Federal Court  Cour fédérale

Date: 20200722

Dockets: IMM-2977-17
IMM-2229-17
IMM-775-17

Citation: 2020 FC 770

Ottawa, Ontario, July 22, 2020

PRESENT: Madam Justice McDonald

Docket: IMM-2977-17

BETWEEN:

THE CANADIAN COUNCIL FOR REFUGEES,
AMNESTY INTERNATIONAL,
THE CANADIAN COUNCIL OF CHURCHES,
ABC, DE [BY HER LITIGATION GUARDIAN ABC],
FG [BY HER LITIGATION GUARDIAN ABC]

Applicants

and

THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP AND THE
MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

Respondents

Docket: IMM-2229-17

AND BETWEEN:

NEDIRA JEMAL MUSTEFA

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Docket: IMM-775-17

AND BETWEEN:

MOHAMMAD MAJD MAHER HOMSI
HALA MAHER HOMSI
KARAM MAHER HOMSI
REDA YASSIN AL NAHASS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

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I. INTRODUCTION

[1] The Applicants challenge the validity and the constitutionality of the legislation implementing 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* (referred to as the "Safe Third Country Agreement" or "STCA"). The Applicants allege that by returning ineligible refugee claimants to the United States (US), Canada exposes them to risks in the form of detention, *refoulement*, and other violations of their rights contrary to the 1951 *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS at 137 (Refugee Convention or RT) and contrary to the *United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* (CAT, collectively referred to as the Conventions).

[2] The Safe Third Country Agreement is given effect by s. 101(1)(e) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (*IRPA*), and by s. 159.3 of the *Immigration and Refugee Protection Regulations* SOR/2002-227 (*IRPR* or the *Regulations*) which in 2004 designated the US a "safe third country".

[3] The Safe Third Country Agreement operates by deeming those who arrive at a Canada land Port of Entry (POE) from the US ineligible to make a refugee claim in Canada. These ineligibility provisions apply to a narrow category of refugee claimants – only those arriving from the US at a Canada land POE. Claimants arriving from the US by air, by sea or between land POEs, are eligible to have their refugee claims referred to the Refugee Protection Division (RPD) for assessment.

[4] Each of the individual Applicants, who are citizens of El Salvador, Ethiopia, and Syria, arrived at a Canadian land POE from the US and sought refugee protection. The Applicants, ABC and her children, are from El Salvador. Their refugee claim relates to gang violence and gender-based persecution. The Applicant, Ms. Mustefa is a Muslim woman from Ethiopia who was detained after her attempt to enter Canada from the US. The Homsi /Al Nahass Applicants are a Muslim family from Syria who left the US following the issuance of the first travel ban by the US government.

[5] While their individual situations vary, each of the Applicants sought refugee protection in Canada fearing persecution in their home country. However, because they arrived from the US at a land POE, the Applicants were ineligible to make a refugee claim in Canada by operation of the STCA.

[6] Each of the Applicants seek judicial review of the ineligibility decisions. ABC and her daughters (DE and FG) obtained a stay of their removal from Canada pending the determination of this judicial review application. The Homsi/Al Nahass family obtained Temporary Resident Permits (TRPs). Ms. Mustefa was returned to the US where she was immediately imprisoned.

[7] The Canadian Council for Refugees (CCR), Amnesty International (AI), and, Canadian Council of Churches (CCC) were granted the right to participate in these Applications as public interest parties.

[8] The Applicants challenge the STCA on two fronts.

[9] First, they argue that the Canadian government failed in its duty to review the ongoing designation of the US as a "safe third country" as required by ss. 102 (2) and 102 (3) of the *IRPA*, and therefore the legislation and regulations that make the STCA law are *ultra vires.* They argue that the treatment of asylum-seekers in the US is not in keeping with the spirit or the objective of the STCA. For the reasons outlined below, I have concluded that the legislation enacting the STCA is not *ultra vires*.

[10] Second, the Applicants argue that the legislation implementing the STCA is contrary to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (C*harter*). For the reasons outlined below, I have concluded that the actions of Canadian authorities in enforcing the STCA result in ineligible STCA claimants being imprisoned by US authorities. I have concluded that imprisonment and the attendant consequences are inconsistent with the spirit and objective of the STCA and are a violation of the rights guaranteed by section 7 of the *Charter*. I further conclude that section 1 of the *Charter* does not save the section 7 violations from being unconstitutional.

II. FACTUAL BACKGROUND

ABC, DE, and FG (IMM-2977-17)

[11] The Applicant ABC and her daughters DE and FG are citizens of El Salvador. On April 3, 2013, ABC was raped by MS-13 gang members in her home when they demanded money and threatened her with a gun. They told ABC they would kill her, and her daughters, if she went to the police. ABC became pregnant as a result of this rape. While she was pregnant, the gang

members showed up at her house and threatened to kill her. During this period, men also followed and accosted her daughters. At one point, an unknown man stopped them while they were walking to school and asked about their father. One man told them that if their father "did not show his face" the men would "get even by taking it out on the girls."

[12] In November 2016, MS-13 members again entered ABC's home and pointed a gun at her head, demanded money, and threatened to kill her and her daughters. After this incident, ABC determined that she and her daughters were not safe in El Salvador and on November 10, 2016, she left El Salvador with her daughters. They arrived in the US on November 26, 2016.

[13] Upon arrival in the US, ABC and her daughters were held at a detention centre and advised that they were under removal proceedings. Following their release they stayed with family in Mississippi. In December 2016, they travelled to Buffalo, New York, where they stayed at a refugee shelter.

[14] In January 2017, ABC and her daughters arrived at the Fort Erie, Ontario, POE to make a refugee claim in Canada. The Canada Border Services Agency (CBSA) Officer advised them to withdraw their claim as they would be found ineligible to make a claim under STCA. ABC and her daughters returned to the refugee shelter in the US.

[15] On July 5, 2017, ABC and her daughters again travelled to the Fort Erie POE to make a claim for refugee protection in Canada. The CBSA Officer determined that they were ineligible pursuant to s. 101(1)(e) of the *IRPA* due to the operation of the STCA.

[16] With the assistance of legal counsel, ABC filed this Application for Judicial Review and filed a Motion for a stay of their removal from Canada. On July 6, 2017, I granted an Order staying their removal from Canada.

Ms. Mustefa (IMM-2229-17)

[17] Ms. Mustefa is an Ethiopian national who left the country when she was 11 years old for medical treatments in the US. She entered the US on a Visitor's Visa as an unaccompanied minor and stayed with her uncle Gabriel Mustefa while undergoing medical treatments. In the summer of 2008, Ms. Mustefa went to live with her aunt in Georgia where she remained until she finished high school in 2015. Ms. Mustefa planned to pursue further education in the US but she could not obtain proper documentation having arrived in the US after the cut off date to apply under the Deferred Action for Childhood program.

[18] Around this same time in Ethiopia oppressive acts against the Oromo, Ms. Mustefa's ethnic group, were escalating. In 2016 and 2017, the Oromo were subject to mass arrests and held without charges or trials. The government dispatched the military to Oromo regions leading to the death and disappearance of many Oromo youth. In October 2016 Ethiopian government forces opened fire into a crowd of people attending a cultural festival and the Ethiopian government declared a state of emergency in effect until August 2017.

[19] Due to the situation in Ethiopia, and not being able to seek asylum in the US, on April 10, 2017, Ms. Mustefa arrived at the POE in Saint-Bernard-de-Lacolle, Quebec, and made a claim for refugee protection. She was questioned at the POE for approximately 30 hours and was

informed on April 11, 2017, that she was ineligible for refugee protection pursuant to s. 101(1)(e) of the *IRPA*.

[20] CBSA Officers returned Ms. Mustefa to the US. She was placed in detention at the Clinton Country Correctional Facility where she was held in solitary confinement for the first week (pending a tuberculosis test) and released on a bond on May 9, 2017.

The Al Nahass/ Homsi Family (IMM-775-17)

[21] The adult female Applicant, Reda Yassin Al Nahass, is a citizen of Syria. The other Applicants are her adult son, Mohammad Majd Maher Homsi, who was born in Syria, and her young son and daughter, Karam Maher Homsi and Hala Maher Homsi, who were both born in Saudi Arabia. Ms. Al Nahass lived in Syria until 2003 when the family moved to Saudi Arabia. The family returned to Syria regularly until the war began in 2011.

[22] In 2015, Ms. Al Nahass, travelled to Syria for medical treatment when she was kidnapped, physically attacked and threatened with sexual violence. Her family was able to secure her release. While the family was in the US in November 2015, Ms. Al Nahass's husband lost his job in Saudi Arabia, which put her family's status in Saudi Arabia in jeopardy, as they were dependent on her husband's employer-sponsored residency permit.

[23] Ms. Al Nahass started the asylum process in the US in the spring of 2016. However, she became concerned with the increasing public hatred expressed toward Muslim and Arab people and following the passage of Executive Order 13769, the so-called "Muslim Ban".

