

CANADIAN ASSOCIATION OF REFUGEE LAWYERS REPORT ON PUSHBACK PRACTICES AND THEIR IMPACT ON THE HUMAN RIGHTS OF MIGRANTS

1. Introduction

The Canadian Association of Refugee Lawyers (CARL) is a group of 400 lawyers, academics, and law students that serves as an informed national voice on refugee law and the human rights of refugees and migrants. CARL promotes just and consistent practices in the treatment of refugees and migrants through education, advocacy and litigation.

CARL is concerned that pushback practices at the Canada-United States (U.S.) border during the COVID-19 pandemic place asylum seekers at risk of *refoulement*, exacerbated by a lack of transparency and inadequate access to justice.

Currently, asylum seekers who approach the Canada-U.S. border undergo partial screening, and are then returned to the U.S. for an allegedly temporary but unspecified period of time. Some asylum seekers are immediately detained upon being pushed back to the U.S. and some are placed in removal proceedings. Although tracking individuals taken from the border into detention is difficult, CARL is aware of a number of detained pushbacks, including one person who was deported and two others who the U.S. is actively trying to deport. The risk of *refoulement* increases the longer the person remains in the U.S., as well as for those not initially detained at the border who may be detained and deported later on.

2. Background and Legal Framework

a. Closing the Border to Refugees

Canada imposed COVID-19 travel restrictions in March 2020. Days before these were announced, Minister of Public Safety Bill Blair indicated that Canada would not turn asylum seekers back at the Canada-U.S. border but they would be subject to health screening and 14 days of quarantine after crossing the border.¹ However, days later, Canada implemented measures to return asylum seekers to the U.S. temporarily as a public health measure.²

¹ Michelle Carbert & Marieke Walsh, “Canada will not bar irregular asylum seekers over COVID-19 concerns,” *The Globe and Mail* (17 March 2020), online: <<https://www.theglobeandmail.com/politics/article-canada-will-not-bar-irregular-asylum-seekers-over-covid-19-concerns/>>; Emerald Bensadoun, “Coronavirus: Asylum seekers irregularly crossing to Canada will be screened,” *Global News* (17 March 2020), online: <<https://globalnews.ca/news/6689836/asylum-seekers-canada-coronavirus/>>.

² Andrew Russel, “Coronavirus: Trudeau says irregular migrants will be turned away at Canada-US Border,” *Global News* (20 March 2020), online: <<https://globalnews.ca/news/6707593/coronavirus-trudeau-says-irregular-migrants-will-be-turned-away-at-canada-us-border/>>; Ian Austen, “In Shift, Trudeau Says Canada Will Return Asylum Seekers to US,” *The New York Times* (20 March 2020), online: <<https://www.nytimes.com/2020/03/20/world/canada/trudeau-asylum-seekers-coronavirus.html>>.

These border restrictions were implemented through Orders in Council (OIC) made under the *Quarantine Act*,³ in accordance with s. 41(d) of the *Immigration and Refugee Protection Regulations*. Section 41(d) now provides that:

...an officer who examines a foreign national from the United States shall direct them to return temporarily to the United States if... (d) the foreign national is prohibited from entering Canada by an order or regulation made by the Governor in Council under the *Emergencies Act* or the *Quarantine Act*.⁴

The first OIC restricting travel from the U.S. to Canada was issued on March 20, 2020.⁵ This barred non-essential travel—travel for an “optional or discretionary purpose”⁶—and specifically prohibited asylum seekers from crossing the border.⁷

b. Reasonable Alternatives to the Border Closure

The OICs are predicated on the assumption that “no reasonable alternatives to prevent the introduction or spread of [COVID-19] are available.”⁸ However, the government failed to indicate why alternative measures, such as those initially contemplated by Minister Blair, or those outlined by the United Nations High Commissioner for Refugees,⁹ would not provide the necessary public health precautions while still respecting the right to seek asylum.¹⁰

This failure is more acute ten months into the pandemic when Canada now understands best practices necessary to maximize the containment of COVID-19. Moreover, Canada has introduced effective measures to allow the safe entry of asylum seekers who meet an exception to the *Safe Third Country Agreement* (“STCA”), yet has refused to extend this practice to others who arrive in Canada seeking protection.

c. Temporariness of the Border Closure

The refugee restrictions are further predicated on the measures being temporary and remaining in place only as necessary during the pandemic. The requirement that they be temporary is found in its enabling legislation,¹¹ and is reflected in the “Direction to Return to the United States”

³ *Quarantine Act*, SC 2005, c 20.

⁴ *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 41(d) [IRPR].

⁵ Canada, *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)*, (Order in Council), PC 2020-0161 (20 March 2020), online: <<https://orders-in-council.canada.ca/attachment.php?attach=38958&lang=en>> [OIC 2020-0161].

⁶ *Ibid*, s 3(1).

⁷ *Ibid*, s 4(1)-(2) (subject to limited exemptions for stateless habitual residents of the U.S., unaccompanied minors, and parents of minor children seeking to make refugee claims).

⁸ OIC 2020-0161, *supra* note 6, s (d).

⁹ United Nations High Commissioner for Refugees, “Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response” (16 March 2020), online: <<https://www.refworld.org/docid/5e7132834.html>>; UNHCR Bureau for Europe, “Practical Recommendations and Good Practice to Address Concerns in the Context of the COVID-19 Pandemic” (9 April 2020) at 2, 8.

