



The Right Honourable Justin Trudeau  
Prime Minister of Canada  
80 Wellington Street  
Ottawa, ON K1A 0A2  
K1A 0A2

The Honourable Chrystia Freeland  
Deputy Prime Minister of Canada  
80 Wellington Street  
Ottawa, ON  
K1A 0A2

The Honourable Bill Blair  
Minister of Public Safety  
340 Laurier Avenue  
Ottawa, Ontario  
K1A 0P8

The Honourable Marco Mendicino  
Minister of Immigration, Refugees and Citizenship  
365 Laurier Avenue  
Ottawa, Ontario  
K1A 1L1

The Honourable David Lametti  
Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, Ontario  
K1A 0H8

July 29, 2020

Dear Prime Minister, Deputy Prime Minister and Ministers,

We write regarding last week's Federal Court ruling in which Justice Ann Marie McDonald concluded that the Canada/US Safe Third Country Agreement violates liberty and security of the person rights in section 7 of the Canadian Charter of Rights and Freedoms. Her judgement is based on extensive and compelling concerns about the prevalence, arbitrariness, and cruel and inhumane conditions associated with immigration detention in the United States, which she finds to be an "immediate and automatic" punishment for refugee claimants denied entry into Canada under the STCA.

As we note in greater detail in the attached briefing note, this judgement provides a crucial opportunity for the government to act decisively and live up to its responsibility to bring to an end years of grave violations of the rights of refugee claimants seeking protection at official land border posts between Canada and the United States. We urgently implore the government to:

- **immediately stop sending refugee claimants back to the United States and suspend the STCA; and**
- **refrain from pursuing an appeal of this decision.**

We would welcome an opportunity to meet with you and your officials on an urgent basis to discuss these recommendations further.

Sincerely,



Dorota Blumczynska  
President  
Canadian Council for Refugees



Alex Neve  
Secretary General  
Amnesty International Canada



Reverend Stephen Kendall  
President  
Canadian Council of Churches

cc. Andrew Scheer, Leader of the Official Opposition  
Yves-François Blanchet, Leader of the Bloc Québécois  
Jagmeet Singh, Leader of the New Democratic Party of Canada  
Elizabeth May, Parliamentary Leader, Green Party of Canada

## **BRIEFING NOTE**

**Federal Court Ruling: *Canadian Council for Refugees, Amnesty International, Canadian Council of Churches, ABC, DE, FG, Nedira Jemal Mustefa, Mohammad Majd Maher Homs, Hala Maher Homs, Karam Maher Homs and Reda Yassin Al Nahass v. Minister of Citizenship and Immigration and Minister of Public Safety and Emergency-Preparedness***

On July 22, 2020 Federal Court Justice Ann Marie McDonald ruled that the impact of the legislation that implements 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* (known as the Safe Third Country Agreement or “STCA”), violates liberty and security rights in section 7 of the Canadian Charter of Rights and Freedoms, and that those violations cannot be justified under section 1 of the Charter.

Justice McDonald consequently determined that s. 101(1)(e) of the *Immigration and Refugee Protection Act* and s. 159.3 of the *Immigration and Refugee Protection Regulations* are of no force or effect. She suspended that declaration of invalidity for a period of six months, until January 22, 2021.

In July 2017, the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches launched this application for judicial review, joined eventually by eight individual applicants from El Salvador, Ethiopia and Syria. At this time, in responding to this ruling, we urgently implore the government to:

- **Immediately stop sending refugee claimants back to the United States and suspend the STCA.**
- **Accept Justice McDonald’s judgement and refrain from pursuing a further appeal.**

Justice McDonald’s judgement is based on glaring and well-documented concerns about wide-ranging and very serious human rights violations associated with immigration detention in the United States. Her analysis includes a review of the experience of one of the applicants, Nedira Jemal Mustefa, who was “immediately imprisoned” after being denied entry into Canada and returned to the United States pursuant to the STCA.

Ms. Mustefa was detained for one month, including one week in solitary confinement which she described as a “a terrifying, isolating and psychologically traumatic experience.” She lost 15 pounds because her dietary requirements as a Muslim were not respected. She was “detained alongside people who had criminal convictions” and held in “freezing cold” conditions in which prisoners were “not allowed to use blankets during the day.” She “felt scared, alone, and confused at all times” and “did not know when [she] would be released, if at all.”