[24] On February 2, 2017, Ms. Al Nahass, and her children tried to enter Canada by walking across the border at Roxham Road between New York and Quebec. As they approached the border, a CBSA officer told them they would be arrested if they crossed into Canada. They were advised to go back to the US. Upon return to the US they were stopped by US authorities and put in separate police cars. They were fingerprinted and questioned. During this time, Ms. Al Nahass was forced to take off her hijab and was photographed. An hour later, they were taken to Saint-Bernard-de-Lacolle, Quebec, POE.

[25] On February 3, 2017, Ms. Al Nahass was told she and her children were ineligible because they were attempting to enter Canada from the US. While Ms. Al Nahass was at Saint-Bernard-de-Lacolle, she managed to contact a lawyer who filed an emergency stay of removal application on behalf of the family. The stay was granted, following which the family was granted Temporary Resident Permits (TRPs) allowing them to remain in Canada. The family has since been granted permanent resident status.

Public Interest Parties

[26] On December 11, 2017, Justice Diner granted public interest standing to the Canadian Council for Refugees, Amnesty International, and the Canadian Council of Churches on the grounds that the application for judicial review "raises a serious justiciable issue in which the Organizations have a genuine interest" (*Canadian Council for Refugees et al. v Canada (Immigration, Refugees and Citizenship)* 2017 FC 1131 at para 74).

III. CONSOLIDATION ORDER

[27] On April 12, 2018, Justice Diner ordered these three applications be consolidated and heard together (*Canadian Council for Refugees et al. v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 396 at para 39).

IV. **RELIEF SOUGHT**

[28] In their Applications for Judicial Review, the Applicants each phrase the requested relief slightly differently, however, they all seek the following common relief:

1. An order that the decisions of the Officers be set aside and the individual Applicants' claims for refugee protection be found eligible and referred to the Refugee Protection Division for determination;

2. A declaration that s. 159.3 of the *Immigration and Refugee Protection Regulations* is *ultra vires* or otherwise unlawful because the designation of the United States of America is not and/or was not at the time of the decision under review in conformity with ss. 102(1)(a), 102(2) and 102(3) of the *Immigration and Refugee Protection Act*;

3. A declaration that s. 159.3 of the *Regulations* is inconsistent with Canada's international obligations under the *Refugee Convention* and the *Convention Against Torture*;

4. A declaration that s. 159.3 of the *Regulations* is of no force or effect pursuant to section 52 of the *Constitution Act*, 1982, because it violates section 7 and/or section 15(1) of the *Charter of Rights and Freedoms*;

5. A declaration that s. 101(1)(e) of the *IRPA* is of no force or effect pursuant to section 52 of the *Constitution Act,* 1982, because it violates section 7 and/or section 15(1) of the *Charter of Rights and Freedoms*.

V. NOTICE OF CONSTITUTIONAL QUESTION

[29] The Applicants served a Notice of Constitutional question pursuant to section 57 of the *Federal Courts Act,* RSC 1985 c F-7, on the Attorney General of Canada and each of the Attorneys General for the Provinces and Territories. Apart from the Attorney General of Canada, none of the Attorneys General responded. The Notice of Constitutional question stated:

> The Applicants intend to question the constitutional validity of the combined effect of s. 101(1)(e) of the *Immigration and Refugee Protection Act* ("the IRPA") and s. 159.3 of the *Immigration and Refugee Protection Regulations* ("the *Regulations*").

VI. THE EVIDENCE

[30] The parties filed extensive evidentiary records including affidavits, reports, expert opinions and transcripts. Below is a summary of the evidence.

Applicants' Evidence

[31] The Applicants filed affidavits from the following individuals:

- The Applicant ABC, whose affidavits were sworn June 29, 2017, September 8, 2017, and December 15, 2017.
- The Applicant, Nedeira Mustefa, whose affidavit was sworn September 14, 2017.

- The Applicant, Reda Al Nahass, whose affidavit was sworn April 29, 2017.

- Clare Long, whose affidavit was sworn June 24, 2018, is a Senior Researcher at the US Program of Human Rights Watch.

- Janet Dench, whose affidavits were sworn September 7, 2017 and June 27, 2018, is the Executive Director of the Canadian Council for Refugees.

- Christina Fialho, whose affidavit was sworn June 25, 2018, is the co-Executive Director of Freedom for Immigrants.

- Audrey Macklin, whose affidavit was sworn on June 23, 2018, is a Professor at the University of Toronto and the Director of the Centre for Criminology and Sociolegal Studies.

- Gloria Nafziger, whose affidavits were sworn December 18, 2017 and June 26, 2018, is the Refugee Coordinator at Amnesty International Canada.

- Ksenija Novakovic, whose affidavit was sworn on June 29, 2018. Ms. Novakovic worked at Downtown Legal Services under the supervision of Prasanna Balasundaram, counsel for ABC, DE, FG and Ms. Mustefa.

- Carol Anne Donohue, whose affidavit was sworn August 30, 2018, is an immigration lawyer practising in Pennsylvania, USA.

- Ryan Witmer, whose affidavit was sworn July 24, 2018, is a lawyer practising immigration law in Buffalo, USA.

- Timothy Warden-Hertz, whose affidavit was sworn August 30, 2018, is the Directing Attorney of the Tacoma office of the Northwest Immigration Rights Project.

- Ruby Robinson, whose affidavit was sworn June 20, 2018, is a co-managing attorney at the Michigan Immigrant Rights Centre.

- Ramon Irizarry, whose affidavit was sworn June 25, 2018, is the Supervising Immigration Attorney at the Volunteer Lawyers Project of the Erie County Bar Association.

- Nadege Jean-Mardy, whose affidavit was sworn June 25, 2018, founded Action D'Entraide Multifonctionnelle du Canada and currently serves as Director General of the organization.

- Sarah Alarabi, whose affidavit was sworn on June 17, 2018, describes her experience seeking refugee protection in Canada under the family member exception to the STCA.

- H.I., whose affidavit was sworn July 31, 2018, attempted to seek refugee protection in Canada, but was found ineligible under the STCA.

- J.K., whose affidavit was sworn November 10, 2017, and was translated by Carmen Maria Rey on November 13, 2017. J.K. tried to make a refugee claim in Canada but was told by Canadian officers that she was "not in a good place to cross".

- L.M., whose affidavit was sworn on November 10, 2017, attempted to seek refugee protection in Canada, but was found ineligible under the STCA.

- N.O., whose affidavit was sworn July 25, 2018, attempted to seek refugee protection in Canada in July 2017, but was found ineligible under the STCA.

- P.Q., whose affidavit was sworn April 20, 2018, made a refugee claim at a Canadian border crossing in May 2015.

- R.S., whose affidavit was sworn July 25, 2018 and translated by Suu Yang on July 27, 2018, attempted to go to a Canadian border crossing in March 2017, but was stopped by American police officers.

- T.U., whose affidavit was sworn July 31, 2018, made a refugee claim in February 2017 at a Canadian Port of Entry.

- V.W., whose affidavit was sworn April 26, 2018, attempted to enter Canada but she was returned to the United States and detained.

- X.Y., whose affidavit was sworn on an unknown date, attempted to enter Canada at a Canadian Port of Entry but was told he was not able to make a refugee claim because of the STCA.

- Z.Z., whose affidavit was sworn on an unknown date, made a refugee claim at the Canadian border in October 2017.

[32] The Applicants rely upon the Affidavit evidence of the following experts:

- Professor Deborah Anker, whose affidavits were sworn October 6, 2017 and June 26, 2018, is a professor at Harvard Law School and the Founder and Director of the Harvard Law School Immigration and Refugee Clinical Program.

- Professor Karen Musalo, whose affidavits were sworn September 22, 2017 and June 25, 2018, is a professor at the University of California Hasting College of Law.

- Elizabeth Kennedy, whose affidavit was sworn August 7, 2018, is scholar with an expertise in country conditions in El Salvador, Honduras and Guatemala.

- Anwen Hughes, whose affidavits were sworn December 6, 2017 and June 26, 2018, is the Deputy Legal Director of the Refugee Representation Program at Human Rights First.

- Lenni Beth Benson, whose affidavit was sworn June 25, 2016, is a professor at New York Law School and is an expert in US immigration law with a further expertise in the rights of children and their ability to seek protection under US asylum law and other provisions of the US *Immigration and Nationality Act*.

- James C. Hathaway, whose affidavit was sworn June 27, 2018, is a professor of law at the University of Michigan, specializing in international and comparative refugee law.

- Abed Ayoub, whose affidavit was sworn June 26, 2018, is the National Legal Director of the American-Arab Anti-Discrimination Committee.

- Katharina Obser, whose affidavits were sworn December 4, 2017 and June 25, 2018, is a Senior Policy Advisor in the Migrant Rights and Justice Program of the Women's Refugee Commission.

- Jaya Ramji-Nogales, whose affidavit was sworn August 27, 2018, is a law professor at Temple University who has conducted several empirical studies of asylum adjudication in the United States.

