Supplementary submission to Cabinet with respect to the designation of the U.S. as a safe third country for refugees

April 2007

A. INTRODUCTION

In November 2006, the Canadian Council for Refugees (CCR) made a submission to the federal Cabinet to assist it in its statutory obligation to ensure the continuing review of the designation of the United States of America as a safe third country under s.102 of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c.27 ("*IRPA*").

The CCR submitted in November 2006 compelling evidence that the U.S. fails to meet the definition of a "safe third country" in *IRPA* on the basis of the factors identified in paragraphs 102(2)(b) and (c).

The CCR is concerned that, since the designation in 2004 of the U.S. as a safe third country, there have been significant negative developments in the U.S. relating to various human rights issues that have not been subject to review by the Cabinet. Despite these developments, the Cabinet still does not appear to have conducted a review, either before or after the CCR's November 2006 submission. Since November 2006, further information has become available that indicates that the U.S. does not meet the criteria for a safe third country as established in *IRPA.* These supplementary submissions outline some of these recent developments, and restate the call for the Cabinet to respect its statutory obligations.

B. UPDATE ON U.S. POLICIES AND PRACTICES WITH RESPECT TO CLAIMS UNDER THE REFUGEE CONVENTION

1. United States Commission on International Religious Freedoms

In our November 2006 submission, we drew attention to the 500-page report issued by the U.S. Commission on International Religious Freedom (the "Commission") entitled "*Asylum Seekers in Expedited Removal*", published in February 2005.[1] "Expedited removal" is a process introduced into U.S. immigration legislation in 1996. It provides for the summary removal of improperly documented persons arriving in the U.S.

In its report, the Commission presented a stinging criticism of the U.S. refugee determination system and made a series of recommendations to address problems identified. Specifically, the Commission made 18 recommendations to the agencies responsible for implementing the Expedited Removal program, all of which were designed to further the aims of both protecting U.S. borders and ensuring fair and humane treatment for *bona fide* asylum seekers.

[1] United States Commission on International Religious Freedom, *Report on Asylum seekers in expedited removal*, February 2005, http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/index.html.

In February 2007, the Commission presented a two-year review of its recommendations, in response to requests from two Senators for a report on progress made. They concluded that the problems identified in the original report remain unresolved, and that the "majority of its recommendations have not been implemented."[2] The Commissions' chair, Felice D. Gaer, criticized the Department of Homeland Security for expanding the scope of Expedited Removal from a port-of-entry program to one that covers the entire land and sea border of the United States. The Report further criticized Customs and Border Protection for failing to institute any of the five recommendations made by the Commission to improve oversight, including measures as simple as adding videotape monitoring systems to all border patrol stations and ports of entry or employing so-called testers to verify that procedures are followed correctly. The Report also criticized Immigration and Customs Enforcement for failing to take any steps to improve the prison-like conditions under which asylum seekers are detained or ensure that release criteria are applied uniformly. According to the Commission's press release:

> Congress intended Expedited Removal, written into law in 1996, to protect U.S. borders and *bona fide* asylum seekers. As this policy is being implemented, though, it has put asylum seekers at risk of being returned to countries where they face persecution.
>
> That has helped turn the United States, a nation founded by people fleeing repression, into a country of bureaucratic walls and mazes where victims are sent back to their tormentors or thrown into U.S. jails alongside criminals pending a judgment on asylum.[3]

As stated in our November 2006 submission, the problems in the U.S.'s policies and practices identified by the Commission in 2005 lead to refugees being denied protection and placed in a situation where they face refoulement, in contravention of the U.S.' obligations under Article 33 of the Refugee Convention. The Commission's two-year review is evidence not only that these problems persist, but also of an apparent indifference to the problems on the part of the U.S. Administration. This evidence is directly relevant to the assessment of whether the U.S. meets the definition of a safe third country, taking into account the factors set out in the *Immigration and Refugee Protection Act*.

2. Detention

On 22 February 2007, the Women's Commission for Refugee Women and Children and Lutheran Immigration and Refugee Service (LIRS) issued a report entitled "*Locking Up Family Values: The Detention of Immigrant Families"*,[4] which found significant problems with the U.S. treatment of immigrant families in detention.

[2] U.S. Commission on International Religious. Freedom, "U.S.CIRF Finds Disappointing Response from Departments of Justice and Homeland Security to its Recommendations on Expedited Removal Process", Press Release, 8 February 2007, http://www.U.S.cirf.gov/mediaroom/press/2007/february/20070208Response.html.
[3] *Ib.*
[4] Women's Commission for Refugee Women and Children issued a report entitled "*Locking Up Family Values: The Detention of Immigrant Families"*, http://www.womenscommission.org/pdf/famdeten.pdf.

