

# NAVIGATING NORTH: HOW THE CANADIAN APPROACH TO FIRM RESETTLEMENT SHOULD GUIDE U.S. IMPLEMENTATION OF THE REFUGEE CONVENTIONS

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## INTRODUCTION

Deqa Ahmad Haji Ali fled her native Somalia in 1991, after suffering severe persecution as a result of her political affiliations and caste status: she was sexually assaulted in front of her family by paramilitaries, who then murdered her brother-in-law, severely beat her husband, and destroyed her home.<sup>1</sup> Ali, her husband, and their two young sons (aged eight and nine) escaped from further violence by fleeing to Ethiopia, where they lived illegally for five years.<sup>2</sup> During this time, the family lived under constant threat of arrest or deportation, the children could not attend school, and Ali supported her family by working “under-the-table” as a housemaid.<sup>3</sup> Finally, on

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1. *Ali v. Ashcroft*, 394 F.3d 780, 782 (9th Cir. 2005). Ali is a member of a low-caste clan, the Muuse Dirriye, who traditionally occupy a powerless position in Somali society. *Id.* The regime of Siad Barre granted greater political opportunities to the Muuse Dirriye, which resulted in violent reprisals against clan members, after his government collapsed into civil war. *Id.*

2. *Id.* at 783.

3. *Id.*

November 21, 1996, Ali and her two sons traveled to the United States, where they applied for asylum.<sup>4</sup>

Ms. Ali's five year flight from Somalia, spending years illegally in an intermediate country, is not unusual.<sup>5</sup> Prior to reaching U.S. soil, asylum applicants commonly pass through a number of "third" countries, often for extended periods of time.<sup>6</sup> Like Ms. Ali, applicants sometimes work, legally or illegally, to raise funds for their onward journey, or to support themselves while searching for family or other social contacts overseas who can assist them.<sup>7</sup> During these stays, applicants may also receive temporary legal status in third countries.<sup>8</sup> International conventions and U.S.

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4. *Id.* at 784.

5. *See, e.g.*, *Rosenberg v. Woo*, 402 U.S. 49, 57 n.6 (1971) ("[M]any refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way. Such stops do not necessarily mean that the refugee's aim to reach these shores has in any sense been abandoned."); *see also* *Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006) (considering asylum claim by a Mauritanian refugee who lived in a refugee camp in Senegal for five years before reaching the United States); *Diallo v. Ashcroft*, 381 F.3d 687 (7th Cir. 2004) (considering asylum claim by a Mauritanian refugee who lived as an illegal street merchant in Senegal for four years before stowing away on a cargo ship to Baltimore).

6. In 2002, more than 20,000 African refugees fleeing persecution resided temporarily in South Africa due to "lack of money" and "inability to arrange travel onward," among other reasons. Robert D. Sloane, *An Offer of Firm Resettlement*, 36 *Geo. Wash. Int'l L. Rev.* 47, 65–66 (2004).

7. *See supra* notes 5–6 and accompanying text.

8. Asylum seekers commonly receive some form of temporary status while awaiting final determination of their asylum claim. For example, in South Africa: [n]ewly arrived asylum seekers are registered and issued with a temporary residence permit in terms of Section 22 of the Refugees Act . . . [which] allows the holder to sojourn in the Republic while his or her claim is under consideration by the Refugee Status Determination Officers. . . . These permits are renewed every thirty days at any Refugee Reception Office in the country.

Gcinunzi Ntlakan, Acting Deputy Dir. Gen., Dep't of Home Affairs, Statement on the Refugee Backlog Project at the Court Classique Hotel in Arcadia, Pretoria (Apr. 20, 2006), *available at* <http://www.info.gov.za/speeches/2006/06042108451002.htm>. However, South Africa still struggles to process applications from the late 1990s, delays which "have resulted in some instances in unlawful arrests, detention and deportation of legitimate applicants." *Id.* The backlog is enormous: "in December 2005 there were over 140,000 people who had applied for asylum but whose status had yet to be determined." Loren B. Landau, *Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy*, 19 *J. Refugee Stud.* 308, 312 (2006). Even obtaining fingerprints, part of

regulations recognize that such extended journeys and temporary residences are often necessary and should not bar applicants from obtaining asylum *per se* at a later date.<sup>9</sup>

