UCLouvain

LOUVAINTERNATIONAL
ANNÉE 2018 - 2019

CAHIERS DE L'EDEM
LOUVAIN MIGRATION CASE LAW COMMENTARY

EDEM

Octobre 2020

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These Commentaries are written by the European Law and Migration team (EDEM), which is part of UCLouvain. Each month, they present recent judgments from national or European courts in the field of the implementation of European asylum and immigration law in Belgian law. The Commentaries are written in French and/or English. If you wish to subscribe, please send an email to cedie@uclouvain.be.

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Parmi les trois contributions de ce mois d'octobre, deux contributions anglophones : celle de **Jack Mangala**, membre de l'EDEM et Associate Professor of Political Science and African Studies at Grand Valley State University (Michigan), ainsi que celle du **Dr. Edit Frenyó**, Hauser Global Postdoctoral Fellow at NYU Law.

Nous vous invitons à consulter la page actualités du CeDIE car le mois d'octobre a été riche en publications par les membres du CeDIE/EDEM.

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La Cour européenne des droits de l'homme condamne la pratique de l'Office des étrangers, avalisée par la jurisprudence formaliste de la Cour de cassation, consistant à délivrer des titres de détention

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Les Cahiers de l'EDEM ont vu le jour dans le cadre du projet de recherche fonds européen pour les réfugiés – UCL.

successifs au sujet desquels les juridictions d'instruction n'ont pas le temps de se prononcer. Une fois encore, la Belgique est visée pour l'ineffectivité des recours qu'elle organise lorsqu'un étranger est détenu en vue de son éloignement.

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In Department of Homeland Security v. Regents of the University of California*, the Supreme Court of the United States held that the Trump administration's decision to terminate the Deferred Action for Childhood Arrivals (DACA) program was arbitrary and capricious. The Court found that the administration violated the reasoned decision-making requirement under the Administrative Procedure Act by 1) failing to distinguish between the protection from deportation and the benefits granted to recipients under DACA; 2) not considering the consequences of the decision on DACA recipients, their families and communities.*

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1. COUR EUR. D.H., ARRET DU 30 JUIN 2020, *SAQAWAT C. BELGIQUE*, REQ. N° 54962/18

Détention d'un étranger en vue de son éloignement : La jurisprudence « sans objet » de la Cour de cassation condamnée par la Cour européenne des droits de l'homme

Jean-Baptiste Farcy

A. Arrêt

La décision de la Cour européenne des droits de l'homme fait suite à l'impossibilité alléguée par Monsieur Saqawat de faire constater le caractère arbitraire de sa détention. Selon le requérant, la jurisprudence de la Cour de cassation, en vertu de laquelle le recours intenté contre une décision de maintien en détention est « sans objet » dès lors qu'un nouveau titre de détention est délivré, est contraire au droit à un recours effectif.

Arrivé à l'aéroport de Zaventem le 2 décembre 2017, le requérant introduit une demande d'asile à la frontière. L'Office des étrangers (« OE ») adopte, le jour même, une décision de maintien en détention le temps que la demande d'asile soit traitée. Cette dernière est refusée par une décision du 20 décembre 2017. S'ensuit une deuxième demande d'asile introduite le 23 janvier 2018 et une deuxième mesure de maintien en détention. Le lendemain, le Commissariat général aux réfugiés et aux apatrides (« CGRA ») refuse de prendre en considération la seconde demande d'asile. Le même jour, Monsieur Saqawat s'oppose à son éloignement, suite à quoi l'OE adopte une nouvelle mesure de maintien en détention en vue de son éloignement. Le 31 janvier, la chambre du conseil du tribunal de première instance de Bruxelles ordonne la remise en liberté du requérant au motif que la décision de détention du 23 janvier, et par extension, celle du 24 janvier, étaient motivées de manière stéréotypée sans appréciation de la situation individuelle du requérant. En appel, la chambre des mises en accusation a réformé la décision, considérant que les mesures de détention des 23 et 24 janvier constituaient des titres autonomes reposant sur des motifs distincts de détention (respectivement, dans l'attente d'une décision du CGRA et en vue de l'éloignement). C'est à tort que la chambre du conseil a étendu l'examen de la demande dirigée contre la première décision à la deuxième. Au vu de la jurisprudence de la Cour de cassation, la chambre des mises en accusation estime que le recours introduit contre la décision de détention du 23 janvier est devenu sans objet. Le 21 mars 2018, la Cour de cassation valide l'arrêt de la chambre des mises en accusation et rejette le pourvoi introduit devant elle.

Entre-temps, le 20 février 2018, le requérant a introduit une troisième demande d'asile. Il est maintenu en détention et, le 26 février, le CGRA rejette la demande d'asile multiple. Le lendemain, un vol de retour est organisé mais le requérant s'y oppose, suite à quoi l'OE adopte une nouvelle (la cinquième) mesure de maintien en détention. Par la suite, la chambre du conseil ordonne la libération du requérant au motif que les décisions de maintien en détention, des 20 et 27 février, étaient à nouveau stéréotypées, ce que confirme la chambre des mises en accusation. Par un arrêt du 25 avril 2018, la Cour de cassation considère au contraire qu'il y a lieu de distinguer les deux

mesures de maintien en détention, l'illégalité de la première n'affectant pas la régularité de la seconde.

Saisie d'un recours, la Cour européenne des droits de l'homme est appelée à se prononcer sur la conformité de la jurisprudence de la Cour de cassation avec l'article 5, §4 de la Convention. Selon la Cour de cassation, le recours introduit contre une première mesure de détention devient sans objet lorsque, entre-temps, une nouvelle mesure de privation de liberté est adoptée. D'après cette jurisprudence, le premier titre de détention devient caduc. Autrement dit, il disparait de l'ordonnancement juridique et il ne fonde plus la détention de l'étranger. Il n'y aurait dès lors plus lieu d'en attaquer la légalité. Le requérant allègue toutefois qu'il s'agit là d'une pratique dilatoire l'empêchant de saisir un juge pour qu'il se prononce sur la légalité de sa détention à bref délai.

La Cour européenne des droits de l'homme fait droit à la requête de Monsieur Saqawat et condamne la Belgique. Selon la Cour, l'application de la jurisprudence « sans objet » de la Cour de cassation a eu pour conséquence de maintenir la personne étrangère en détention pour des motifs étrangers à la légalité interne des titres de détention contestés. En ce qu'elle ne permet pas à un étranger maintenu en détention d'obtenir sa libération malgré plusieurs constats d'illégalité et ce au motif qu'un nouveau titre de détention est venu fonder sa détention, la législation belge n'offre pas les garanties d'effectivité requises par l'article 5, §4 de la Convention. En l'espèce, ce n'est que trois mois et vingt jours après avoir introduit une première requête de mise en liberté que le demandeur a obtenu une décision finale sur la légalité de sa détention.