¹⁰ Elise Mercier & Sean Rehaag, “The Right to Seek Asylum in Canada (During a Global Pandemic)” (2020) 57:3 *Osgoode Hall LJ* 705 at 707, online: <<https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss3/7/>>.

¹¹ IRPR, *supra* note 5, s. 41(d).

document issued to asylum seekers by the Canadian Border Services Agency (CBSA)¹². However, Canada’s failure to ensure that asylum seekers are able to return to the border risks that pushbacks are permanent.

d. U.S. Non-Refoulement Assurances

The precarious nature of the pushback practice was evident from the outset as returning to Canada depends on how the U.S. handles people upon return. In late March 2020, Deputy Prime Minister Chrystia Freeland stated: “We are very much aware of the problem of *refoulement*. It was, and continues to be, important for Canada to have assurances that that would not happen to those returned to the United States.”¹³

It is apparent that the assurances fail to cover all asylum seekers who arrive at the border, but there is a lack of transparency as to further details. The assurances take the form of a diplomatic note, and the government would only state that the U.S. indicated that “most asylum seekers who are turned back will be able to return and make their claims” once the restrictions are lifted.¹⁴ Government officials declined to provide a copy of this diplomatic note because it “represents ‘state-to-state communication.’”¹⁵

e. Ongoing Border Restrictions

Each OIC remains in force for 30 days. The April 2020 and all subsequent iterations allowed asylum seekers who were exempt from the STCA to enter at official ports-of-entry.¹⁶ The number of asylum seekers who have entered Canada through the STCA exceptions is low.¹⁷

The April 2020 OIC also introduced a national interest exemption to override the entry bar for people “whose presence in Canada, as determined by the Minister of Public Safety and Emergency Preparedness or the Minister of Citizenship and Immigration, is in the national or public interest, while recognizing the paramount public health interests of Canada and Canadians.”¹⁸

These measures remain in place.¹⁹

¹² See e.g. Appendix A, BSF505(20/08) “Direction to Return to the United States”.

¹³ Catharine Tunney, “Canada ‘urgently’ discussing asylum seeker deportation issue with US,” *CBC News* (27 March 2020), online: <<https://www.cbc.ca/news/politics/troops-trump-border-coronavirus-1.5512261>>.

¹⁴ Amanda Coletta, “Canada is turning asylum seekers away at the border. In the US, they face deportation,” *The Washington Post* (29 December 2020), online: <https://www.washingtonpost.com/world/the_americas/canada-asylum-coronavirus-border-deportation/2020/12/28/28a8c588-40cc-11eb-9453-fc36ba051781_story.html>.

¹⁵ *Ibid.*

¹⁶ Canada, *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)*, (Order in Council), PC 2020-0263 (20 April 2020), s 5(1), online: <<https://orders-in-council.canada.ca/attachment.php?attach=39170&lang=en>>.

¹⁷ Kathleen Harris, “Canada has turned back 4,400 asylum seekers in 5 years,” *CBC* (24 Nov 2020), online: <<https://www.cbc.ca/news/politics/asylum-seekers-canada-us-trump-pandemic-1.5813211>>.

¹⁸ OIC 2020-0263, s 5(1)(b).

¹⁹ Canada, *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)*, (Order in Council), PC 2021-0009 (20 Jan 2021), online: <<https://orders-in-council.canada.ca/attachment.php?attach=40170&lang=en>>.

f. Non-Refugee Exceptions to Border Restrictions

While the Canada-U.S. border has been closed to asylum seekers since mid-March, there are vast numbers of people whose entry is deemed essential and are permitted to enter²⁰, and many have even been exempt from quarantine measures.²¹ At least 6.5 million people entered Canada from March 31 to November 12, 81% of whom were exempt from the quarantine requirement.²² Moreover, the “national interest” exemption has been used to allow professional athletes, among others, to cross the border freely.²³ Others, including Hollywood stars²⁴ and CEOs of American companies,²⁵ have been able to enter despite the restrictions.

3. Pushback Practices and Experiences

As of December 2020, Canada had pushed back 226 persons.²⁶ Many months passed before CARL learned of individualized cases who were pushed back. They are generally not represented by either Canadian or U.S. legal counsel and most are unable to contact organizations due to pandemic restrictions. This not only heightens their risk of *refoulement*, puts a large number of people at risk of *refoulement* without any oversight.

a. Border Practices

When asylum seekers cross the Canada-U.S. border, they are apprehended and transported to a CBSA facility. Their protection request triggers a process that includes opening a file, taking identity documents and checking biometrics. Some people are tested for COVID-19 and some are questioned about the basis of their refugee claim. However, there is no individualized assessment of their risk of persecution in their home country or an assessment of their risk of removal from the U.S. CBSA officers then issue a “Direction to Return” and transport

²⁰ OIC 2020-0263, s 3. *See also, e.g.*, James McCarten, “Canada-U.S. border to remain closed to non-essential travel until at least Nov. 21,” *The Globe and Mail* (19 Oct 2020), online: <<https://www.theglobeandmail.com/canada/article-canada-us-border-to-remain-closed-to-all-non-essential-travel-until/>>.