The primary purpose and inviolable commitment of all international treaties on refugees is to prevent *refoulement*: removal to a country where persecution will occur.<sup>10</sup> To achieve this purpose, Article 1(E) of the United Nations Convention Relating to the Status of Refugees of 1967 provides that an applicant will be eligible for asylum, even if he resided in a third country, so long as he has not

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the Section 22 permit process, can take up to two years. Niren Tolsi, *Refugees in Backlog Limbo*, Mail & Guardian Online, June 5, 2008, available at <http://www.mg.co.za/article/2008-06-05-refugees-in-backlog-limbo>. This temporary status should not be confused with the temporary protection sometimes instituted in order to cope with large influxes of refugees, which entirely removes them from the asylum process and does not offer the possibility of permanent resettlement. See generally Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 Am. J. Int'l L. 279 (2000) (discussing the development of temporary protection in European countries in response to Bosnian and Kosovar refugees).

9. See, e.g., United Nations Convention Relating to the Status of Refugees, adopted July 28, 1951, art. 1(E), 19 U.S.T. 6259, 6263, 189 U.N.T.S. 137, 156 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention] (establishing that residence in a third country does not bar asylum, unless certain criteria are met); 8 C.F.R. § 208.15(a) (2007) (mandating that travel through third countries does not bar asylum in the United States if certain criteria are met). Although a long delay in an application does not bar asylum, a credible fear of persecution may no longer exist, due to changes in country conditions years after an applicant flees. Therefore, applicants have an incentive to apply for asylum while the persecuting activities are ongoing and demonstrable. Many courts will consider a long delay between flight and application for asylum as evidence there is not a credible fear of persecution. See, e.g., *Ngwenya v. Canada*, [2008] F.C. 156, para. 23 (Can.) (“The issue of delay can go to the existence of a subjective fear of persecution. In certain exceptional situations, a claimant’s delay may be so extreme that it is nearly determinative of the claim.” (citations omitted)).

10. See Refugee Convention, *supra* note 9, art. 33 (prohibiting return when the individual’s “life or freedom would be threatened on account of his race, religion, nationality, membership of a social group or political opinion”); United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, art. 1, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268, 270 (entered into force Oct. 4, 1967) [hereinafter Refugee Protocol] (lifting temporal and geographic limitations on the Refugee Convention’s *non-refoulement* obligations); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, art. 3 (entered into force June 26, 1987) [hereinafter CAT] (prohibiting *refoulement* to a “[s]tate where there are substantial grounds for believing that he would be in danger of being subjected to torture”).

been “recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.”<sup>11</sup> Moreover, a refugee does not cease to be defined as a refugee until he “has acquired a new nationality, and enjoys the protection of the country of his new nationality.”<sup>12</sup> These provisions are incorporated into the laws of the signatory states.<sup>13</sup> In other words, once a refugee has been given permanent legal protection in a host country, he ceases to have legal status as a “refugee,” and he loses the right to apply for asylum in all other countries.

This doctrine is commonly referred to as the “firm resettlement bar.” Unlike other Article I bars to asylum,<sup>14</sup> the firm resettlement bar is not related to the merits of the applicant’s claim for asylum.<sup>15</sup> For example, under U.S. law, the firm resettlement inquiry follows *after* the court determines the applicant is qualified for asylum.<sup>16</sup> The court may find that although the applicant would be persecuted if returned to her home country, asylum in the United States is unnecessary because she has already obtained safe haven

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11. Refugee Convention, *supra* note 9, art. 1(E).

12. *Id.* art. 1(C)(3).

13. “Congress codified the mandatory prohibition on grants of asylum to firmly resettled refugees when it passed the Illegal Immigration Reform and Illegal Immigrant Act of 1996.” *Diallo v. Ashcroft*, 381 F.3d 687, 693 (7th Cir. 2004). *See* 8 U.S.C. § 1158(b)(2)(A)(vi) (2006), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 604, Pub. L. No. 104-208, 110 Stat. 3009.

