th Supp.), c. 28.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 7, 9, 15.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, [1987] Can. T.S. No. 36, Arts. 1, 3.

Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community, 15 June 1990, Dublin. (Dublin Convention).

Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, Arts. 3, 13.

Council Regulation (EC) No. 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-Country National (Dublin II).

Criminal Code, R.S.C. 1970, c. C-34.

Immigration Act, 1976, S.C. 1976-77, c. 52.

Immigration Act, R.S.C., 1985, c. I-2.

Immigration and Nationality Act (INA), § 101(a)(3)(B) (iii),(43), 208, 212, 237(a)(4)(B), 241(b)(3)(B)(ii),(iv), 242(b)(4).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3, 5(1), 34, 96, 97, 101(1)(*e*), 102, 230(1).

Immigration and Refugee Protection Regulations, SOR/2002-227, ss. 159.1 to 159.7 (as enacted by SOR/2004-217, s. 2).

Immigration Regulations, 8 C.F.R. § 208.16(b)(4)(2), 208.17(a), 208.16(c), 208.18(a),(5),(7).

National Harbours Board Act, R.S.C. 1970, c. N-8, s. 7 (as am. by S.C. 1980-81-82-83, c. 121, s. 6).

Real ID Act of 2005, Pub. L. 109-13, Div. B. Title II, § 101(a)(3)(B)(ii),(d)(e).

Refugee Claimants Designated Class Regulations, SOR/90-40.

Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2004-217, s. 2.

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Arts. 1(F), 33.

United Nations Protocol Relating to the Status of Refugees, January 31, 1967, [1969] Can. T.S. No. 29.

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56 (2001).

CASES JUDICIALLY CONSIDERED

APPLIED:

Thorson v. Attorney General of Canada et al., [1975] 1 S.C.R. 138; (1974), 43 D.L.R. (3d) 1; 1 N.R. 225; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; (1989), 57 D.L.R. (4th) 231; [1989] 3 W.W.R. 97; 75 Sask. R. 82; 47 C.C.C. (3d) 1; 33 C.P.C. (2d) 105; 38 C.R.R. 232; 92 N.R. 110; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; (1986), 33 D.L.R. (4th) 321; [1987] 1 W.W.R. 603; 23 Admin. L.R.197; 17 C.P.C. (2d) 289; 71 N.R. 338; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791; (2005), 254 D.L.R. (4th) 577; 130 C.R.R. (2d) 99; 335 N.R. 25; 2005 SCC 35; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; (1998), 212 A.R. 237; 156 D.L.R. (4th) 385; [1999] 5 W.W.R. 451; 67 Alta. L.R. (3d) 1; 224 N.R. 1; *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211; (1998), 13 Admin. L.R. (3d) 280; 157 F.T.R. 123 (T.D.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1; 2002 SCC 1; *United States v. Burns*, [2001] 1 S.C.R. 283; (2001), 195 D.L.R. (4th) 1; [2001] 3 W.W.R. 193; 148 B.C.A.C. 1; 85 B.C.L.R. (3d) 1; 151 C.C.C. (3d) 97; 39 C.R. (5th) 205; 81 C.R.R. (2d) 1; 265 N.R. 212; 2001 SCC 7; *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; (1985), 17 D.L.R. (4th) 422; 12 Admin. L.R. 137; 14 C.R.R. 13; 58 N.R. 1; *R. v. Swain*, [1991] 1 S.C.R. 933; (1991), 75 O.R. (2d) 388; 71 D.L.R. (4th) 551; 63 C.C.C. (3d) 481; 5 C.R. (4th) 253; 3 C.R.R. (2d) 1; 125 N.R. 1; 47 O.A.C. 81; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; (1999), 170 D.L.R. (4th) 1; 43 C.C.E.L. (2d) 49; 236 N.R. 1; *The Queen v. Oakes*, [1986] 1 S.C.R. 103; (1986), 26 D.L.R. (4th) 200; 24 C.C.C. (3d) 321; 50 C.R. (3d) 1; 19 C.R.R. 308; 65 N.R. 87; 14 O.A.C. 335.

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CONSIDERED:

Canadian Council of Churches v. Canada, [1990] 2 F.C. 534; (1990), 68 D.L.R. (4th) 197; 44 Admin. L.R. 56; 46 C.R.R. 290; 36 F.T.R. 80; 10 Imm. L.R. (2d) 81; 106 N.R. 61 (C.A.); affd [1992] 1 S.C.R. 236; (1992), 88 D.L.R.

(4th) 193; 2 Admin. L.R. (2d) 229; 5 C.P.C. (3d) 20; 8 C.R.R. (2d) 145; 16 Imm. L.R. (2d) 161; 132 N.R. 241; *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735; (1980), 115 D.L.R. (3d) 1; 33 N.R. 304; *Thorne's Hardware Ltd. et al. v. The Queen et al.*, [1983] 1 S.C.R. 106; (1983), 143 D.L.R. (3d) 577; 46 N.R. 91; *Spinney v. Canada (Minister of Fisheries and Oceans*) (2000), 183 F.T.R. 71 (F.C.); *de Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655; (2005), 262 D.L.R. (4th) 13; 42 Admin. L.R. (4th) 234; 137 C.R.R. (2d) 20; 51 Imm. L.R. (3d) 17; 345 N.R. 73; 2005 FCA 436; *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247; (1994), 17 Admin. L.R. (2d) 121; 164 N.R. 342 (C.A.); *Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595; (1995), 125 D.L.R. (4th) 141; 30 Imm. L.R. (2d) 139; 180 N.R. 330 (C.A.); *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485; (2004), 346 A.R. 4; 236 D.L.R.(4th) 385; [2004] 7 W.W.R. 603; 26 Alta. L.R. (4th) 1; 12 Admin. L.R. (4th) 1; 46 M.P.L.R. (3d) 1; 318 N.R. 170; 18 R.P.R. (4th) 1; 2004 SCC 19; *Sunshine Village Corp. v. Canada (Parks)*, [2004] 3 F.C.R. 600; (2004), 238 D.L.R. (4th) 647; 16 Admin. L.R. (4th) 242; 4 M.P.L.R. (4th) 174; 320 N.R. 331; 2004 FCA 166; *David Suzuki Foundation v. British Columbia (Attorney General)* (2004), 8 C.E.L.R. (3d) 235; 17 Admin. L.R. (4th) 85; 2004 BCSC 620; *Jose Pereira E. Hijos, S.A. v. Canada (Attorney General)* (2007), 26 C.E.L.R. (3d) 169; 358 N.R. 310; 2007 FCA 20; *T.I. v. U.K.*, App. No. 43844/98 (ECHR); *Regina v. Secretary of State for the Home Department, ex parte Adan*, [2001] 2 A.C. 477 (H.L.); *Regina (Yogathas) v. Secretary of State for the Home Department*, [2003] 1 A.C. 920; 2002 UKHL 36; *Regina v. Secretary of State for the Home Department, ex parte Salas*, [2000] E.W.J. No. 4340 (QL); *Minister of Employment and Immigration v. Satiacum* (1989), 99 N.R. 171 (F.C.A.); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; (1993), 103 D.L.R. (4th) 1; 20 Imm. L.R. (2d) 85; 153 N.R. 321; *Kadenko v. Canada (Minister of Citizenship and Immigration)* (1996), 143 D.L.R. (4th) 532; 206 N.R. 272 (F.C.A.); leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 612 (QL); *Ins v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Mogharrabi (Matter of)*, 19 I&N Dec. 439 (BIA 1987); *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.); *Jabari v. Turkey*, [2000] ECHR 369; *Williams v. Canada (Secretary of State)*, [1995] F.C.J. No. 1025 (T.D.) (QL); *Elcock v. Canada (Minister of Citizenship and Immigration)* (1999), 175 F.T.R. 116 (F.C.T.D.); *A-H- (Matter of)* 23 I&N Dec. 774 (A.G. 2005); *S-K- (In re)*, 23 I&N Dec. 936 (BIA 2006); *Arias v. Ashcroft*, 143 Fed.Appx. 464 (3rd Cir. 2005); *Canada (Minister of Citizenship and Immigration) v. Asghedom* (2001), 210 F.T.R. 294; 2001 FCT 972; *Kathirgamu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 300; *R-A- (In re)*, 22 I&N Dec. 906 (BIA 1999); *Bocova v. Gonzales*, 412 F.3d 257 (1st Cir. 2005); *S-P- (In re)*, 21 I&N Dec. 486 (BIA 1996); *Maldonado v. Minister of Employment and Immigration*, [1980] 2 F.C. 302; (1979), 31 N.R. 34 (C.A.); *S-M-J- (In re)*, 21 I&N Dec. 722 (BIA 1997); *In re J-E-*, 23 I&N Dec. 291 (BIA 2002); *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003); *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *R. v. Lyons*, [1987] 2 S.C.R. 309; (1987), 44 D.L.R. (4th) 193; 37 C.C.C. (3d) 1; 61 C.R. (3d) 1; 80 N.R. 161; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657; (2004), 245 D.L.R. (4th) 1; [2005] 2 W.W.R. 189; 206 B.C.A.C. 1; 34 B.C.L.R. (4th) 24; 124 C.R.R. (2d) 135; 327 N.R. 1; 2004 SCC 78; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; (1989), 56 D.L.R. (4th) 1; [1989] 2 W.W.R. 289; 34 B.C.L.R. (2d) 273; 25 C.C.E.L. 255; 10 C.H.R.R. D/5719; 36 C.R.R. 193; 91 N.R. 255; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; (1997), 151 D.L.R. (4th) 577; [1998] 1 W.W.R. 50; 38 B.C.L.R. (3d) 1; 96 B.C.A.C. 81; 218 N.R. 161.

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APPLICATION for judicial review challenging 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* on the basis that the U.S. does not comply with certain international conventions protecting refugees, a precondition to enacting the Regulations which authorized this Agreement (*Immigration and Refugee Protection Regulations*, ss. 159.1-159.7), and on the basis that declaring the U.S. a safe third country violates the Charter as well as principles of administrative law. Application allowed.

APPEARANCES:

Barbara L. Jackman, *Andrew Brouwer* and *Leigh Salsberg* for applicants Canadian Council for Refugees, Canadian Council of Churches and John Doe.
Lorne Waldman for applicant Amnesty International.
David Lucas, *François Joyal*, *Gregory G. George* and *Matina Karvellas* for respondent.

SOLICITORS OF RECORD:

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Waldman & Associates, Toronto, for applicant Amnesty International.
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The following are the reasons for judgment rendered in English by

PHELAN J.:

I. INTRODUCTION

[1] The Canadian Council for Refugees (CCR), the Canadian Council of Churches (CCC), Amnesty International (AI) and John Doe, a Colombian refugee claimant in the United States, filed a judicial review application challenging 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* [December 5, 2002, [2004] Can. T.S. No. 2], also known as the Safe Third Country Agreement (STCA). This agreement, which was enacted in its current form as part of the *Smart Border*

Declaration: Building a Smart Border for the 21st Century on the Foundation of a North American Zone of Confidence [Ottawa, December 12, 2001] (Smart Border) and came into force in December 29, 2004, deems (subject to limited exceptions) a foreign national who attempts to enter Canada at a land border from a "designated country" ineligible to make a refugee claim.

[2] The applicants seek a declaration that the designation of the United States of America as a "safe third country" for asylum seekers, and the resulting ineligibility for refugee protection in Canada of certain asylum seekers, is invalid and unlawful. The applicants claim, amongst other grounds, that the Regulations [*Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 159.1 to 159.7 (as enacted by SOR/2004-217, s. 2)] authorizing the STCA are invalid because the preconditions to enacting the Regulations were not met because the U.S. does not comply with certain international conventions protecting refugees and prohibiting returning people to places of torture and in any event, the Regulations and STCA offend the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. The applicants are seeking a declaration that the respondent's decision to declare the U.S. a designated country is unlawful pursuant to administrative law principles, the Charter and international law.

[3] The STCA operates in a manner whereby a person from a country other than the U.S. who travels through the U.S. and arrives in Canada, by land (and only by land), to claim refugee protection status is immediately sent back to the U.S. The net effect is to deny such persons any substantive consideration of their refugee claim by Canadian authorities.

[4] The decision to enter into the STCA was delegated by Parliament to the Governor in Council (GIC) subject to certain conditions being met. These conditions include that the other country — in this case the U.S. — complies with Article 33 of the *United Nations Convention Relating to the Status of Refugees* [July 28, 1951, [1969] Can. T.S. No. 6] (Refugee Convention or RC) which generally prevents refoulement (sending back to the persecuting home country), and Article 3 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* [December 10, 1984, [1987] Can. T.S. No. 36] (Convention Against Torture or CAT) which specifically prohibits sending someone back to a country that engages in torture.

[5] In determining whether to enter into an STCA, the GIC is required to consider a number of factors including the "policies and practices" of the other country, not just its legislation.

[6] In addition, the STCA and its operation must comply with the provisions of the Charter.

[7] For the reasons outlined in this judgment, the United States' policies and practices do not meet the conditions set down for authorizing Canada to enter into an STCA. The U.S. does not meet the Refugee Convention requirements nor the Convention Against Torture prohibition (the Maher Arar case being one example). Further, the STCA does not comply with the relevant provisions of the Charter. Finally, the Canadian government has not conducted the ongoing review mandated by Parliament despite both the significant passage of time since the commencement of the STCA and the evidence as to U.S. practices currently available.

II. BACKGROUND

[8] A safe third country clause first appeared in Canadian law in 1988 amendments [R.S.C., 1985 (4th Supp.), c. 28] to the *Immigration Act* [R.S.C., 1985, c.
I-2]. There was a constitutional challenge to the amendments; however the Federal Court of Appeal held in *Canadian Council of Churches v. Canada*, [1990] 2 F.C. 534 (C.A.), appeal dismissed [1992] 1 S.C.R. 236, that litigation on that provision was premature as no country had been designated. (The Supreme Court decision is discussed below in relation to the issue of standing.) The Government of Canada continued to negotiate with the U.S. towards a mutual designation. The Smart Border and its 30-Point Action Plan contained a new commitment to an STCA. The final text of the STCA was signed on December 5, 2002 and entered into force December 29, 2004.

[9] The STCA is an agreement between Canada and the U.S. The operative provision of the STCA is Article 4(1), which provides that the country of last presence shall examine the refugee status claim of any person arriving at a land border port of entry who makes a refugee claim.

ARTICLE 4

1. Subject to paragraphs 2 and 3, the 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 on or after the effective date of this Agreement and makes a refugee status claim.

[10] The legislative structure that incorporates the principles of the STCA into domestic law is contained in the *Immigration and Refugee Protection Act* [S.C. 2001, c. 27] (IRPA) and in the *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2004-217, October 12, 2004 (STCA Regulations), more fully detailed in paragraphs 20 to 30.

[11] The U.S. is currently the only country designated as a "safe third country" under the STCA Regulations.

[12] The applicants include three public-interest based organizations, the CCR, the CCC, and AI, all of which are recognized as organizations that assist and advocate for the rights of refugees in Canada.

[13] The applicant John Doe is an asylum seeker from Colombia currently residing in the U.S. He was initially refused protection because he failed to apply within one year of arrival in the U.S. He then went into hiding in the U.S. and sought an injunction, during the course of this judicial review, to prevent the Canadian authorities from invoking the STCA if he should be able to arrive at a Canadian port of entry. An interim injunction was granted but it developed that, against the background of this judicial review, U.S. authorities agreed to have his refugee claim reconsidered.

[14] As noted by Bruce Scoffield of the Refugees Branch of Citizenship and Immigration Canada, one of the respondent's expert affiants, the Regulations constitute the decision and reasons in this case. The Regulatory Impact Analysis Statement (RIAS) [*C. Gaz.* 2004.II.1622] accompanying the Regulations also comprise part of the reasons for the decision to enter into the STCA.

A. Legislation and regulations

(1) Relevant international law

[15] As noted earlier, there are conditions imposed upon the GIC before entering into an STCA and passing the requisite regulations. The conditions of critical importance to this case are U.S. compliance with the applicable provisions of the Refugee Convention Article 33 and Article 3 of the Convention Against Torture.

[16] Article 33 of the Refugee Convention reads:

ARTICLE 33
Prohibition of Expulsion of Return ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[17] Article 3 of the Convention Against Torture reads:

ARTICLE 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

[18] Those two international agreements find their expression in domestic Canadian law, in part, in the IRPA, more specifically sections 96 and 97:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

[19] Also of relevance is the definition of torture in the Convention Against Torture, which is provided in Article 1 (the Article referred to in paragraph 97(1)(*a*) of the IRPA):

ARTICLE 1

1. For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

(2) Safe third country designation

[20] Paragraph 101(1)(*e*) of the IRPA provides that a person entering Canada from a “designated country” is ineligible to have his or her claim for refugee protection considered by the Immigration and Refugee Board [IRB]:

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

. . .

(*e*) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence. . ..

[21] Paragraph 102(1)(*a*) provides that the Governor in Council may designate a country as being subject to paragraph 101(1)(*e*):

102. (1) The regulations may govern matters relating to the application of sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions

(*a*) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;

(*b*) making a list of those countries and amending it as necessary; and

(*c*) respecting the circumstances and criteria for the application of paragraph 101(1)(*e*).

[22] The legislation only allows the GIC to designate countries that comply with Article 33 of the Refugee Convention, which prevents refoulement (subject to very limited circumstances) and Article 3 of the Convention Against Torture, which unequivocally prohibits refoulement to torture. In deciding to designate a country, the GIC is required under subsection 102(2) to consider four factors:

102.. . .

(2) The following factors are to be considered in designating a country under paragraph (1)(*a*):

(*a*) whether the country is a party to the Refugee Convention and to the Convention Against Torture;

(*b*) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;
(*c*) its human rights record; and
(*d*) 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. [Emphasis added.]

[23] The legislation also requires ongoing review by the GIC of any country it designates as safe under paragraph 102(1)(*a*). Subsection 102(3) provides as follows:

102.. . .

(3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country.

[24] By virtue of subsection 5(1) of IRPA, Parliament conferred on the GIC the power to make regulations under the Act. Regulations must conform to section 3 of the IRPA. Paragraphs 3(*d*) and (*f*) are relevant to the matter in issue:

3.. . .

(3) This Act is to be construed and applied in a manner that
. . .