²¹ Sophia Harris, “There have been more than 7 million entries into Canada since COVID-19 began. CBSA explains why,” *CBC* (17 December 2020), online: <<https://www.cbc.ca/news/business/canada-u-s-border-travel-covid-19-1.5843872>>.

²² Rachel Aiello, “81 per cent of travellers to Canada since March exempt from quarantine, largely essential workers,” *CTV News* (18 November 2020), online: <<https://www.ctvnews.ca/health/coronavirus/81-per-cent-of-travellers-to-canada-since-march-exempt-from-quarantine-largely-essential-workers-1.5194097>>.

²³ Stephanie Levitz, “Professional athletes score border exemptions in the name of national interest,” *CBC* (26 Nov 2020), online < <https://www.cbc.ca/news/politics/border-exemptions-athletes-1.5817227>>; Sean Rehaag, “Whose travel is ‘essential’ during coronavirus: Hockey players or asylum seekers?” *The Conversation* (17 June 2020), online: <<https://theconversation.com/whose-travel-is-essential-during-coronavirus-hockey-players-or-asylum-seekers-140239>>.

²⁴ Simon Little, “No break on 14-day quarantine for Hollywood stars, says B.C. premier,” *Global News* (8 May 2020), online < <https://globalnews.ca/news/6924335/hollywood-north-quarantine/>>.

²⁵ Jonathon Gatehouse, Madeline McNair, Albert Leung, “COVID-19 quarantine exemption for Costco CEO shouldn’t have happened, Ottawa says,” *CBC* (16 Oct 2020), online < <https://www.cbc.ca/news/world/costco-executives-quarantine-exemption-error-1.5763787>>.

²⁶ Amanda Coletta, “Canada is turning asylum seekers away at the border. In the US, they face deportation,” *supra* note 14.

individuals back to the U.S. At this point, Canada loses jurisdiction over their return to the border.

Some pushbacks are immediately detained by U.S. officials and face imminent removal, and others are placed in removal proceedings. Even those who are not detained are in a precarious position because they must await the reopening of the border but their “direct back” from Canada does not grant them any interim status in the U.S. More than ten months later, the border remains closed.

b. Examples of Pushbacks

CARL has learned of a number of asylum seekers who were detained at the border by the U.S. Their circumstances, however, are indicative of the risks faced by all who are pushed back from the Canadian border.²⁷

The following are examples of people who were detained:

- K.M. was directed back in August 2020 and immediately detained by U.S. authorities. He was taken from his bunk at a U.S. detention centre without warning and deported to Tanzania in early December 2020.
- S.A.H. was directed back in September 2020, was granted a last-minute stay while on a plane bound for Ghana in December 2020 and remains detained.
- A.N. was directed back in October 2020 and was almost removed to Burundi on two occasions in January 2021. He was placed in solitary confinement on several occasions.
- M.H. was directed back in November 2020 and faced removal to Pakistan in mid-January 2021. He was taken from his bunk in the middle of the night and transferred in shackles to a staging facility without warning in preparation for his deportation. His removal remains imminent.
- C.S. has been detained for eight months since his pushback from the Canadian border and has been repeatedly denied requests for release from detention.
- J.A.M. is one-year barred from seeking asylum in the U.S. and has been placed in solitary confinement at his detention facility on at least one occasion as punishment. He has been detained since being pushed back in September 2020.

Given the risk these individuals face, a request for Precautionary Measures against Canada was submitted to the Inter-American Commission on Human Rights (IACHR), but no decision has yet been rendered

c. National Interest Exemptions

Although a national interest exemption to the border closure may be sought through application to one of the responsible two Ministers, obtaining one does not guarantee return to Canada. If approved, a National Interest Exemption Letter (NIEL) is issued indicating that, when the person returns to the border, their application will resume despite the ongoing border closure. In fact,

²⁷ See Appendix B, Declaration of Kate D. Webster dated January 15, 2021.

five of those individuals listed above were granted NIELs in mid-December 2020 but Canada has been unable to secure their return.²⁸ The U.S. refuses to release them from jail and continues to actively pursue the removal of two of them, even after the issuance of the NIELs.

4. CARL's Concerns

Pushbacks at the Canada-U.S. border create a risk of *refoulement* because there is no guarantee of being able to return to Canada for people who are detained in the U.S. and subject to removal. A lack of transparency and inadequate access to justice exacerbates this risk.

a. The Temporariness of Pushbacks is Illusory

The direct back policy presents a risk of *refoulement* for all people who appear at the border seeking Canada's protection. Returning asylum seekers to the U.S. triggers the risk of detention and deportation, which results in Canada's loss of jurisdiction over their return.

The exemption mechanism fails to mitigate this risk as evidenced by the circumstances of the five persons for whom NIELs were granted. Despite the exemptions, and notwithstanding CBSA's efforts to facilitate their return, the U.S. has refused to bring these individuals back to the border.²⁹

The risk of *refoulement* remains even when a person has sought asylum claim in the U.S. and was refused protection. Canada has accepted its international and domestic responsibility to assess protection needs of those who appear at the border, evidenced by its initial processing and suspension of protection requests pending the lifting of the border restrictions or the granting of an exemption.

The IACHR found Canada's previous pushback policy to violate its *non-refoulement* obligations when it assessed the cases of three people who were detained and deported from the U.S. after being temporarily directed back in 2003.³⁰ The IACHR concluded that Canada violated its *non-refoulement* obligations; Canada rescinded the policy.