Respondents' Evidence

[33] The Respondents rely upon the following Affidavit evidence:

- Bruce Scholfield, whose affidavit was sworn October 9, 2018, is a former employee of the Department of Citizenship and Immigration (now Immigration Refugees and Citizenship Canada).

- André Baril, whose affidavit was sworn October 11, 2018, is the Senior Director of Refugee Affairs with the Department of Immigration Refugees and Citizenship.

- Matthew Dan, whose affidavit was sworn October 12, 2018, is the Assistant Director of the Department of Immigration, Refugees and Citizenship Canada's Irregular Migration Policy Hub within the Refugee Affairs Branch.

- Sharon Spicer, whose affidavit was sworn October 12, 2018, is the Director of Inland Enforcement Operations and Case Management Division for the Canadian Border Services Agency.

- Alexandre Bilodeau, whose affidavit was sworn October 11, 2018, is the Assistant Director in the Data Management and Reporting Division of the Research and Evaluation Branch.

- Daniel Badour, whose affidavit was sworn October 11, 2018, is the Director of the Asylum Seeker Task Force with the Canada Border Services Agency.

- Laura Soskin, whose affidavit was sworn October 12, 2018, is a Paralegal with the Department of Justice in Toronto.

- Rebecca Louis, whose affidavit was sworn October 9, 2018, was an articling student with the Department of Justice at the time she sworn her affidavit.

[34] The Respondents rely upon the following Expert Affidavits:

- Stephen Yale-Loerh, whose affidavit was sworn October 12, 2018, is a Professor at Cornell Law School and is counsel at Miller Mayer, LLP, in Ithaca, New York where he practises immigration law.

- Kay Hailbronner, whose affidavit was sworn October 10, 2018, is a Professor Emeritus of Public Law, Public International Law and European Law at the University of Konstanz in Germany.

VII. **PRELIMINARY MATTERS**

[35] There are two preliminary matters. One is the Respondents' objection to the Court considering the expert evidence of Professors Anker and Musalo. The other is the request by the Applicant Ms. Mustefa to raise a new procedural fairness argument.

Expert Evidence of Deborah Anker and Karen Musalo

[36] At the opening of their submissions, the Respondents reiterated their objections to the Court considering the expert evidence of Professor Anker. The Respondents argue that Professor Anker's public advocacy statements on the issues raised in these applications affect the objectivity of her evidence. The Respondents do not identify specific statements or specific paragraphs in her affidavits that they object to and seek to strike, but rather they argue that her evidence overall lacks objectivity.

[37] Professor Anker is a law professor at Harvard University. She is the co-founder of the Harvard Immigration and Refugee Clinical Program and has authored a treatise on US asylum law. She is offered as an expert on US asylum law. The Respondents do not dispute her qualifications. Their objection arises from the public positions she has taken in criticizing Canada's continued adherence to the STCA. They point to a radio interview and a letter sent by Professor Anker to the Prime Minister encouraging Canada to repeal the STCA with the US. The Respondents argue that, in so doing, she has engaged in advocacy and therefore cannot be considered an objective witness.

[38] The objections to Professors Anker's evidence were addressed in a Motion heard on February 21, 2019. At that time, I dismissed the Respondent's Motion (*Canadian Council for Refugees et al v Canada (Citizenship and Immigration)*, 2019 FC 285 at para 36) [*CCR 2019*]. I concluded that Professor Anker's comments in the media about the Canadian refugee system were not the areas for which she was being tendered as an expert witness. Her expertise is the US asylum system. As a result, her expert evidence can be considered apart from her personal views (*CCR 2019* at para 36). I further noted that any issues with the objectivity of her evidence would go to the weight of her evidence rather than its admissibility (*CCR 2019* at para 37).

[39] With respect to Professor Musalo, the Respondents also argue that she has made public statements in her role with the Centre for Gender and Refugee Studies that are inconsistent with the statements contained in her Affidavits and therefore her evidence is not reliable. Again, the Respondents do not dispute her qualifications and do not identify specific statements or paragraphs in her affidavits that they seek to strike, but argue that the general content of her affidavits does not align with her public statements.

[40] Having had the opportunity to consider the evidence of both experts in the context of the issues raised on these applications, and with the benefit of a full record from all parties, I maintain my position to allow their evidence. Given that the Respondents have not identified specific portions of the evidence that they seek to strike, it is not appropriate to strike the evidence in its entirety. Professor Anker has engaged in public lobbying with respect to the plight of asylum-seekers. On these Applications, she is offered as an expert on US asylum law and international refugee law. Professor Anker's evidence as contained in her affidavits of

October 6, 2017 and June 26, 2018, is accepted for the factual detail provided. Her public statements and her opinion regarding the appropriateness of the STCA are irrelevant.

[41] The Respondents' objection to Professor Musalo's evidence is weaker. They claim that the public statements of her organization regarding the likelihood of success of asylum claims in the US system are in direct contradiction to the evidence provided in her affidavits. Specifically, the Respondents claim that the Professor's website suggests that asylum claims can be successfully pursued, whereas in her affidavits (September 22, 2017 and June 25, 2018) she claims that the likelihood of success is low. The challenge with how the Respondents have raised their objections to this evidence, is that they fail to specify what portions or what statements they take issue with. I agree with the Respondents that broad categorical statements on the success of asylum claims within the US system is irrelevant and I will therefore disregard these statements.

[42] Both Professors Anker and Musalo signed the expert witness certificate under the *Federal Courts Rules* which specifically states they "have read the Code of Conduct for Expert Witnesses set out in the schedule to the *Federal Courts Rules* and agree to be bound by it." The Code of Conduct provides:

> [a]n expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.
>
> … This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.

[43] In *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*], the Supreme Court of Canada held that the role of an expert is to assist the Court, *not* to advocate. The Court further noted that experts "have a special duty to the court to provide fair, objective and non-partisan assistance" (*White Burgess* at para 2).

[44] Having considered Professors Anker and Musalo's evidence in the full context of these Applications, I accept their evidence. I acknowledge that they are engaged in broader forms of advocacy in support of asylum causes. However, for the present Applications, their evidence was based on their professional views of the US asylum system and how it functions, or fails to function. It is in that regard that their evidence and opinions are of assistance to the Court.

[45] Given the failure of the Respondents to clearly articulate their specific objections, and considering the test outlined by the Supreme Court in *White Burgess*, I accept their evidence subject to the qualifications noted.

Ms. Mustefa's Request to Make New Arguments

[46] At the hearing, Ms. Mustefa's lawyers requested leave to amend her Application to make new procedural fairness arguments. I declined this request. As I stated at the hearing, these Applications had been ongoing for a number of years, accordingly, there was ample time to identify and raise these arguments earlier. In my view, it was not fair to the Respondents, or in the interests of justice, to allow Ms. Mustefa to raise procedural fairness arguments at the hearing of this judicial review application.

VIII. **ISSUES**

[47] The following are the issues for determination:

A. Is s. 159.3 of the *Regulations* ultra vires?

B. Does the STCA infringe section 7 of the *Charter*?

C. Is the infringement justified under section 1 of the *Charter*?

D. Does the STCA infringe section 15 of the *Charter*?

E. Should the Court decline to consider Ms. Mustefa's application?

F. Do certified questions arise?

IX. **STANDARD OF REVIEW**

[48] After hearing these applications, the Supreme Court released its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*]. Accordingly, I invited the parties to make post-hearing submissions on the impact of *Vavilov* on the applicable standard of review.

[49] The Applicants assert that *Vavilov* strengthens their position that s. 159.3 of the *Regulations* is *ultra vires* for two reasons. First, because the Supreme Court held that external constraints limit the range of reasonable outcomes of administrative decisions (*Vavilov* at para

90). Second, they argue that, even when applying a deferential standard, interpretations that are contrary to the legislative purpose of the grant of power, contrary to the overarching purpose of the *Act*, or contrary to Canada's international obligations will necessarily be unreasonable (*Vavilov* at paras 114 and 120).

[50] The Respondents say that *Vavilov* does not change their position on the *vires* issue, because, according to the Respondents, the Court cannot consider evidence that post-dates the promulgation of s. 159.3 of the *Regulations*. Therefore, the standard of review question is irrelevant as the issue is resolved before it is necessary to consider the appropriate standard of review.

[51] Taking these positions into consideration, and the direction provided in *Vavilov*, in my view, the standard of review for the *vires* considerations is reasonableness. *Vavilov* at para 68 states:

> Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of reasonable interpretations open to the decision maker - perhaps limiting it [to] one…

[52] The issue of whether s. 159.3 of the *Regulations* and s. 101(1)(e) of the *IRPA* violate the *Charter* will be considered on a correctness standard (*Vavilov* at para 57).

X. ANALYSIS

Is Section 159.3 of the Regulations *Ultra Vires*?