(*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;
. . .

(*f*) complies with international human rights instruments to which Canada is signatory.

[25] The provisions of the Charter which have been raised in this judicial review are:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
. . .

7. 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.

. . .

15. (1) 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.

[26] In accordance with the regulation-making power under IRPA subsection 102(1), the Governor in Council enacted section 159.3 of the STCA Regulations which designated the U.S. as a country that complies with Article 33 of the Refugee Convention and Article 3 of CAT on October 12, 2004. This designation is the central point of contention in this judicial review.

[27] Section 159.5 outlines the exceptions to the general rule provided for in paragraph 101(1)(*e*) of IRPA that a claim is not to be referred to the Refugee Protection Division. These exceptions cover generally the following classes of persons:

- family members of Canadian citizens, permanent residents, and protected persons;
- unaccompanied minors;
- holders of Canadian travel documents;
- persons who do not need visas to enter Canada, but need visas to enter the U.S.;
- persons who were refused entry to the U.S. without having their claim adjudicated or permanent residents of Canada being removed from the U.S.;
- persons who are subject to the death penalty; and
- persons who are nationals of countries to which the relevant Minister has imposed a stay on removal orders.

[28] Once a Canadian immigration officer determines that a claimant does not fall within one of these stated exceptions, the officer retains no discretion to allow the claimant into Canada. The person must be returned to the U.S.

[29] A feature of the STCA regime is that, in accordance with the Regulations, it only operates at land ports of entry. The STCA regime does not apply to travellers arriving in Canada by air or water from the U.S.

[30] The RIAS states that the STCA reflects a [at page 1622] "widespread and growing international consensus that no refugee receiving country can, on its own, solve the refugee problems of the world. International efforts, both bilateral and multilateral, are needed to share the responsibilities."

B. Governor in Council's decision-making process

[31] The RIAS states that consultations were undertaken with NGOs [non-governmental organizations] who oppose the STCA both on principle, and because they do not feel the U.S. meets its international refugee protection obligations. The RIAS notes that it considered submissions from interested parties as to whether the U.S. is a safe country, including information provided as to detention practices, expedited removal and mandatory bars to asylum. The RIAS states that these concerns resulted mainly in the expansion of the existing exceptions. The Government also engaged in a gender-based analysis and found that the body of case law is broadly supportive of gender-based claims in the U.S.

[32] The RIAS also states that after the Regulations were pre-published in 2002, the Government continued to monitor developments in the U.S. It further notes that a process for ongoing review, in accordance with subsection 102(3), was already in the making. Furthermore, the RIAS claims that the

Government would be in a better position to determine impact after the implementation of the Regulations.
[33] According to the respondent, on May 29, 2006, in testimony before the House of Commons Standing Committee on Citizenship and Immigration (Standing Committee), Mr. Jahanshah Assadi, the UNHCR [United Nations High Commissioner for Refugees] representative in Canada, stated that the UNHCR considers the U.S. to be a safe country.

C. Application of the Regulations/operation of the STCA

[34] The UNHCR, Canada, and U.S. one-year review (contained at Exhibit TH2 to Tom Heinz' affidavit) (one-year review report) provides an overview of the process involved in applying the STCA. First, a person who makes a claim for refugee protection must undergo admissibility and eligibility determinations. The Canadian Border Services Agency (CBSA) is responsible for administering the port of entry (POE) process. Upon making a claim for protection at the POE, an individual appears before a CBSA officer for an examination in order to determine whether his or her claim is eligible to be referred to the IRB [Immigration and Refugee Board]. An eligibility decision must be made within three working days after receipt of the claim or the claim will be deemed referred to the IRB. Pursuant to the STCA, persons whose claims are found to be ineligible and who are issued a removal order can be removed to the U.S. Removals are most often conducted on the same day.

[35] Upon making a claim for refugee protection, the eligibility determination of the claim by one officer is reviewed by a separate decision maker (Minister's delegate). The appeal process of the delegate's decision is by way of judicial review, often from outside the country. There are thus two levels of review of a determination of ineligibility under the STCA.

[36] However, the effect of the operation of the STCA is, upon determining that the person is one who has come by land from the U.S., to return that person to the U.S. without further regard to their personal situation including any consideration of their refugee claim or their concerns about being returned to the U.S. The effect is to deprive a person of the ability to claim refugee protection in Canada.

III. STANDING

[37] The respondent has challenged the standing of the three organizations to bring this judicial review. In particular, the respondent says that these organizations fail to meet the third prong of the standing test — the absence of any other reasonable and effective manner to have this matter brought before a court. The argument is made in the face of the operation of the STCA in Canada, which has as its purpose the immediate return of the putative claimant to the U.S. — ideally on the same day as their arrival.

[38] The test for public interest standing was established in *Thorson v. Attorney General of Canada et al.*, [1975] 1 S.C.R. 138, where the Supreme Court established three factors that must be met for standing to be granted. These factors are also discussed, to the same effect, in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607. The questions to be examined are whether:

1. there is a serious issue to be tried (as to the invalidity of the legislation);

2. the person has been affected directly or has a genuine interest as a citizen in the validity of the legislation; and

3. there is no other reasonable and effective manner in which the issue may be brought before the Court.

[39] The respondent submits that the applicants CCR, CCC and AI failed to satisfy the third criteria of the test for obtaining public interest standing, which requires that there must be no other reasonable and effective manner in which the issue may be brought before the Court. Individuals who are directly affected by the designation of the U.S. as a safe third country are available and would be in a better position to litigate this matter. Although John Doe arguably has a personal interest in the litigation, the respondent argues the applicants do not address the issues from his perspective. According to the respondent,

allegations of a Charter breach should only be evaluated on the basis of a proper factual record.

[40] The Supreme Court in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at page 253, applied the standing test in a similar context as this case. The Supreme Court affirmed that this test was the appropriate test for challenging legislation and did not need to be adapted. The Supreme Court then reviewed the standing of Canadian Council of Churches to bring an action challenging several provisions in the then *Immigration Act, 1976* [S.C. 1976-77, c. 52]. The Court held that the CCC failed to satisfy the third prong of the test. However, its reasons for doing so were that refugees from within Canada were capable of bringing the full challenge on their own. Justice Cory stated [at pages 254-256]:

> The challenged legislation is regulatory in nature and directly affects all refugee claimants in this country. Each one of them has standing to initiate a constitutional challenge to secure his or her own rights under the *Charter*. The applicant Council recognizes the possibility that such actions could be brought but argues that the disadvantages which refugees face as a group preclude their effective use of access to the court. I cannot accept that submission.
> . . .
>
> From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the Court. On this ground the applicant Council must fail. I would hasten to add that this should not be interpreted as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging the legislation. Thus the very rationale for the public interest litigation party disappears. The Council must, therefore, be denied standing on each of the counts of the statement of claims.

[41] Justice Cory held that it is a matter of the courts' discretion to grant public interest standing when challenging administrative action. The balance must be struck between access to the courts and preserving judicial resources. The granting of public interest standing is not required when, on the balance of probabilities, the measure will be subject to attack by a private litigant.

[42] Justice Cory also held at page 253 that "when exercising the discretion [to grant standing] the applicable principles should be interpreted in a liberal and generous manner."

[43] In this instance, no refugee from within Canada can bring the claim. Instead, a challenge requires a refugee from outside of Canada to bring the challenge. The applicants provide some evidence indicating that most claimants in the U.S. who might be caught by the STCA would be unwilling to undertake this litigation. Some would be afraid that becoming involved in litigation might bring their presence to the attention of U.S. authorities and put them at risk of being deported or detained and put in the very position in the U.S. of refoulement which forms the basis of this Court challenge.

[44] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, addresses some of the realities involved in public interest litigation by vulnerable persons. There, a doctor and a patient challenged legislation that prohibited private health insurance on the ground that the delays in the public system violated the Charter and the Quebec *Charter of Human Rights and Freedoms* [R.S.Q., c. C-12]. Justice Deschamps considered the issue and determined that the doctor and patient both had standing. Her analysis is found at paragraph 35 of that judgment:

> Clearly, a challenge based on a charter, whether it be the *Canadian Charter* or the *Quebec Charter*, must have an actual basis in fact: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441. However, the question is not whether the appellants are able to show that they are personally affected by an infringement. The issues in the instant case are of public interest and the test from *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, applies. The issue must be serious, the claimants must be directly affected or have a genuine interest as citizens and there must be no other effective means available to them. These conditions have been met. The issue of the validity of the prohibition is serious. Chaoulli is a physician and Zeliotis is a patient who has suffered as a result of waiting lists. They have a genuine interest in the legal proceedings. Finally, there is no effective way to challenge the validity of the provisions other than by recourse to the courts

[45] Even in dissenting opinions in that judgment, there was agreement on the issue of standing. Justice Binnie and Justice LeBel, at paragraph 189, underscored the practical difficulties in finding a person to initiate the litigation:

> All three of these conditions [set out in *Borowski*] are met in the present case. . . . the appellants advance the broad claim that the Quebec health plan is unconstitutional for *systemic* reasons. They do not limit themselves to the circumstances of any particular patient. Their argument is not limited to a case-by-case consideration. They make the generic argument that Quebec's chronic waiting lists destroy Quebec's legislative authority to draw the line against private health insurance. From a practical point of view, while individual patients could be expected to bring their own cases to court if they wished to do so, it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan, as was done here. The material, physical and emotional resources of individuals who are ill, and quite possibly dying, are likely to be focussed on their own circumstances. In this sense, there is no other class of persons that is more directly affected and that could be expected to undertake the lengthy and no doubt costly systemic challenge to single-tier medicine. Consequently, we agree that the appellants in this case were rightly granted public interest standing. However, the corollary to this ruling is that failure by the appellants in their systemic challenge would not foreclose constitutional relief to an individual based on, and limited to, his or her particular circumstances.

[46] While not in the same grave physical condition referred to in *Chaoulli*, one could not expect most potential refugee claimants, in a new country and terrified of refoulement, to find the time and resources to mount this challenge. Of equal importance is the speed with which Canadian authorities are mandated to act in returning the person to the U.S.

[47] It is of no import that John Doe has not actually approached the Canadian border. There is no doubt (nor was it seriously challenged) that if he did so, he would be sent back to the U.S. Consistent with the finding in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, it would be wasteful, delaying and unfair to wait for acts of discrimination and require a separate challenge to each provision.

[48] In this case, it would be pointless to force a claimant in the U.S. to approach Canada, and then be sent back to U.S. custody in order to prove that this would in fact happen. Given other findings by this Court as to the operation of the U.S. system, that individual could be exposed to the very harm at issue before the Court.

[49] It should be noted that the Federal Court of Appeal decision in the *Canadian Council of Churches* case, which was subsequently upheld by the Supreme Court, held that with respect to the safe third-country provisions of the legislation, CCC would have been an appropriate public interest litigant had a country actually been designated at the time. Justice MacGuigan addressed several arguments raised by the applicants that provisions of the amended legislation which exclude certain claimants from having their claims considered, including the safe third-country provision, contravened section 7 of the Charter. Justice MacGuigan held that [at page 559]:

> Precisely by reason of the fact that such claimants would have no access to the statutory refugee process and might easily be removed from Canada without having any real opportunity to challenge the legislation, it seems to me that there would be "no other reasonable and effective manner" in which these issues might be brought forward for judicial review than by allowing the respondent status to challenge the relevant legislative provisions in this declaratory action. However, the allegations in paragraphs 6(*b*) and 6(*c*) are entirely speculative, as they depend upon the promulgation of regulations under paragraph 114(1)(*a*) of the Act which would limit refugee claims to those from certain countries.

The Supreme Court did not address this point directly.

[50] Justice Evans (when he was on the Federal Court Trial Division) also analyzed the application of the third prong of the test in *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211. At paragraph 71, Justice Evans distinguishes between the application of this principle to regulatory and declaratory legislation. Generally, it is easier to secure public interest standing when the administrative action in question is declaratory because it does not impose any duties or liabilities upon defined individuals or groups. Challenges to regulatory legislation or administrative action will normally only be afforded to those who are subject to the legal duties or liabilities imposed by it. Such persons are more directly affected. This increases the burden on the public interest organizations in this judicial review to be

granted standing. The onus is on an applicant to satisfy the Court that they have public interest standing, which requires that applicant to prove that there is no other person more directly affected who can reasonably be expected to litigate.

[51] Even without a John Doe applicant, the status of the three organizations bears recognition as legitimate applicants. They (and other organizations like them) have been recognized as having an interest in this type of litigation; more importantly, they bring resources and arguments which assist the Court in identifying and considering the relevant issues. They also act or substitute for the unidentified applicants who are unable, for both physical and psychological reasons, to undertake the daunting task of challenging the government. In those circumstances, I have concluded that it is unlikely that any individual refugee could adequately bring this matter before the Court. Therefore, I have exercised my discretion to maintain the Canadian Council for Refugees, Canadian Council of Churches and Amnesty International as applicants.

[52] I note that although John Doe came forward as a litigant, he was represented by these organizations and did not seek separate representation. It is noteworthy that John Doe was hiding in the United States, unable to secure a reconsideration of his claim there, and feared exposure by arriving at the Canadian border only to be returned to the United States for deportation to Colombia.

[53] A motion for an injunction was brought during the middle of the hearing of argument to prevent Canadian authorities from invoking the STCA if John Doe should somehow arrive at the Canadian border. An interim order was issued. The Court was advised that, despite lack of success previously on the part of John Doe to secure reconsideration of his claim, following this Court's order, U.S. authorities agreed to reconsider his claim. The Court cannot help but draw an inference that, but for this litigation, John Doe's fate would have been different and that he would have been treated in the manner which the applicants say is the general rule.

[54] This judicial review has been argued from two perspectives. The first is an attack on the legitimacy of the Regulations — an argument as to "*vires*." The second is an attack on the GIC decision which led to the Regulations — an argument involving the standard of review and its application.

IV. PRINCIPLES OF REVIEW/STANDARD OF REVIEW

[55] The central issue in this case is whether the Regulations designating the U.S. as a safe third country are *ultra vires* the power given by Parliament to make such regulations. The language of subsection 102(1) [of the IRPA] contains multiple uses of the word "may." Read disjointedly, section 102 says that the regulations "may include provisions . . . designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture."

[56] However, read as a whole, section 102 gives to the GIC the discretion to enter into an STCA only upon specific conditions; a fundamental condition is compliance with the specific articles of the Refugee Convention and Convention Against Torture. I do not interpret the provision as giving the GIC the power to enter into an STCA where the country does not comply with those preconditions. It simply gives the GIC the discretion to set up a regulation to designate a country as "safe" if the country meets the conditions of compliance.

[57] To interpret subsection 102(1) as giving the GIC discretion to enter into such agreements with countries that did not comply with the Refugee Convention and Convention Against Torture would make a mockery of Canada's international commitments, of the very purpose of our domestic laws and even of the internal logic of subsection 102(1). There would be no need to consider whether the country is a party to the Refugee Convention and Convention Against Torture (paragraph 102(2)(*a*)), nor that country's policies and practices with respect to claims under the Refugee Convention or its obligations under the Convention Against Torture — both factors are compulsory factors to be considered. Nor would there be any merit in requiring an ongoing review of these factors (subsection 102(3)) which is a requirement phrased in directory terms: "must ensure the continuing review."

[58] Except in the limited review permitted of GIC decisions, as discussed in paragraph 61, the Court is

not generally to review the discretionary decision to make regulations. However, in this case the Court is required to review whether the Regulations are *intra vires* the Act; most specifically, whether the conditions to the designation of a third country under the Regulations have been met.

[59] I cannot agree with the respondent's position that so long as the GIC has acted in good faith and for no improper purpose, the Court has no role to play in assessing whether the Regulations are valid.

[60] In my view, the issue is whether the conditions for passing the Regulations have been met on an objective basis. The conditions are framed in terms of legal criteria and address the matter in absolute terms of compliance with international law; not in terms of the GIC's opinion or reasonable belief in such compliance. As outlined further, the designated country either does or does not comply with international law, and if it does not, Parliament has not given the GIC the power to enter into an STCA or to enact a regulation doing so.

A. *Vires*

[61] The power to enact regulations is principally a legislative action and is generally not subject to the administrative review regime. Regulations are generally reviewed to determine whether they are *intra vires* their delegating legislation. The jurisprudence establishes that this includes ensuring that any conditions precedent to the regulation-making action have been met. The effectiveness and wisdom of the action is irrelevant, as is the government's motive, unless it can be shown the action was taken pursuant to irrelevant considerations or for an improper purpose. However, Court review is complicated because with respect to the Charter challenge, the review by the Court is quite different in that it requires a review on the basis of correctness (*Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256).

[62] The leading authority in this regard is *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, which concerned whether procedural fairness attached to actions taken by the GIC. In that decision, Justice Estey noted, at page 752, that:

> It is not helpful in my view to attempt to classify the action or function by the Governor in Council (or indeed the Lieutenant-Governor in Council acting in similar circumstances) into one of the traditional categories established in the development of administrative law. The Privy Council in the *Wilson* case, *supra*, described the function of the Lieutenant-Governor as "judicial" as did the judge of first instance in the *Border Cities Press* proceedings, *supra*. However, in my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute.

[63] In *Inuit Tapirisat*, the GIC was not enacting a regulation but was acting pursuant to statutorily-mandated powers. Justice Estey further noted that [at page 750] "such a statutory power can be validly exercised only by complying with statutory provisions which are, by law, conditions precedent to the exercise of such power." Thus, although the actions of the GIC are subject to limited review, the jurisdictional review by the courts includes the ability to determine whether the GIC complied with any conditions precedent to the action.

[64] In setting out the manner of review for the GIC's decision in this case, the Court continued at pages 758-759:

> I realize, however, that the dividing line between legislative and administrative functions is not always easy to draw: see *Essex County Council v. Minister of Housing* ((1967), 66 L.R.G. 23).
>
> The answer is not to be found in continuing the search for words that will clearly and invariably differentiate between judicial and administrative on the one hand, or administrative and legislative on the other. . . . Where, however, the executive branch has been assigned a function performable in the past by the Legislature itself and where the *res* or subject matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may be thought to arise. The fact that the function has been assigned as here to a tier of agencies (the CRTC in the first instance and the Governor in Council in the second) does not, in my view, alter the political science pathology of the

case. In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Council has performed its functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate.