B. Éclairage

Par l'arrêt commenté, la Cour européenne des droits de l'homme considère que la Belgique a privé le requérant d'une voie de recours effective. Une nouvelle fois, les garanties procédurales offertes aux étrangers détenus sont jugées insuffisantes (1). En l'espèce, l'hyper-formalisme de la jurisprudence « sans objet » de la Cour de cassation est condamné (2).

1. L'ineffectivité des recours, un problème persistant

L'effectivité des recours intentés contre une mesure de détention et/ou une mesure d'éloignement pose question depuis de nombreuses années en Belgique[1]. La volonté politique de renforcer l'effectivité de la politique de retour, facilitée par le formalisme de la jurisprudence de la Cour de cassation, limite l'effectivité des procédures juridictionnelles offertes aux étrangers.

Concernant, par exemple, l'étendue du contrôle judiciaire, la Cour de cassation se retranche derrière le principe de la séparation des pouvoirs pour justifier le fait que le contrôle des juridictions d'instruction soit limité à la légalité, et non à l'opportunité, d'une mesure de privation de liberté, conformément à l'article 72 de la loi du 15 décembre 1980. Or, cette jurisprudence critiquée empêche le juge d'apprécier le respect du principe de proportionnalité imposé par le droit européen (voy. à cet égard, l'arrêt *Mahdi* de la Cour de justice de l'Union européenne).

S'agissant, par ailleurs, de l'effet suspensif des recours intentés contre une mesure d'éloignement dont l'exécution ferait courir à l'étranger un risque de traitement inhumain ou dégradant, la

[1] La revue du droit des étrangers a d'ailleurs consacré un numéro spécial à la question de l'effectivité des recours pour un étranger privé de liberté en vue de son éloignement (n° 191).

législation belge a été sanctionnée à plusieurs reprises. Selon la Cour européenne des droits de l'homme dans l'arrêt *S.J. c. Belgique*, un recours doit être suspensif de plein droit afin de permettre un examen effectif des moyens tirés de la violation de l'article 3 de la Convention. En 2002, l'arrêt *Čonka* avait déjà souligné, à propos du recours en suspension devant le Conseil d'État, que « l'effectivité des recours exigée par l'article 13 suppose qu'il puisse empêcher l'exécution des mesures contraires à la Convention et dont les conséquences sont potentiellement irréversibles » (§79). De manière analogue, la jurisprudence de la Cour de justice de l'Union européenne se prononce en faveur du caractère suspensif des recours intentés contre une mesure d'éloignement. Dans l'arrêt *Abdida* datant de 2014, la Cour a estimé que le recours exercé contre une décision ordonnant à un ressortissant de pays tiers atteint d'une maladie grave de quitter le territoire doit avoir un effet suspensif, lorsque cette décision est susceptible de l'exposer à un risque sérieux de détérioration grave et irréversible de son état de santé. Tardant à mettre en œuvre cet enseignement, la Belgique a reçu plusieurs rappels à l'ordre (voy. par exemple l'arrêt *Gnandi* du 19 juin 2018), et ce pas plus tard que le 30 septembre 2020 dans les arrêts *LM* (C-402/19) et *B* (C-233/19).

En ce qui concerne, enfin, le délai endéans lequel la Cour de cassation est tenue de statuer lorsqu'elle est saisie d'un pourvoi à l'encontre d'une décision de maintien en détention, on rappellera que la Cour de cassation estime, par excès de formalisme, que la loi du 20 juillet 1990 sur la détention préventive n'est pas applicable puisque celle-ci est postérieure à la loi du 15 décembre 1980. Le délai de 15 jours prévu par la loi du 20 juillet 1990 peut donc être dépassé, alors même que l'article 15 de la directive dite « retour » exige un contrôle juridictionnel accéléré.

Ces différents exemples attestent de l'insuffisance des garanties procédurales offertes aux étrangers maintenus en détention en vue de leur éloignement. L'arrêt commenté s'inscrit ainsi dans la lignée d'autres condamnations à l'encontre de la Belgique. Non sans rappeler l'arrêt *Firoz Muneer c. Belgique*[2], il vise en particulier la délivrance de titres de détention successifs dont l'enchainement conduit à une absence de contrôle.

2. Le réquisitoire du réécrou, un obstacle au droit à un recours effectif

L'arrêt commenté condamne la pratique belge consistant à délivrer plusieurs décisions de maintien en détention successives, notamment lorsque la personne étrangère s'oppose à son éloignement. Un réquisitoire de réécrou est ainsi adopté sur la base de l'article 27 de la loi du 15 décembre 1980 avant que les voies de recours à l'encontre de la décision antérieure de maintien en détention n'aient été épuisées. S'agissant de titres autonomes de détention, le premier disparait au profit du second et, par conséquent, conformément à une jurisprudence constante de la Cour de cassation, le recours intenté contre la première décision de maintien en détention devient « sans objet »[3]. Récemment, la Cour de cassation a néanmoins apporté un léger tempérament : s'il est invoqué que la première décision de privation de liberté est affectée d'une illégalité de nature à invalider une décision subséquente, il appartient au juge saisi d'en examiner la légalité[4].

[2] Pour un commentaire de cet arrêt : P. D'HUART, *Cahiers EDEM*, avril 2013.
[3] En ce sens : Cass., 3 septembre 2008, P.08.1323.F ; Cass., 16 septembre 2014, P.141289.N.
[4] Cass., 10 mai 2017, P.17.0447.F.

Outre le fait que la détention semble ainsi pouvoir se prolonger au-delà des limites fixées par la loi[5], la pratique de l'OE a pour effet de priver l'étranger maintenu en détention du droit à un recours effectif. S'il est loisible à l'administration de délivrer un nouveau titre de détention avant qu'un juge ait pu se prononcer sur la légalité du titre précédent, le recours n'a plus lieu d'être et l'étranger, qui demeure cependant privé de liberté, perd l'intérêt qu'il avait à agir. Le recours intenté contre une mesure de détention est ainsi dépourvu d'effectivité puisqu'il ne permet pas à un étranger d'obtenir une décision judiciaire portant sur la légalité de sa détention.