Statutory and Convention Provisions

[53] The relevant provisions of the *IRPA* are:

3...3 Application This Act is to be construed and applied in a manner that	3…3 Interprétation et mise en oeuvre L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
…	…
(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;	d) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la Charte canadienne des droits et libertés, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada;
…	…
(f) complies with international human rights instruments to which Canada is signatory	f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.
…	…
Report on Inadmissibility 44 (1) An officer who is of the opinion that a permanent resident	Rapport d'interdiction de territoire 44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de

or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
Ineligibility	Irrecevabilité
101 (1) A claim is ineligible to be referred to the Refugee Protection Division if	101 (1) La demande est irrecevable dans les cas suivants :
…	…
(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;	e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;
…	…
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	102 (1) Les règlements régissent l'application des articles 100 et 101, définissent, pour l'application de la présente loi, les termes qui y sont employés et, en vue du partage avec d'autres pays de la responsabilité de l'examen des demandes d'asile, prévoient notamment :
(a) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;	a) la désignation des pays qui se conforment à l'article 33 de la Convention sur les réfugiés et à l'article 3 de la Convention contre la torture;
102 (2) The following factors are to be considered in designating a country under paragraph (1)(a):	102 (2) Il est tenu compte des facteurs suivants en vue de la désignation des pays :
(a) whether the country is a party to the Refugee Convention and to	a) le fait que ces pays sont parties à la Convention sur les réfugiés et à

the Convention Against Torture;	la Convention contre la torture;
(b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;	b) leurs politique et usages en ce qui touche la revendication du statut de réfugié au sens de la Convention sur les réfugiés et les obligations découlant de la Convention contre la torture;
(c) its human rights record; and	c) leurs antécédents en matière de respect des droits de la personne;
(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.	d) le fait qu'ils sont ou non parties à un accord avec le Canada concernant le partage de la responsabilité de l'examen des demandes d'asile.
102 (3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country.	102 (3) Le gouverneur en conseil assure le suivi de l'examen des facteurs à l'égard de chacun des pays désignés.

[54] Section 159.3 of the *IRPR* states:

Designation - United States	Désignation - États-Unis
159.3 The United States is designated under paragraph 102(1)(a) of the Act as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture, and is a designated country for the purpose of the application of paragraph 101(1)(e) of the Act.	159.3 Les États-Unis sont un pays désigné au titre de l'alinéa 102(1)a) de la Loi à titre de pays qui se conforme à l'article 33 de la Convention sur les réfugiés et à l'article 3 de la Convention contre la torture et sont un pays désigné pour l'application de l'alinéa 101(1)e) de la Loi.

[55] Article 33 of the *Refugee Convention* provides:

> PROHIBITION OF EXPLUSION OR RETUN
> ("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.

[56] Article 3 of the *Convention against Torture* states:

> 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.

[57] These provisions were considered extensively in *Canadian Council for Refugees v Canada*, 2007 FC 1262 [*CCR 2007*] and *Canada v Canadian Council for Refugees*, 2008 FCA 229 [*CCR 2008*].

Applicants' Submissions

[58] The Applicants argue that s. 159.3 of the *Regulations* is *ultra vires* because the ongoing designation of the US as a safe third country is inconsistent with the statutory purpose and the

statutory grant of power. Further, they argue that the statutory conditions precedent for the ongoing designation of the US as a safe third country have not been satisfied.

Designation Inconsistent with Statutory Purpose and Grant of Power

[59] The Applicants submit that developments in the law since the FCA decision in *CCR 2008* allow this Court to reconsider the *vires* issue. They rely upon *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 [*West Fraser Mills*] (at paras 10 and 12) and *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 (at para 12) to argue that a regulation is *ultra vires* when it is "inconsistent with the objective of the enabling statute or the scope of the statutory mandate" (*West Fraser Mills* at para 12).

[60] According to the Applicants, based on the evidence of violations by the US of the *Refugee Convention*, the US is not a safe third country. They rely upon the following evidence:

- "Proposal for a Targeted Review of the US as a Safe Third Country" (Exhibit 8 to the cross-examination of André Baril) ("Proposal for a Targeted Review").

- "Submission by the UNHCR's Submission for the Officer of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: United States of America", UNHCR, October 2014 (Exhibit 10 to the cross-examination of André Baril) ("Universal Periodic Review").

- Memorandum to Minister Hussein from Deputy Minister, "Amnesty International and Canadian Council for Refugees Report contesting the US Designation as a Safe Third Country" (June 28, 2017) (Exhibit 10 to the cross-examination of André Baril) ("Contesting the US Designation as a Safe Third Country").

- Human Rights Watch, "In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells" (Exhibit 30 to the cross-examination of André Baril) ("In the Freezer").

- "Memorandum to the Assistant Deputy Minister – U.S. Development pertaining to domestic and gang violence related to asylum claims" (Exhibit 29 to the cross-examination of André Baril).

- "Domestic Gang Violence Claims in the US", September 2018 (Exhibit 20 to the cross-examination of André Baril).

- "Memorandum to the Assistant Deputy Minister – U.S. Development pertaining to domestic and gang violence related to asylum claims", Summary (Exhibit 23 to the cross-examination of André Baril).

- "UNHCR Amicus brief on asylum policy developments in the US" (Exhibit 24 to the cross-examination of André Baril) ("UNHCR Amicus brief").

- Emails from Dean Barry with IRCC Reports and Flash Reports, June 7, 2018 – November 26, 2018 (Exhibit 52 to the cross-examination of André Baril).

[61] The Applicants argue that based upon these reports, Canadian officials were aware of the US practice of detaining and punishing asylum-seekers in contravention of the *Refugee Convention*. They point out that the detention conditions were reported to the Minister in the document "Contesting the US Designation as a Safe Third Country" prepared by Amnesty Intentional and The Canadian Council for Refugees. The "Proposal for a Targeted Review" provided information on the US policy of separating parents from their children in detention. "In

the Freezer" confirms that routine detention in inhumane conditions was continuing in the US into February 2018.

[62] Information contained in the "Universal Periodic Review" and the "Contesting the US Designation as a Safe Third Country" reports provided the Canadian government with information on the impact of the one-year bar, the US zero tolerance policy and the risk of *refoulement*. In the US, asylum seekers must make their claim within a year of entering the US. If this deadline is missed, claimants must show it is more likely than not that they will be persecuted because of a protected ground, which is a higher standard than the usual standard of having a well-founded fear of persecution. The Applicants contend that the shift in the burden after the one-year deadline is missed means that people with legitimate claims will likely be *refouled* because they do not reach the new (higher) threshold.

[63] The Applicants also argue that the adoption of the "zero tolerance" policy for illegal entry was an explicit attempt to deter migration, including asylum seekers. They point to the February 4, 2019 cross-examination of Prof. Yale-Loerh who agreed that family separation and detention are penalties being imposed to deter migrants from entering the US.

[64] Furthermore, the Applicants argue that "UNHCR Amicus brief" demonstrates that following the decision in the *Matter of A-B-*, it became more difficult to establish domestic and/or gang grounds for refugee protection in the US.

[65] The Applicants submit that the Canadian government had knowledge that the US asylum practices and policies are not in keeping with the UNHCR Guidelines, and therefore the US is not a "safe third county" within the meaning of the statutory purpose.

Failure to Satisfy Conditions Precedent

[66] The Applicants submit that the factors outlined in s. 102 (2) and (3) of the *IRPA* are conditions precedent that have not been met. They rely upon the decisions in *Katz Group Canada Inc v Ontario (Health and Long-Term Care),* 2013 SCC 64 [*Katz*] and *Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106 [*Thorne's*] to argue that the regulation, as subordinate legislation, is invalid as it fails to satisfy the applicable statutory conditions. The Applicants argue that s. 102(3) of the *IRPA* mandates a continuing review of the designation factors and requires the Minister to form an opinion that the safe third country designation should be maintained.

[67] Initially, by the 2004 Order in Council (OIC), the review responsibility was delegated to the Minister of Citizenship and Immigration. In his Affidavit, Mr. Baril explains that pursuant to the 2004 OIC, reviews were conducted every 5 years (2009 and 2014). The 2015 OIC marked a change in the review responsibility. The 2015 OIC states:

> The Minister of Citizenship and Immigration must undertake a review, on a continual basis, of the factors set out in subsection 102(2) of the Immigration and Refugee Protection Act with respect to the United States, as a country designated under paragraph 102(1)(a) of that Act and referred to in section 159.3 of the Immigration and Refugee Protection Regulations, by monitoring those factors on a regular basis. The Minister must report to the Governor in Council on that review when the circumstances warrant.

[68] The Applicants allege that this change in review responsibility was an unlawful sub-delegation of the review authority (*Brant Dairy Co v Milk Commission of Ontario*, [1973] SCR 131; *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575 at paras 82-83).

[69] On monitoring, the Applicants argue that the evidence demonstrates that there was a lack of meaningful analysis of the US compliance with the *Refugee Convention* and international human right standards. According to the Applicants, in the absence of such analysis, the Minister, and the GIC, were not provided with the information necessary to reassess the designation.