The IACHR determined that a pushback policy must either (1) contain sufficient assurances that the individuals directed back would be able to return to Canada; *or* (2) involve individual assessments of whether those directed back would have access to asylum and not face legal bars; those barred could not be directed back. In either circumstance, Canada must conduct an "individualized determination of whether there is risk of subsequent *refoulement* for any refugee claimant directed back."³¹ By 2019, Canada had only partially complied with the decision.³²

²⁸ See e.g., Appendix C, Authorization for Exemption from Canadian Travel Restrictions due to COVID-19.

²⁹ *Ibid.*

³⁰ REPORT No 78/11 CASE 12.586 MERITS JOHN DOE ET AL. CANADA July 21, 2011, online: <<https://www.refworld.org/pdfid/502b61572.pdf>>.

³¹ *Ibid.*, at page 31.

³² Inter-American Commission on Human Rights, FOLLOW-UP FACTSHEET OF REPORT No. 78/11 CASE 12.586 JOHN DOE ET AL. (Canada), online: <<http://www.oas.org/en/iachr/docs/annual/2018/docs/IA2018cap.2G.ca12.586-en.docx>>.

Canada's current policy similarly fails to meet its *non-refoulement* obligations. That individuals who obtained exemptions remain in jail, some at imminent risk of removal, establishes the insufficiencies of existing assurances. Further, Canada failed to conduct individualized assessments of the risk of *refoulement* faced by those directed back. Any access to a person's U.S. immigration history during an initial interview fails to constitute a determination concerning risk of *refoulement* and is not an individualized assessment.

b. Lack of Transparency and Inadequate Access to Justice Exacerbate the Risk of Refoulement

Two crucial areas of the pushback policy lack transparency, barring any scrutiny of the policy. There are no stated criteria for the national interest exemption and no information exists concerning the scope and terms of the U.S. assurances.

Access to justice is also impaired, heightening the risk of *refoulement*. Access to counsel for detained asylum seekers is difficult at the best of times, particularly in the U.S., and is more acute during the pandemic. Most asylum seekers who arrive at the Canadian border have no contact with Canadian lawyers (so will have no chance of obtaining a national interest exemption) nor access to U.S. counsel to fight their detention and possible removal. CARL believes that it is highly probable that there is a significant number of people who were detained upon pushback from the border, as well as at a later time, and may have been deported from the U.S.

5. Conclusion and Recommendations

Canada's current pushback policy operate in opposition to its *non-refoulement* obligations to those who seek protection at the border.

Taking into account the frailties of current assurances from the U.S. including the inadequacy of the exemption mechanism, and risk of detention and deportation in the U.S., the Government of Canadian must act to protect the rights of asylum seekers who arrive at the border regardless of U.S. assurances.

CARL urges the Government of Canadian to implement the following two measures:

1. Immediately eliminate the pushbacks policy for asylum seekers. The OIC must be modified to allow asylum seekers to enter Canada and seek protection. This provision should allow for reasonable public health screening and quarantine of arriving asylum seekers.
2. Facilitate the return of the asylum seekers who have already been pushed back to the U.S., including those in detention. This includes negotiating with the U.S. to facilitate the return of those detained and contacting others to arrange their return to the border to continue the processing of their protection applications. The return of this "cohort" should occur immediately given the increased risk of *refoulement* with the passage of time, and can occur before the OIC is amended.

In the alternative, CARL recommends that the Government of Canadian renegotiate assurances with the U.S. to ensure that no asylum seekers who are pushed back are detained or deported before they are able to return to Canada. The Government of Canada must make public the nature of the assurances obtained from the U.S. to ensure that both countries are held to account in protecting the rights of asylum seekers.

APPENDIX A



**DIRECTION TO RETURN TO THE UNITED STATES
ORDRE DE RETOURNER AUX ÉTATS-UNIS**

Surname - Nom de famille		Given name(s) - Prénom(s)		GCMS ID no. - N° d'ID SMGC	File no. - N° de référence
Date of birth / Date de naissance		D - J	M	Y - A	Country of birth - Pays de naissance BURUNDI
				Country of citizenship / Pays de citoyenneté BURUNDI	Cross-reference no(s) / N° de dossier(s) relié(s)
Permanent or temporary address in the United States - Adresse permanente ou temporaire aux États-Unis					

You are directed to return to the United States pursuant to section 41 of the *Immigration and Refugee Protection Regulations* in that:

- no officer is able to complete an examination;
- the Minister is not available to consider a report under subsection 44(2) of the Act;
- an admissibility hearing cannot be held by the Immigration Division;
- You are prohibited from entering Canada by an order or regulation made by the Governor in Council under the *Emergencies Act* or the *Quarantine Act*.

You may return to Canada at the time and place specified below at which time:

- an officer will be able to examine your application to enter Canada;
- the Minister will be available to consider a report made under subsection 44(2) of the Act;
- an admissibility hearing will be conducted by the Immigration Division.
- prohibition order from entering Canada has been lifted and an officer will be able to examine your application to enter Canada.