La Cour européenne des droits de l'homme ne s'y trompe pas. Il s'agit là d'une manœuvre déloyale de la part de l'OE, manœuvre à laquelle le formalisme excessif de la Cour de cassation accorda des airs de légalité.

C. Pour aller plus loin

Lire l'arrêt : Cour eur. D.H., arrêt du 30 juin 2020, *Saqawat c. Belgique*, req. n° 54962/18.

Jurisprudence :

Cour eur. D.H., arrêt du 11 avril 2013, *Firoz Muneer c. Belgique*, req. n° 56005/10.

Doctrine :

P. HUBERT, P. HUGET et G. LYS, « Le recours effectif devant les juridictions d'instruction et la Cour de cassation », *Revue du droit des étrangers*, 2016, n° 191, pp. 695-719.

S. SAROLEA, "Detention of Migrants in Belgium and the Criminal Judge: A Lewis Carroll World", in M. MORARU, G. CORNELISSE et PH. DE BRUYCKER (dir.)*, Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*, Oxford, Hart, 2020.

T. WIBAULT, « Le recours effectif contre la détention – Un droit fondamental », *Revue du droit des étrangers*, 2016, n° 191, pp. 689-694.

Pour citer cette note : J.-B. FARCY, « Détention en vue de l'éloignement : La jurisprudence « sans objet » de la Cour de cassation condamnée par la Cour européenne des droits de l'homme », *Cahiers de l'EDEM*, octobre 2020.

[5] À cet égard, voy. notamment : D. ANDRIEN, « La détention illimitée de l'étranger réfractaire, ou le retour de la lettre de cachet », *J.L.M.B.*, 2001/23, pp. 1013 – 1017.

2. SUPREME COURT OF THE UNITED STATES
DEPARTMENT OF HOMELAND SECURITY V. REGENTS OF THE UNIVERSITY OF CALIFORNIA
591 U.S. (2020)

The Dreams Live on for Now — An Arbitrary and Capricious Rescission of DACA Cannot Stand

Jack Mangala

A. Facts and Ruling

On June 18, 2020, the Supreme Court of the United States by a 5-4 vote ruled against the Trump administration's attempt to rescind the Deferred Action for Childhood Arrivals (DACA) program. In a narrow opinion based on administrative law doctrine, Chief Justice John Roberts, joined by the Court's four more liberal justices, stressed the reliance interests of DACA recipients. They agreed with the challengers that the administration in its initial 2017 rescission had not adequately considered alternatives that would ease the "hardship" posed by the rescission to the roughly 800,000 people in the program. In particular, the Court held that when the Department of Homeland Security (DHS) found in 2017 that DACA was unlawful and thus required rescission, the department failed to address whether one facet of DACA —its "forbearance" in deferring removal of recipients— was in fact legal as an exercise of prosecutorial discretion. This flaw in the department's decision-making rendered the rescission invalid.

DACA was enacted by the Obama administration in June 2012. Considered to be a signature immigration initiative of President Obama, the program has provided a shield from deportation, for renewable two-year terms, for foreign nationals who came to the United States as children. The program also allowed DACA recipients to work legally in the United States and gave them access to other benefits, such as health insurance, drivers' licenses and tuition reimbursement. As Chief Justice Roberts observed, Obama's DHS had found that DACA would allow the United States to benefit from "productive young people" who "know only this country as home." Polls showed that DACA enjoyed broad support among Americans.[1] It is worth noting that DACA was accompanied by another Obama initiative, Deferred Action for Parents of Americans (DAPA) which extended the same protection and benefits to parents of U.S. citizens and permanent residents. In 2015 and 2016, the then presidential candidate Donald Trump repeatedly described both programs as "illegal executive amnesties" and promised to end them if elected.[2]

1. Attempts to end DACA faced with a cascade of legal challenges

The Trump administration rolled out its rationale for ending DACA in two phases. On September 5, 2017, the then Attorney General Jeff Sessions opined in a letter that DACA was unlawful and unconstitutional as a unilateral exercise of executive power inconsistent with the Immigration and

[1] One poll conducted in January 2018 indicated that 87 percent of those surveyed believed that DACA recipients should be allowed to stay in the country as long as they were working or going to school.

[2] Unlike DACA, DAPA was never enacted due to an early legal challenge in which the U.S. Court of Appeals for the Fifth Circuit held that the program was too massive to fit within Congress's scheme under the Immigration and Naturalization Act (INA). The Supreme Court, shortly after Justice Antonin Scalia's passing in 2016, affirmed the Fifth Circuit in a 4-4 tie without issuing any opinion, thus precluding DAPA from taking effect.

Naturalization Act (INA)'s careful demarcation of foreign nationals entitled to enter or remain in the United States. Following Mr. Sessions' letter, the then Acting Secretary of DHS issued a memorandum on September 5 reiterating the Attorney General's opinion and terminating DACA. Shortly after, lawsuits were filed in the federal district courts in California, New York, Maryland, and the district of Columbia challenging the termination. The challengers in these lawsuits included states, cities, universities, DACA recipients, civil rights groups and even Microsoft corporation. In substance, the challengers argued that the decision to rescind DACA violated the rights of DACA recipients and the Administrative Procedure Act (APA), the federal law governing administrative agencies.

In January 2018, a U.S. district court in California issued the first order enjoining the termination and forcing DHS to keep the program open to those who had previously been granted DACA status. Other district courts would side with the challengers. Following these judicial decisions that found the justifications outlined in the 2017 memorandum to be inadequate, the new Acting Secretary of DHS Kirsten Nielsen would issue more expansion reasons for the rescission in a June 22, 2018 memo. While reiterating that DACA was simply unlawful, the Secretary asserted that the legality of DACA triggered "serious doubts" which, in themselves, were a reasonable basis for ending the program. The Secretary also outlined policy reasons for rescinding the program, such as a preference for case-by-case decision-making approach over DACA's broad eligibility criteria for childhood arrivals. Faced with all these legal challenges and court defeats, the Trump administration asked the Supreme Court to weigh in on cases that were still making their way through lower appeal courts.

2. The Supreme Court finally took up all DACA cases

On June 28, 2019, the justices finally announced that they would take up all three appeals together. They agreed to tackle two questions: whether the government's decision to end DACA was reviewable by the courts and, if so, whether the decision to end DACA was legal.