[70] The Applicants say that the FCA in *CCR 2008*, did not consider whether section 102(3) created a condition precedent to the validity of the ongoing designation. They argue that the FCA did not make any finding on whether ongoing review is actually required. They argue that the FCA did not find subsequent factors are irrelevant, and that, as such, the FCA has not decided the *vires* issue they raise now. The Applicants further note that, unlike in *CCR* 2008, they are seeking a remedy for the alleged failure to review (see: *CCR 2008* at para 83).

Analysis – Ultra Vires

[71] I begin the analysis of this issue by reference to the following statement from the FCA in *CCR 2008*, at para 57:

> An attack aimed at the vires of a regulation involves the narrow question of whether the conditions precedent set out by Parliament for the exercise of the delegated authority are present at the time of the promulgation…

[72] Further, at paragraph 89, the FCA states:

> There is one key date that the Applications judge had to be mindful of: December 29, 2004 when the Regulations came into force, the last relevant date for the assessment of the vires issue. Regardless of the conditions precedent which one wishes to apply, the vires of the Regulations could not be assessed on the basis of facts, events or developments that are subsequent to the date of the promulgation…

[73] On the decision to designate the US, the FCA found that "[o]nce …the GIC has given due consideration to these four factors, and formed the opinion that the candidate country is compliant with the relevant Articles of the Conventions, there is nothing left to be reviewed judicially" (*CCR 2008* at para 78).

[74] Considering the clear statements from the FCA in *CCR 2008*, and notwithstanding the able arguments of counsel for the Applicants, I am bound by *CCR 2008.* While the Applicants have somewhat reframed the *vires* arguments on these judicial review applications, in my view, the FCA decision is a full answer to the *vires* argument even as the Applicants now present them.

[75] I have considered the cases relied upon by the Applicants (*Katz, Thorne's*, *Wildlands League v Ontario (Natural Resources and Forestry)*, 2016 ONCA 741), however I do not read these cases as opening the door for this Court to take post-promulgation facts into consideration to determine the *vires* of the regulation. These cases specify that judicial review of regulations is "usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed" (*Katz* at para 27). This issue was addressed in *CCR 2008.*

[76] In *CCR 2008*, the FCA notes in paragraphs 74, 75, 76 and 78 that s. 101 of the *IRPA* does not require "actual compliance" or compliance in absolute terms. Further, the wording of s. 102(3) does not reference actual compliance with the *Refugee Convention* or the *Convention against Torture*, rather, it is compliance with the factors set out in s. 102(2) of the *IRPA* that is assessed.

[77] The Applicants' arguments regarding the sufficiency of the ongoing review were also addressed by the FCA in *CCR 2008* at paragraphs 92-97. For the timeframe post *CCR 2008*, in his Affidavit, Mr. Baril confirms that reporting on the STCA continued. Mr. Baril states that the IRCC prepared reports in December 2016, March 2017, and February 2018, although he acknowledges that these reports were not submitted to the Governor in Council (GIC).

[78] Redacted versions of the reports to the Minister were marked as exhibits to Mr. Baril's cross-examination. Although the content of these reports was not in evidence, they do provide evidence that reporting continued after the 2015 OIC. Therefore, I am satisfied that the obligation to review and to report "when circumstances warrant" as noted in the 2015 OIC continued. Furthermore, the Applicants' arguments regarding the 2015 OIC are an attempt to challenge the OIC itself, which is beyond the mandate of this judicial review.

[79] Overall, in my view, the Applicants have not convinced me that the threshold to revisit the binding nature of the FCA decision on the *vires* issue is met here. Notwithstanding that the factual circumstances of the Applicants here may differ from the circumstances before the FCA

in 2008, what does not differ are the legal arguments aimed at the same legislative provisions as determined by the FCA in 2008.

[80] I therefore find that the issue of whether s.159.3 of the *IRPR* is *ultra vires* of the *IRPA* was determined by in *CCR 2008* and I see no grounds to depart from binding authority.

Does the STCA Violate Section 7 of the *Charter*?

[81] Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice."

Applicants' Submissions

[82] The Applicants argue that there is a causal connection between Canada's adherence to the STCA and the deprivation of s. 7 rights because failed STCA applicants are imprisoned upon being returned to the US. They argue that liberty and security of the person interests are engaged because of the penalization of asylum seekers by US authorities. According to a report prepared by the UN Human Rights Council in July 2017, as referred to by Dr. Anker in her Affidavit of October 6, 2017 (para 19), the US "now operates the largest immigration detention system in the world".

[83] Aside from the deprivation of liberty caused by detention, the fact of being detained often results in a lack of basic human dignity, lack of medical care, and lack of food. Furthermore,

detention impedes the ability to retain and instruct legal counsel and increases the risk of *refoulement.* Anwen Hughes states that asylum seekers can be detained for months without review of their detention.

Respondents' Submissions

[84] The Respondents argue that even if s. 7 is engaged on these facts, there are safeguards in the *IRPA*, ongoing monitoring of s. 102(2) factors, and discretionary remedies. They also note that there is the option to seek judicial review of CBSA decisions. Additionally, the Respondents argue that the *Charter* does not apply to US law or the actions of US authorities.

Analysis

(a) *Section 7 - General Principles*

[85] Section 7 considerations are two-fold. First, a claimant must demonstrate that the challenged law deprives her or him of the right to life, liberty or security of the person. If so, s. 7 is engaged. Once s. 7 is engaged, the claimant must demonstrate that the deprivation is not in accordance with the principles of fundamental justice (*Carter v Canada (Attorney General),* 2015 SCC 5, para 55 [*Carter*]).

[86] The principles of fundamental justice are concerned with arbitrariness, overbreadth, and gross disproportionality (*Carter* at para 72). "The question under s. 7 is whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad; a grossly

disproportionate, over-broad, or arbitrary effect on one person is sufficient to establish a breach of s. 7." (*Canada (Attorney General*) *v Bedford*, 2013 SCC 72 [*Bedford*] at para 123).

[87] As a starting point, I would note that having been physically present in Canada, the individual Applicants have the right to advance a *Charter* claim (S*ingh v Minister of Employment and Immigration*, [1985] 1 SCR 177, para 35). Furthermore, the fact that Ms. Mustefa was returned to the US, does not prevent her from asserting a *Charter* claim (*Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 para 78 [*Kreishan*]).

[88] In order to properly assess the s. 7 arguments, it is important to understand the process that unfolds under the STCA when a claimant arrives at a Canadian land POE and claims refugee status.

[89] In her Affidavit, Sharon Spicer, the Director of Inland Enforcement Operations and Case Management Division for the CBSA, details that process. It starts with an interview by a CBSA Examining Officer (EO) who makes an initial determination on eligibility under s. 101 of the *IRPA* including whether any of the STCA exceptions apply. Exceptions to the STCA are outlined in s. 101(1)(e) and include, among others, those who have immediate family who are Canadian citizens or permanent residents, and unaccompanied minors. Following this assessment, the EO prepares an admissibility report to the Minister's Delegate (MD) under s. 44 of the *IRPA* outlining the grounds of inadmissibility.

[90] Ms. Spicer explains that the MD reviews this report and informs the claimant of the results. If the claimant is eligible to advance a refugee claim, the claim is referred to the Immigration and Refugee Board. If the claimant is not eligible, the MD issues an exclusion order, which has immediate effect and removal takes place as soon as possible. If the CBSA EO determines that a claimant does not fall within one of the exceptions, and is therefore ineligible because of the operation of the STCA, the Officer has no discretion to exercise.

[91] The CBSA arranges for the claimant to be returned to the US by (1) informing their US counterparts that the claimant is being returned, (2) providing a notification of return to US authorities, or (3) driving the claimant back to the US.

[92] Here, each of the individual Applicants were found to be ineligible because of the STCA. CBSA returned Ms. Mustefa to the US where she was immediately imprisoned.

(b) *Engagement - Liberty*

[93] The Applicants must establish that their liberty and security of the person has been or may be negatively affected or limited and that there is a sufficient causal connection between the STCA ineligibility finding and the prejudice suffered (*Bedford* at para 58 and 75). In *Bedford* at para 75 (quoting from *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44) the Court noted the need for "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" for s. 7 to be engaged. The Court also noted that the impugned government action or law does not need to be the only or the dominant cause of the prejudice suffered by the claimant; the connection can be satisfied by a reasonable inference

drawn on a balance of probabilities. This requires a real and non-speculative link between the prejudice and the legislative provisions (*Bedford* at para 76).

[94] The issue in relation to s. 7 is if the actions of Canadian officials in returning ineligible STCA claimants to US authorities, where they will be imprisoned, is a sufficient causal connection so as to engage liberty and security of the person interests. The evidence is clear that the most significant harm suffered is imprisonment. Additionally, there are the related harms regarding the conditions of detention and the heightened risk of *refoulement*.

[95] In the case of the Applicant Ms. Mustefa, upon being found ineligible she was returned to the US by CBSA officers and immediately taken into custody by US authorities. She was detained at the Clinton Correctional Facility for one month and held in solitary confinement for one week. She was released on bond on May 9, 2017.