The Report details prison-like conditions at the Department of Homeland Security's facilities that house families, including asylum seekers, who are in immigration proceedings. The Women's Commission and LIRS visited the T. Don Hutto Residential Center in Texas and the Berks Family Shelter Care Facility in Pennsylvania and talked with detained families as well as former detainees and ICE officials. The delegation found families, many with young children, detained in harsh conditions, for days, months and sometimes years. These families are held in penal settings where residents are deprived of the right to live as a family unit, denied adequate medical and mental health care, and face overly harsh disciplinary tactics.

The Report notes that the detention of families expanded dramatically in 2006 with the opening of a family facility in Texas, and represents a major shift in the U.S. government's treatment of families in immigration proceedings.

Canadians were made aware of the harsh conditions at the Hutto detention centre when a 9-year-old Canadian citizen child, Kevin Yourdkhani, was held there with his parents, in February and March 2007. He was eventually able to return to Canada when the Canadian government, taking into account the best interests of their child, issued temporary permits to Kevin's parents.[5]

As pointed out by the report, the treatment of detained families in the U.S. violates a number of provisions of the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. The use of detention against families seeking asylum and the conditions in which they are detained also conflict with obligations under the Refugee Convention, and with the detention guidelines issued by the UN High Commissioner for Refugees, which are themselves predicated on the Refugee Convention.[6] The report also gives details of a number of barriers to access to counsel for detainees which in turn is likely to influence whether all refugee detainees receive protection from refoulement.

The information in the report therefore constitutes another factor against considering the U.S. as a safe third country, based on its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention against Torture, its human rights record and its compliance (or lack of compliance) with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture.

3. Update on Recently Introduced Waivers to the "Material Support for Terrorism" Bar

On 11 January 2007, the Department of Homeland Security announced several changes to the "material support" for terrorism restrictions U.S. asylum law. As canvassed in CCR's November 2006 report, an individual in the United States may be barred from both asylum and withholding of removal for providing "material support" to "terrorist organizations,"[7] regardless of whether

[5] CBC news, "Canadian boy, Iranian parents headed to Toronto from Texas prison", 21 March 2007.
[6] UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999.
[7] "Material support" includes the "transfer of funds, or other material financial benefit." 8 U.S.C.A. § 1182(a)(3)(B)(iv)(VI) (2005). See generally Immigration And Refugee Clinic & Int'l Human Rights Clinic, Harvard Law School, *Preliminary Findings and Conclusions on the Material Support for Terrorism Bar as applied to the*

the individual had actual knowledge of the terrorist activities[8] or whether the individual was acting under duress.[9] This contradicts international and Canadian legal standards that allow a duress defence,[10] and require an applicant's individual responsibility for an act to be established in order to justify exclusion of the individual from refugee protection.[11]

In January 2007, the Department of Homeland Security announced its intent to use its authority to exempt some asylum seekers and others from the "material support" for terrorism bar. The administration also announced that it will seek legislation from Congress to allow it to exempt other groups, for example to allow for the resettlement of members and combatants of armed groups that have supported U.S. forces. According to the Press Release issued by the Department of Homeland, the Secretary, Michael Chertoff, undertook to use his "discretionary authority to permit consideration of applications for refugee status, asylum or adjustment of status from some who have provided material support to groups while under duress."[12]

However, the Refugee Council USA reported that as of March 2007, no asylum or adjustment of status applicants had been issued a waiver, and that an unknown number of asylum seekers in removal proceedings remain at risk of deportation because there is still no process by which to apply for a waiver.[13] These waivers, if and when they are in fact issued, will provide minimal relief to asylum seekers, will remain discretionary and fail to treat the full extent of the problem posed by the material support bar, given that they extend to cover only a very select portion of the refugees and asylum seekers at risk. The flawed language of the definitions used to label individuals as supporters of "terrorist organizations" remains unchanged.[14]

As a result, despite the acknowledgement of the problem by the U.S. government, the rules relating to "material support" continue to leave refugees exposed to refoulement, in violation of the U.S.'s obligations under Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture.

Overseas Resettlement of Refugees from Burma (2006), http://www.law.harvard.edu/academics/clinical/asylum_law/Material_Support_Study.pdf.

[8] The language of "should not reasonably have known" in 8 U.S.C.A. § 1182(a)(3)(B) appears to be an objective standard that requires no actual knowledge.