In its brief on the merits at the Supreme Court, the government maintained that its decision to end DACA was not reviewable. The lower courts, the government explained, had ruled that the decision to end DACA should be set aside because it was "arbitrary and capricious" —that is, not the product of reasoned decision-making— under the APA. But, the government continued, a court can't review an agency's decision under the "arbitrary and capricious" standard if the agency's action is one it has the discretion to take. The decision to wind down a policy of not enforcing immigration laws (DACA) is, the government contended, precisely the kind of "quintessential action" that is "committed to an agency's absolute discretion." For the government, the reasons for an agency's action don't matter if the courts don't have the power to review the action in the first place.

The challengers rejected the government's contention that its decision to end DACA was the kind of agency action that has been traditionally immune from review in the courts, pointing to a general assumption that courts will be able to review actions by a federal agency involving immigration. For the challengers, the decision to end DACA was reviewable by courts because the government's rationale for ending the program was that it violated the law.

On the question pertaining to the legality of its decision to end DACA, the government argued that it had several reasonable reasons for terminating the program. The government reiterated its belief that the program was illegal and keeping it in place would be "sanctioning an ongoing violation of federal immigration law by nearly 700,00 aliens." The government also pointed to the announcement

made by Texas and several other states to challenge the legality of DACA in court. Finally, the government argued that DACA, according to the then President Obama, was intended to be a "temporary stopgap measure." By terminating the program, the government argued, it was returning to the pre-DACA system of reviewing requests for protection from deportation on a case-by-case basis. "One can agree or disagree with that judgment," the government suggested, "but it is not remotely specious."

As for the challengers, they did not question that the Trump administration had the legal authority to end DACA. However, they argued that, under the APA, an agency has to provide a "genuine analysis and lucid explanation of the relevant policy considerations before reversing a long-standing policy and subjecting 700,000 individuals to deportation to unfamiliar nations where they may not even speak the language." They contended that government's decision was "almost entirely unexplained" and therefore did not pass the basic standards set forth in APA.

On the two questions before it, the majority of the Supreme Court agreed with the challengers and decided to send the issue back for DHS to take another look and provide a better explanation if it wanted to rescind the program.

B. Discussion

The opinion authored by Chief Justice Roberts was narrowly focused on procedural grounds. The question before the Supreme Court was not whether the Trump administration had the power to end DACA, because everyone agreed it had. Instead, the question was whether the administration went about it the right way. The administration's compliance with the standards of decision-making set forth in the APA was at the heart of the Court's opinion, not any provisions from the INA. As stated by Roberts, "We do not decide whether DACA or its rescission are sound policies. The wisdom of those questions is none of our concern. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action." But, before the Court could reach this central question, it had to dispose of a threshold question: whether courts had the power to review DACA in the first place.

1. DACA rescission is reviewable by the courts

The majority disposed of the reviewability question rather quickly. The government had argued that the courts could not review DACA's rescission since DACA is a policy of non-enforcement —that is, it just announces that DHS will refrain from taking action against dreamers. The government invoked a legal doctrine established by the Supreme Court in 1985 in *Heckler v. Chaney* and which insulates agency inaction from court review. The Court squarely rejected the government's claim that DHS's DACA rescission was not reviewable. As a general rule, Roberts explained, courts will be able to review an agency's action, unless (among other things) the action falls within the agency's discretion. But courts have read that exception "quite narrowly," Roberts noted. For the majority, the government's efforts to compare one example of an agency action that is not subject to judicial review —a decision not to institute enforcement proceedings— to the termination of DACA fell short because DACA is not a "passive non-enforcement policy" but instead a "program for conferring affirmative immigration relief" through individual adjudications. Individuals apply for deferred action, and DHS decides whether to grant or deny their applications. By establishing this program,

DHS took agency action, and that action is reviewable. The Court concluded, rightly so, that *Heckler v. Chaney* did not bar judicial review of DHS's DACA policy or its attempt to rescind that policy.

Having disposed of this threshold question, the Court then turned to the central question as to whether the Trump administration had followed proper procedures in terminating DACA.

2. DACA rescission is arbitrary and capricious

As previously indicated, the Trump administration's rationale to rescind DACA was rolled out in two phases. In September 2017, DHS rescinded DACA through a short memo issued by then Acting Secretary Duke Elaine Duke. In June 2018, the new Acting DHS Secretary Kirsten Nielsen issued a second memo after the D.C. district court vacated the 2017 rescission memo and offered DHS the chance to issue a new memo rescinding DACA with a fuller explanation for the rescission. In light of these two memos offering various explanations for DACA rescission, the first step in the Court's inquiry was to determine which memo to consider as the administration's rationale for terminating DACA.

The majority declined to consider the 2018 memo, reasoning that it is a "foundational principle of administrative law" that courts should only look at the grounds on which an agency relied when it took the action being challenged. The Chief Justice noted that Acting Secretary Nielsen could have issued a new decision terminating DACA but decided not to. Instead, she opted to rely on the 2017 memo, which she supplemented with her own. However, the Chief Justice noted, "Nielsen's reasoning bears little relationship to that of her predecessor." Roberts concluded that that "the basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision." In focusing on DHS' initial 2017 reason for rescinding DACA and disregarding the more detailed 2018 memo, the majority relied on the *Chenery* doctrine first outlined by the Supreme Court in 1943's *SEC v. Chenery Corp*. This core tenet of administrative law stipulates that when it comes to justifications, an agency gets only one bite at the apple. The agency should state its reasons fully the first time around, rather than alter its positions to fit subsequent lawsuits. Allowing the agency to reply on after-the-fact, "*post hoc*" rationalizations would fail to give stakeholders adequate notice of the agency's reasoning and frustrate courts called upon to review agency action. The rule against *post hoc* rationalization, observed the Court, serves important values of promoting agency accountability and "instill[ing] confidence that the reasons given are not simply convenient litigation positions."

The second step in the Court's inquiry was to consider whether, on the basis of the original memo by Acting Secretary Duke, DACA termination was arbitrary and capricious under the APA. Under the APA and Supreme Court precedent, courts may conclude that agency action is "arbitrary and capricious" if an agency fails to examine relevant data and factors, acts counter to the evidence before it, or explains its action with reasoning so implausible that the action cannot be considered a product of agency expertise. The majority concluded that the 2017 memo terminating DACA was arbitrary and capricious on two grounds.

First, observed the Court, DHS concluded that DACA was illegal and should be terminated because it made DACA recipients eligible for benefits such as Social Security, Medicare and the ability to work legally in the United States. These benefits, noted the Court, only represent one aspect of DACA policy. The other aspect is its forbearance of removal, which lies "at the heart of DACA." According

to the majority, the decision to terminate DACA failed to address this second important aspect altogether. Even if the benefits provided by DACA were illegal, the majority noted, DHS could still have retained the protection from deportation, but instead it simply decided, without any explanation, to terminate that protection as well. By so doing, DACA rescission was arbitrary and capricious.