[96] Ms. Mustfa's imprisonment evidence is compelling. In her Affidavit she explains not knowing how long she would be detained or how long she would be kept in solitary confinement. She describes her time in solitary confinement as "a terrifying, isolating and psychologically traumatic experience." Ms. Mustefa, who is Muslim, believes that she was fed pork, despite telling the guards she could not consume it for religious reasons. Ms. Mustefa describes skipping meals because she was unable to access appropriate food, and losing nearly 15 pounds. Ms. Mustefa also notes that after she was released from solitary confinement, she was detained alongside people who had criminal convictions. She explains the facility as "freezing cold" and states that they were not allowed to use blankets during the day. Ms.

Mustefa states that she "felt scared, alone, and confused at all times" and that she "did not know when [she] would be released, if at all."

[97] The Anonymized Affiants H.I., L.M., N.O., P.Q., R.S., T.U., V.W., X.Y., and Z.Z., were each detained by US authorities after being refused entry to Canada as ineligible STCA claimants. In their Affidavits, the Affiants N.O., P.Q., T.U. and V.W., state that CBSA handed them directly over to US officials. In the case of the Affiant L.M., CBSA also gave her cellphone directly to US officials.

[98] There is also the affidavit evidence of lawyers who provide assistance to those detained. Ruby Robinson, Carol Anne Donahue, Ramon Irizarry and Ryan Witmer work for organizations that provide legal services to those detained following their return to the US under the STCA. Ms. Donahue notes that at the detention facility where she provides services, most are detained for two weeks to two months. Mr. Witmer notes that nearly all of the STCA returnees he has encountered have been detained for three to five weeks without bond. Mr. Witmer also states that attempts to claim refugee status in Canada can be used by US authorities as grounds to justify a large bond and ongoing detention.

[99] The lawyers describe meeting their clients in detention and their clients spending weeks in detention before getting bond hearings. In cross-examination, Anwen Hughes confirmed that the average time in detention is 31 days.

[100] Deprivations of s. 7 rights caused by actors other than our own government are still subject to the guarantee of fundamental justice, as long as there is a sufficient causal connection between our government's participation and the deprivation. In this context, a sufficient causal connection is one in which "Canada's participation is a necessary precondition" to the deprivation and "where the deprivation is an entirely foreseeable consequence of Canada's participation" (*Suresh v Canada (Minister of Citizenship and Immigration*, 2002 SCC 1, at para 54 [*Suresh*]). Canada "does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand" (*Suresh* at para 54). Accordingly, the fact that STCA returnees are imprisoned by US authorities, does not immunize the actions of Canadian officials from consideration.

[101] The evidence of Sharon Spicer confirms that CBSA officials inform US officials that STCA claimants are being returned. CBSA officials are involved in the physical handing over of claimants to US officials. This conduct does not make Canada a "passive participant" and it provides a "sufficient connection" (*Suresh* para 55) to the offending conduct. I conclude that the actions of Canadian officials in returning ineligible STCA claimants to US officials facilitates a process that results in detention.

[102] I would also note that none of the factors regarding security or criminality as outlined in s. 101(1)(f) of *IRPA* were identified as being relevant with respect to any of the Applicants here when they were deemed ineligible pursuant to the STCA.

[103] Ms. Mustefa's imprisonment is a clear illustration of the limitation on liberty flowing directly from a finding of ineligibility under s. 101(1)(e) of the *IRPA*. It is my conclusion, based upon the evidence, that ineligible STCA claimants are returned to the US by Canadian officials where they are immediately and automatically imprisoned by US authorities. This is sufficient to establish that s. 7 liberty rights are engaged.

(c) *Engagement - Security of the Person*

[104] In *Singh* (para 47) the Supreme Court held that "'security of the person' must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself." In *United States v Burns*, 2001 SCC 7, at para 59 [*Burns*], the Court found that extradition that potentially puts a life at risk deprives a person of their liberty and security of the person. Although *Burns* dealt with extradition and the possible application of the death penalty, it is relevant insofar as both scenarios involve the near certainty of detention which engages liberty and at times security of the person. Further, in *Suresh*, at para 44, the Court noted that "deportation to torture may deprive a refugee of liberty, security and perhaps life."

[105] The Applicant ABC fears the MS-13 gang if she were forced to return, or *refouled*, to El Salvador. The Applicants argue that there is a real risk she would be returned to El Salvador based on the interpretation of the "particular social group" under US asylum law and the requirement that asylum seekers prove their persecutor's motive. This they argue, is inconsistent with the *Refugee Convention*. The Applicants also argue that the US decision in *Matter of A-B-*, means that victims are unlikely to be able to prove that state protection is not reasonably available. The Applicants' expert on the conditions in El Salvador, Elizabeth Kennedy, reports

that between 2013-2015, more than 70 people who were deported to El Salvador from the US were murdered after their return.

[106] In the case of ABC, I am satisfied that the evidence supports a finding that the risk of *refoulement* for her is real and not speculative had she been detained in the US. I find this based upon the evidence documenting the challenges in advancing an asylum claims for those detained. There is evidence of the barriers in accessing legal advice and acquiring the necessary documents to establish an asylum claim in the US.

[107] Professor Hughes describes the difficulties faced by those who are detained including: detainees not being able to afford phone calls, people from outside the detention facility not being able to contact detainees because they cannot call them, evidence being lost due to transfers between detention centres, and detainees not having access to translators they may need to fill in the necessary forms.

[108] Mr. Witmer, a lawyer working with detainees, describes issues with "basic communication" as an impediment to the making of an asylum case. He notes that detainees are unable to leave messages with a call back number. He also notes that while many detainees are accustomed to communicating with family using email, social media and internet-based communication apps, they do not have access to these services in detention.

[109] Further, lawyer Timothy Warden-Hertz estimates that, at the detention centres his organization services, the Northwest Detention Center (NWDC), 80-85% of those detained do

not have a lawyer and must represent themselves. He estimates that 75% of asylum claims from the NWDC are denied as compared to the national average of 52% of claims being denied.

[110] The use of solitary confinement, and the general conditions of detention are also factors that raise security of the person interests. Ms. Mustefa, P.Q., and R.S. were all placed in solitary confinement immediately upon arrival at US detention facilities. R.S. was left without food and was not given the opportunity to bathe for the first three days she was in solitary confinement. R.S. states that after she was able to speak to other STCA detainees she came to realize that "everyone would be placed in solitary confinement upon arriving in prison" (Affidavit of R.S. at para 32).

[111] Further, Ms. Mustefa, J.K., P.Q. and R.S. all describe the detention centres as abnormally cold. J.K. describes being unable to sleep due to the cold; P.Q. describes asking for extra blankets, but not receiving any until she had a fever and needed to see a doctor, and R.S. stated that when prisoners would huddle together for warmth, the guards would pull the blankets off them.

[112] J.K. states that she denied requiring medical attention to avoid being handcuffed. R.S. describes the medical care in her detention facility as being inadequate. R.S. observed the nurse in her detention facility ignore black detainees while going out of her way to address medical issues of white detainees. She states that the nurse would "ignore us and simply not address our concerns" (Affidavit of R.S. at para 35).

[113] These circumstances raise security of the person interests and flow directly from the actions of Canadian officials in returning claimants to the US where they are imprisoned. In this context, it is the impact of detention and not the current state of the US asylum law which raises security of the persons interests.

[114] Security of the person encompasses freedom from the threat of physical punishment or suffering (*Singh* at para 47); the accounts of the detainees demonstrate both physical and psychological suffering because of detention, and a real risk that they will not be able to assert asylum claims.

[115] It is my finding that the evidence establishes that the conditions faced by those detained, as detailed above, engages the security of the person interest under s. 7 of the *Charter*.

(d) *Conclusion – Engagement*

[116] Having found that detention and the attendant hardship and risks that flow from detention is a limitation on liberty and security of the person within the meaning of s. 7 of the *Charter*, I must now determine if the limitation is in accordance with the principles of fundamental justice.

(e) *Principles of Fundamental Justice*

[117] In *Bedford*, at para 125, the Supreme Court states:

> …The question under s. 7 is whether the law's negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the

> specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose.

[118] Although there may be "significant overlap" between the principles (arbitrariness, overbreadth, and gross disproportionality), the question is whether the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it…" (*Bedford* para 107). In considering these principles, the objective or purpose of the law must be identified.

[119] The Federal Court of Appeal in *CCR 2008* defined the legislative objective of the STCA at para 75 as follows:

> …the scheme implemented by Parliament has, as its objective, the sharing of responsibility for the consideration of refugee claims with countries that are signatory to and comply with the relevant Articles of the Conventions and have an acceptable human rights record…

[120] This is reflected in the preamble to the STCA which states:

> CONSIDERING that Canada is a party to the 1951 Convention relating to the Status of Refugees….and the Protocol Relating to the Status of Refugees…that the United States is a party to the Protocol, and reaffirming their obligation to provide protection for refugees on their territory in accordance with these instruments;
>
> ACKNOWLEDGING in particular the international legal obligations of the Parties under the principle of non-refoulement set forth in the Convention and Protocol, as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment…and reaffirming their mutual obligations to promote and protect human rights and fundamental freedoms.