[65] In the subsequent decision of *Thorne's Hardware Ltd. et al. v. The Queen et al.*, [1983] 1 S.C.R. 106, the appellants alleged that an Order in Council extending the limits of Saint John Harbour was passed for improper motives in order to increase harbour revenues. The appellants argued further that section 7 [as am. by S.C. 1980-81-82-83, c. 121, s. 6] of the *National Harbours Board Act* [R.S.C. 1970, c. N-8], which authorizes expansion of harbour limits, requires it to be for the "administration, management and control" of the harbour, and that expansion for increased revenues did not fall within this. Justice Dickson [as he then was] referred to the *Inuit Tapirisat* case, concluding that the Court had jurisdiction to review legislative action of the Governor in Council [at page 111] "in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect."

[66] Justice Dickson noted that governments do not publish the reasons for their decisions and that it is therefore very difficult to establish that legislation was passed in bad faith or for improper purposes. He referred to some evidence presented by the appellants as to the improper purpose of the expansion and concluded that [at page 115]:

> . . . the issue of harbour expansion was one of economic policy and politics; and not one of jurisdiction or jurisprudence. The Governor in Council quite obviously believed that he had reasonable grounds for ... extending the boundaries of Saint John Harbour and we cannot enquire into the validity of those beliefs in order to determine the validity of the Order in Council.

The Court very easily concluded that the purpose for the expansion fell within the objectives set out in the Act.

[67] In *Spinney v. Canada (Minister of Fisheries and Oceans)* (2000), 183 F.T.R. 71 (F.C.), Justice Blais considered an order made by the GIC which increased the legal minimum carapace size of lobsters in a fishing area, concluding at paragraph 60:

> Given that the variation order is a legislative act, authorized by the Regulations and adopted pursuant to the Act, this Court's jurisdiction is limited. It can intervene on the basis of unconstitutionality (i.e. contrary to sections 91 or 92 of the *British North America Act*), a breach of procedure, or the legislative act being *ultra vires* of the enabling statute.

[68] These principles were considered in the context of regulations enacted by the GIC in *de Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655 (F.C.A.). In that decision, at paragraph 25, Justice Evans for the Federal Court of Appeal held:

> . . . compared to other kinds of administrative action, regulations have rarely been found to be invalid by courts, partly, no doubt, because of the broad grants of delegated power under which they are often made....

[69] He continues by noting at paragraph 26 that:

> If there is a conflict between the express language of an enabling clause and a regulation purportedly made under it, the regulation may be found to be invalid. Otherwise, courts approach with great caution the review of regulations promulgated by the Governor (or Lieutenant Governor) in Council.

[70] Justice Evans makes reference to *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247 (C.A.), at page 260, where Justice Linden discussed another ground for review of a legislative decision and concluded that it is not the role of the Court to judge whether decisions of this nature are wise or unwise. The decision is only impeachable in those circumstances when it is based entirely or predominantly on irrelevant factors.

[71] The scope of review of the Court is further constrained by a presumption that regulations are *intra vires.* Moreover, not only are regulations deemed to remain *intra vires*, there is also a presumption that they are formally coherent with the enabling statute; the onus is on plaintiffs to rebut the presumption: *James Doyle (Sr) & Sons Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1992] 3 F.C. 128 (T.D.), at pages

140-141; *Saskatchewan Wheat Pool v. Canada (Attorney General)* (1993), 112 Sask. R. 181 (Q.B.), at paragraph 54; *Gulf Canada Resources Ltd. v. Alberta* (2001), 285 A.R. 307 (Q.B.), at paragraph 26.

[72] If the GIC must comply with all conditions precedent in the legislation, the question arises as to what extent the Court can assess whether the substantive requirements of the condition precedent have been met. This issue is discussed in *Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.). Justice Strayer states, at page 602, that the Court can review the substance of the regulation to conclude whether it is made for a completely irrelevant purpose. The regulations in question in that case [*Refugee Claimants Designated Class Regulations*, SOR/90-40] required the GIC to consider whether the admission of certain people would be in accordance with Canada's "humanitarian tradition." Justice Strayer described his approach to this issue, at page 602:

> It goes without saying that it is not for a court to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences. The essential question for the court always is: does the statutory grant of authority permit this particular delegated legislation? In looking at the statutory source of authority one must seek all possible *indicia* as to the purpose and scope of permitted delegated legislation. Any limitations, express or implied, on the exercise of that power must be taken into account. One must then look to the regulation itself to see whether it conforms and where it is argued that the regulation was not made for the purposes authorized by the statute one must try to identify one or more of those purposes for which the regulation was adopted. It is accepted that a broad discretionary power, including a regulation-making power may not be used for a completely irrelevant purpose but it is up to the party attacking the regulation to demonstrate what that illicit purpose might be. [Footnotes omitted.]

[73] With respect to this point, Justice Strayer noted, at pages 605-606 that:

> Assuming then that paragraph 3(2)(*f*) of the Regulations is *prima facie* authorized by the statute, one must consider whether it is contrary to some condition imposed on the exercise of the regulation-making power. All that subsection 6(2) requires is that regulations establishing classes of persons should be consistent with Canada's "humanitarian tradition with respect to the displaced and the persecuted." I can see nothing in these Regulations which is inconsistent with that "tradition." [Emphasis added.]

[74] The jurisprudence confirms that the Court can review whether a regulation complies in substance with the condition precedent to the power to enact it. However, in reviewing the regulations in *Jafari*, Justice Strayer granted the GIC some deference in relation to whether the regulations were in accordance with Canada's humanitarian tradition. He states that although the reasons for enacting the regulations were not all well conceived [at page 604] "I do not think we can say they were completely unrelated to the purposes of the statute." Justice Strayer appears to have been influenced by the fact that the result of the legislation was that the claimant was entitled to the regular, fair, refugee hearing, rather than a special, expedited hearing.

[75] In reviewing whether a regulation is *intra vires* its delegating statute, courts have generally applied a standard of correctness. According to the Supreme Court of Canada in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, at paragraph 5, the review of whether a by-law is *ultra vires* is always reviewable on a standard of correctness. Although that case dealt with delegated legislation enacted by a municipality rather than the GIC or Lieutenant GIC, the Federal Court of Appeal applied the same principle to enacted regulations in *Sunshine Village Corp v. Canada (Parks)*, [2004] 3 F.C. 600, at paragraph 10.

[76] That said, other cases have been decided differently. For instance in *David Suzuki Foundation v. British Columbia (Attorney General)* (2004), 8 C.E.L.R. (3d) 235, Justice Hood of the B.C. Supreme Court applied a pragmatic and functional analysis (possibly in the alternative to his *vires* analysis) to the decision of a Lieutenant GIC, concluding that much deference is required and the decision is subject to a standard of patent unreasonableness. In that case, the issue was whether the Lieutenant GIC was "satisfied" that certain conditions were met, not whether they were in fact met. This is an example of the more traditional powers of the executive by use of phrasing such as "satisfied" or "in its opinion."

[77] In *Jose Pereira E. Hijos, S.A v. Canada (Attorney General)* (2007), 26 C.E.L.R. (3d) 169 (F.C.A.), at paragraph 78, Justice Nadon succinctly put the issue:

The nature of the inquiry which a court must conduct with regard to the validity of regulations is therefore not a determination of the Government's motivation, but rather a determination of whether the regulations are authorized by the enabling legislation.

[78] With respect to what is authorized in terms of regulation making, there are several conditions precedent that accompany the authority of the GIC to designate the U.S. a safe third country. First, subsection 102(2) sets out several factors which must be considered before designating a country. There are no strict standards established for the consideration of the four factors but their consideration is phrased in mandatory language. The wording of the RIAS establishes that the GIC considered the application of the four factors. Furthermore, the applicants set out in detail the content of a memorandum to the GIC created on September 24, 2002, and signed by the relevant Minister at the time. This memorandum appears to be the basis upon which the GIC entered into the STCA. In reviewing the points the applicants extract from that memorandum, it is clear that the GIC, in reading and reviewing the Minister's memorandum would have turned their mind to the four factors in the legislation, including the U.S. human rights record in general.

[79] The main condition at issue in this case is paragraph 102(1)(*a*), which states that the GIC is authorized to enact regulations that include provisions "designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture" [underlining added]. The provision requires that compliance with the non-refoulement provisions of the Refugee Convention and the CAT is a necessary precondition to designation. It was my conclusion earlier that if a country did not comply with the relevant articles of the two Conventions, the GIC had no power to designate the country as "safe." It is my further conclusion that in reaching this determination, the GIC must base its decision on the practices and policies of that government in respect of claims under the Refugee Convention and the obligations under the Convention Against Torture.

[80] The issue of whether the U.S. complies is, to some extent, a matter of opinion — in this case expert legal opinion, not of the GIC or of the responsible Minister, but of that presented to the GIC from government and other sources. It is these opinions which are the focus of the applicants' attack and form the basis of the GIC's determination.

[81] Nor is the issue whether U.S. policies and practices are necessarily in accordance with Canadian law or whether Canada complies with these international agreements. Indeed there may be an issue of whether a Canadian law which requires a person to make their refugee claim in a country, other than the one of their choosing, is compliant with the Refugee Convention. However, in the absence of other evidence, it is presumed that Canadian law is at least compliant with the relevant Conventions.

[82] Therefore, the Court will only find that the GIC lacked jurisdiction to designate the U.S. as a safe third country if the GIC erred in concluding that the preconditions existed, and that any reasonable inspection of the evidence of U.S. law and practice would lead to the conclusion that the U.S. is not in compliance with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture.

[83] As discussed further in respect of the standard of review and what degree of deference is owed to the GIC in analyzing the factors to be considered in designating a country, the basis for decision is objective — compliance or not. The factors at issue are "legal facts" requiring a consideration of legal norms. There is nothing to suggest that Parliament intended to circumscribe the Court's role or power to consider whether the conditions have been met.

[84] It is reasonable to postulate that this objective analysis by a court avoids the diplomatic and other government-to-government consequences of a finding of non-compliance, but it does not lessen the responsibility imposed on the Court.

[85] While the determination of whether to designate another state, or to revoke the designation upon subsequent reviews, particularly one with whom Canada has a close relationship, may be politically charged, the role of the Court is to assess the regulation and compliance from a legal perspective.

[86] For the above reasons, it is my conclusion that in examining the Regulations, the Court is required to engage in more than merely analysing whether the Regulations are made in good faith and not for an improper purpose. What is required is a consideration of the existence of the conditions upon which the GIC may exercise its discretion to designate a country as "safe."

[87] Given that the GIC is required to consider certain "factors" in determining whether to designate a country, the GIC is entitled to some deference in regard to those factors requiring the exercise of judgment, specifically the practices and policies of the third country and its human rights record. The issue is what level of deference is owed to the GIC.

B. The standard of review

[88] Unlike many cases of review of the *vires* of a regulation, the parties had access to some of the material before the GIC in its consideration of the relevant factors. Therefore, there is a record upon which the Court can apply a standard of review to the GIC's determination. Both parties made extensive submissions as to the standard of review applicable in this case.

[89] At issue in this judicial review is the GIC's determination that the U.S. meets the conditions of compliance with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture. The challenge to the Regulations is not based upon a challenge to the GIC's exercise of discretion to pass the Regulations *per se*, a matter over which the Court has much less responsibility for review.

[90] As the issue in this case is a finding of the existence of a legal state of affairs, and of a condition precedent, the Court is required to consider that finding in accordance with the appropriate standard of review. There is no serious challenge, nor could there be, to the issue of whether the GIC considered the four factors in subsection 102(2). The question is whether the consideration of the U.S. practices and policies in respect of claims under the Refugee Convention and the obligations under the Convention Against Torture can lead to the conclusion of compliance.

[91] This consideration of the standard of review is also relevant to the issue of the continuing review of the subsection 102(2) factors mandated by the legislation, particularly in view of the evidence which has come to light since the Regulations were promulgated and the STCA was entered into.

[92] The analysis in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, most closely approximates the contextual circumstances of this case. It provides the analytical framework to determine the standard of review in respect of the GIC's conclusion that U.S. practices and policies comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture.

[93] As directed by the Supreme Court, it is necessary to engage in the pragmatic and functional analysis in order to conclude as to the correct standard of review. I have earlier indicated that, despite authority suggesting that examinations of conditions precedent to regulations should be based on a purely objective standard, "correctness" is not an appropriate standard because of the nature of the decision. The conditions to be met are not those of an easily fixed nature such as the passage of specific time or the occurrences of a specific event. The issue is whether the standard is reasonableness *simpliciter* or patent unreasonableness. The analysis requires the Court to examine the following elements.

(1) The presence or absence of a privative clause or statutory right of appeal

[94] The purpose of this aspect of the standard of review analysis is to glean whether Parliament intended to limit judicial consideration or to fully engage it in the review of government actions. The legislation, while giving the GIC broad discretion to establish an STCA, uses mandatory language both as to the factors to be considered and as to the continuing review of those factors. The legislation requires the GIC to consider what can be more conveniently described as "legal facts," a matter engaging legal analysis.

[95] The absence of a privative clause or of a statutory right of appeal generally suggests that this aspect is neutral in terms of deference. While in some cases, such as *Suresh* at paragraph 31, the requirement to

obtain leave, as required in this case, indicates some deference, that consideration is significantly offset by the mandatory language used as to how the GIC is to consider whether to establish an STCA. The absence of the usual broad discretion given to the GIC in determining the basis upon which to enact the Regulations should also be noted. Therefore, I conclude that, at the very most, the factor is neutral although, as discussed earlier, there may be good reason to expect judicial scrutiny.

(2) Expertise of the decision maker as compared to that of the Court

[96] There are two aspects to this element. There is the pure factual aspect as to what is the practice or policy and there is the more critical aspect of the significance or result of the practice or policy which is akin to an assessment of mixed law and fact. The assessment of pure facts according to the legal norms and therefore the significance or result is a matter well within a court's area of expertise.

[97] The GIC has no particular expertise in respect of the practices and policies of the U.S. nor with respect to the interpretation and application of international conventions. The essential function engaged in dealing with the issues are within the domain and expertise of a court. The function is more closely equivalent to what courts are designed to do rather than the broad policy considerations which are the preserve of the GIC. Therefore, considerably less deference is called for.

(3) Purpose of the legislation and the provision in particular

[98] The purpose of IRPA is broad policy based with a heavy emphasis on individual rights. It is, however, generally polycentric seeking to accomplish a number of broad policy goals.

[99] The provisions in issue have, as the RIAS suggests, the goal of sharing of responsibility for international refugee flow. Its effect is to restrict the entry of certain types of refugees and to pass off the cost of dealing with those persons to the country of last presence.

[100] Nevertheless, the means by which this policy goal is achieved is a direct, legalistic interpretation and application of legal norms which can, in the event of failure by the other country to respect those norms, directly impact human rights and individual safety.

[101] The provision at issue and particularly the designation as a safe country is highly legalistic in concept, set against legal rather than policy norms. Therefore, the purpose of the provisions at issue suggests very limited deference.

(4) Nature of the question

[102] The exercise of the GIC's power to make the regulations in question requires a consideration of the facts of the U.S. practices and policies and the application of those facts to the legal requirements for claims under the Refugee Convention and the obligations under the Convention Against Torture. The two components are integrally linked.

[103] International law is traditionally proven as a matter of fact, as is other foreign law. However, this international law, which is a cornerstone of Canadian domestic law, is not as foreign to Canadian courts as would be the laws of many other nations. To that extent, Canadian courts have greater familiarity with this type of opinion evidence and its subject matter. However, since the inquiry is one of fact, although it is of "legal facts," some deference is owed.

(5) Conclusion on standard of review

[104] In the end, considering these factors and having particular regard for the nature of the inquiry being based on legal norms and involving issues of mixed fact and law, I conclude that the appropriate standard of review is reasonableness *simpliciter*.

[105] This standard of review is applicable both in regard to the initial conclusions leading to enactment of

the Regulations authorizing the STCA and to the continuing review mandated by subsection 102(3), if it had been conducted.

V. THE EVIDENCE: DOES U.S. REFUGEE LAW AND PRACTICE VIOLATE THE REFUGEE CONVENTION OR CAT?

A. The experts

[106] The applicants and the respondent have provided the Court with numerous expert affidavits concerning the U.S. refugee system. Below, I will list the key expert affiants and summarize their qualifications. I have found each of them to be highly qualified in their fields of expertise, but for reasons stated later, I have generally accepted the evidence of the applicants as being more compelling.

(1) For the applicants

(a) Eleanor Acer is the Director of Human Rights First's Asylum Legal Representation Program in New York City. She oversees that organization's *pro bono* program. She describes the risk of detention faced by refugees in the U.S.

(b) Susan M. Akram is an Associate Professor at Boston University, and a supervising attorney of the immigration work in the civil litigation program. She is involved in representing several Guantanamo Bay detainees. Her evidence is directed towards the targeting of Arabs and Muslims.

(c) Deborah E. Anker is a clinical professor of law and directs the Harvard Immigration and Refugee Clinical Program. She both supervises students and represents asylum seekers. She has many publications on the subject of U.S. immigration and refugee law. She discusses corroboration, the U.S. interpretation of nexus and persecution, and exclusions from asylum.

(d) James Hathaway is a renowned academic specializing in international and comparative refugee law. He has written many articles and three books on the subject. His evidence is directed to international and comparative law on refugee responsibility sharing agreements. He describes European safe third country agreements.

(e) Karen Musalo is a resident scholar at the University of California, where she directs the Centre for Gender and Refugee Studies and teaches refugee and international human rights. Her expertise is the treatment of gender-based asylum claims in the U.S.

(f) Victoria Neilson describes the difficulties faced by asylum seekers in the U.S. whose claims are based on sexual orientation, transgender identity, or HIV positive status. She is the Legal Director of Immigration Equality, which focuses exclusively on lesbian, gay, bisexual, transgender and HIV immigration issues.

(g) Hadat Nazami is a lawyer with Jackman & Associates. This affidavit introduces many academic articles concerning U.S. refugee law. The respondent has argued quite properly that these exhibits are inadmissible. I have not relied on this affidavit or its attachments in my judgment, and thus do not need to address its admissibility.