Justice McDonald also reviews extensive evidence about both the process and conditions of immigration detention in the United States provided by other individuals who had been detained, and lawyers and advocates who work with refugee claimants and migrants in detention centres and jails. She concludes that “detainees demonstrate both physical and psychological suffering because of detention, and a real risk that they will not be able to assert asylum claims.”

Having found that liberty and security of the person rights are engaged due to the evidence that refugee claimants turned away from Canada under the STCA are “immediately and automatically imprisoned by US authorities,” Justice McDonald then considers whether this deprivation of liberty and violation of security of the person is nonetheless in accord with the principles of fundamental justice. She does so by assessing the stated objective of the STCA, as previously recognized by the Federal Court of Appeal, namely the “sharing of responsibility for the consideration of refugee claims” between Canada and the United States.

Justice McDonald concludes that the impact of the STCA is impermissibly *overbroad* as there is “no connection” between the deprivation of the liberty rights of STCA returnees” and that stated objective of responsibility-sharing. She further concludes that the impact of the STCA is *grossly disproportionate* as “imprisonment flows automatically from a finding of ineligibility under the STCA.” She notes that “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.”

Justice McDonald further notes that “the impact it has on the lives of those who attempt to make refugee claims in Canada and are returned to the US ... cannot be justified for the sake of, and in the name of, administrative efficiency.” She concludes that “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*” and that “to find otherwise would be ‘entirely outside the norms accepted in our free and democratic society.’”

Notably, Justice McDonald holds that Ms. Mustefa’s evidence alone “meets this test and is sufficient to ‘shock the conscience’” and thus does not accord with the principles of fundamental justice.

Finally, Justice McDonald turns to the question as to whether this violation of section 7 is saved by section 1 of the Charter as being demonstrably justified in a free and democratic society. The government argued that without the STCA the numbers of refugee claimants arriving in Canada would rise, posing a challenge to the sustainability of our refugee system. Justice McDonald concludes, however, that the “evidence offered by the [government] on this point is weak. In the past, Canada has demonstrated flexibility to adjust to fluctuations in refugee numbers in response to needs.”

As noted, the government has been provided with six months grace before the ruling takes effect. We strongly urge the government, however, to move immediately to rectify this longstanding and very serious human rights concern and, similarly, to refrain from launching an appeal that will further prolong and protract this intolerable situation.

By any measure, respect for the rights of refugee claimants in the United States at this time constitutes a human rights crisis, particularly when it comes to the prevalence, arbitrariness and cruel and inhumane conditions associated with immigration detention, which fall far below required international human rights standards. Canada should not continue to be complicit in these deeply troubling human rights violations for another day, let alone for six months.

As Justice McDonald observes, there is no compelling or convincing evidence that lifting the STCA would give rise to arrivals of numbers of refugees beyond Canada's ability and resources to respond. What is most important is that we act immediately to uphold the Charter, respect our international human rights obligations and ensure the safety and dignity of refugees.

If refugees are able to make claims for protection at official land border posts it will be manageable and feasible for the government to adopt measures that public health officials recommend as being necessary to address any concerns related to COVID-19. It will also bring an end to the crossings at Roxham Road, which have been challenging both for the refugees forced to use this route, as well as for the various levels of government affected and the local community.

Canadians have been deeply troubled by the longstanding lack of respect for the rights of refugees and migrants in the United States, which has worsened precipitously in recent years. Embracing this ruling and moving immediately to suspend operation of the STCA provides an opening to demonstrate the strength of Canada's commitment to refugee protection at a time when such leadership is in short supply and urgently needed around the world.

Most importantly this is a crucial opportunity for Canada to live up to its responsibility, under the Charter and international law, to ensure that the rights of refugee claimants -- who are understandably anxious and fearful about the prospect of turning to the mounting uncertainties and outright cruelty of the US asylum system -- are protected and upheld. We must not allow another person to be sent back to face imprisonment in conditions that "shock the conscience".

We urge the government to take the principled and necessary step of moving immediately to stop sending refugee claimants back to the United States and suspend the Safe Third Country Agreement.