Vous devez retourner aux États-Unis en application de l'article 41 du *Règlement sur l'immigration et la protection des réfugiés*, car :

- aucun agent n'est en mesure d'effectuer un contrôle complet;
- le ministre n'est pas disponible pour l'examen du rapport établi à votre sujet aux termes du paragraphe 44(2) de la Loi;
- une enquête ne peut être tenue par la Section de l'immigration.
- Vous êtes interdit d'entrée au Canada au titre d'un décret ou d'un règlement pris par le gouverneur en conseil en vertu de la *Loi sur les mesures d'urgence* ou de la *Loi sur la mise en quarantaine*.

Vous pouvez retourner au Canada à la date, l'heure et lieu précisés ci-dessous. À ce moment-là :

- un agent sera en mesure d'effectuer un contrôle complet de votre demande d'entrée au Canada;
- le ministre sera disponible pour l'examen du rapport établi en vertu du paragraphe 44(2) de la Loi;
- une enquête pourra être tenue par la Section de l'immigration.
- le décret d'interdiction d'entrée au Canada a été levé et un agent sera disponible pour examiner votre demande d'entrer au Canada.

Location - Endroit À ÊTRE DÉTERMINER / TO BE DETERMINED	Date D - J M Y - A
	Time - Heure
If you desire to continue with your application to enter Canada, please return on the date and time mentioned above.	
Si vous souhaitez maintenir votre demande d'entrée au Canada, veuillez vous présenter à la date et à l'heure mentionnées ci-dessous.	

Print name of officer / Imprimer le nom de l'agent POISSANT 37259	Signature of officer - Signature de l'agent
Port of entry - Point d'entrée LACOLLE CTR - RTC	Date D - J M Y - A 0 1 1 0 2 0 2 0

The information on this form is collected under the authority of the *Immigration and Refugee Protection Regulations - Section 41* for the purpose of serving a direction to return to the United States. The personal information on this form is protected in accordance with the *Privacy Act*. The information may be disclosed to internal or external bodies as a consistent use for program evaluation and reporting to senior management.

You have the right to access and/or to correct your personal information under the *Privacy Act - Section 12*. The information collected is described under the Personal Information Bank *Traveller Processing CBSA PPU 1101* which is detailed at www.infosource.gc.ca.

L'information fournie dans le présent formulaire, qui a été collectée en vertu du *Règlement sur l'immigration et la protection des réfugiés - Section 41*, est requise afin de servir un retour temporaire vers les États-Unis. Les renseignements personnels fournis dans ce formulaire sont protégés en vertu de la *Loi sur la protection des renseignements personnels*. Les renseignements peuvent être divulgués à des organismes internes et externes de l'Agence des services frontaliers du Canada pour un usage compatible utilisé pour les évaluations des programmes et informer la haute direction.

Vous avez le droit d'accéder à vos renseignements personnels et/ou d'y apporter des corrections en vertu de l'article 12 de la *Loi sur la protection des renseignements personnels*. Les renseignements recueillis sont décrits dans le fichier de renseignements personnels *Le traitement des voyageurs ASFC PPU 1101*, qui est présenté en détail sur le site www.infosource.gc.ca.

cc - File All details of this form should be entered in GCMS as a status entry.

c.c. Dossier Tous les renseignements figurant sur ce formulaire doivent faire l'objet d'une entrée du statut au SMGC.



*****IMPORTANT*****

Veillez compléter les formulaires de demande d'asile qui vous ont été remis aussitôt que possible.

Il est de votre responsabilité de compléter les formulaires afin d'accélérer le processus de demande d'asile.

Les formulaires seront vérifiés par un représentant du gouvernement canadien lors de votre rendez-vous à l'ASFC Centre de traitement Urbain du 1010 St-Antoine O, Montréal, Qc.

Au moment de votre rendez-vous, si les formulaires ne sont pas complétés, il se pourrait que le traitement de votre demande d'asile soit retardé ou que ce rendez-vous soit annulé et reporté à une date ultérieure.

Instruction pour vous aider à compléter les formulaires disponibles sur le Web :
<https://www.canada.ca/fr/immigration-refugies-citoyennete/services/demande/formulaires-demande-guides/guide-5746-demande-asile-presentee-canada.html>

*****IMPORTANT*****

Please complete the asylum claim forms that you were given as soon as possible.

It is your responsibility to complete the forms in order to accelerate the asylum process.

They will be verified by a representative of Canadian government at your appointment to CBSA Urban processing Centre, 1010 St-Antoine W, Montreal, QC

At time of the appointment, if forms were not completed, it is possible that your refugee claim process will be delayed or your appointment be cancelled or even postponed to a later date.

Instructions to help to fill in the forms available on Web:
<https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5746-applying-refugee-protection-within-canada.html>

APPENDIX B

20 Dundas Street West
Suite 202
Toronto ON M5G 2H1
Telephone: 416-977-8111
Toll-free: 1-800-668-8258
Fax: 416-977-5567
E-mail: refugee@lao.on.ca

Bureau 202
20 rue dundas ouest
Toronto ON M5G 2H1
Téléphone : 416-977-8111
Sans frais : 1-800-668-8258
Télécopieur : 416 977-5567
Courriel : refugee@lao.on.ca

STATUTORY DECLARATION OF KATE D. WEBSTER

I, **KATE D. WEBSTER**, of the City of Toronto, in the Province of Ontario, hereby MAKE OATH AND SAY AS FOLLOWS:

1. I am an attorney admitted to practice in the Province of Ontario and the State of New York. I currently work as a staff lawyer with the Refugee Law Office of Legal Aid Ontario, located in Toronto, Canada.