(h) Jaya Ramji-Nogales, Andrew Schoenholtz and Philip G. Schrag all work on refugee law at Georgetown University. I will refer to their evidence as the "Georgetown affidavit." They provide an overview of the asylum process in the United States and describe the consequences of the one-year bar and the different standards for withholding and asylum.

(i) Morton Sklar describes how the U.S. applies CAT. He is the founding Executive Director of the World Organization for Human Rights USA, an organization which focuses on protecting refugees from deportation to torture.

(j) Steve Macpherson Watt, a senior attorney with the Human Rights Working Group of the American Civil

Liberties Union, provides evidence on torture committed by the U.S. and the practice of rendition.

(2) For the respondent

(a) Kay Hailbronner is a professor at the University of Konstanz, Germany. He has a great deal of expertise with international refugee law, and at one time served as a judge at an appeal level dealing with immigration and asylum law. He has written several books and many articles on refugee law. Professor Hailbronner served as counsel in cases involving European safe third country agreements. Professor Hailbronner's affidavit is the counterpoint to Professor Hathaway's evidence.

(b) David Martin has worked in the U.S. government dealing with refugee issues for many years. He has served as general counsel for the Immigration and Naturalization Service [INS] and worked primarily on removal cases in immigration court and provided advice to the INS and other top officials on the interpretation of U.S. immigration laws. He currently serves as a professor at the University of Virginia and works as an expert consultant to the government on refugee issues.

(c) Bruce A. Scoffield has been employed by the Government of Canada since 1989 and has dealt extensively with refugee protection issues. He currently serves as Director, Policy Development and International Protection. Mr. Scoffield was the lead CIC official in the negotiation of the STCA and was involved in the designation of the U.S. as a safe third country. He is engaged in the oversight and monitoring of the Agreement.

[107] As I indicated, each of the experts is well qualified and I believe gave evidence honestly as to their perspectives. However, the applicants' experts were generally more focused, both in their expertise and their opinion, as compared particularly to the more general evidence of Bruce Scoffield. Many of the areas relied upon by the applicants to show non-compliance were alluded to by Scoffield but just not expanded upon, either in this Court or before the GIC. The applicants' experts have expanded upon some of those areas to show their importance in practice and in terms of compliance with the relevant Conventions.

[108] I find the applicants' experts to be more credible, both in terms of their expertise and the sufficiency, directness and logic of their reports and their cross-examination thereon. I also recognized and have given the appropriate weight to the fact that some of the applicants' experts could be said to speak for or have "constituencies" which means that their evidence may lean in a direction more favourably to the constituency. The same can be said for the respondent's experts who testify in support of either a process in which they have been engaged from the beginning or in support of a system they have worked in. Taking account of these subjective factors, I find the applicants' experts to be more objective and dispassionate in their analysis and report.

[109] Therefore, I have been persuaded that, where in conflict, the applicants' evidence is to be preferred.

B. U.K. and E.U. practice regarding safe third country agreements

[110] Expert evidence was introduced on these practices for comparative purposes and to establish international norms. Parties relied on a number of cases emanating from these circumstances to buttress their opinion evidence.

[111] The 1985 Schengen Agreement [*Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders*, signed 14 June 1985 in Schengen (Luxembourg)] brought the issue of third country agreements to a European community level, with the intention to allow European states to address concerns of "asylum shopping" and multiple claims. The 1990 Dublin Convention [*Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community*, 15 June 1990, Dublin] provided a comprehensive mechanism for determining the responsible state for examining asylum applications. All E.U. member states were designated as "safe." With the movement towards a more community-based as opposed to state-based approach to asylum, the Dublin Convention was superseded in February 2003 by Dublin II [*Council*

Regulation (EC) No. 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-Country National], an E.U. Council Regulation. All E.U. states are still designated as safe for all other E.U. states.

[112] While both parties through their submissions and in their expert affidavits submitted evidence as to the status of safe third country agreements at international law, there is no need to look at third country agreements in general because the applicants are not disputing the legal basis for the Canadian enactment of third party agreements generally. Furthermore, the parties converge on most of the issues relating to the international status of such agreements. Specifically, both parties agree that in order to return someone to a third country, that country must be in compliance with the non-refoulement provisions in the Refugee Convention and CAT. Neither party disputes that indirect refoulement constitutes a breach of the country of last presence's obligations, as this was formally recognized in the *Suresh* decision.

[113] There are a few points in dispute that may raise refoulement issues. Firstly, Professor Hathaway questions the legality of the generalized assessment attaching to any safe third country agreement. He does not agree that an agreement can apply uniformly to all refugees. Secondly, Professor Hailbronner maintains that differences in interpretation of international refugee law standards are acceptable, as long as minimum standards are met. Additionally, both the U.K. and the European Court of Human Rights (ECtHR) cases were considered in order to establish basic principles as to how other jurisdictions have approached the question that is currently before the Court.

[114] Three experts have provided a detailed examination of three cases that arose in the U.K. The first, *T.I. v. U.K.* (App. No 43844/98) was decided by the European Court of Human Rights (E.C.H.R.) in 2000. The other two, *Regina v. Secretary of State for the Home Department, ex parte Adan*, [2001] 2 A.C. 477 and *Regina (Yogathas) v. Secretary of State for the Home Department*, [2003] 1 A.C. 920 were decisions of the House of Lords. Another decision that was mentioned only in passing but considered helpful was the U.K. case *Regina v. Secretary of State for the Home Department, ex parte Salas* [[2001] E.W.J. No. 4340 (QL)] (unreported 19 July 2000, and referred to in the Greenwood affidavits) in which the U.K. High Court specifically addressed whether the U.S. was a safe third country.

[115] Professor Greenwood reviews the development of the legislation in the U.K. Domestic legislation contains provisions whereby the Secretary of State can certify that a person be returned to a third country to have their asylum application considered if that country is "safe." Pursuant to the Dublin Convention and Dublin II, all countries in the European Union are "safe countries." The three cases in question all involved the question of whether the U.K. could return an asylum seeker to a state that did not consider non-state agents to be persecutors under the Refugee Convention. In the U.K., a non-state agent can be a persecutor for Refugee Convention purposes.

[116] The initial difficulty with the three cases is that the E.C.H.R. first decided in *T.I.* that returning an asylum seeker to a country that operated under a different (narrower) interpretation of the Refugee Convention was permissible. The House of Lords decided the opposite in *Adan.* However, in *Yogathas*, the House of Lords followed the decision in *T.I.* All cases involved very similar factual circumstances.

[117] Upon reading the cases and the analysis of the three experts, it is clear that the cases are really not inconsistent and reinforce basically the same principles. A summary of the principles that emerge reveals that the focus is on the likelihood that return to a third country will result in refoulement to face persecution rather than on requiring consistency in interpretation of the Refugee Convention. The courts looked to the reality rather than the theoretical basis upon which the originating countries operated.

[118] In *T.I.*, the E.C.H.R. held that the U.K. could not rely automatically on arrangements made in the Dublin Convention. The Court was reviewing U.K. compliance with Article 3 of the European Convention for Human Rights [*Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950 [213 U.N.T.S. 221] (ECHR), which contains a non-refoulement provision akin to that in CAT. The Court held that to rely on a safe third country agreement automatically would be to absolve responsibility under the Convention. The Court also held that the important issue is not whether the interpretations of the

Refugee Convention are the same, but whether there is sufficient protection in the third country's law to protect against the risk of refoulement. This does not mandate that the refugee be entitled to refugee status in the same manner in both countries. In that case, Germany had sufficient safeguards against refoulement existing independent of any claim to asylum that would be able to protect a person persecuted by non-state agents.

[119] The other principle arising from *T.I.* is that if there is a higher burden of proof placed on asylum seekers in the third country than in the returning country, as long as this burden does not prevent meritorious claims in practice, it is not a bar to returning a refugee to the third country. This concept is relevant in interpreting the "withholding/asylum" dichotomy discussed at length below.

[120] The principles the House of Lords relied on in *Adan* were not that different from those in *T.I.* The distinction between the decisions in the two cases arises principally on an evidentiary basis. The Law Lords did not have before them the decision in *T.I.*, nor did they have evidence of the alternative protections offered under German law.

[121] The House of Lords in *Adan* did note that there is only one true interpretation of the Refugee Convention and that the U.K.'s obligations must be interpreted in light of its interpretation, on the assumption it is the correct one. The Law Lords rejected all arguments that the treaty is subject to varied interpretations (see the decisions of Lord Slynn of Hadley and Lord Steyn). It was on this basis that the House of Lords concluded that a person could not be returned to a country that did not recognize non-state agents as persecutors. In light of these distinctions in interpreting the Convention, the House of Lords concluded that there was not sufficient evidence to refute the risk of refoulement. As a result of differences in interpretation, gaps in protection can arise and make a receiving state unsafe.

[122] That said, even the principle in *Adan* that there is only one interpretation of the Refugee Convention cannot be taken too literally. Lord Slynn of Hadley noted, at paragraph 14, that:

> There may be cases in which an interpretation adopted by the Secretary of State can be carried out in different ways and in such a case it may well be that the Secretary of State could accept that such other ways were in compliance with the Convention. But the Secretary of State is neither bound nor entitled to follow an interpretation which he does not accept as being the proper interpretation of the Convention.

[123] It is clear, however, that the case turned on the fact that the House of Lords considered an interpretation of the Refugee Convention that excluded non-state agents as persecutors to be incorrect. Lord Steyn held at paragraph 40, that the House of Lords was not in a position to express opinion on alternative procedures for the protection of asylum seekers in Germany and France. Since Germany and France did not apply all the protections in the Refugee Convention, on the evidence before the Court, refoulement was a definite possibility.

[124] In *Yogathas*, Lord Bingham of Cornhill held that there were two guiding considerations. First, a court should not readily infer that a friendly sovereign state party to the Refugee Convention will not perform the obligations it has undertaken. However, the Government is still obliged to inform itself of the facts and monitor the decisions made by the third country. This is similar to the holding in *T.I.* He concluded, at paragraph 9, that:

> . . . the humane objective of the convention is to establish an orderly and internationally-agreed regime for handling asylum applications and that objective is liable to be defeated if anything other than significant differences between the law and practice of different countries are allowed to prevent the return of an applicant to the member state in which asylum was, or could have been, first claimed.

[125] The second principle Lord Bingham relied on was that the Refugee Convention is primarily directed to preventing refoulement and it is inappropriate to compare other issues between two states, such as the applicant's living conditions in the third country. As Lord Hope of Craighead noted, at paragraph 43, the critical question for the Court was whether the German authorities would apply its alternative mechanism in such a way as to recognize the applicant's fear of persecution by non-state agents. The conclusion was that German law grants discretion to suspend deportation in cases of substantial danger for life, personal integrity or liberty of an alien. Lord Hope recognized that [at paragraph 47] "the focus [in the right to return

to a third country] is on the end result rather than the precise procedures by which the result was achieved."

[126] Professor Greenwood concludes that in the U.K. there is a high threshold for review of a decision to certify a third country as safe provided that the Secretary of State has had regard to all relevant considerations. Also, Professor Greenwood appears to be correct that the law, as it now stands in the U.K., supports an assertion that it is necessary to examine not only legal interpretation of the applicable principles but also actual practice.

[127] In fact, Professor Hathaway also seems to accept that returning a person to a state that will not grant refugee status in the same way as the returning state will not constitute a violation of Article 33 of the Refugee Convention where the destination state would not, in practice, subject the refugee to refoulement. However, Professor Hathaway cautions that the inquiry into the partner state's laws and practices must not be formalistic, but must take primary account of verifiable practical realities.

[128] Finally, as Professor Hailbronner notes, Lord Scott of Foscote pointed out at paragraph 115 [of *Yogathas*] that the focus is on whether there is compliance with minimum standards, not whether the procedures and laws are identical. This could also be interpreted as being counter to the assertion that there is only one true interpretation and appears to be a point of contention between the experts. Professor Hathaway relies on the fact there is only one true interpretation and that as such, a court will begin with the interpretation of the Refugee Convention provision arrived at in its own jurisprudence in determining whether a party is safe, subject to exception for detail or nuance. It does not appear, however, that the House of Lords was denying there is only one true interpretation, but just that where U.K. law adds additional elements, it is not necessary to expect the same of other countries, as long as they meet all the necessary safeguards.

[129] A case of note is *Salas*, above, which involved the decision of the U.K. government to return an Ecuadorian national to the U.S., on the basis that the U.S. was a safe third country. The High Court held that, in reviewing whether the U.S. was a safe country, consideration of its law alone is not enough. The High Court concluded that it is also necessary to look at administrative practice to see if the practice itself gives rise to a real risk of return in breach of the Refugee Convention.

[130] The case was not discussed in detail by either party although the High Court directly addressed the dispute raised by both parties to this judicial review regarding the distinction between the standards for asylum and withholding, detention practice, and availability of legal counsel (albeit without providing an overly detailed analysis).

[131] The High Court held that the important consideration is whether there is a real risk that the U.S. would send the asylum seeker to another country otherwise than in accordance with the Refugee Convention. Although administrative practice may be so defective that there is a real risk of return, even if the government adopts a position counter to the "Convention's true interpretation," it does not follow that this leads in practice to a real risk of return.

[132] All grounds of challenge were denied and instead the U.K. court addressed in full the unique aspect of American law that provides discretion to a decision maker to grant asylum status even where all the requisite elements of refugee status are not met. The Court concluded that, in practice, there was little chance of the discretion being exercised unfavourably.

[133] It should be borne in mind that the facts before this Court seem to be significantly different than those before the High Court in *Salas* and clearly relate to a different time of practice and policies in the U.S.

[134] Finally, the respondent raises several Canadian cases in support of the approach in *Yogathas* to third countries. In *Minister of Employment and Immigration v. Satiacum* (1989), 99 N.R. 171, the Federal Court of Appeal held that in the absence of exceptional circumstances established by the claimant, in a Convention refugee hearing, similar to the principles in an extradition hearing, Canadian tribunals have to assume a fair and independent judicial process in the foreign country, subject to contrary evidence. This

principle was affirmed in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at page 725, and in *Kadenko v. Canada (Minister of Citizenship and Immigration)* (1996), 143 D.L.R. (4th) 532 (F.C.A.), leave to appeal to S.C.C. refused [[1996] S.C.C.A. No. 612 (QL)].

[135] The cases referred to above set some context and principles applicable to consideration of safe third countries. The cases turn on the evidence before the particular courts of actual practice and real risks of refoulement and refoulement to torture.

[136] On the basis of the expert evidence before this Court as to the international law principles at issue, the principles established by these cases are as follows:
(a) First, a party cannot merely rely on the existence of the agreement but must be open to reviewing compliance of the third country.
(b) Second, there is a presumption of compliance by the third country.
(c) Third, the focus of the Refugee Convention is on protection against refoulement and as long as the third party protects in practice against refoulement, other distinctions will not bar return.
(d) Fourth, the protection need not be refugee status so long as there is protection.
(e) Fifth, even if the other country applies different burdens of proof, as long as the practical results are attainable in the same way, the distinction is unimportant.

In summary, the key is actual protection from refoulement under a minimum recognized standard. In my view, that is the basic principle in paragraph 102(1)(*a*) of IRPA and is the reason for requiring the consideration of the practices and policies of the third country.
[137] Further, it is my view that interpretation of the relevant Conventions need not be absolutely identical but where there is a difference, it is necessary to review whether the difference in interpretation leads to a difference in treatment. It should also be presumed that where there is a difference in interpretation, there will be a difference in treatment. This is particularly germane in respect of the U.S.'s view of its obligations under Article 3 of the Convention Against Torture.

C. A brief overview of the U.S. system

[138] The basis for this judicial review application is that the American refugee determination system contains deficiencies that render it unsafe according to the Refugee Convention and CAT standards. For that reason, a basic understanding of the way in which the American refugee system operates is necessary for placing the submissions in their appropriate context. The applicants in the Georgetown affidavit and the respondent in the affidavit of Mr. Martin provide an extensive discussion of this system. A brief summation follows.

[139] The U.S. is a party to the 1967 Protocol to the Refugee Convention [*United Nations Protocol Relating to the Status of Refugees*, January 31, 1967, [1969] Can. T.S. No. 29], which places its international obligations equivalent to other parties for all relevant purposes. Protection decisions are currently made either by asylum officers under the Department of Homeland Security (DHS) or experienced lawyers sitting as immigration judges under the Department of Justice (DOJ). Which of the two decision makers makes the decision depends on the stage of the proceedings. When it is made before removal proceedings have been instituted against the claimant, the process is an "affirmative claim" decided by the asylum officer. If it is made after removal proceedings have begun, it is decided by an immigration judge, and is referred to as a "defensive claim." If the asylum officer does not grant asylum in the affirmative claim, he or she refers the case to an immigration court. The immigration judge considers the asylum application *de novo* and also considers withholding claims or CAT claims. A negative decision of the immigration judge can be appealed to the Board of Immigration Appeals (BIA) which decides questions of law *de novo* and defers to the immigration judge on facts. Judicial review to the Federal Court of Appeals is also possible without leave. Further appeal to the U.S. Supreme Court is available, although limited in a similar manner as in Canada.

[140] There are three major forms of protection available in the United States. The first, asylum, is the equivalent of recognition as a Convention refugee under section 96 of IRPA. Asylum entitles the person to permanent residence in the U.S., with all the associated rights attaching to that classification. The second,

withholding of removal based on convention grounds and the third, withholding of removal based on fear of torture under CAT (CAT protection), are basically the American equivalent to the PRRA [pre-removal risk assessment] process in Canada, with several significant distinctions that are discussed by the parties. Neither withholding process entitles the individual to permanent residence, family reunification, travel documents or insurance against release from detention. The claimant's status can be cancelled if home country conditions change.

[141] The most significant distinction between the asylum and withholding process is that asylum is granted if the applicant establishes a reasonable possibility of persecution while withholding and CAT relief are granted only if an individual establishes that persecution or risk of torture is more likely than not.

[142] U.S. legislation bars asylum claims filed later than one year after arrival in the U.S., with limited discretionary powers, subject to some exceptions. Those who are barred are entitled to be considered for withholding of removal by an immigration judge, but that is subject to the higher standard for withholding (i.e. whether persecution/torture is more likely to occur than not).

D. Analysis of American refugee law

[143] The following is an analysis of the matters which the applicants alleged constitute the basis for concluding that the practices and policies of the U.S. do not comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture.