14. Other bars include serious criminal convictions, commission of crimes against humanity, health risks, and other security risks. *See* Refugee Convention, *supra* note 9, art. 1(F).

15. The United Nations High Commissioner for Refugees interprets art. 1(F) as “[p]ersons considered not to be *deserving* of international protection” while it interprets resettlement in art. 1(E) as “[p]ersons not considered to be *in need* of international protection.” United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, chs. IV(B)(2)–(3), U.N. Doc HCR/IP/4/Eng/Rev.1 (Jan. 1992), *available at* <http://www.unhcr.org/home/PUBL/3d58e13b4.pdf> [hereinafter UNHCR Handbook] (emphasis added).

16. Functionally, it is often more efficient to consider the firm resettlement issue first. *See Diallo v. Ashcroft*, 381 F.3d 687, 692 (7th Cir. 2004) (noting the proper order of inquiry but arguing that, “[firm resettlement] seems the logical place to begin . . . . If the doctrine of firm resettlement sounds the death knell on the asylum-seeker’s claim, there is simply no need to continue on to determine [the merits of the asylum claim].”).

elsewhere. Firm resettlement reflects the principle that once obtained, “[n]ational protection and status in a third country negate the need for international protection.”<sup>17</sup> Without this bar, victims of persecution might have a life-long special status, permitting them to seek new nationalities in any country that honored the Refugee Conventions.

Because applicants frequently reside in third countries prior to reaching the United States, the interpretation of the doctrine of firm resettlement has a significant impact on asylum applicants. Federal courts are split, however, on how to determine when an applicant has firmly resettled in a third country and, therefore, is no longer eligible for U.S. asylum. Two approaches exist: a formal offer approach and the “totality of the circumstances” approach.

The Third, Seventh, and Ninth Circuits have adopted the more recent formal offer approach to the issue.<sup>18</sup> Under this approach, asylum seekers are not considered firmly resettled unless they have been offered some form of *permanent* resettlement from a third country, regardless of the length of settlement in third countries. In contrast, the Second, Fourth, Eighth, Tenth, and D.C. Circuits utilize the older “totality of the circumstances” approach.<sup>19</sup> Under this approach, an asylum seeker who has resided in a third country and has not exhausted his or her opportunities for asylum

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17. Deborah E. Anker, *Law of Asylum in the United States* 447 (3d ed. 1999).

18. *See, e.g.*, *Maharaj v. Gonzales*, 416 F.3d 1088, 1092 (9th Cir. 2005) (adopting the formal offer approach); *Diallo*, 381 F.3d at 694–95 (rejecting “the now out-dated ‘totality of the circumstances’ analysis”); *Abdille v. Ashcroft*, 242 F.3d 477, 486 (3d Cir. 2001) (adopting the formal offer approach).

19. *See, e.g.*, *Sall v. Gonzales*, 437 F.3d 229, 233–35 (2d Cir. 2005) (*per curiam*) (acknowledging the persuasiveness of the “reasoning of those circuits that have applied the ‘totality of circumstances’ test”, but emphasizing the “particular importance . . . of whether he actually received an offer of permanent resident status”). This emphasis somewhat undermines the court’s avowed support for the “totality of the circumstances” approach. *See also* *Mussie v. INS*, 172 F.3d 329, 331–32 (4th Cir. 1999) (affirming a finding of firm resettlement in part based on a six-year stay in a third country, receipt of government assistance, and renting of a personal apartment); *Abdalla v. INS*, 43 F.3d 1397, 1400 (10th Cir. 1994) (considering family ties); *Farbakhsh v. INS*, 20 F.3d 877, 881 (8th Cir. 1994) (listing factors relevant to determination of firm resettlement, such as “family ties” and “business or property connections”) (internal quotation marks omitted); *Chinese Am. Civil Council v. Att’y Gen.*, 566 F.2d 321, 326 (D.C. Cir. 1977) (finding Chinese asylum applicants had firmly resettled during lengthy stay in Hong Kong).