Overview

2. The Canada-United States border has been closed to asylum-seekers since March 21, 2020, with limited exceptions. I represent five individuals in their Canadian immigration proceedings who are currently in the custody of the Department of Homeland Security ("DHS"). On December 18, 2020, these five individuals were each granted an exemption to the current closure of the Canada-United States border by the Canadian Minister of Citizenship and Immigration. This exemption allows them to return to Canada immediately, prior to the general reopening of the border. In practice, this means that they will be able to enter Canada to seek protection immediately upon presenting themselves at the Canadian border. They will be able to remain in Canada for the duration of their claims to protection, and if unsuccessful, would later face return to their countries of origin. They would not be returned to the United States.
3. On information and belief, despite efforts by Canadian officials to secure the return of the exemption beneficiaries to Canada, DHS refuses to bring these individuals to the border. Instead, since the issuance of the exemptions on December 18, 2020, DHS has taken active steps to remove at least two of the beneficiaries of the exemptions to their countries of origin.

Legal Basis for the Border Closure and the Exemption Thereto

4. On March 20, 2020, the Government of Canada issued Order in Council 2020-0161, *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)* ("OIC") under its authority under the *Quarantine Act*.¹ The OIC is only valid for 30 days but has been renewed every 30 days since that time. With limited exceptions, the

¹ Order in Council ("OIC") 2020-0161, *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)* (March 20, 2020); OIC 2020-0263 (April 20, 2020); OIC 2020-0370 (May 21, 2020); OIC 2020-0469 (June 19, 2020); OIC 2020-0538 (July 20, 2020); OIC 2020-0565 (August 8, 2020); OIC 2020-0672 (September 20, 2020); OIC 2020-0810 (October 20, 2020); OIC 2020-0886 (November 18, 2020); OIC 2020-1128 (December 18, 2020).

OIC prohibits a foreign national from entering Canada from the United States for the purpose of making a claim for refugee protection.

5. Since the first OIC was issued closing the border, the Prime Minister of Canada and numerous other senior members of the Federal Government have repeatedly made clear that the border closure is a temporary measure that is in place owing to the pandemic.
6. Individuals who approach the Canadian border from the United States and attempt to initiate a claim – and who are therefore subject to the OIC – will instead be directed **to return temporarily** to the United States to await the lifting of the OIC and the reopening of the border. Section 41(d) of the *Immigration and Refugee Protection Regulations* states that: “an officer who examines a foreign national who is seeking to enter Canada from the United States shall direct them **to return temporarily** to the United States if [...] (d) the foreign national is prohibited from entering Canada by an order or regulation made by the Governor in Council under the *Emergencies Act* or the *Quarantine Act*.”²
7. Accordingly, asylum seekers subject to the direct back policy will be permitted to return to Canada to proceed to present their protection claims once the pandemic border restrictions are lifted. This is confirmed by the terms of the “Direction to Return to the United States” which is issued by CBSA.
8. The OIC is completely distinct from the Safe Third Country Agreement (“STCA”).³ The latter, a bilateral agreement in place since December 2004, governs the ability of foreign nationals to seek refugee protection for those who present at official land border ports-of-entry between Canada and the United States. Under its terms, Canada bars foreign nationals seeking to make claims at official land border ports-of-entry with the U.S. unless they meet a specified exception. The STCA does not apply to individuals who seek to make a claim to protection by entering *between* land border ports-of-entry.
9. Since April 20, 2020, the OIC has recognized that distinction and treated those that seek to enter at a land border port-of-entry, and therefore subject to the requirements of the STCA, in a different manner than those entering Canada between ports of entry. The former are able to enter and make a claim for protection only if they meet an exception to the STCA; if they do not, they are otherwise deemed ineligible to seek protection in Canada, ordered excluded from Canada and returned to the United States under the STCA.

² *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 159.3 (“IRPR”)

³ *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*, 5 December 2002, [2004] Can. T.S. No. 2.

10. Section 5(1)(b) of the OIC provides an exemption to the prohibition of refugee claims for “a person whose presence in Canada is determined by the Minister of Public Safety and Emergency Preparedness or the Minister of Citizenship and Immigration to be in the national or public interest, while recognizing the paramount public health interests of Canada and Canadians.”⁴ Five of the individuals that I represent were issued a national interest exemption by the Minister of Citizenship and Immigration under section 5(1)(b).