Second, the Court held that DHS also failed to consider the "serious reliance interests" of DACA recipients, their families, and their communities. Although DHS was not required to make its ultimate decision based solely on these reliance interests, the agency was "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." Acting Secretary Duke failed to address whether DACA recipients had counted on the existence of the program in arranging their lives, if she had, the majority suggested, she "might have considered more accommodating termination dates" for DACA recipients who were in the middle of —for example— academic programs, military service or medical treatment.

3. DACA rescission is not motivated by racial animus

Finally, Chief Justice Roberts addressed the challengers' claim that the Trump administration's decision to terminate DACA violated the right to equal protection under the Fifth Amendment of the Constitution because it was motivated by an intent to discriminate. The Court concluded that the challengers presented insufficient allegations to "raise a plausible inference" that racial animus was a motivating factor in DHS's decision. Notably, the Court determined that various anti-Latino statements made by President Trump cannot give rise to a plausible inference of discriminatory intent because his statements were unrelated to DHS' decision to rescind DACA.

Justice Sonia Sotomayor joined most of the Chief Justice's opinion but dissented from his conclusion on the equal protection claim arguing that this claim should be remanded for further development. Justice Sotomayor criticized how the Chief Justice's opinion "minimizes the disproportionate impact of the rescission decision on Latinos." She argued that President Trump's statements describing Mexican immigrants as "criminals, drug dealers, [and] rapists" are not so removed from DHS' decision that they cannot be considered when deciding whether racial animus motivated the DACA rescission. For Justice Sotomayor, taken together President Trump's statements "help to create the strong perception" that the decision to end DACA was motivated by an intent to discriminate. This view was not shared by the three other liberal Justices who joined Chief Justice Roberts' opinion.

In closing, Chief Justice Roberts reiterated that the Court was not deciding "whether DACA or its rescission are sound policies." Instead, he stressed, the Court addressed "only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action" which, in the majority's view, it failed to so. The solution, Roberts continued, was for the Court to send the issue back to DHS for it to reconsider and, if it wants to rescind the program again, for it to offer a better explanation.

Justice Clarence Thomas, joined by Justices Samuel Alito and Neil Gorsuch, wrote a stinging dissent asserting that DACA was illegal from the start. The other conservative Justice, Brett Kavanaugh, wrote a separate dissent acknowledging the plight of DACA recipients while arguing that the majority had

applied the *Chenery* doctrine too broadly and should have considered the 2018 memo by Acting Secretary Nielsen in deciding whether DACA rescission had complied with the APA.

4. Conclusion

This was a narrow opinion based on technical and procedural questions. The justices did not address whether DACA or its recession are sound policies. They did not address whether DACA itself is legal. The legal questions before the Court did not center on the INA. They were limited to the cardinal requirement, under the APA, that federal agencies undertake reasoned decision-making. Such a requirement is vital because executive agencies do not exist in a vacuum. Rather, they exercise power that Congress has delegated. An agency can responsibly exercise that delegated power only through careful reflection and the comprehensive provision of reasons. When the agency's stated reasons do not fit the stakes of the decision that it has made, the agency has failed in its obligation for reasoned decision-making.

Even though the Court's holding was narrow and its legal significance rather limited, its practical implications however were enormous for the nearly 800,000 DACA recipients, children who came to the United States to no fault of their own and who don't know any other place to call home. They can continue, at least for now, to live and work in the United States without fear of deportation. Their dreams live on. The Court's ruling has given DACA recipients some reprieve but, ultimately, as Justice Kavanaugh argued in its dissent, the Court's decision "cannot eliminate the broader uncertainty over the status of the DACA recipients." If Congress could pass legislation, he suggested, it could "produce a sturdy and enduring solution to this issue, one way or the other." In this sense, the Court's opinion highlighted the significance of the 2020 elections. A victory for the democrats would result in DACA's preservation, consistent with their pledge to maintain the program. A victory for the republicans, by contrast, would allow an embolden Trump administration more time to attempt to rescind the program —hopefully correctly this time.

C. Suggested Reading

To read the case : US Supreme Court, *Department of Homeland Security, et al. v. Regents of the University of California, et al*, 591 U.S. (2020).

Case law :

US Supreme Court, *SEV v. Chenery Corp*., 332 U.S. 194 (1947).

US Supreme Court, *Heckler v. Chaney*, 470 U.S. 821 (1985).

US Supreme Court, *Michigan v. EPA*, 576 U.S. (2015).

Doctrine :

M. DOWNEY and A. GARNICK, "Explaining the Supreme Court's DACA Decision", *The Regulatory Review*, July 7, 2020.

A. HOWE, "Opinion analysis: Court rejects Trump administration's effort to end DACA", *SCOTUSblog*, June 18, 2020.

K. JOHNSON, "Lessons about the future of immigration law from the rise and fall of DACA", *U.C. Davis Law Review*, 343 (2018-2019).

P. MARGULIES, "The Supreme Court Rules that Trump's DACA Rescission Doesn't Pass Muster", *Lawfare*, June 18, 2020.

R. WARREN and D. KERWIN, "Beyond DAPA and DACA: Revisiting legislature reform in light of long-term trends unauthorized immigration to the United States", *Journal of Migration and Human Security*, Vol. 3, Issue 1, 2015.

To cite this contribution : J. MANGALA, "The Dreams Live on for Now — An Arbitrary and Capricious Rescission of DACA Cannot Stand", *Cahiers de l'EDEM*, October 2020.

3. *CANADIAN COUNCIL FOR REFUGEES V CANADA (IMMIGRATION, REFUGEES, AND CITIZENSHIP)*, 2020 FC 770

Internalizing the Consequences of Externalized Asylum Processes – Federal Court affirms that the Safe Third Country Agreement violates asylum seekers' fundamental rights under Canadian law

Dr. Edit Frenyó

A. Facts and Ruling

In a landmark decision on July 22, 2020, Justice McDonald of the Federal Court has ruled that the "Safe Third Country Agreement" (STCA) between Canada and the United States, which allows Canada to send certain refugee claimants back to the United States, is unconstitutional. Specifically, provisions enacting the STCA are in violation of Section 7 of the Canadian Charter of Rights and Freedoms (Charter) protecting the life, liberty and security of persons and this infringement does not fall under reasonable and justified limitations of rights and freedoms, allowed under Section 1 of the Charter. Justice McDonald suspended her judgement for six months to allow for Parliament to respond. The Government has appealed the ruling and has meanwhile asked the Federal Court of Appeal (FCA) to stay the order of the Court, beyond the six-month suspension already granted, while the appeal is being heard. The FCA granted the government's request for a stay, therefore Justice McDonald's decision will not come into effect on January 22nd, 2020. The FCA is set to hear the appeal in the week of February 22.