[121] The Respondents urge caution in relying upon the *CCR 2008* articulation of the legislative objective arguing that the FCA was only addressing the *vires* issue. I disagree with this as it suggests that the legislative objective changes depending upon the purposes for which it is being assessed.

[122] The legislative objective of "sharing of responsibility", provides the framework for considering whether the legislation is overbroad and disproportionate. The parties did not argue that the legislation was arbitrary.

(f) *Overbroad*

[123] *Bedford* (para 101) tells us that a law is overbroad when it goes too far and interferes with conduct that bears no connection to the objective of the law. In *Carter* at para 85, the Court confirmed that the focus when considering if a law if overbroad is the "impact of the measure on the individuals whose life, liberty or security of the person is trammeled."

[124] The Applicants argue that the actions of Canadian authorities in returning STCA claimants to US authorities where they are imprisoned bears no connection to the "sharing of responsibility" objective of the STCA. This, according to the Applicants, is overbroad. They also argue that this deprivation of liberty is completely out of sync with the purpose of the STCA and therefore it is also grossly disproportional.

[125] In response, the Respondents argue that in *Bedford* and in *Carter* the impacts caused by the legislation were within Canada's control, unlike here where the conduct complained of is

outside Canada's control. They argue that the issues raised are with the US authorities and US policies and, therefore, is outside of Canada's control. In any event, the Respondents argue that the *IRPA* has safeguards to protect against overbreadth, as there are discretionary remedies available.

[126] The Respondents rely upon the cases that state that the *Charter* is not engaged at time of removal from Canada. Recently, in *Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 (at para 81) the Court addressed this and referenced a number of the cases relied upon by the Respondents. At para 87 in *Tapambwa* the Court states:

> …this Court held that individuals who were barred from a full PRRA, as the appellants here, have their section 7 risks assessed at the removal stage. The manner in which section 7 risks of applicants who are PRRA-barred are assessed is a process where 'an enforcement officer assesses the sufficiency of the evidence of risk, and if satisfied the evidence is sufficient, defers removal and refers the risk assessment to another decision-maker' (Atawnah at para. 27). An enforcement officer's refusal to defer removal may be challenged in the Federal Court, and a stay of removal may be obtained pending the outcome of an application for judicial review. The Federal Court can, and often does, consider a request for a stay of removal in a more comprehensive manner than an enforcement officer can consider a request for a deferral … the rights available to those being removed in the absence of the basis of any PRRA were 'not illusory', but real and effective.

[127] The Applicants in *Tapambwa* had a risk assessment by the RPD (para 77). In fact, in the cases that arise in the inadmissibility or exclusion scenarios, there has been some consideration of the claimant's risk. That is not the case for the Applicants here, who because they are ineligible by operation of the STCA, have not had <u>any</u> form of risk assessment. The facts of the Applicants here are different from those in *Tapambwa*.

[128] I find that the cases that have held that s. 7 interests are not engaged at the removals stage are distinguishable from the facts in these Applications. Here, the Applicants have had no consideration of their risks or the substance of their refugee claim because of the STCA. They are returned to the US under the STCA based on the understanding that they will have access to a fair refugee determination process. However, the evidence demonstrates that the immediate consequence to ineligible STCA claimants is that they will be imprisoned solely for having attempted to make a refugee claim in Canada. The "sharing of responsibility" objective of the STCA should entail some guarantee of access to a fair refugee process.

[129] Additionally, *Tapambwa* is distinguishable on the basis that the *Charter* argument was hypothetical, as there was no factual basis to support the argument that the applicants faced risk upon their removal (*Tapambwa* at paras 77 at 90). Here, the Applicants provided the necessary factual evidence of Ms. Mustefa and others to serve as the factual basis for their *Charter* claim.

[130] Despite the fact that two of the Applicants had access to lawyers who were able to advance stay applications on their behalf, this should not be taken to suggest that such resources are readily available. It is clear that this was accomplished as a result of extraordinary efforts, which would not be generally available to those who arrive at a land POE. Despite the Respondents' suggestion that there are safeguards, in my view, they are largely out of reach and are therefore "illusory".

[131] I conclude that the STCA legislation is overbroad as the deprivation of the liberty rights of STCA returnees (their detention in the US) has no connection to the "mischief contemplated

by the legislature" (sharing responsibility for refugees with a country that complies with the Conventions) (*Carter* at paras 85).

(g) *Grossly Disproportionate*

[132] In considering if a law is grossly disproportionate, the beneficial effects of the law do not factor into the analysis. Rather, the analysis balances the negative effect of the law on the individual as against the purpose of the law. A grossly disproportionate effect on one person is sufficient (*Bedford*, para 121-122).

[133] The Respondents argue that there are a number of protections against the grossly disproportionate impact of the STCA. First, they argue that the test is whether the impact of foreign law would "shock the conscience" (*Suresh* at para 18). The Respondents also point out that pursuant to *Burns*, at para 36, the Supreme Court of Canada confirmed that we cannot apply our *Charter* extraterritorially. In any event, the Respondents rely upon *Suresh* and *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 [*Revell*], to argue that in the removal context, the STCA is not overbroad or disproportionate in its application.

[134] As noted above, there is an important distinction between the removal cases and the facts here. Here, the Applicants have not had the merits or the substance of their refugee protection claims considered in any manner in Canada, nor have they had their risks assessed. In the "removals" cases, such as *Suresh* and *Revell*, the Courts found that there were sufficient consideration of the merits of the claims and "safety valves" to assess claims for protection. The

Applicants here – ABC, DE, FG, Ms. Mustefa and the Homsi/Al-Nahass family – did not benefit from any such consideration of their claims for protection.

[135] The question is whether the evidence of the impact of the STCA demonstrates that the *Charter* deprivation is "out of sync" with the objectives of the legislation. Ms. Mustefa's evidence, and the evidence of the ten anonymized affiants, establishes that imprisonment flows automatically from a finding of ineligibility under the STCA. Failed claimants are detained without regard to their circumstances, moral blameworthiness, or their actions. They are detained often without a release on bond and without a meaningful process for review of their detention. While, responsibility sharing may be a worthwhile goal, this goal must be balanced against the impact it has on the lives of those who attempt to make refugee claims in Canada and are returned to the US in the name of "administrative efficiency" (*Bedford* at para 121). In my view, imprisonment cannot be justified for the sake of, and in the name of, administrative efficiency.

[136] The risks of detention and loss of security of the person, which are facilitated by the STCA, are grossly disproportional to the administrative benefits of the STCA, which was intended to help Canada and the US share responsibility for refugees in a way that complies with the *Refugee Convention* (*CCR 2008* at para 75). In my view, the impact of being found ineligible under the STCA is grossly disproportionate, and out of sync with the objective of the legislation (*Bedford* at para 120). Responsibility sharing cannot be positively balanced against imprisonment or the deleterious effects of cruel and unusual detention conditions, solitary

confinement, and the risk of *refoulement*. In my view, to find otherwise would be "entirely outside the norms accepted in our free and democratic society" (*Bedford* at para 120).

[137] Gross disproportionality can be established based upon the impact on a single person. In my view, Ms. Mustefa's evidence alone meets this test and is sufficient to "shock the conscience".

(h) *Conclusion - Section 7*

[138] The Applicants have provided significant evidence of the risks and challenges faced by STCA ineligible claimants when they are returned to the US. Although the US system has been subject to much debate and criticism, a comparison of the two systems is not the role of this Court, nor is it the role of this Court to pass judgment on the US asylum system. The narrow focus here is the consequences that flow when a refugee claimant is returned to the US by operation of the STCA. The evidence establishes that the conduct of Canadian officials in applying the provisions of the STCA will provoke certain, and known, reactions by US officials. In my view, the risk of detention for the sake of "administrative" compliance with the provisions of the STCA cannot be justified. Canada cannot turn a blind eye to the consequences that befell Ms. Mustefa in its efforts to adhere to the STCA. The evidence clearly demonstrates that those returned to the US by Canadian officials are detained as a penalty.

[139] The penalization of the simple act of making a refugee claim is not in keeping with the spirit or the intention of the STCA or the foundational *Conventions* upon which it was built.

[140] For these reasons, I conclude that the Applicants have established a breach of section 7 of the *Charter*.

Is the Section 7 Infringement Justified Under section 1 of the *Charter*?

[141] Section 1 of the *Charter* provides:

> 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.

[142] In *R v Nur*, 2015 SCC 15, at para 111, the Court outlined the section 1 considerations once a violation of a *Charter* right has been established. The state must show:

> …that the law has a pressing and substantial objective and that the means chosen are proportional to that objective. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law.