(1) One-year time bar and standard for withholding

[144] When a claim for asylum is barred because of the one-year filing deadline, and is not subject to one of the legislated exceptions to the bar, the only recourse to protect against refoulement is an application for withholding of removal or CAT protection. Asylum claimants must show that they have a "well-founded fear of persecution" while withholding will only be awarded if the claimant shows that persecution is "more likely than not." The applicants' primary argument is that the time bar combined with the higher withholding standard leads to refoulement for refugees who could otherwise meet the asylum standard. The applicants make additional arguments that the bar has a disproportionate impact on gender and HIV claims, and that rejecting an asylum claim purely on the basis of missing a time limit is a breach of the Refugee Convention and Convention Against Torture.

[145] The one-year bar will not apply where there are "changed circumstances" or "exceptional circumstances," which are applied generously in situations such as serious illness, disability, trauma and ineffective counsel.

(a) Is the standard for withholding higher than asylum and will this result in refoulement?

[146] Mr. Martin (the former U.S. INS official), on behalf of the respondent, admits that the standard is different for withholding and asylum cases, but argues that in practice, the standard is the same. At paragraph 76 of his affidavit, Martin admits:

> It cannot be denied that the U.S. standards for applying the non-refoulement guarantee are unusual. I know of no other country that differentiates between the standards for Article 1 and Article 33 of the Convention in this fashion. As noted above, such a distinction was not argued for by any of the parties or *amici curiae* in the *Stevic* case. The Court introduced the distinction on its own, although it has now become a deeply ingrained part of U.S. practice. In my view, it would have been a decidedly better interpretation to apply the "reasonable possibility of persecution" test, which now governs asylum, to both forms of protection.

[147] It is his view that the applicants believe that the courts are applying sharper quantitative distinctions than actual practice can accomplish. Mr. Martin sets out statistics that demonstrate that the rate of acceptance of refugee claims in the U.S. is comparable to that in Canada. In 2005, the U.S. accepted 60% of claims adjudicated while Canada accepted only 51%. Global protection grants (asylum, withholding and CAT) were at 52%.

[148] The distinction in law between withholding and asylum appears to have been firmly entrenched by the U.S. Supreme Court. The BIA originally attempted to establish that the two standards should be the same in practice, despite the distinction in the phrasing of the legislation: see *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). This was expressly overruled in *Ins v. Cardoza-Fonseca*, 480 U.S. 421 (1987), at page 431, which states that the standard of "more likely than not" for withholding is much higher than the standard of a "well-founded fear" of persecution.

[149] At page 431, the U.S. Supreme Court held that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place." It stated that even a 10% probability of harm was sufficient for a "well-founded fear." Although the Court noted at page 448 that there are practical difficulties interpreting the standards, what it really stated was that there is some ambiguity in how the standard for asylum's "well-founded fear," should be interpreted. It does not say that, practically speaking, the two should be interpreted the same way [at pages 448-449]:

> The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. . .. We do not attempt to set forth a detailed description of how the "well-founded fear" test should be applied. Instead we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.

[150] Furthermore, that Court noted at footnote 31, that there are significant differences in the meanings between the two standards:

> How "meaningful" the differences between the two standards may be is a question that cannot be fully decided in the abstract, but the fact that Congress has prescribed two different standards in the same Act certainly implies that it intended them to have significantly different meanings.

[151] The Court found that the immigration Judge incorrectly applied the "more likely than not" standard to an asylum claim. This decision was reversed and sent back to the BIA for redetermination, as it had been decided on the wrong standard of proof. The different standards were later recognized by the BIA in *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The opinion evidence is that *Cardoza-Fonseca* represents the current state of the law. Thus, it was not the applicants who "quantified" the difference in standards between asylum and withholding; it was the U.S. courts.

[152] Professor Anker affirms that this type of analysis does translate into a real difference in how withholding and asylum claims are adjudicated. For example, the grant rate for withholding in the immigration courts is 13%—much lower than for asylum, which the immigration courts grant at a rate of 38%. There is no indication that the BIA or courts have continued to engage in a qualitative analysis after *Cardoza-Fonseca* overruled this approach (as set out in *Matter of Acosta).*

[153] The applicants' evidence is that there are two different standards, and that it is more difficult to establish a claim for withholding. Mr. Martin states that some judges may not make a distinction between the two — but this would appear to constitute an error under U.S. law as it now stands.

[154] Thus, the weight of the expert evidence is that the higher standard for withholding combined with the one-year bar may put some refugees returned to the U.S. in danger of refoulement. This creates a real risk. Although the Canadian system allows the decision maker to consider delay as a factor in determining subjective fear, it cannot alone result in a denial of status. If an adjudicator believed that the claimant had a reasonable fear of persecution, there would be no legal basis for the adjudicator to reject the claim in Canadian law. Canadian law is consistent with the Refugee Convention; the U.S. law, practice and policies are not.

(b) <u>Is the one-year bar a violation of the Convention Against Torture and Refugee Convention, apart from the withholding issue?</u>

[155] The applicants also challenge the legality of having a one-year time bar on other grounds. In

comparing the Canadian and American contexts, it is clear that the approach to time delay is very different. Although the respondent raises several cases for the assertion that delay is an important factor in refugee determination in Canada, the principal distinction is that delay is never determinative of an asylum claim. The respondent recognizes this fact. The applicants also note that although delay is not determinative in the Canadian context, it often is an important factor. In *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.), Justice Létourneau stated [at page 227]:

> The delay in making a claim to refugee status is not a decisive factor in itself. It is, however, a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant.

[156] Furthermore, Canadian judges have discretion to look at the reasons for the delay in determining whether it will be a factor or not. See for instance *El Balazi v. Canada (Minister of Citizenship and Immigration)* (2006), 57 Imm. L.R. (3d) 9 (F.C.).

[157] The case cited in the European context, *Jabari v. Turkey*, [2000] ECHR 369 (July 11, 2000), is a decision of the European Court of Human Rights. In that case, the European Court was called to interpret Article 3 of the ECHR (non-refoulement to torture). The applicant had not had the merits of her claim assessed because Turkish law required her to comply with a five-day registration requirement and she had not done so. The European Court, at paragraph 40, held that:

> In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention.

[158] The Court also held that the failure to consider her claim on the merits for this ground violated Article 13 of the ECHR, requiring national governments to ensure that an effective remedy and recourse exist where ECHR rights are in question. Notably, however, this is a particularly onerous timeframe and the case does not explicitly condemn all time-bars. The decision focuses on the unreasonableness of the Turkish time bar.

[159] The applicants also argue that exceptions to the one-year bar are permissive rather than mandatory, not sufficiently broad, and that those who do qualify for exceptions may be barred if they did not file within a reasonable period after one year (interpreted as six months). They point out that the UNHCR condemns filing deadlines. In the UNHCR comments on the draft agreement issued prior to the release of the STCA, the UNHCR notes at page 2 that it is concerned with the filing deadline. (Notably, in passing this comment, the UNHCR expresses its concern with the time bar relationship to the higher standard for withholding.) The UNHCR recommended that where one party would bar an applicant and the other would not, the applicant should receive the procedure in the favourable country. (This is also the specific recommendation of the UNHCR to Canada referred to in the Scoffield affidavit.)

[160] While Mr. Martin points to the asylum manual as support for his assertion that vulnerable groups are protected by the exceptions, the portions of the manual excerpted into the respondent's memorandum of fact and law are not that helpful in supporting this position as they are broad-based and not specifically focused to minority issues.

[161] Given the evidence, it would be unreasonable to conclude that the one-year bar, as it is applied in the U.S., is consistent with the Convention Against Torture and the Refugee Convention.

(c) <u>One-year bar: Impact on gender-based and other minority group claims</u>

[162] The applicants have also presented evidence that the one-year bar has a disproportionate impact on gender and sexual orientation claims. These claimants are more likely to delay their claims because of a lack of information and because of the shame these types of claimants often feel. The applicants make solid theoretical arguments about why this bar would have a disproportionate impact.

[163] The cases cited by the applicants in support of the finding that gender claims are particularly

vulnerable to the one-year bar is supported by the Canadian case of *Williams v. Canada (Secretary of State)*, [1995] F.C.J. No. 1025 (T.D.) (QL), at paragraph 7, where Justice Reed recognized that many female applicants delay because they do not know spousal abuse is a ground for a refugee claim. This decision was followed in *Elcock v. Canada (Minister of Citizenship and Immigration)* (1999), 175 F.T.R. 116 (F.C.T.D.), at paragraph 17, and several other cases cited by the applicants. A similar problem arises where there are psychological factors which cause delay in seeking refugee protection (see *Diluna v. Canada (Minister of Employment and Immigration)* (1995), 92 F.T.R. 67 (F.C.T.D.), at paragraph 8).

[164] Both the Anker and Musalo affidavits appear to rely on anecdotal evidence from lawyers rather than statistics or case law. The credible evidence is that this type of bar would have a serious impact on gender-based claims, and it is not clear whether the exceptions to the bar would assist these claimants. The Regulations provide exceptions for "extraordinary circumstances" such as physical or mental disability, "including any effects of persecution or violent harm suffered in the past."

(2) Categorical exceptions for criminality and terrorism

[165] There are two ways to be excluded from refugee protection under the Refugee Convention. First, Article 1(F) contains a series of exclusion clauses, including exclusion for persons who committed serious non-political crimes. Second, the principle of non-refoulement enshrined in Article 33(1) is subject to the exception for those who are a threat to security and a danger to the community. Article 33(2) (referring to Article 33(1)) provides that:

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. . .

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[166] Therefore, under the Refugee Convention, a person can only be refouled under these two exceptions.

(a) Exclusion for terrorism

[167] There are two U.S. provisions that contain exclusions from asylum for security reasons and there appears to be no conflict on this description of the exclusion. First, INA [*Immigration and Nationality Act*] §208(b)(2)(A)(iv) creates an exclusion for those who are a danger to the security of the U.S. and INA §212(a)(3)(B) provides a terrorism exclusion. The terrorist exclusion incorporates the general provision governing inadmissibility for security and related grounds under INA § 212. This provision contains a definition of "terrorist activities" at INA § 212(a)(3)(B) that applies to the exclusion from asylum under INA§208. Further, INA § 208(b)(2)(A)(iv) also excludes persons from protection falling under the general inadmissibility under INA§237(a)(4)(B). INA §237(a)(4)(B) incorporates the general terrorist activity principle under INA § 212(a)(3)(B) and INA § 212(a)(3)(F). INA § 212(a)(3)(B) is the general provision discussed above and (F) relates to association with terrorist organizations.

[168] Withholding has similar exclusions under INA § 241(b)(3)(B)(iv) except it only applies to being a "danger to the United States." Following the general inadmissibility provision, there is also a statement that an alien who is described in INA § 237(a)(4)(B) shall be considered an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the U.S.

[169] Engaging in a terrorist activity is defined in INA § 212(a)(3)(B)(iv)(VI) which includes:

212(a)(3)(B)(iv)(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training —

. . .

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

[170] Thus, there are two elements of subjectivity in the definition. First, the person contributing must know, or reasonably should know, that the transfer of funds involves material support. Second, the material support is to someone the person knows, or reasonably should know, has committed or plans to commit a terrorist act.

[171] As Mr. Martin points out, this provision is intended to bar ordinary applicants for a visa or for admission from permission to enter the United States. However, he admits that these provisions apply to refugee cases by a series of complicated cross-references and may operate to exclude some claimants from asylum or withholding. He states at paragraph 115 of his affidavit:

> As applied in the refugee setting, this is no doubt a severe provision, pressing the outer boundaries of the leeway provided to States by the Convention in applying the security-based exclusion provisions, but it reflects Congress' deep concern about terrorism and the difficulty of establishing proof about a supporter's knowledge of the organization to which she has given money.

[172] A critical point set out by Mr. Martin's affidavit at paragraph 112 is that the exclusions for terrorism applying to asylum and withholding do not apply to deferral of removal under CAT. There are extra protections that are delineated in the regulations provided by Mr. Martin at Exhibit H to his affidavit. Under [*Immigration Regulations*, 8 C.F.R. (2007)] § 208.16(b)(4)(2), any person falling within INA § 241(b)(3)(B) (which applies to both security exclusions and exclusions for having committed a particularly serious crime) cannot obtain regular withholding or CAT protection. However, if a person has been found entitled to protection under CAT and is subject to the mandatory denial of withholding in this manner, they shall be granted deferral of removal to the country where he or she is "more likely than not" to be tortured ([*Immigration Regulations*] § 208.17(a)).

[173] Thus, the obligations under CAT are treated separately from the provisions affecting refugees generally. While there is some acknowledgement of CAT obligations, the practices and policies related thereto are discussed later.

[174] The exclusions for terrorism set out above have been interpreted broadly in the decision *Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005). In that decision, it was clear a person can be refouled if there is a potential belief that a person may pose a danger. This is substantially different from the decision in *Suresh* where there is a requirement for an actual threat substantiated on objectively reasonable suspicion based on the evidence (paragraph 90 of *Suresh*). Mr. Martin does not deny the broad interpretation given to the exclusion clauses, essentially reading the "reasonable grounds" requirement to equate to "probable cause" (Martin affidavit, at paragraph 115). The BIA stated a broad interpretation, at pages 788-789:

> Where, under the circumstances, information about an alien supports a reasonable belief that the alien poses a danger—that is, any nontrivial degree of risk—to the national security, the statutory bar to eligibility is applicable.
> . . .
>
> The "reasonable grounds for regarding" standard is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security.

[175] Therefore, the standard of proof required in the U.S. for exclusion by reason of danger to national security is far lower than in Canada (making the person more susceptible to refoulement).

[176] The critical concern raised by the applicants is that the U.S.A. Patriot Act [*Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56 (2001)] expanded the definition of "terrorist activities". According to Professor Anker, the Patriot Act expanded the scope of the definition of "material support" that is under "terrorist activities" to include transferring funds or other financial benefit and it does not require the person to have knowledge of support of terrorism. The "material support" test provides in its current form (as described by Mr. Martin) that any non-citizen who has engaged in terrorist activity, the

definition of which includes providing material support to a terrorist organization or for terrorist act, is inadmissible.

[177] This test is further complicated by the fact that the provision has been interpreted to preclude a defence of duress or coercion. Mr. Martin states, at paragraphs 116-117 of his affidavit:

> One particular critique of the "material support" exclusion derives from circumstances in which the person giving support knows the group's or actor's terrorist or violent nature, and yet is constrained to go forward through pressure or coercion. Such situations may include child soldiers forcibly conscripted by a terrorist militia, revolutionary "taxes" or other provision of food, lodging, or supplies extorted at gunpoint by guerrilla forces, and money paid over to terrorist organizations to ransom a kidnapped relative.
>
> The administering authorities in the United States read the "material support" provision in the inadmissibility section, INA paragraph 212(a)(3)(B), to admit no exceptions for minor amounts of assistance or support provided under duress or coercion. See *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006). If this provision were applied inflexibly in that manner to refugee cases, it would, in my view, be inconsistent with the Convention. . . .

[178] The decision in *In re S-K-*, 23 I&N Dec. 936 (BIA 2006) explicitly affirms the fact that the intent to contribute to a terrorist organization is unnecessary.

[179] In *S-K-*, at pages 943-944, the BIA first stated that it does not matter if there was intent to provide support:

> Nor do we understand the decision in *Singh-Kaur v. Ashcroft*, *supra*, to require a showing of an intent on the part of a provider of material support to further a particular admission-barring or asylum-barring goal of a terrorist organization. Rather, the statute is clearly drafted in this respect to require only that the provider afford material support to a terrorist organization, with the sole exception being a showing by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was of that character. Section 212(a)(3)(B)(iv)(VI)(dd) of the Act. We thus reject the respondent's assertion that there must be a link between the provision of material support to a terrorist organization and the intended use by that recipient organization of the assistance to further a terrorist activity. Especially where assistance as fungible as money is concerned, such a link would not be in keeping with the purpose of the material support provision, as it would enable a terrorist organization to solicit funds for an ostensibly benign purpose, and then transfer other equivalent funds in its possession to promote its terrorist activities. [Footnote omitted.]

[180] The applicants claim that the decision of the BIA in *Arias v. Ashcroft*, 143 Fed. Appx. 464 (3rd Cir. 2005) also states that duress is not a defence. In this case, however, the BIA found that the claimant had provided support voluntarily. The respondent simply notes that the decision in *Arias* was not designated a precedent decision and was upheld on other grounds, and that the U.S. system is working in a manner to ensure the interpretation of the exclusion for material support is done in such a way as to be consistent with international law.

[181] The respondent does not deny that there is a statutory exclusion pertaining to persons who give minimal amounts of support or support as a result of coercion. There is also no denial that if there is no defence for duress that American law would not adhere to international standards.

[182] The weight of the opinion evidence viewed in the context of the *Arias* decision is that there is no defence of duress in these circumstances. This is a significant departure from both international law and Canadian law. The absence of the defence of duress turns child soldiers, those forced (often at gunpoint) to support terrorist groups, and those coerced to pay revolutionary taxes, into terrorists in the U.S. system and subject to refoulement. If this principle were applied to the Canadian immigration experience, persons coerced by the LTTE Tigers [Liberation Tigers of Tamil Ealam] of Sri Lanka would no longer be eligible for refugee treatment and/or protection.

[183] Mr. Martin points to the availability of the extraordinary, discretionary remedy of a waiver of inadmissibility by the Secretary of State or of Homeland Security. This was determined in *S-K-* — the DHS agreed it would apply. The applicants note that this is a very rare remedy which has only been used twice, to their knowledge. The availability of the waiver is recognized in *S-K-*, at page 950:

Accordingly, I concur in the majority's result. I note, however, that the law provides for a limited waiver of the material support bar to be exercised by the DHS in appropriate cases. Section 212(d)(3) of the Act. I suggest that the DHS may wish to consider this respondent as someone to whom the grant of such a waiver is appropriate.