1. Facts and circumstances of the case

The case concerned the latest court challenge to the STCA which came into force in December 2004. The Applicants challenged the validity and the constitutionality of the legislation implementing the STCA, specifically s. 101(1)(e) of the Immigration and Refugee Protection Act (IRPA), and s. 159.3 of the Immigration and Refugee Protection Regulations (IRPR or the Regulations), which designate the US to be a "safe third country". Amnesty International, the Canadian Council for Refugees, the Canadian Council of Churches, and eight individual refugee claimants challenged the legality of the STCA.

The stated purpose of the STCA was to help Canada and the US share responsibility for refugees in a way that complies with the Refugee Convention. Under the Agreement, those who arrive to Canada through a land Port of Entry (POE) from the US are ineligible to make a refugee claim in Canada, unless they have close family members in Canada, or are an unaccompanied minor, or meets a few other specific exceptions. However, claimants arriving from the US by air, sea, or avoiding official POEs are eligible to have their refugee claims assessed. This has created perverse incentives for asylum seekers to enter Canada through unofficial routes, sometimes on rough, or dangerous terrain, possibly subject to exploitation by smugglers.

2. Applications lodged with the Federal Court and its decision

The Applicants in this case are citizens of El Salvador, Ethiopia, and Syria, who arrived at a Canadian land POE from the US and sought refugee protection, fearing persecution in their home country and the lack of protections available in the US. The Applicants' personal stories and journeys were

described in compelling detail, supported by extensive evidentiary records including affidavits, reports, expert opinions and transcripts [§30-34].

The Applicants argued that the STCA violates the Canadian Charter of Rights and Freedoms, threatening the life, liberty, and security of the person (Section 7 of Charter) by returning "ineligible" refugee claimants to the United States where they face abusive and punitive detention measures. They also argued a violation of Section 15 of the Charter, claiming that the policy of returning refugee claimants has a disproportionate negative impact on women fleeing gender based violence. In addition, the Applicants argued that the STCA violates Canada's obligations under international law by designating the US as a safe country for refugees, which they consider unreasonable given the US's ongoing institutional violations of the 1951 Convention Relating to the Status of Refugees (Refugee Convention). According to the Applicants, the STCA contravenes Canada's international obligations under the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), as it exposes refugee claimants to unsafe conditions in the US and introduces the risk of their *refoulement* from the United States.

The Court found that under the STCA, ineligible asylum claimants are immediately returned and handed over to US authorities by Canadian officials where they are automatically detained – resulting in a *de facto* form of punishment without charges or a trial – merely for making a refugee claim in Canada, in contravention of the Refugee Convention. The Court accepted Applicants' extensive evidence of the abusive and punitive nature of the detention of returned asylum seekers and of the fact that Canadian officials were aware of this practice. Justice McDonald concluded that subjecting this specific group of asylum seekers to punitive detention and the ensuing ill-treatment, for the sake of "administrative" compliance with the provisions of the STCA, cannot be justified. It is an outcome that is not in keeping with the spirit or the "responsibility sharing" purpose of the STCA, nor the foundational Conventions upon which it was established. This is sufficient to establish that Section 7 rights under the Charter have been breached and these breaches are not justified under the reasonable limits described in Section 1.

B. Discussion

The following section will provide some context as to the origins of the STCA and the previous court challenge mounted by refugee advocates, which laid the groundwork for the current case. It then takes on the Court's reasoning and relevant case law, finding in favor of Applicants' claims of Section 7 violations; and rejecting Respondents' claims that any limitations of rights under the STCA fall under the protection of Section 1 of the Charter, as "reasonable" and "demonstrably justified". The conclusion offers some updates on the ongoing appeals process and further insights on the local and global impact and relevance of the decision during a time of rampant deterioration in the global asylum protection system.

1. Background of challenges to the STCA

The immediate years following the terrorist attacks on September 11, 2001, saw a conflation of security threats and migration. This had profound impact on movements along the US and Canadian border. As Audrey Macklin's comprehensive study pointed out, a political narrative emerged about Canada as a security threat to the United States, by assuming that its immigration system and security

screening is more lax, allowing potential extremists and easier path to entry and regular status, making their subsequent movement towards the US easier. These allegations were later refuted. Nevertheless, a significant gap between public perception and reality regarding the terrorism-refugee-Canada nexus developed in these years. It was in this context the 2004 STCA came into being. The Agreement came under fire from the very beginning by asylum advocates, and with good reason. One troubling early sign came from transcripts from a US House Subcommittee on Immigration meeting, where government officials openly argued for the efficacy of the safe third country agreement on the basis that it would allow for an "ideal" blanket detention of all returnee asylum seekers. As Macklin's pointed out, "some opponents of immigration commend the Agreement in the hopes that it will eventually link up with other, similar Agreements to create an unbroken chain of *refoulement* back to the country of origin" (at p. 417).

Underscoring their concern for the rights and safety of asylum seekers, in 2005 the Canadian Council for Refugees published a report entitled Closing the Front Door on Refugees, followed by a submission to Cabinet, which outlined relevant changes in US policy and practice since implementation of the Agreement. In the ensuing years there have been continuous calls to the Canadian government to recognize that the US does not meet the requirements under international law for a safe third country and to end the designation of the US as such.

On 29 December 2005, the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches, along with a Colombian asylum seeker ("John Doe") – hoping to enter Canada to seek asylum after being denied asylum in the US –, launched a legal challenge of the designation of the US as a safe third country for refugees. In *Canadian Council for Refugees v R* (2007), Justice Michael Phelan of the Federal Court upheld the challenge, finding that the designation of the US as a safe third country is *ultra vires*, that it is unreasonable to conclude that the US complies with its *non-refoulement* obligations under the Refugee Convention and the Convention against Torture, and that the application of the safe third country rule violates refugees' Charter rights to life, liberty and security of the person (Section 7) and to non-discrimination (Section 15). The Court also found that the federal Cabinet failed to comply with its obligation under the law to ensure continuing review of the status of the US as a safe third country. This victory was short lived as the governments appeal was allowed and on 27 June 2008, the Federal Court of Appeal in *Canadian Council for Refugees v. Canada* (2008) overturned Justice Phelan's ruling.