The Applications for National Interest Exemptions

11. In early November 2020, I was contacted by [REDACTED], an asylum-seeker with a final order of removal who was detained at the Buffalo Federal Detention Facility (“BFDF”) near Buffalo, New York. Mr. [REDACTED] was seeking advice about his rights under Canadian law in relation to his recent attempt to initiate a claim for protection in Canada. Mr. [REDACTED] reported to me that he had entered Canada on or about October 1, 2020 to seek refugee status. He entered between official ports-of-entry and was apprehended by Canadian law enforcement officials. He was then transported to the port-of-entry where his biometrics were collected and the processing of his application was initiated. Mr. [REDACTED] was then informed by Canada Border Services Agency (“CBSA”) officers that he could not continue with his application because the Canada-U.S. land border was closed due to the COVID-19 pandemic. Mr. [REDACTED] was issued a “Direction to Return to the United States” and was transported by CBSA officers back across the border to the United States, where he was delivered to DHS and subsequently detained.
12. Mr. [REDACTED] reported that there were other individuals who were similarly situated – who had also attempted to make a claim for protection in Canada and had been “directed back” on account of the pandemic border closure – who were also detained at BFDF. Throughout November 2020, I was contacted by a total of eight such individuals. In late November 2020, I was retained by seven of these individuals to represent them in an application to seek an exemption to the border closure that would allow them to return to Canada before the border reopens. The eighth individual was released on bond in the United States.
13. On December 1, 2020, two of these individuals reported to me that another, [REDACTED], had been forcibly removed from his bed the previous night and was no longer “on their range” at BFDF. On December 3, 2020, Immigration and Customs Enforcement (“ICE”) confirmed that Mr. [REDACTED] had been removed from the United States.
14. On December 4, 2020, I submitted an application to the Honorable Marco Mendicino, Canadian Minister of Citizenship and Immigration, and the Honorable Bill Blair, Canadian Minister of Public Safety and Emergency Preparedness, seeking an exemption to the border closure on behalf of the

⁴ Order in Council 2020-1128 (December 18, 2020), s. 5(1)(b).

remaining six individuals. The exemption application detailed the circumstances and immigration history of the applicants. Each had attempted to seek protection in Canada but had been directed back pursuant to the pandemic border closure. Before coming to Canada, five had already been ordered removed from the United States and their asylum applications in the United States had been denied. The sixth individual was in removal proceedings in the United States. The fact that many of the applicants had already sought protection in the United States and were under final orders of removal was clearly explained to the Ministers. In addition, it is my understanding that prior to deciding the exemption requests, the Ministers' offices would access the applicants' files from the border officials.

15. On December 18, 2020, the Honorable Marco Mendicino, Minister of Citizenship and Immigration, granted five national interest exemptions. I received a communication from Immigration, Refugees and Citizenship Canada that contained National Interest Exemption Letters for five individuals and stated:

Further to your letter of 04 December 2020, and your request for Minister Mendicino to grant a National Interest Exemption to the current prohibition on entering Canada from the United States for six refugee claimants who have been directed back to US authorities, I am able to advise that he has exercised his authority to grant an exemption in five of the six cases requested.

...

This information has been shared with the Canada Border Services Agency (CBSA) and an entry will be made within departmental systems to facilitate entry on return to Canada.⁵

16. National interest exemptions were granted for the following five individuals:

- a. [REDACTED];
- b. [REDACTED];
- c. [REDACTED];
- d. [REDACTED];
- e. [REDACTED].

17. The application included a request that the Canadian officials work with their U.S. counterparts to facilitate the return of the applicants given that they are detained. Were they not detained, they would be able to present themselves at the Canadian border and would immediately be able to continue their applications in Canada. However, they are prevented from doing so by virtue of their ongoing detention by DHS. Since December 18,

⁵ Letter to counsel from Isabelle Daoust, Director General, Case Management Branch, Immigration, Refugees and Citizenship Canada, December 18, 2020 (on file with undersigned counsel). The sixth application remains pending to date.

2020, Canadian officials have been engaged in discussions with DHS to seek the return of these five individuals to Canada.

The Meaning of a National Interest Exemption

18. On information and belief, each individual who is directed back to the United States undergoes the following process: they enter Canadian territory between designated ports-of-entry where they are apprehended by law enforcement; they are transported within Canada to a port-of-entry where they are inspected by CBSA officers; their biometrics are collected and their photograph is taken; their identification documents are copied and, in some instances, are seized by CBSA; a Canadian immigration file is opened and they are assigned a Unique Client Identification number (equivalent to an A-number in the United States); they are interviewed and, in some instances, questioned about the basis of their claim to protection; some are given hard copies of the forms required to process a refugee claim in Canada. In short, they have started the processing of their claim to protection in Canada. Finally, they are issued a “Direction to Return to the United States” and told to return to Canada when the border reopens.
19. The “Direction to Return” allows an individual to return once the border reopens and to continue the processing of their claim as if such processing had never been interrupted by the border closure. Those who have obtained national interest exemptions, however, are able to return immediately.
20. The national interest exemption letters provide, *inter alia*, as follows:

After reviewing the facts and circumstances as they are currently known for you, [NAME], and having determined your presence in Canada to be in the national or public interest while recognizing the paramount public health interests of Canada and Canadians, the Minister of Citizenship and Immigration has granted you an exemption to enter Canada pursuant to section 5(1)(b) of the Order in Council, Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States).

...

This decision has been documented in Canada’s Global Case Management System.

Important: You must present this email to a border services officer upon entry to Canada.

...

Please note that this document is not a travel document. This exemption from the prohibition on entering Canada is

exclusively for the purposes of making a claim for refugee protection under the *Immigration and Refugee Protection Act*.⁶

The beneficiary of an exemption can return to the Canadian border immediately to continue the processing of their application. As described above, they have already initiated their claim for protection in Canada during their previous entry. They will still be subject to admissibility requirements under Canadian law, but such an assessment does not preclude their physical entry into Canada at the port-of-entry. This is because Canadian law requires that an assessment be conducted as to the risk any individual seeking protection faces if he or she is returned to their country of origin.