[184] The waiver reads as follows:

212(d)(3)(B)(i) The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may conclude in such Secretary's sole unreviewable discretion that subsection (a)(3)(B)(i)(IV)(bb) or (a)(3)(B)(i)(VII) shall not apply to an alien, that subsection (a)(3)(B)(iv)(VI) shall not apply with respect to any material support an alien afforded to an organization or individual that has engaged in a terrorist activity, or that subsection (a)(3)(B)(vi)(III) shall not apply to a group solely by virtue of having a subgroup within the scope of that subsection. The Secretary of State may not, however, exercise discretion under this clause with respect to an alien once removal proceedings against the alien are instituted under section 240.

[185] Mr. Martin attests to the fact that the DHS is uncertain as to how this waiver will apply in these circumstances:

According to the latest information available to me, DHS is working to develop its final guidance or policy on applying the waiver to asylum cases of this type.

[186] The state of the law with respect to waivers is at best uncertain. There is insufficient evidence that the waiver, either in principle or in practice, ameliorates the unusually harsh provisions of U.S. law.

[187] Both parties review Canadian jurisprudence relating to exclusion from the refugee definition under Article 1(F) [of the Refugee Convention]. Neither mention any cases pertaining to section 34 of the IRPA, which relates to security exclusions from admissibility, but a plain reading of the provision does not support the same kind of broad-based exclusions as the American provisions.

[188] Canadian jurisprudence recognizes that the exclusion under Article 1(F) does not apply where there are involuntary acts. On the authority of *Canada (Minister of Citizenship and Immigration) v. Asghedom* (2001), 210 F.T.R. 294 (F.C.T.D.), at paragraph 22, it is necessary to consider duress when dealing with exclusion for war crimes or crime against humanity (see also the leading case of *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.) and *obiter* in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.)). The applicants, however, do not cite any cases relating to duress and exclusion in the terrorist context.

[189] There is Canadian jurisprudence relating to persons claiming refugee status on the basis of extortion by terrorist groups; these persons are not barred under terrorist exclusions. For instance, in *Kathirgamu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 300, a woman was forced to cook for the LTTE because she could not afford to pay the extortion they demanded. There was no dispute by any party in that case or by the Board (either IRB at the hearing or before the Federal Court) that extortion was a legitimate ground to claim fear of persecution.

[190] It is clear that the Canadian jurisprudence is less restrictive, adding further support to the proposition that the American provisions create a real risk of refoulement. In the absence of evidence that Canadian law is more generous than or is not consistent with the provisions of the Refugee Convention and CAT, I find that Canadian law reflects the international obligations under both Conventions.

[191] Based on the evidence, and where there is conflict between the experts I have preferred the evidence of the applicants' experts, it would be unreasonable to conclude that U.S. law in this area does not put genuine refugees in danger. It is difficult to imagine how the GIC could have reasonably concluded that the U.S. complies with the Refugee Convention when the law allows the exclusion of claimants who involuntarily provided support to terrorist groups. The terrorist exclusions are extremely harsh, and cast a wide net which will catch many who never posed a threat. In returning claimants to the U.S. under these circumstances, the weight of the evidence is that Canada is exposing refugees to a serious risk of

refoulement and torture which is contrary to the applicable articles of the Refugee Convention and CAT.

(b) Exclusion for serious criminality

[192] A person is excluded from being granted asylum if, having been convicted of a particularly serious crime, they constitute a danger to the community of the United States; INA § 208(b)(2)(A)(ii). For the purpose of that clause, an alien convicted of an aggravated felony is deemed to be convicted of a particularly serious crime; INA § 208(b)(2)(B)(i). An aggravated felony is defined in INA § 101(a)(43). Sentences for certain crimes under INA § 101(a)(43) can range as low as one year, including theft and burglary punishable by imprisonment of one year.

[193] A person convicted of a particularly serious crime is also excluded from eligibility for withholding of removal. Thus, INA § 241(b)(3)(B)(ii) excludes a person who, having been convicted of a particularly serious crime, is a danger to the community of the United States, just like its asylum counterpart under INA § 208. However, in contrast to the asylum provision, after the withholding exclusion provision there is a further interpretation applicable to INA § 241(b)(3)(B)(ii) which deems an alien convicted of an aggravated felony sentenced to five years as having committed a particularly serious crime. Thus, the scope of the provision is narrower. That said, the U.S. Attorney General can consider certain offences to be particularly serious even if the aggregate sentence is less than five years. Thus, while the likelihood of refoulement is higher than in Canada, it is unclear whether the U.S. interpretation is inconsistent with generally accepted principles on what constitutes a sufficiently serious crime.

[194] Although the Refugee Convention contains an exception to the protection against refoulement, Article 3 of CAT permits no such exception. However, the same exclusion considerations do not appear to apply to persons who apply for CAT protection. There are extra protections that are delineated in the regulations as stated by Mr. Martin at Exhibit H to his affidavit. Under [*Immigration Regulations*] § 208.16(b)(4)(2), any person falling within INA § 241(b)(3)(B) (which applies to both security exclusions and exclusions for having committed a particularly serious crime) cannot obtain regular withholding or CAT protection. However, if a person has been found entitled to protection under CAT and is subject to the mandatory denial of withholding in this manner, they shall be granted deferral of removal to the country where he or she is more likely than not to be tortured ([*Immigration Regulations*] § 208.17(a)) Thus, the obligations under CAT appear to be protected because no one can be refouled even if they are found excluded as a result of serious criminality.

[195] While Canada may be more liberal with respect to exclusion from asylum for serious criminality, deportation to torture where serious criminality is involved in theory is not the norm in the U.S. In Canada, there is no such legislative protection and *Suresh*, some argue, suggests that deportation even where there is a risk of torture may be legal in extraordinary circumstances.

[196] While the likelihood of refoulement is higher than in Canada, it is unclear whether the U.S. interpretation is inconsistent with generally accepted principles on what constitutes a sufficiently serious crime. Although the impact of considering a five-year sentence serious enough to render a claimant ineligible may be harsher than Canada, it is not so different from the Canadian law and of the Refugee Convention as to show that the GIC was unreasonable to accept that the U.S., at least in theory, is not violating the Refugee Convention.

(3) Interpretation of the term “persecution” and claims based on particular social group and gender claims

[197] The applicants raise numerous areas in which the U.S. interpretation of aspects of the definition of refugee in the Refugee Convention diverges from Canadian and/or international law. The submissions on the term “persecution” and claims based on particular social group (PSG) and gender are somewhat interrelated, and are addressed in this section of these reasons.

(a) Gender claims

[198] Neither the applicants nor the respondent dispute that the role gender plays in claims of

persecution in the U.S. is uncertain. What the parties dispute is the significance of this state of flux on asylum seekers. In 1999, the BIA determined in *In re R-A-* [22 I&N Dec. 906] (BIA 1999), vacated decision, that a victim of domestic violence was not a member of a PSG, and even if she were, her husband did not persecute her because of this membership.

[199] In 2000, the DOJ issued proposed regulations affirming that only immutable/fundamental characteristics are necessary to establish a PSG and that gender is clearly an immutable trait. It also re-interpreted all of the components of a PSG to enable gender-related claims, including the difficult area of domestic violence claims, to qualify.

[200] In 2001, Attorney General Janet Reno vacated the BIA's decision in *R-A-*. She remanded the case to the BIA, directing them to reconsider it when the regulations were final. John Ashcroft applied the same process. However, the regulations have never been issued in final form and the law remains at best uncertain.

[201] The DHS filed a brief in February 2004 that affirms many of the principles in the draft regulations. The brief definitively states, at page 25, that the standard from *Matter of Acosta*, above, in which the Board articulated the "immutable characteristic" test, as recognized in the U.K. and Canada, should be followed. But despite these positive movements, there is still no definitive law on the issue.

[202] According to Professor Musalo, the DHS filed another brief on February 22, 2005. She states that it instructs DHS trial attorneys that the only gender-based claims currently cognizable under the U.S. law are those involving female genital cutting, until *In re R-A-* is conclusively decided. She has not produced sufficient documentation or citation to allow this to be verified.

[203] However, I accept Professor Musalo's evidence that Mr. Martin's quantitative analysis of the acceptance of these types of claims misses the point that the protection not being solidified may lead to arbitrary decision making. Even if the draft regulations and the DHS brief demonstrate a movement towards recognition of gender claims in a manner consistent with Canada, this is not the current state of the law. Further, although the DHS brief recognizes that membership in a PSG should be defined as immutable and innate characteristics, it goes on to state, at pages 18 to 24, that the Court's application of the law has been inconsistent.

[204] There is no question that the Canadian standard accepts the "immutable and innate characteristics" definition of particular social group (see *Ward*, above). The UNHCR also advocates for this type of approach. In the E.U. context, Professor Hailbronner notes that the European countries have not evolved a generally accepted standard of protection with regard to domestic violence as persecution. However, Professor Hailbronner admitted during cross-examination that most European states will grant some kind of protection with respect to domestic violence, arising out of a sense of legal obligation.

[205] The question to be determined is whether this state of flux in the U.S. law, which is really not in dispute by any party, gives rise to a likelihood of refoulement. Interestingly, the Standing Committee on Citizenship and Immigration recommended [*The Safe Third Country Regulations: Report*, December 2002] to the Canadian government that women claiming protection from domestic violence be a blanket excluded category under the STCA. Specifically it stated that [Recommendation 2]:

> The Committee recommends that until such time as the American regulations regarding gender-based persecution are consistent with Canadian practice, women claiming refugee status on the basis that they are victims of domestic violence be listed as an exempt category under section 159.6 of the proposed regulations.

[206] There is clearly a serious concern that women with these claims are not being sufficiently protected under American law and that concern is not refuted by the evidence submitted by the respondent. Obviously if these women are being denied asylum protection, the secondary withholding of removal provision would not protect them and the CAT protection may impose too high a threshold of danger to protect women subject to domestic violence. This could result in a real risk of refoulement, contrary to the Refugee Convention. Since the GIC has an obligation to conclude positively that the U.S. is compliant, it

would be unreasonable to do so in the face of the uncertainty in U.S. law.

(b) "Persecution"

[207] The American interpretation of persecution, although giving rise to some concerns, does not appear to conclusively give rise to a risk of refoulement. The applicants have not provided sufficient evidence of U.S. practice in this regard nor shown that the GIC's conclusions on this aspect are unreasonable.

[208] The applicants argue that the U.S. is unsettled in its approach to non-state agents. A failure to recognize non-state agents as persecutors is counter to Canadian and U.K. interpretations and is also contrary to the UNHCR interpretation (which provides guidance, rather than an expression of law). However, the evidence supports a reasonable conclusion that the U.S. does recognize persecution by non-state agents, as long as the state cannot protect a person from the action.

[209] The applicants further argue that neither the courts nor the government have provided a clear definition of persecution in the U.S. The draft regulations (attached as Exhibit K to the Martin affidavit) indicate that Congress believes the definition to be well established by court decisions, specifically that in *Matter of Acosta*, above.

[210] Professor Anker admits this is the definition the BIA often applies. However, Anker contends that the lack of true definition can lead to confusion. For instance, the Court of Appeals for the First Circuit in *Bocova v. Gonzales*, 412 F.3d 257 (1st Cir. 2005), recognized that persecution is not defined and held that it had to look to BIA decisions to determine its true meaning. It then held that the BIA has eschewed rigid rules for determining persecution, preferring analysis on a case-by-case basis. The Court did recognize that BIA decisions have provided guidance as to the definition.

[211] On this issue, as unsettled and as unsettling as the U.S. law may be, there does not appear to be enough evidence provided to establish that the lack of definition would result in refoulement. There is a reasonable basis for the GIC to conclude otherwise.

[212] Finally, the applicants argue that the respondent does not recognize persecution based on mixed motives. Unlike in Canada, where the Refugee Convention definition is directly incorporated into IRPA, the definition in the U.S. of refugee is expressed in its legislation as requiring persecution "on account of" instead of in accordance with the wording in the Convention "for reasons of." This has arguably created a problem for persecution arising from "mixed motives" cases.

[213] Both Professor Anker and Mr. Martin agree that the leading case on persecution in the U.S. is *In re S-P*, 21 I&N Dec. 486 (BIA 1996). In that precedent case, it was formally recognized that the evidence may suggest mixed motives of the persecutor, at least one or more of which is related to a protected ground. Mr. Martin notes this remains the law.

[214] However, it is also true that the *Real ID Act of 2005* [Pub. L. 109-13, Div. B, Title II], passed only in 2005, seems to make the requirement stricter, in that although it recognizes that persecution for mixed motives can exist, there must be a central focus on the enumerated grounds of persecution. Although Mr. Martin argues that the most recent clarification of this definition in the Real ID Act will likely not result in any real changes, this is purely speculative.

[215] The DHS brief notes the use of the term "central" but states that it still allows for mixed motives; it just precludes the Convention ground from being incidental or tangential. The U.S. Supreme Court emphasized that in order for persecution to be "on account of" one of the Convention grounds, there must be evidence that the persecutor seeks to harm the victim on account of the victim's possession of the characteristic at issue: see *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). However, that case did not say anything that would preclude mixed motives. Both parties agree that the way in which the lower courts and the BIA have interpreted mixed motives is inconsistent.

[216] Given the wording of the Refugee Convention's definition of persecution, and Canada's

interpretation and application of that term which I take to be the proper interpretation, the U.S. practice of inconsistency in application is sufficient to show that it is unreasonable to conclude that the U.S. is in compliance.

(4) Corroboration and credibility

[217] The applicants maintain that amendments introduced in the Real ID Act that allow for rejection of a refugee claim on the basis of lack of credibility and lack of corroboration elevate the standards for rejection to a level exceeding that in Canada.

[218] In *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.), at page 305, Justice Heald explicitly held that testimony of a claimant in Canada is presumed credible. Also, it is the Canadian position that a trier of fact must not deny a person asylum on credibility issues where the credibility issues relate to peripheral issues of the claim. See for instance *R.K.L. v. Canada (Minister of Citizenship and Immigration)* (2003), 228 F.T.R. 43 (F.C.T.D.), at paragraph 14.

[219] Under the Real ID Act, a presumption of credibility is explicitly denied. Furthermore, although the grounds upon which credibility is assessed are the same as in Canada (for instance, plausibility, consistency, and demeanour), the trier of fact is entitled to base these findings of credibility "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor"; see INA § 101(a)(3)(B)(iii).

[220] With respect to corroboration, the Real ID Act provides that:

> 101(a)(3)(B)(ii) The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. . . . Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

[221] Unlike the discrepancy between the Canadian and American standards relating to credibility, the corroboration provision amended by the Real ID Act does not appear to drastically depart from Canadian and international norms.

[222] Canadian jurisprudence establishes that the failure of an applicant to provide documentation cannot be associated with a credibility finding, in the absence of evidence to contradict the allegations: see *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Ahortor v. Canada (Minister of Employment and Immigration)* (1993), 65 F.T.R. 137 (F.C.T.D.). The jurisprudence is clear that the IRB may not discredit an applicant's testimony simply because of an absence of documentary evidence, particularly in situations where it would not be reasonable to expect the applicant to have it at his or her disposal.

[223] However, the IRB may reject a claim because of an absence of documentation if there was ample opportunity to seek the documentation and if the Board does not accept an applicant's explanations for failing to produce the evidence: *Singh v. Canada (Minister of Citizenship and Immigration)* (2003), 233 F.T.R. 166 (F.C.T.D.). This does not appear materially different from the U.S. law, where there is provision made to exempt persons who could not reasonably obtain that evidence.

[224] Furthermore, according to Mr. Martin, the Real ID provision was intended to solidify the standard set by the BIA in *In re S-M-J-*, 21 I&N Dec. 722 (BIA 1997), which had been variously applied and not applied. Professor Anker, for the applicants, admits the standard as established in *S-M-J-*, is reasonable and appropriate doctrine but maintains that it is not followed in practice. However, Anker also notes that the Real ID Act does not codify all of the principles in *S-M-J-*. In particular she claims it does not codify the requirement in *S-M-J-* that an applicant should be given an opportunity to explain why the evidence is not presented. Notably, however, the legislation also does not codify to the contrary.

[225] Professor Anker also raises concern with the limited scope afforded to judicial review of decisions involving corroboration. § 101(d)(e) of the Real ID Act provides that INA § 242(b)(4) is amended by adding that the court shall not reverse a determination made by a trier of fact with respect to the availability of corroborating evidence unless the court finds that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

[226] However, according to Mr. Martin, this is just a codification of the same "substantial evidence" standard of review that applies to all other factual determinations (Martin affidavit, at paragraph 180). On reading Mr. Martin's overview of this standard of review, although in wording it is different from the Canadian standard of patent unreasonableness, in function it appears similar.

[227] It would appear from a comparison of the two standards that the American standard is not inconsistent with either the Canadian standard or the international norm.

(5) Detention and access to counsel

[228] The applicants raise these matters as factors that aggravate the risk of refoulement. There does not appear to be a solid evidentiary basis provided by the applicants in their materials to demonstrate that detention practices and lack of access to counsel could result in the refoulement of refugees.

[229] Any assertions that failure to provide legal counsel would result in a higher likelihood of refoulement could apply equally in Canada as in the United States. Firstly, only six provinces have an established legal aid process available for immigration claimants (though these include the provinces with the highest number of refugee claimants). The rest rely on pro bono representation and refugee advocacy clinics. Secondly, the provision of legal aid is subject to similar limitations as the pro bono system in the United States, including underfunding and screening for merit. Furthermore, even the applicants' expert, Professor Anker, notes that "international law does not specifically call for this measure as part of the implementation of a fair adjudication system." The U.K. High Court also accepted that international law does not require the provision of legal advice and assistance to asylum seekers.

[230] The applicants try to make a link between detention and lack of legal representation. The statistics suggest that asylum seekers are six times more likely to succeed when they are represented and that twice as many detainees are unrepresented as asylum seekers who are not detained (Asylum Representation, Summary Statistics, prepared by Dr. Andrew I. Schoenholz, Director of Law and Policy Studies, Institute for the Study of International Migration, Georgetown University, May 2000). Furthermore, it is alleged that it is far more difficult to obtain corroboration for claims from detention. Even accepting the applicants' argument that Americans detain people more readily than Canadians, there is still insufficient evidence to support a finding that this has resulted in refoulement to persecution (much less to torture).

[231] Likewise, there is insufficient evidence to reasonably conclude that the U.S. process of expedited removal, highly criticized by the UNHCR, as well as the Standing Committee on Citizenship and Immigration, would itself lead to refoulement.