It is important to note that the FCA in 2008 *did not dispute, or even consider the lower-court's factual findings on substantive Charter violations and conclusions of US noncompliance*. Instead the Court applied a formalist approach and found it did not need to consider any evidence of US law and practice. On the administrative law ground, the FCA held that a plain reading of IRPA's statutory requirement for the Cabinet to 'consider' a country's conformity with the Refugee Convention and the CAT prior to designating it a 'safe third country', simply means an obligation to 'consider'. So long as Cabinet 'considered' and was satisfied of US conformity with the treaties, the *vires* of the Agreement was unaffected by whether or not the US actually complied with them. The Court simply stripped the human rights organizations (Applicants) of their public interest standing. This was justified by the fact that "John Doe" from Colombia was also barred from bringing a Charter challenge since the US had already granted him protection by the time the FCA heard the case – rendering his

claim moot.[i] In 2009 the Supreme Court of Canada denied the application to appeal the FCA's decision.

In 2017 the original three organizations joined a group of eight individual litigants in asking the Federal Court to strike down the STCA and to allow the claimants to make a refugee claim in Canada. The Applicants submitted what they considered to be developments in Canadian law, in particular regarding the authority responsible for supervising the conditions to be met for Safe Third Country designation (at paras 58-70). In the July 22, 2020 decision Justice McDonald reiterated that the *ultra vires* question was determined by in *CCR 2008* and that she saw no grounds to depart from binding authority. However, by neither considering nor disputing the substantive Charter violations in its *CCR 2008* decision, the FCA left the door open to revisit the very same issues, undergirded by compelling narratives of the individual Applicants plight at the hand of the US immigration system as well as a decade and a half of evidence on the impact and functioning of the STCA.

At the outset, Justice McDonald cited *Singh v Minister of Employment and Immigration* (1985, para 35) to state that having been physically present in Canada, the individual Applicants have the right to advance a Charter claim. In addition, the fact that one of the Applicants was returned to the US, does not prevent her from asserting a Charter claim as established in *Kreishan v Canada (Citizenship and Immigration)* (2019, para 78). The Court then turned the attention to the substance of potential Charter violations.

2. Does the STCA infringe Section 7 of the Charter?

Here, the Court had to address two interrelated issues: did the Canadian officials who returned ineligible STCA claimants to US authorities to face detention, deprive the claimants of their "right to life, liberty, or security of the person" under Section 7; and if so, are these deprivations in accordance with the "principles of fundamental justice"?

- ***Right to life, liberty, or security***

The Applicants argued the penalization of asylum seekers by US authorities for the mere fact of attempting to seek asylum in Canada, and the complicity of Canadian authorities by knowingly returning "ineligible" people, certainly engaged their liberty and security interests. The Court agreed with the Applicants.

US detention conditions often lack in ensuring basic human dignity, medical care, and food. The term of detention may last for months without any review [§82]. The affidavit of one of the Applicants, Ms. Mustefa, was particularly compelling, detailing her time in solitary confinement as a "traumatic experience". As a Muslim she was denied appropriate meal options which resulted in her losing 15 pounds. She was eventually detained among people with criminal convictions in "freezing cold" conditions [§96].

Furthermore, the Court found that immigration detention routinely impedes access to legal counsel and increases the risk of *refoulement,* implicating a violation the security of the person. Another Applicant, "ABC", had already faced violence at the hand of the MS-13 gang, who threatened her and her daughters' lives if she were to return to El Salvador [§105]. Detained asylum seekers face insurmountable systemic barriers in the US, especially in accessing legal representation, access to translators and assistance with legal forms and weaker asylum protections for gender based violence.

Justice McDonald concluded that had ABC been detained in the US, there would have been a real risk of *refoulement* [§105-§108].

Justice McDonald cited *Suresh v Canada (Minister of Citizenship and Immigration)* (2002), to send an important message in the era of border and immigration control externalization: Canada "does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand" (para 54). Accordingly, the fact that STCA returnees are imprisoned by US authorities, does not immunize the actions of Canadian officials from consideration. Evidence makes it clear that Canadian officials not only inform US officials that STCA claimants are being returned, but they are involved in the physical handover of ineligible claimants. where they are immediately and automatically imprisoned by US authorities [§101-§103].

- ***Principles of Fundamental Justice***

To round up its inquiry into Section 7 violations, the Court had to determine if the limitation is "in accordance with the principles of fundamental justice." According to *Carter v Canada (Attorney General)* (2015, para 55), the principles of fundamental justice are concerned with arbitrariness, overbreadth, and gross disproportionality. Further in *Canada (Attorney General) v. Bedford* (2013, para 125), the Supreme Court argued that 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.

Respondents argued that, unlike in *Bedford* and in *Carter,* the impacts on the individuals caused by the legislation fall outside Canada's control. In addition, they relied upon case-law in *Suresh* and in *Revell v Canada (Citizenship and Immigration)* (2019), to argue that *IRPA* has safeguards to protect against overbreadth, as there are discretionary remedies available in the context of removal of unsuccessful asylum seekers [§125-§126]. Therefore, the STCA is not overbroad or disproportionate in its application. In addition, the Respondents argue that the grossly disproportionate impact test needs to show that the impact of foreign law would "shock the conscience" (*Suresh* at para 18).

The Court however reiterated that the cited cases do not match the facts present here. In "removals" cases, such as *Suresh* and *Revell*, there were sufficient consideration of the merits of the asylum claims. In the present case however, the Applicants have not had access to such consideration, or had any risk-assessment performed by Canadian authorities. If the immediate consequence of ineligibility under the STCA is imprisonment, the "sharing of responsibility" objective of the STCA should entail some guarantee of access to a fair refugee process [§128].

After rebutting the Respondents' arguments, Justice McDonald, relying on both *Carter* (at para 72) and *Bedford* (at para 125), as well as *CCR 2008* (at para 75) found that the legislation provisions of the STCA were both overbroad and grossly disproportional in their applications [§136].

Overbroad, because the deprivation of liberty rights of STCA returnees has no connection to the "mischief contemplated by the legislature", i.e. the original purpose of responsibility sharing (citing *Carter* at para 131). The legislative objective of the STCA scheme is the sharing of responsibility for consideration of refugee claims with countries that comply with the relevant Conventions. Returning applicants to the US to face imprisonment does not bare a connection to this original purpose.