[143] Under section 1, the Respondents bear the burden of proof and they need evidence to discharge the burden. In *Bedford*, at par 125, the Supreme Court explains the section 1 considerations as follows:

> Under s.1, the question is different — whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of an overarching public goal is at the heart of s.1…

[144] The Attorney General must show that that a law's breach of individual rights can be justified. I note the following from *Bedford*:

> [129] It has been said that a law that violates s.7 is unlikely to be justified under s.1 of the Charter (Motor Vehicle Reference, at p. 518). The significance of the fundamental rights protected by s. 7 supports this observation. Nevertheless, the jurisprudence has also recognized that there may be some cases where s. 1 has a role to play (see, e.g., Malmo-Levine, at paras. 96-98). Depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s.1 of the Charter cannot be discounted.

[145] The Respondents argue that the pressing and substantial objective of ss 101(e) and 102 of the *IRPA*, which is the sharing of responsibility, has been met. They rely upon the Affidavit evidence of Mr. Badour, who explains the challenges Canada's refugee system would face if the volume of refugee claimants were to increase. He states that if the STCA were not operative it would be reasonable to assume there would be an increase in the number of refugee claimants. According to the Respondents, the overall refugee system sustainability is at risk if there is an increase. Mr. Badour states there would be impacts to accommodation space for refugee claimants and the flow of immigration processing times. Mr. Badour also says that it would add more stress on the system which would result in increased processing time and costs. This according to the Respondents, tips the balance in favour of the government (*Newfoundland (Treasury Board) v N A P E*, 2004 SCC 66, at paras 65-72).

[146] The Respondents also argue that although failed STCA claimants are subject to detention in the US there is a fair detention review process available. They point to the fact that Ms. Mustefa was eventually released, as were eight of the nine detained anonymized affiants. In my

view, the fact that the detainees were released does not establish that there is a fair review process available. In any event, suggesting that those who are imprisoned will eventually be released, is not sufficient evidence of minimal impairment.

[147] The Respondents' strongest argument to justify the STCA is the sustainability of the refugee system in Canada if the number of claimants were to increase. However, in my view, the evidence offered by the Respondents on this point is weak. In the past, Canada has demonstrated flexibility to adjust to fluctuations in refugee numbers in response to needs. Having found that the operation of the STCA is a violation of section 7 *Charter* rights, I see no principled reason to continue to allow the provisions of the STCA to be applied to this narrow category of refugee claimants, when the evidence is that they will be imprisoned upon return to the US.

[148] The treatment of this narrow category of refugee claimants who arrive from the US at a land POE as compared to others who arrive from the US but have the benefit of the exemptions carved out in the STCA, is hard to reconcile (*Kreishan* at para 71). Although there may have been justifiable reasons in 2004 when the STCA was enacted, there is a lack of evidence that this "carve out" serves any current justifiable purpose.

[149] The Respondents have failed to produce sufficient evidence to meet the section 1 justification burden, as the rights of refugee claimants are more than minimally impaired by the STCA and the deleterious effects (detention and threats to security of the person) are not proportional to the salutary effects (administrative efficiency).

[150] I conclude that the Respondents have not met their section 1 evidentiary burden.

Does the STCA Infringe Section 15 of the *Charter*?

[151] In addition to the challenge under s. 7 of the *Charter*, the Applicants also argue that although the STCA applies to everyone, it violates s. 15 of the *Charter* because it has a disproportionate impact on women. The Applicants contend that this is due to the operation of domestic US asylum law and to claims made under the "particular social group" where most gender claims would be made. They rely upon the evidence of Prof. Anker and Prof. Musalo, who explain recent developments in US asylum law pertaining to the category "particular social group", in particular, new restrictions that have come about due to the *Matter of A-B-*.

[152] Prof. Anker explains in her June 26, 2018 affidavit, the *Matter of A-B-* reframed the non-state actor doctrine in the US in a manner that makes it more restrictive. In this decision, the Attorney General restricted the application of the non-state actors doctrine to "exceptional circumstances" in which the state "condones the conduct and when the 'persecutors actions can be attributed' to the state" (June 26, 2018 affidavit of Prof. Anker at para 10; *Matter of A-B-* 22 I&N 318 (A.G. 2018) p 317)). Prof. Anker states, at para 8 of her June 2018 Affidavit, that this different requirement is a derogation from the "basic principle of refugee law that lack of state protection will be found where the state is *either* unwilling *or* unable, despite willingness, to provide protection from serious harm by a non-state actor." The Applicants argue that this decision, in addition to other pre-existing factors, such as the restrictive definition of "particular social group" under US law, increases the risk of *refoulement* for those making claims under the category.

[153] The Applicants also argue that the one-year bar in the US disproportionately affects women because they frequently miss this deadline due to the nature of their claims. They argue that the nature of the persecution makes women less likely to disclose their persecution within the one-year deadline, because of the social norms in their countries of origin where they are viewed as private and/or family matters.

[154] As I have concluded that the STCA infringes section 7 of the *Charter*, I decline to address the section 15 *Charter* challenge (*Carter* para 93).

Should the Court Decline to Consider Ms. Mustefa's Application?

[155] The Respondents argue that Ms. Mustefa does not have "clean hands" because she engaged in "serious misconduct" at the time of making her refugee claim therefore the Court should decline to consider her judicial review application.

[156] When she arrived at the POE, Ms. Mustefa claimed she was eligible for an exemption to the STCA under s. 159.5(b)(ii) of the *Regulations* because she had family in Canada. Ms. Mustefa initially listed two men as "uncles" on the forms she submitted. However, these men were in fact Ms. Mustefa's cousins, not uncles. She then listed her actual uncle, Mr. Mustefa, as her proposed anchor relative. At that time, Mr. Mustefa did not reside in Canada, but was present in Canada when Ms. Mustefa tried to make a refugee claim, as he drove her to the border.

[157] Based upon the questioning of Ms. Mustefa on this issue, her evidence is that she uses the term “uncle” to address older male relatives as a sign of respect. In light of this, in listing her cousins as anchor relatives, I do not find that she intended to deceive the CBSA Officer or that she engaged in serious misconduct. Furthermore, there was no finding of misconduct on the part of CBSA. Accordingly, I accept her evidence.

[158] In any event, as I have found a breach of s. 7 of the *Charter*, I am allowing her judicial review application on that basis.

XI. **CERTIFIED QUESTIONS**

[159] The parties jointly propose the following questions:

1. Is the designation of the United States of America as a “safe third country” under paragraph 159.3 of the *Immigration and Refugee Protection Regulations ultra vires* [of] the *Immigration and Refugee Protection Act*?

2. Does the combined effect of section 101(1)(e) of the *Immigration and Refugee Protection Act* and paragraph 159.3 of the *Immigration and Refugee Protection Regulations* result in violation(s) of sections 15(1) and/or 7 of the *Charter of Rights and Freedoms*, and if so is/are such violation(s) justified under section 1 of the *Charter*?

[160] In the circumstances I am satisfied that these questions meet the test in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, at para 46.

[161] I am therefore certifying both questions.

XII. **CONCLUSION**

[162] For the reasons outlined above, I conclude that the provisions enacting the STCA infringe the guarantees in section 7 of the *Charter*. I have also concluded that the infringement is not justified under section 1 of the *Charter*. Accordingly, s. 101(1)(e) of the *IRPA* and s. 159.3 of the *Regulations* are of no force or effect pursuant to section 52 of the *Constitution Act, 1982*, because they violate s. 7 of the *Charter*.

[163] To allow time for Parliament to respond, I am suspending this declaration of invalidity for a period of 6 months from the date of this decision.

[164] No costs were requested and no costs are awarded.

JUDGMENT in IMM-2977-17, IMM-2229-17 and IMM-775-17

THIS COURT'S JUDGMENT is that:

1. The judicial review applications are granted;

2. Section 101(1)(e) of the *IRPA* and section 159.3 of the *Regulations* are of no force or effect pursuant to section 52 of the *Constitution Act, 1982*, because they violate section 7 of the *Canadian Charter of Rights and Freedoms*;

3. This declaration of invalidity shall be suspended for a period of 6 months from the date of this decision;

4. The following questions are certified:

    1) Is the designation of the United States of America as a "safe third country" under paragraph 159.3 of the *Immigration and Refugee Protection Regulations ultra vires* [of] the *Immigration and Refugee Protection Act*?

    2) Does the combined effect of section 101(1)(e) of the *Immigration and Refugee Protection Act* and paragraph 159.3 of the *Immigration and Refugee Protection Regulations* result in violation(s) of sections 15(1) and/or 7 of the *Charter of Rights and Freedoms*, and if so is/are such violation(s) justified under section 1 of the *Charter*?

5. No costs are awarded.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-2977-17 THE CANADIAN COUNCIL FOR REFUGEES ET AL v MIRC ET AL IMM-2229-17 NEDIRA JEMAL MUSTEFA v MIRC ET AL IMM-775-17 MOHAMMAD MAJD MAHER HOMSI ET AL v MIRC ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 4-8, 2019
JUDGMENT AND REASONS:	MCDONALD J.0
DATED:	JULY 22, 2020

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