[232] However, the problem with detention and expedited removal under the U.S. system and where it runs afoul of international norms is that detention, according to the weight of the evidence, is used as a penalty. The matter of detention is aggravated by the fact that, unlike Canada's legislated criteria, U.S. parole criteria are inconsistent—a matter which Mr. Martin agrees is an accurate description of the U.S. system.

[233] Again, unlike Canada, parole is not determined by an independent decision maker. There is no appeal and very limited rights to *habeas corpus*. This absence of an independent review is contrary to international law.

[234] Moreover, the expert evidence is that detention and parole are inconsistently applied to certain groups such as those of Arab descent and/or the Muslim faith.

[235] The effect of this increased use of detention is, so it was argued, to make contesting refugee cases more difficult. From that proposition, it is argued that the inability or difficulty in fighting a case results in unjustified losses which results in refoulement.

[236] With respect, while there is some logic in the proposition that fighting a case from jail is troublesome, it is difficult to establish with sufficient certitude that systemically there are a significant number of cases lost which should not have been. It cannot be said that this in itself is contrary to international conventions.

(6) Summary

[237] The applicants have raised a number of issues that they say show that the U.S. does not meet the standards of Article 33 of the Refugee Convention. I have found some, such as the matter of serious criminality and persecution, as forming no basis for undermining the reasonableness of the GIC's determination that the U.S. is a safe country through its compliance with the international conventions.

[238] I have found that some other issues raise concerns about compliance, such as the use of expedited removals and use of detention, which absent more, are not sufficient in themselves to undermine the reasonableness of the GIC's designation. However, these issues in combination with more clear contradictions with Convention provisions call the reasonableness of the GIC's determination into question.

[239] Finally, there are a series of issues, which individually, and more importantly, collectively, undermine the reasonableness of the GIC's conclusion of U.S. compliance. These include: the rigid application of the one-year bar to refugee claims; 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. Lastly, there are the vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country.

[240] These instances of non-compliance with Article 33 are sufficiently serious and fundamental to refugee protection that it was unreasonable for the GIC to conclude that the U.S. is a "safe country." Further, in the light of this evidence it was even more unreasonable for the GIC not to engage in the review of U.S. practices and policies required by subsection 102(2) of IRPA.

VI. INTERPRETATION AND APPLICATION OF CAT

[241] When the United States ratified the Convention Against Torture (CAT) in 1994, it did so subject to several reservations and understandings (which amount to interpretative guidelines). The following reservations are at issue in this case:

> II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:
>
> (1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering . . . .
>
> . . .
>
> (d) That with reference to article 1 of the Convention, the United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.
>
> . . .
>
> (2) That the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in article 3 of the Convention, to mean'if it is more likely than not that he would be tortured.'

[242] Mr. Martin includes the regulations that discuss the incorporation of CAT and CAT protection at

Exhibit H (all subsequent references are to the *Immigration Regulations*, 8 C.F.R. The *Immigration Regulations* explicitly incorporate the actual definition of Article 1 of CAT, "subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." (*Immigration Regulations*, § 208.18(a)) . The application of Article 3 is subject to the same proviso (*Immigration Regulations*, § 208.16(c)).

[243] More specifically, § 208.16(c)(2) states that the burden of proof is a balance of probabilities ("more likely than not"). This is the same standard as in Canada: see *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 239 (C.A.). The *Immigration Regulations* also incorporate the specific intent requirement at § 208.18(a)(5), which provides that to constitute torture, "an act must be specifically intended to inflict severe physical or mental pain or suffering." Finally, at § 208.18(a)(7), "[a]cquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."

[244] The applicants argue that the requirement for a specific intent to inflict torture may put refugees at risk. The effect of this requirement is illustrated in the following cases. *In re J-E-*, 23 I&N Dec. 291 (BIA 2002), the BIA considered whether the Haitian government's indeterminate detention of criminals prior to their hearing constituted torture. The claimant, who had been convicted of selling cocaine, argued that he would be subject to torture because of this indefinite period of detention in inhuman conditions.

[245] The BIA states, at page 298:

> . . . the act must be *specifically intended* to inflict severe physical or mental pain or suffering. . . . This specific intent requirement is taken directly from the understanding contained in the Senate's ratification resolution. . . . Thus, an act that results in unanticipated or unintended severity of pain or suffering does not constitute torture. In view of the specific intent requirement, the Senate Foreign Relations Committee noted that rough and deplorable treatment, such as police brutality, does *not* amount to torture. . . .

[246] The BIA found, at pages 300-301, that although the practice was deplorable,

> . . . there is no evidence that Haitian authorities are detaining criminal deportees with the specific intent to inflict severe physical or mental pain or suffering. . . .
> Although Haitian authorities are intentionally detaining criminal deportees knowing that the detention facilities are substandard, there is no evidence that they are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture.
> The record establishes that Haitian prison conditions are the result of budgetary and management problems as well as the country's severe economic difficulties.

[247] Mr. Martin also points to the decision in *Zubeda v. Ashcroft*, 333 F.3d 463 (2003), a decision of the Court of Appeals for the Third Circuit as applying a less exacting standard. The Court held, at page 473 that:

> Although the regulations require that severe pain or suffering be "intentionally inflicted," *id*., we do not interpret this as a "specific intent" requirement. Rather, we conclude that the Convention simply excludes severe pain or suffering that is the unintended consequence of an intentional act. . . . The intent requirement therefore distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct. However, this is not the same as requiring a specific intent to inflict suffering.

[248] The Court later stated, at page 474, "requiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture."

[249] While *J-E-* is the leading case in the United States, there remains a serious question as to the difference between the U.S. view of Article 3 and the Canadian view.

[250] As to the matter of the American interpretation of "state acquiescence," in *Y-L-*, the BIA held that acquiescence required a "wilful acceptance of the torturous activity." In that case, the BIA found no state acquiescence where the claimant feared torture by gangs in Jamaica that he had associated with,

accompanied by the possible involvement of corrupt police, because a few rogue agents acting against the country's laws did not constitute state acquiescence.

[251] The evidence establishes that the state of U.S. law in respect of "state acquiescence to torture" is found in *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004), at page 170. The Court of Appeals rejected a BIA decision that held that state acquiescence to torture required wilful acceptance of torturous activity. The U.S. Court of Appeals was very clear that the fact that even if police torture was not committed as part of their official duties, the threshold for state acquiescence was met.

[252] In coming to this conclusion, the Court of Appeals considered the language of CAT itself and the U.S. conditions which accompanied their ratification of CAT. At page 171, the Court noted that the Senate voted in favour of a condition that "that both actual knowledge and 'willful blindness' fall within the definition of the term 'acquiescence.'" The Senate voted in favour of this condition.

[253] There is some dispute in the expert evidence that U.S. law holds that a state has not acquiesced to torture by non-state agents where the state is powerless to control or stop the torture.

[254] Although neither party provided evidence on Canadian law on these issues, I would refer to the following passage from Lorne Waldman's text *Immigration Law and Practice*, 2nd ed., loose-leaf (Toronto: Butterworths, 2006), Vol. 1, at paragraph 8.26, footnote 2:

> It is significant to note that the CAT does require state complicity so that in circumstances where there is no acquiescence on the part of the state to the commission of the acts, but the state is unable to provide protection, the acts will not constitute torture as defined by Article 1 of CAT.

[255] It is in the area of security and CAT protection where there is a significant departure between Canadian and international principles and the approach and practices of the U.S. It was the applicants' contention that refoulement to torture is not prohibited in the U.S. or if prohibited, it is permitted in any event by practice.

[256] The expert evidence is that the U.S. takes a narrow interpretation of the prohibition of refoulement to torture. This is consistent with the U.S. action in putting in a reservation against torture when it ratified the CAT as discussed in paragraph 241.

[257] In respect of this aspect of the interpretation of the international conventions, there is some guidance from the Supreme Court in *Suresh*. The Supreme Court recognized that Article 3 of CAT is an absolute prohibition against deportation to torture. Since CAT is not domestic law, the Supreme Court found that the domestic prohibition was contained in section 7 of the Charter. Because courts are generally loath to make unequivocal statements beyond that which is necessary to decide a case, the Supreme Court went on to speculate that there might someday in some unforeseen circumstance be an "exceptional circumstance" justifying departure from this norm. This is hardly an approval of refoulement to torture.

[258] It is evident that Article 3 of CAT is an absolute bar against removal to torture. That prohibition is also part of Canadian law. Canada will not remove a person who is likely to face death (*United States v. Burns*, [2001] 1 S.C.R. 283) or torture (*Suresh*).

[259] The evidence of American law is equivocal. U.S. law authorizes the acceptance of assurances from another country that it will not torture a deportee but neither U.S. law, nor certainly its practice, considers that deportation to a country where torture is a likely occurrence to be an absolute bar to deportation. The CAT prohibits deportation to torture where it is reasonably likely. In other words, a deporting country who knows or ought to know that torture would likely occur cannot deport a person into those circumstances.

[260] While this is not the Maher Arar case and this Court is not trying that case, the Court can take judicial notice of the findings of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar [*Report of the Events Relating to Maher Arar*, Ottawa: The Commission, 2006] (the Arar Report). Although the U.S. did not participate in those proceedings, it advised the Commission

that it complied with Article 3 of CAT.

[261] The facts in the Arar case give one serious cause to doubt that assurance. It may be that the assurance is based on a narrow interpretation of Article 3 but it would be an interpretation which is at odds with Canadian understanding of the obligations under CAT (see IRPA, paragraph 102(2)(*b*)).

[262] Specifically, in this regard, the applicants' submissions and evidence that the U.S. does not comply with Article 3 are credible. Those submissions and evidence are supported by a real life example and therefore more credible than the respondent's evidence. It was unreasonable, given the evidence, for the GIC to conclude that the U.S. meets the standards of Article 3 of CAT.

[263] Further, but standing as a distinct matter, the Arar Report and the circumstances examined should have at the very least caused a thorough and comprehensive review of U.S. practices and policies. It is difficult to understand how or why the obligation to have a continuing review, mandated by subsection 102(3), was not immediately put into operation on an urgent basis. There is no evidence of any such thing occurring.

VII. FAILURE TO REVIEW

[264] In addition to the matter of the preconditions to the Regulations, the applicants allege that the government has failed to conduct the required reviews of the STCA and the conditions for refugee claimants in the U.S. It is necessary to examine the nature of this duty to determine whether the GIC has complied with its obligations.

[265] Subsection 102(3) of IRPA requires a continuing review of factors in subsection (2). The legislation provides specifically that:

102. . . .

(3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country.

[266] On October 12, 2004, the GIC adopted Directives for ensuring a continuing review of factors set out in subsection 102(2) of the *Immigration and Refugee Protection Act* with respect to countries designated under paragraph 102(1)(*a*) of that Act (Directives). The Directives do not impose a particular timeline for review but state:

1. The Minister of Citizenship and Immigration shall undertake a review, on a continuous basis, of the factors set out in subsection 102(2) of the *Immigration and Refugee Protection Act* with respect to the countries designated under paragraph 102(1)(*a*) of that Act.

2. The Minister of Citizenship and Immigration shall report to the Governor in Council on the review undertaken under section 1 on a regular basis, or more often should the circumstances warrant.

[267] Neither the legislation nor the Directives authorize a specific time frame for review. Nor is there a legislated format for review. However, the use of the phrases "continuous" and "regular" suggest that a failure to review in the more than two years raises the issue of whether there has been compliance with the expressed obligation.

[268] In the absence of a specific time frame established in the legislation, such a review must be ongoing consistent with the word "continuing." This does not necessarily require a minute-by-minute review but it does require a review on a reasonably continuous basis consistent with the facts and circumstances as they develop from time to time.

[269] There has still been no review of the subsection 102(2) factors. The applicants point to the cross-examination of Bruce Scoffield, the principal affiant for the respondent, to support its argument that the

respondent cannot provide evidence of a systematic, continuing review of U.S. policies and practices under the Refugee Convention and CAT. The respondent has filed no evidence in its submissions to refute this challenge. As the applicants have pointed out throughout their submissions, numerous changes in U.S. law have arisen since December 2004, not least of which is the Real ID Act upon which several allegations were founded.

[270] Mr. Scoffield states that the Government has made public monthly statistical reports prepared in accordance with UNHCR's monitoring plan, held regular meetings with several NGOs including CCR, and received extensive input that he testified was being taken into account during the review of the Agreement's first year of implementation. However, he makes only a blanket statement that the Minister will report formally to the GIC without specifying a projected timeline. The Minister has not established a review process nor has it reported to the GIC.

[271] The respondent has complied with the requirement at paragraph 8(3) of the STCA for a one-year review by both parties in cooperation with UNHCR; the document was released in November 2006. However, that is not the review mandated by Parliament nor is it sufficient to meet the obligation of continuous review to ensure ongoing compliance.

[272] Although there is no specific instruction in the legislation as to what is to be done following a review, it must be implied that, in the appropriate circumstances, the GIC is required to take the actions outlined in section 159.7 of the STCA Regulations, namely suspension or termination of the STCA.

[273] Reading section 102 as a whole, I conclude that before the STCA Regulations are passed, the GIC must conclude on a reasonable basis that the third country complies with the specific Articles of the Refugee Convention and the Convention Against Torture; when the Regulations are passed, that the third country continues to comply; and when the third country ceases to comply or when evidence becomes available to suggest that the initial conclusion of compliance can no longer stand, the Government either suspends or terminates the STCA.

[274] The purpose of subsection 102(3), at least in part, is to address the fact that new matters may develop, practices and policies of a third country may shift depending on the current administration, and that opinions formed initially are not immutable and must be re-examined in the light of more current opinion and other evidence of the third country's actual, rather than claimed, compliance.

[275] On this issue, I find that the GIC has failed to ensure the continuing review of the subsection 102(2) factors.

VIII. *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

[276] The analysis for the applicants' arguments on sections 7 and 15 of the Charter is based on both the U.S. law and practices and policies as well as the manner in which Canada views the operation of the STCA. The standard of review in respect of the Charter is correctness.

A. Is the Charter engaged in this situation, even if the substance of the human rights violations occur outside of Canada?

[277] A critical issue raised is whether the Charter applies to refugees sent back to the U.S. according to the STCA, since the Canadian government would no longer be responsible for their refoulement.

[278] In *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at page 202, Justice Wilson stated that section 7 can be asserted by "every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law." According to *Singh*, the word "everyone" in section 7 includes illegal immigrants who wish to make a refugee claim in Canada. This decision provided that every illegal immigrant in Canada claiming to be a refugee was entitled to a hearing.

[279] In *Burns*, above, the Supreme Court of Canada determined that extradition to the U.S. without

assurances that the government would not seek the death penalty was contrary to the principles of fundamental justice. The Court stated, at paragraph 29, that although the Canadian government would not impose the death penalty itself, "[t]he Minister's decision [to extradite] is a prior and essential step in a process that may lead to death by execution." In that case, there was no guarantee that the respondents would be convicted, let alone sentenced to the death penalty. Nonetheless, the Supreme Court determined that sending the accused to the U.S., where they faced a risk of this sentence, was sufficient to engage the Charter.

[280] The situation of a person charged with an offence punishable by death is somewhat analogous to the situation of a refugee claimant who approaches the Canadian border, and whom Canadian immigration officials return to the U.S., where the laws and practice as set out above put him at risk of refoulement.

[281] It is therefore clear that the Charter would apply to a refugee claimant at the Canadian border and under the control of Canadian immigration officials. If Canadian officials return the refugee claimant to the U.S., this action must be in compliance with the Charter.

(1) Section 7

[282] Section 7 protects 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.

(a) Is a refugee claimant's life, liberty or security of the person at stake?

[283] Several aspects of U.S. law put genuine refugees at risk of refoulement to persecution and/or refoulement to torture. In *Singh*, the Supreme Court considered whether the possibility of refoulement deprived a claimant of life, liberty or security of the person. The Court stated in concluding that section 7 was so engaged [at pages 205-207]:

> . . . it will be recalled that a Convention refugee is by definition a person who has a well-founded fear of persecution in the country from which he is fleeing. In my view, to deprive him of the avenues open to him under the Act to escape from that fear of persecution must, at the least, *impair* his right to life, liberty and security of the person in the narrow sense advanced by counsel for the Minister. The question, however, is whether such an impairment constitutes a "deprivation" under s. 7.
>
> It must be acknowledged, for example, that even if a Convention refugee's fear of persecution is a well-founded one, it does not automatically follow that he will be deprived of his life or his liberty if he is returned to his homeland. Can it be said that Canadian officials have deprived a Convention refugee of his right to life, liberty and security of the person if he is wrongfully returned to a country where death, imprisonment or another form of persecution *may* await him? There may be some merit in counsel's submission that closing off the avenues of escape provided by the Act does not *per se* deprive a Convention refugee of the right to life or to liberty. It may result in his being deprived of life or liberty by others, but it is not certain that this will happen.
>
> I cannot, however, accept the submission of counsel for the Minister that the denial of the rights possessed by a Convention refugee under the Act does not constitute a deprivation of his security of the person.
>
> . . .
>
> For purposes of the present appeal it is not necessary, in my opinion, to consider whether such an expansive approach to "security of the person" in s. 7 of the *Charter* should be taken. It seems to me that even if one adopts the narrow approach advocated by counsel for the Minister, "security of the person" must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. I note particularly that a Convention refugee has the right under s. 55 of the Act not to ". . . be removed from Canada to a country where his life or freedom would be threatened. . .". In my view, the denial of such a right must amount to a deprivation of security of the person within the meaning of s. 7.

[284] Section 7 applies to torture inflicted abroad if there is a sufficient causal connection with Canadian government acts. At paragraph 54 of *Suresh*, the Supreme Court remarks:

> . . . the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the

deprivation ultimately effected. We reaffirm that principle here. 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.]

[285] It is therefore quite clear that the life, liberty and security of refugees is put at risk when Canada returns them to the U.S. under the STCA if the U.S. is not in compliance with CAT and the Refugee Convention. The law in the U.S. with respect to gender claims and the material support bar, along with the other issues found to be contrary to the Convention, make it "entirely foreseeable" that genuine claimants would be refouled. The situation is potentially even more egregious in respect of refoulement to torture. A refugee, by his/her very nature, is fleeing a threat to his/her life, liberty or security, and a risk of return to such conditions would surely engage section 7. There is sufficient causal connection between Canada and the deprivation of those rights by virtue of Canada's participation in the STCA.