[9] In a non-precedential opinion, the U.S. Court of Appeals for the Third Circuit recently affirmed a Board of Immigration Appeals (BIA) ruling that a Colombian asylum applicant who paid war taxes to a terrorist group was ineligible for refugee protection because he had voluntarily engaged in a terrorist activity. The court, however, declined to rule on whether involuntary conduct could be considered "engag[ing] in a terrorist activity." *Arias v. Gonzales*, 2005 WL 1811822, at *2, *4 (3d Cir. 2005).

10 United Nations High Commissioner for Refugees, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees ¶ 22 (Sept. 4, 2003). For Canadian jurisprudence, see Bermudez v. MCI, [2005] F.C.J. No. 345; Canada MCI v. Asghedom, [2001] F.C.J. No. 1350; Ramirez v. M.E.I. (1992), 2 F.C. 306 (C.A.); Moreno v. M.E.I., [1994] 1 F.C. 298 (C.A.); Sivakumar v. MCI [1994], 1 FC 433.

[11] *Id.* at ¶ 18.

[12] Department of Homeland Security, Statement by Homeland Security Secretary Michael Chertoff on the Intention to Use Discretionary Authority for Material Support to Terrorism, 19 January 2007, http://www.dhs.gov/xnews/releases/pr_1169465766808.shtm.

[13] Refugee Council USA, "Administration's Actions to Address the Material Support Problem as of March 2007", 27 March 2007, http://www.refugeecouncilusa.org/ms-backgrd-admisprog3-27-07.pdf.

[14] For further information, see Human Rights First, "Refugees at Risk under Sweeping "Terrorism" Bar", undated, last visited 26 April 2007, http://www.humanrightsfirst.org/asylum/asylum_refugee.asp.

C. UPDATE ON U.S. PRACTICES WITH RESPECT TO OBLIGATIONS UNDER THE CONVENTION AGAINST TORTURE

1. Human Rights Watch Report, The 'Stamp of Guantánamo'

On 29 March 2007, Human Rights Watch issued a 43-page report entitled "*The 'Stamp of Guantánamo': The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States*",[15] documenting the forced return by the U.S. of former Guantánamo detainees to Russia in 2004 to face torture and other abuse, despite Moscow's pledge to the U.S. government that they would be treated humanely.

The seven Russians were all detained soon after the U.S. invasion of Afghanistan and were transferred to Guantánamo, where they spent about two years. Although they complained of mistreatment by the U.S. authorities, all of the detainees repeatedly asked authorities at Guantánamo not to be returned to Russia because they expected to be treated worse there. In fact, three of the seven prisoners experienced serious torture and ill-treatment after being arrested in Russia. Two of the prisoners were convicted at unfair trials, and all of them have been harassed and hounded by Russian law enforcement. Human Rights Watch noted that these prisoners' experience illustrate that the United States is wrong to rely on "diplomatic assurances" of fair treatment to justify sending people from Guantánamo Bay to countries where they are at risk of torture.

By transferring prisoners to countries where they may face torture, the United States violates Article 3 of the *Convention Against Torture*. It therefore cannot properly be designated a safe third country, which the *Immigration and Refugee Protection Act* defines as one that complies with this non-refoulement principle.

E. CONCLUSIONS

These reports all raise serious, ongoing concerns about the failures by the U.S., in policy and in practice, to respect human rights standards, including the Refugee Convention and the Convention Against Torture. Particularly in light of the findings detailed in CCR's November 2006 submission, it is clear that the U.S. does not satisfy the definition or factors established in Canadian law with respect to the designation of a country as a safe third country.

Canadian law requires the federal Cabinet to ensure the continuing review of the status of the United States as a "safe third country". According to an October 2004 Cabinet Directive, this review was to be conducted on the basis of regular reports to Cabinet by the Minister of Citizenship and Immigration. Nevertheless, there has apparently not been a single report to Cabinet on U.S. compliance with the legislated definition and factors since the original report was provided to Cabinet in September 2002. As a result, Canadian officials continue to turn back refugee claimants to the U.S. in 2007 on the basis of their determination that it was safe to do so in 2002.

[15] Human Rights Watch "*The 'Stamp of Guantánamo': The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States*", March 2007, http://www.hrw.org/reports/2007/russia0307/.

In light of the substantial changes in policy and practice in the U.S. since 2002, the CCR submits that the U.S. can no longer be considered a safe third country, according to the definition and factors established in the *Immigration and Refugee Protection Act*. We therefore call on the Government of Canada to suspend the Agreement immediately, and to conduct a full public review of U.S. compliance with the definition and factors set out by Parliament as pre-conditions to the operation of any safe third country system.