21. This principle applies to the exemption beneficiaries.
22. Under current Canadian law, even individuals who have instituted asylum claims elsewhere, including individuals who have had those claims denied, have a legal right to a risk assessment. Depending on their immigration history, some will have access to assessment by an administrative tribunal (the Refugee Protection Division of the Immigration and Refugee Board) and others will have their risk assessed by a Citizenship and Immigration Canada official. In either case, the assessment determines whether the person concerned faces a risk of persecution on account of one of the five protected grounds enumerated in the *Refugee Convention*, and whether they face a risk to their life or a risk of cruel and unusual treatment or punishment even if that risk is not on account of one of the enumerated grounds.⁷
23. At minimum, pursuant to section 112 of the *Immigration and Refugee Protection Act*, all beneficiaries of national interest exemptions to the OIC would be able to enter Canada and apply for a Pre-removal Risk Assessment.⁸ Even if they were determined to be inadmissible to Canada for reasons of serious criminality or other security concerns, Canada still has an obligation to assess their risk of *refoulement*.
24. **In practice, this means that the beneficiaries of national interest exemptions will be able to enter Canada to seek protection immediately upon presenting themselves at the Canadian border.** They will be able to remain in Canada for the duration of their claims to protection, and if

⁶ National Interest Exemption Letters, December 18, 2020.

⁷ *Immigration and Refugee Protection Act*, SC 2001, c 27, ss. 96 and 97 (“IRPA”).

⁸ IRPA s.112(1). The exemption beneficiaries would only be denied access to a claim for protection if “they are the subject of an authority to proceed issued under section 15 of the Extradition Act.” IRPA s.112(2)(a). In practice, even individuals who have previously been deemed ineligible for referral to the Refugee Protection Division under the STCA are still provided with the opportunity to apply for a Pre-removal Risk Assessment.

unsuccessful, would later face return to their countries of origin.⁹ They would not be returned to the United States.

25. On information and belief, despite efforts by Canadian officials to secure the return of the exemption beneficiaries to Canada, DHS refuses to bring these individuals to the border, even though DHS is aware that the direct backs are temporary and exemptions have been granted. In fact, Mr. [REDACTED] was scheduled for an appointment at the Peace Bridge port-of-entry on January 5, 2021, and the four other beneficiaries were promised appointments during the week of January 11, 2021. Nonetheless, DHS refused to transport the beneficiaries 20 minutes by car to the border to attend their appointments and enter Canada. Instead, since the issuance of the exemptions on December 18, 2020, DHS has taken active steps to remove at least two of the beneficiaries of the exemptions to their countries of origin.

SWORN BEFORE ME)
by videoconference,)
with both parties in the City of Toronto,)
in the Province of Ontario,)
on this 15th day of January, 2021.)



MAUREEN SILCOFF
Barrister and Solicitor
LSO # 28656L



KATE D. WEBSTER

⁹ For persons who are found inadmissible and a removal order issued at the POE, they have the right to apply for PRRA but it does not carry a statutory stay. They would have to seek deferral and stay in order for the risk to be assessed. Also, for persons who have previously had a formal risk assessment in Canada within a fixed period of time set out in the IRPA, they would not have access to the formal PRRA process but would rather have any renewed risk considered in the deferral process itself. **In all cases, if removal proceeds, it would be to their home country and not to the United States.** See IRPA, s.112; IRPR s. 166.

APPENDIX C



FROM: Associate Assistant Deputy Minister, Operations
Immigration, Refugees and Citizenship Canada

TO: [REDACTED]
[REDACTED]
[REDACTED]

Authorization for Exemption from Canadian Travel Restrictions due to COVID-19

After reviewing the facts and circumstances as they are currently known for you, [REDACTED] and having determined your presence in Canada to be in the national or public interest while recognizing the paramount public health interests of Canada and Canadians, the Minister of Citizenship and Immigration has granted you an exemption to enter Canada pursuant to section 5(1)(b) of the Order in Council, Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States).

Please note that an exemption from mandatory isolation has not been granted under section 6(f) of the Order in Council, Minimizing the Risk of Exposure to COVID-19 in Canada Order (Mandatory Isolation), No. 7. As such, you will be required to self-isolate for 14 days upon arrival in Canada even if you do not have coronavirus disease (COVID-19) symptoms. For more information on the **mandatory 14-day self-isolation** for all people entering Canada, see <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/latest-travel-health-advice.html>. Please visit [canada.ca/covid19](https://www.canada.ca/covid19) for official Government of Canada news and announcements regarding COVID-19.

This decision has been documented in Canada's Global Case Management System.

Important: You must present this email to a border services officer upon entry to Canada.

This authorization is valid for single use. To enter Canada, you must meet all admissibility and other requirements, as well as other applicable laws and regulations.

Please note that this document is not a travel document. This exemption from the prohibition on entering Canada is exclusively for the purposes of making a claim for refugee protection under the *Immigration and Refugee Protection Act*.

Digitally signed by Giles,
Nicole
Date: 2020.12.18 15:11:00
-05'00'

I, Nicole Giles, Associate Assistant Deputy Minister, Operations, Immigration, Refugees and Citizenship Canada, am communicating this decision on behalf of the Minister of Citizenship and Immigration
18DEC2020