(b) Principles of fundamental justice

[286] A further step in a section 7 analysis is to determine whether the deprivation is in accordance with the principles of fundamental justice. The applicants assert several principles of fundamental justice are applicable to this case. According to the applicants, non-refoulement itself is a principle of fundamental justice. The applicants also argue that the STCA violates the following principles: arbitrariness/lack of discretion and overbreadth of legislation, arbitrary detention, right to counsel and right to review.

[287] I will first deal with the proposed principles of fundamental justice that are not applicable in this situation. First, it is not necessary to determine whether non-refoulement stands on its own as a principle as fundamental justice, as the Charter arguments can be dealt with in another manner.

[288] Next, the CBSA officer's initial decision at the port of entry that a claimant does not fall under one of the exceptions to the STCA will be reviewed by the Minister's delegate who makes the final decision. Judicial review is also available. I disagree with the applicants' position that this is a highly complex determination at which counsel must be present. I agree with the respondent that because this is not a final determination about the person's status as a refugee, but simply a determination of where the person can claim status, there is no absolute right to counsel. In any case, it appears that counsel is generally permitted.

[289] I could not find, based on the evidence provided to me, that claimants returned to the U.S. under the STCA will be subject to excessive or unfair detention in the U.S., so this principle is irrelevant to the case. The fact that the claimant may ultimately be unfairly detained in the home country or subject to persecution or torture is dealt with earlier in these reasons.

[290] It is in the area of arbitrariness and lack of discretion where the principles of fundamental justice collide with the operation of the STCA.

(c) Arbitrariness/lack of discretion

[291] As noted earlier, a Canadian immigration officer retains no discretion to allow a claimant into Canada after determining that the claimant does not fit one of the very narrow exceptions to the STCA. The applicants argue that this leads to arbitrary results which do not take the individual claimant's circumstances into account.

[292] For purposes of analysis, it is appropriate to compare how safe third country agreements have been applied in practice in Canada, the U.S. and the U.K. and determine whether some discretion must remain with immigration officers to allow a claim to be made in Canada in order to satisfy the requirements of fundamental justice.

(i) Canada

[293] The provision under which individualized discretion could be afforded is Article 6 of the STCA,

which provides as follows:

ARTICLE 6

Notwithstanding any provision of this Agreement, either Party may at its own discretion examine any refugee status claim made to that Party where it determines that it is in its public interest to do so.

[294] The one-year review report [*A Partnership for Protection: Year One Review*, November 2006] by the Canadian government describes how Canada interprets Article 6, at pages 35 and 36. The report states, at page 35 that:

Canada does not apply it on a case-by-case basis but rather as a means to achieve an articulated public good or outcome.

[295] The government opted for a regulatory mechanism to codify examples of when the public interest exception should be exercised. According to the report, the advantage of defining categories in the Regulations rather than in the guidelines is that regulations provide for maximum transparency and objective decision making. It is not possible to define all situations where the public interest exception should be exercised. Thus, in order to respond to new or extraordinary circumstances, including those relating to concerns for the safety of individuals in the U.S. which engage the public interest, the guidelines could be used as an interim measure, until the Regulations are amended. The current Regulations codify public interest exceptions in two situations: (1) persons subject to the death penalty; and (2) nationals of countries with stay of removals under subsection 230(1) of IRPA. Thus, Canada interprets the public interest exception as operating to allow for temporary categorical exceptions in the interim until they can be incorporated formally in the Regulations. Furthermore, the report states, at page 36 that:

Any future regulatory amendments would need to be similarly based on policy considerations generally relevant beyond individual cases, no matter how compelling.

[296] The UNHCR recommended broadening the interpretation to include, for example, vulnerable persons who do not fall under any of the exceptions to the Agreement.

[297] In the June 2006 Monitoring Report [*Monitoring Report: Canada–United States "Safe Third Country" Agreement, 29 December 2004-28 December 2005*], UNHCR noted, at page 36 that "[t]he public interest provision in Article 6 is interpreted in a way that leaves little room for discretion." Thus, UNHCR recommended at Recommendation 13.0:

Recommendation 13.0: There are cases that fall outside the Agreement but that would otherwise warrant exceptional consideration. The interpretation of Article 6 should permit sufficient flexibility to allow for the consideration of certain cases based on the public interest provision of the Agreement. For example, vulnerable individuals who would not normally be eligible under an exception but who nevertheless warrant special consideration because of their vulnerability (e.g. victims of torture, disabled claimants, the elderly, etc.) should be deemed eligible for consideration under Article 6.

[298] In sum, Canada's interpretation of Article 6 leaves no room for a case-by-case discretionary analysis. The U.S. interprets Article 6 in an entirely different fashion.

(ii) The United States

[299] The U.S. position on Article 6 is that it retains discretion in its interpretation of the STCA and its application on a case-by-case basis.

[300] Under INA § 208(a)(2)(A), a person cannot apply for asylum where the alien is subject to the STCA, "unless the Attorney General [now deemed to be the Secretary of Homeland Security for purposes of this provision] finds that it is in the public interest for the alien to receive asylum in the United States" (emphasis added).

[301] The process in the U.S., as described in the one-year review report, unfolds as follows. For an offensive claim, an asylum officer conducts a threshold screening interview to determine whether the applicant is eligible for credible fear screening or is subject to removal to Canada under the STCA. Threshold screening determinations are subject to review by both a supervisory asylum officer and Headquarters Asylum Division (HQASM). There are thus three layers of independent consideration, and no other further review. Where there is a defensive claim, immigration judges determine whether asylum seekers fall under the STCA and whether they can establish an exception to the STCA.

[302] The one-year review report discusses the retention of discretion at page 68. During the threshold screening interview, if the asylum officer determines that no other exception applies, the Asylum Officer asks the applicant for any other reasons why he or she wishes to pursue an asylum claim in the U.S. instead of Canada, and considers whether a public interest exception applies to the individual case. The report notes that in the U.S., a determination of a public interest exception is made on a case-by-case basis. The Report lists several categorical areas in which a person might claim such an exception, including humanitarian concern, the existence of minor anchor relatives, past torture, and health needs, along with other relevant circumstances, on a case-by-case basis. If an asylum officer believes a public interest exception applies, he or she makes a recommendation to the Director of the Office of Refugee, Asylum and International Operations. HQASM coordinates the final determination of the exception.

[303] With respect to the U.S. approach, the UNHCR stated, at page 64 of the June 2006 Monitoring Report that:

> UNHCR appreciates CIS' policy of exploring asylum-seekers' eligibility for the public interest exception in cases where they do not clearly establish eligibility under the other exceptions to the Agreement. UNHCR also appreciates CIS' stated willingness to consider a variety of humanitarian factors when deciding eligibility under the public interest exception.

[304] Thus, it appears that the U.S. retains discretion to apply the provisions of the STCA where Canada does not. It can be fairly argued that Canada has abdicated its international and domestic responsibilities towards potential refugees in favour of the administrative convenience of passing back to the U.S. the responsibility for assessing those refugee claims. From a public policy perspective, it may be advantageous to do so since the vast bulk of these prospective refugees are inbound to Canada not *vice versa*. This administrative convenience does not overshadow the individual rights and no section 1 evidence has been adduced to justify the Canadian position under section 1 of the Charter.

(iii) The United Kingdom

[305] Professor Greenwood provides a very thorough analysis of the evolution of the U.K. legislation. His analysis suggests that there is no discretion retained by U.K. officials in determining whether to certify that a person should be returned to a safe country in situations similar to the situation under the Canada/U.S. agreement. The only time the U.K. must make an individualized assessment is when there is no pre-existing treaty or regulatory framework designating a country as safe.

[306] The U.K. does not enjoy the benefits and burdens of a charter of rights and freedoms.

(d) Does the Charter require individualized consideration?

[307] The Supreme Court has held that a lack of discretion can render a provision arbitrary, and has discussed the merits of allowing a front line decision maker some discretion in applying laws which deprive an individual of their life, liberty or security of the person. In *R. v. Lyons*, [1987] 2 S.C.R. 309, the accused argued that the fact that offenders could be treated differently because of the prosecutor's discretion about whether or not to make an application to declare an accused a dangerous offender was unconstitutionally arbitrary. At page 348, the Court stated that the absence of this discretion would render the law's application arbitrary because the Crown would be required to seek the declaration in every case, regardless of whether or not it was warranted.

[308] The most relevant pronouncement on this issue is *R. v. Swain*, [1991] 1 S.C.R. 933. The accused challenged sections of the *Criminal Code* [R.S.C. 1970, c. C-34] which required that a person found not guilty by reason of insanity be detained. No discretion was given to the trial Judge, so detention was mandatory in every case. The accused argued that his rights were infringed because of automatic detention without any consideration of the necessity for detention in each particular case.

[309] Chief Justice Lamer found that automatic detention without any sort of hearing was not in accordance with the principles of fundamental justice, and was therefore in breach of the procedural aspect of section 7. He also concluded that the impugned provision was arbitrary detention within the meaning of section 9 because it provided no rational standard for determining which acquittees should be detained and which should not. The effect of the scheme was that people who were not dangerous would be detained automatically. Chief Justice Lamer appears to have regarded the scheme as an infringement of section 7 as well, since he notes that section 9, concerning arbitrary detention, is simply an illustration of the general protection given in section 7.

[310] The facts of the case at bar are analogous to *Swain*. The STCA, in its application to an individual, may be "overbroad" or "arbitrary" because it applies to individuals who may be placed at risk if sent back to the U.S. and grants no discretion to the immigration officer to allow a person to make a claim in Canada where such risk exists. The analysis of the state of U.S. law, practices and policies indicates that it is not safe for all refugee claimants. Some discretion in the hands of the front line immigration official would protect refugees who would otherwise be exposed to risk of contravention of Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture or who for other individual circumstances should not be returned to the U.S.

[311] I need not decide whether the Charter would be engaged in any event if the U.S. was a safe country but one would be concerned about the lack of a case-by-case process in that event as well.

[312] There is a further aspect of arbitrariness which affects both section 7 and section 15; the limitation of the STCA to those arriving by land. While there may be good practical reasons for the distinction (it was suggested that traceability to ensure that the person truly arrived from the U.S. is one), there is no section 1 justification advanced. Indeed, with respect to the traceability of a person whose last stop before Canada was the United States, flights from U.S. points would provide at least the same degree of assurance of origin as transportation over land.

[313] Two people, in the identical refugee situation, receive vastly different treatment and protection. One transiting the U.S. from their home country makes the last part of the journey by land to Canada, is immediately returned to the U.S. without the benefit of being able to make a refugee claim. The other transits the U.S. and makes the last part of the journey on a non-stop flight originating in the U.S., and receives the full panoply of Canadian protection.

[314] The situation raises issues under section 7 and section 15 and is more fully discussed in the analysis below.

(2) Section 15

[315] The applicants argue that the application of the STCA discriminates against refugees and non-citizens, because other groups are given an opportunity to have a hearing in Canada. The applicants allege that women and minorities will be disproportionately impacted because of the one-year bar and because of how gender-based claims are treated in the U.S. Colombians are also disproportionately affected by the material support bar since Colombians are more likely to have been extorted by a terrorist organization than other nationals.

[316] According to the Supreme Court of Canada's section 15 jurisprudence, the equality guarantees of section 15 are aimed at preventing the "violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally

capable and equally deserving of concern, respect and consideration"; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paragraph 51.

[317] As first outlined in *Law*, discrimination can be identified through a three-step test.

1. Did the law, program, or activity impose differential treatment between the claimant and a comparator group? That is, was a distinction created between the groups in purpose or effect?

2. If so, was the differential treatment based on enumerated or analogous grounds?

3. If so, did the law in question have a purpose or effect that is discriminatory within the meaning of the equality guarantee?

(a) Does the law impose differential treatment between the claimants and a comparator group?

[318] The first question in the *Law* framework is whether the impugned law draws a formal distinction or fails to take into account the claimant's already disadvantaged position within society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics.

[319] The applicants propose the following comparator group: persons seeking protection of their fundamental human rights in the Canadian justice system, including citizens and non-citizens. The respondent suggests that the appropriate comparator group is refugee claimants arriving in Canada at a port of entry other than a land border.

[320] An appropriate comparator group shares all of the claimant's characteristics except for the enumerated or analogous personal characteristic which is the alleged ground of discrimination; *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357. In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, the claimants argued that the government discriminated against autistic people because it covered all medically necessary services provided by physicians, and some services by non-physicians, but not medically necessary autism therapy. The Supreme Court selected a very narrow comparator group: those who were receiving comparable novel therapies, as opposed to people receiving medically necessary therapy.

[321] In that case, as in this one, the selection of the comparator group may be determinative. *Auton* suggests a narrow approach to defining a comparator group. The applicants argue that *Auton* should be distinguished because it concerned a new benefit, whereas this case concerns a well-recognized obligation. I do not see how we can distinguish a ruling about the appropriate approach to comparator groups on that basis.

[322] I find the respondent's choice of comparator group is more appropriate, but not ideal. Refugee claimants entering Canada otherwise than at a land border share most of the characteristics of the persons subject to the STCA, except that they are not subject to the STCA. However, this comparator group does not touch on the real issues at stake in this case in that it specifically ignores the very different treatment of female claimants arriving at land borders compared to male claimants. It also ignores differential treatment based on nationality.

[323] Women and certain nationals are affected more harshly than other refugee claimants covered by the STCA. I note that the respondent's statistics on the acceptance rates for Colombians, for example, is not a clear indication that these individuals would not suffer disproportionately under the STCA. There may be a high acceptance rate because conditions in Colombia are especially harsh. Many others may still be excluded under the material support bar or because they cannot prove state acquiescence.

[324] I do not have sufficient evidence before me concerning discriminatory practice in the U.S. with respect to race or religion. However, there is evidence that people from countries which are powerless to stop torture or from countries where terrorist organizations routinely extort money will be disproportionately affected. It will be especially hard for these individuals to prove genuine refugee claims

in the U.S. This is a burden which other claimants entering at the land border do not bear.

(b) Discrimination

[325] In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, Justice McIntyre stated that discrimination is [at page 174] "a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society."

[326] This indicates that although the government's objective was not to discriminate based on sex or nationality (and in fact, on its face the STCA applies equally to everyone approaching a land border), the fact that it has an especially adverse effect for certain groups can mean that it is discriminatory. For example, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the Supreme Court found that it was discriminatory that the government did not take the special circumstances of deaf people into account and provide sign language interpretation services. The failure to provide interpretation denied deaf people the full benefits of healthcare which were provided to hearing people.

[327] To determine whether a distinction is discriminatory, it is necessary to consider the four contextual factors set out in *Law*.

(i) Pre-existing disadvantage

[328] Women have been traditionally disadvantaged. This is especially true of women from many refugee-producing countries, where women are forced to flee their homes because of the severe discrimination or more clearly the physical abuse they face and the inability or unwillingness of their governments to protect them.

[329] Refugee claimants from countries such as Colombia, where the government is powerless to prevent torture by guerrilla groups, are also likely to have suffered pre-existing disadvantage.

(ii) Correspondence of the law with the individual's circumstances

[330] Here, the law applies generally to those who approach the border from the U.S. It may meet the needs of many such claimants, but in my opinion, it may not meet the needs of women and people from countries which are likely to produce the type of claim which the U.S. may reject. It does not meet the needs of those persons who would be caught by the U.S. laws, practices and policies which are not compliant with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture.

(iii) Ameliorative purpose

[331] This is not a particularly relevant consideration in this context. The use of limited exceptions to the STCA, as discussed earlier, does not address the specific needs of individuals.

(iv) Nature and scope of interests affected

[332] The interest at stake is highly important to an individual's life, safety and dignity: the right not to be refouled contrary to the Refugee Convention or CAT.

[333] I would therefore conclude that the designation of the U.S. as a safe third country leads to a discriminatory result in that it has a much more severe impact on persons who fall into the areas where the U.S. is not compliant with the Refugee Convention or CAT, and it discriminates against and exposes such people to risk based solely on the method of arrival in Canada, a wholly irrelevant Charter consideration.

(3) Can the breaches of section 7 and section 15 be justified under section 1?

[334] In *The Queen v. Oakes*, [1986] 1 S.C.R. 103, Chief Justice Dickson set out the following approach to the section 1 analysis of whether the limitation on a Charter right is justified in a free and democratic society:

1. There must be a pressing and substantial objective.

2. The means must be proportional.

(i) The means must be rationally connected to the objective.

(ii) There must be minimal impairment of rights.

(iii) There must be proportionality between the infringement and objective.

[335] It is quite clear that the government's objectives are important. Canada and the U.S. formed the STCA in order to share their respective refugee obligations and to create a more efficient refugee determination process. This may be an admirable objective, which would be well served by the designation of the U.S. as a safe third country. The STCA and the designation of the U.S. are clearly connected to these goals.

[336] The difficulty with the respondent's position is that there is insufficient evidence of section 1 justification. There is no explanation of minimal impairment or even that the objective is pressing and substantial. There has been no evidence of the inadequacy of the Canadian refugee system to afford proper protection.

[337] In my view, the STCA, as it is currently structured and applied, contravenes section 7 and section 15 of the Charter for which justification under section 1 has not been made out.

IX. CONCLUSION

[338] For the reasons outlined above, I find:[*]

(a) that sections 159.1 to 159.7 of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement are *ultra vires* in that the conditions to the enactment of the Regulations specified in IRPA subsection 102(1) had not been met;

(b) that the Governor in Council acted unreasonably in concluding that the United States complied with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;

(c) that the Governor in Council has failed to ensure the continuing review, particularly of the practices and policies of the United States, as required by IRPA subsection 102(2); and

(d) that the Regulations and the operation of the Safe Third Country Agreement are contrary to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and are not saved by section 1.

[339] Following submissions by the parties as to any questions for certification and any other terms of the judgment, a judgment granting a declaration and ancillary relief in accordance with these reasons shall issue. The parties shall have until December 17, 2007 to make submissions as to questions for certification and form and content of the judgment. Each party may then reply to the other's submissions by January 14, 2008.

[340] These are special circumstances where a cost award is appropriate. The parties may make submissions as to costs, in writing, within the time frames regarding submissions as to a certified question.