The detention and risk to security of the person, facilitated by the STCA, were also found to be grossly disproportionate to the stated administrative benefits of the STCA [§135]. Justice McDonald stated that to find otherwise would be "entirely outside the norms accepted in our free and democratic society" (*Bedford* at para 120). Furthermore, gross disproportionality can be established based upon the impact on a single person. In the Court's view, Ms. Mustefa's evidence of abuses suffered is alone sufficient to meet this test and to "shock the conscience" [§137].

3. Justification under Section 1 of the Charter

The final remaining question was whether a Section 7 infringement in this case may be justified under Section 1 of the Charter as "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Under Canadian constitutional case-law, the burden of proof to show justifications under Section 1 falls on the respondents [§143].

The Respondents argued that the disputed sections of the IRPA and IRPR meet the pressing and substantial objective of the STCA, namely "the sharing of responsibility" [§145]. They further argued that should the appellants prevail, the sustainability of the Canadian asylum system would be at stake, because of the presumable increase in the volume of refugee claimants and consequent challenges brought. In addition, they suggest that despite being subject to detention, failed STCA claimants have access to a fair detention review process in the US [§145-§146].

Justice McDonald found the evidence provided to support these arguments to be weak and that "in the past, Canada has demonstrated flexibility in adjusting to fluctuations in refugee numbers in response to certain needs" [§147]. Meanwhile, 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)" [§149].

4. Does the STCA Infringe Section 15 of the Charter?

The Applicants also argued that the STCA further violates Section 15 of the Charter because the practice of returning asylum-seekers has a disproportionate impact on women. Women facing sexual violence in Central America have a particularly hard time proving they merit protection in the US as a "social group" despite systematic, gender based violence and inadequate state protections. This restrictive attitude by US asylum officials is inconsistent with the Refugee Convention and leads to an increased risk of *refoulement* according to the Applicants' argument [§105].

However, Justice McDonald declined to substantively address Section 15 of the Charter challenge due to the finding of the infringement of Section 7.

5. Conclusion

Although the Court determined that the Canadian legislation designating the US as a safe third country violates the Charter and is consequently of no force or effect, it also ordered that its decision will only take effect after six months from the decision, that is on January 22, 2021. Meanwhile the Canadian Council of Refugees has called for an immediate halt to sending refugee claimants back to the United States and a suspension of the STCA. The government has appealed the ruling and asked the Federal Court of Appeal to stay the order of the Court beyond the six-month suspension already granted, while the appeal is being heard, for fear that a sudden surge of asylum claims in January

would overwhelm the Canadian asylum system. The refugees advocates counter argument is that the government has failed to show that the STCA's expiration would lead to "irreparable harm", as it ignores that all travel, and therefore refugee claim numbers, are dramatically down because of the COVID-19 pandemic. They further emphasized that maintaining policies that have been found unconstitutional by the Federal Court, is clearly contrary to the public interest. Despite the extensive evidence supporting these counter-arguments, on October 26, 2020, the Federal Court of Appeal granted the government's request for a stay of the Federal Court's decision on the Safe Third Country Agreement until the Court determines the appeal and cross-appeal. This means that the Federal Court's decision will not come into effect on January 22. The Federal Court of Appeal will hear the appeal in the week of February 22. The FCA in its analysis, among other arguments, took into account the exigencies of the COVID-19 pandemic on the Parliament's legislative process mand the drastically reduced number of asylum seeker arrivals, resulting in less room for potential Charter violations, at the border.

With all its limitations and the mounting challenges to come, the Federal Court's judgment striking down the STCA comes as a beacon of light in a time of a severe deterioration of migrants and asylum seekers rights and access to protection in the United States and around the world. The past four years of the Trump administration brought sweeping policy changes, all but dismantling the proper functioning of the asylum system and increasing abusive practices in immigrant detention. Today, for the first time ever since the enactment of the Refugee Act in 1980, people seeking asylum at the US border are being turned away by Border Patrol agents with no chance to make a legal case for asylum. Child asylum seekers of all ages are routinely separated from their parents at the US-Mexico border and kept in prolonged and inappropriate detention conditions, or otherwise deported without any due process protections. Highlighting the vulnerability of women are the recent allegations about coerced sterilizations of immigrant women at the Irwin County Detention Center (ICDC) in Georgia. There are also widespread reports of failures in protecting detained asylum seekers from Covid-19 infections.

Safe country agreements and other methods of externalizing immigration control are problematic worldwide. The Federal Court's decision likely resonates with advocates challenging asylum externalization efforts from Australia to the peripheries of the European Union, including recent Greek court challenges to returning asylum seekers to Turkey. This case note highlighted how the "safe third country" concept and related agreements can represent the dark side of otherwise necessary inter-state cooperation in the field of migration management. These arrangements contribute to the *de facto* and *de iure* erasure of asylum seekers, their opportunities to reach safety and the very notion that their claims might be credible. Amidst these restrictive measures it is important to keep in mind that "refugees do not cease to enter countries, but they decreasingly enter as refugees" (Macklin at p. 370). Canada has also been complicit in "expending considerable resources to ensure that asylum seekers – most of whom are non-white – do not succeed" in reaching its land (Macklin at p. 20). Nevertheless, the Canadian Court's current decision is an important step in internalizing the costs of externalization in the context of refugee protection.

C. Suggested Reading

To read the case : *Canadian Council for Refugees v Canada (Immigration, Refugees, and Citizenship)*, 2020 FC 770.

Case law :

Canadian Council for Refugees v R, 2007 FC 1262.

Canadian Council for Refugees v. Canada, 2008 FCA 229 [CCR 2008].

Singh v Minister of Employment and Immigration, [1985] 1 SCR 177.

Kreishan v Canada (Citizenship and Immigration), 2019 FCA 223.

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1.

Carter v Canada (Attorney General), 2015 SCC 5.

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Literature :

H. ADELMAN, "Canadian Borders and Immigration Post 9/11", *The International Migration Review* 36, no. 1, 2002, pp. 15-28.

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A. MACKLIN, "Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement Migration and Refuge in the Twenty-First Century: A Symposium in Memory of Arthur Helton", *Columbia Human Rights Law Review* 36, no. 2, 2005, pp. 365-426.

To cite this contribution : E. FRENYÓ, "Internalizing the Consequences of Externalized Asylum Processes – Canadian Federal Court affirms that the Safe Third Country Agreement with the US violates asylum seekers' fundamental rights under Canadian law", *Cahiers de l'EDEM*, October 2020.

[i] A key "public interest standing" test would be that there by no other reasonable or effective manner to bring the issue to court. The FCA made it clear that a refugee claimant who was denied entry at the border could her/ himself launch a judicial review of the decision.