FIRM RESETTLEMENT AND THE NORTH KOREAN HUMAN RIGHTS ACT

by Judith L. Wood and Krista Kopina [*]

The U.S. attorney general is barred from granting asylum to an otherwise deserving refugee if that person has "firmly resettled" in another country prior to arriving in the United States.[1] The doctrine of firm resettlement originates in the definition of a refugee in the 1951 Convention Relating to the Status of Refugees (Refugee Convention).[2] The Immigration and Nationality Act (INA) does not furnish a definition of "firm resettlement," but federal regulations do. Specifically, 8 Code of Federal Regulations (CFR) §208.15, captioned "Definition of 'firm resettlement,'" provides the following:

> An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:
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> (a) That his or her entry into that nation was a necessary consequence of his or her flight from persecution, that he or she remained in that nation only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that nation; or
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> (b) That the conditions of his or her residence in that nation were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled."[3]

Under this scheme the government initially bears the burden of establishing that a petitioner firmly resettled.[4] If the government persuades an immigration judge (IJ) that the petitioner firmly resettled and the evidence is legally sufficient to support that conclusion, the burden shifts to the petitioner to establish an exception noted in the regulations.[5]

THE GOVERNMENT MUST PROVIDE DIRECT EVIDENCE OF AN OFFER OF PERMANENT SETTLEMENT

What constitutes an *offer of permanent settlement* in a country other than the one the refugee is fleeing from? This has been the subject of considerable discussion and debate in the courts.

The U.S. Court of Appeals for the Ninth Circuit held that the Department of Homeland Security (DHS) "bears the initial burden of showing 'an offer of permanent resident status, citizenship, or some other type of permanent resettlement' under §208.15."[6] The court unequivocally stated "that §208.15 plainly focuses the firm resettlement inquiry on the existence *vel non* of an offer."[7] Indeed, "'firm resettlement' necessarily, and *by definition*, is coextensive with *an offer*."[8] An "offer" is "'[t]he act or an instance of presenting something for accep-

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[1] Immigration and Nationality Act (INA) §208(b)(2)(A)(vi).

[2] The 1951 Convention Relating to the Status of Refugees states that a person seeking asylum is not a refugee if the person "has acquired a new nationality, and enjoys the protection of the country of his new nationality…." *Convention Relating to the Status of Refugees*, Art. 1 §C(3) (Apr. 22, 1954), 189 U.N.T.S. 150. Even before passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the U.S. Supreme Court held in *Rosenberg v. Woo* that firm resettlement constituted a factor in evaluating asylum petitions. *Rosenberg v. Woo*, 402 U.S. 49 (1971). The underlying rationale to denying asylum in instances of firm resettlement was that persons firmly resettled elsewhere "are by definition no longer subject to persecution." *Yang v. INS*, 79 F.3d 932, 939 (9th Cir. 1996). Courts have explained that asylum is available "to protect those arrivals with nowhere else to turn. " *Sall v. Gonzales*, 437 F.3d 229, 233 (2d Cir. 2006). The Rosenberg Court, however, noted that refugees who flee persecution in successive steps are not disqualified from gaining asylum; rather, this policy is merely aimed at those refugees "who either never aimed to reach these shores or have long since abandoned that aim." 402 U.S. at 57, n.6.

[3] 8 Code of Federal Regulations (CFR) §208.15.

[4] *See Sall v. Gonzales*, 437 F.3d 234 (2d Cir. 2006).

[5] *See* 8 CFR 208.15; *Sall* 437 F.3d at 234.

[6] *Maharaj v. Gonzalez*, F.3d 6389, 6411 (9th Cir. 2006).

[7] *Id.* at 6413.

[8] *Id.* at 6415–16.

tance.'"[9] As a threshold matter, then, DHS must produce evidence that the alien seeking asylum either entered, or once there, obtained an offer for acceptance of "permanent resident status, citizenship, or some other type of permanent resettlement."[10] Absent an initial finding of an offer, conditions of the alien's stay in the third country are irrelevant.[11]

The language "some other type of permanent resettlement" … "was likely added to account for the great variety in names and types of permanent offers of settlement in countries around the globe and was not meant to … undo the requirement of a governmental 'offer.'"[12] In addition, the court's recognition that an offer is an act of presenting something for acceptance means that DHS must show that the applicant was entitled to permanent settlement in the third country and chose not to accept it.[13] In other words, the mere possibility of permanent settlement is not enough; it must be an actual offer in order to serve as a bar to asylum pursuant to 8 CFR §208.15.

While the duration of stay in another country can be significant in establishing that the asylum applicant was permanently resettled, it is not sufficient.[14]

In *Abdille v. Ashcroft*,[15] the U.S. Court of Appeals for the Third Circuit interpreted for the first time the meaning of the "firm resettlement bar" to asylum now codified in the INA and further defined in 8 CFR §208.15. The court concluded that

> the plain language of §208.15 makes clear that the prime factor in the firm resettlement inquiry is the existence of an offer of permanent resident status, citizenship, or some other type of permanent resettlement. While recognizing that factors other than the issuance of such an offer may prove relevant to the firm resettlement question, we reject an alternative "totality of the alien's circumstances" approach that would have us consider the existence of an offer as simply one component of a broader firm resettlement inquiry according equal weight to such non-offer-based factors as the alien's length of stay in a third country, the economic and social ties that the alien develops in that country, and the alien's intent to make that country his permanent home.

Quoting the *Abdille* decision, the *Diallo v. Ashcroft* court explained, "[A]bsent some government dispension, an immigrant who surreptitiously enters a nation without its authorization cannot obtain official resident status no matter his length of stay, his intent, or the extent of the familial and economic conditions he develops. Citizenship or permanent residency cannot be gained by adverse possession."[16]

If Direct Evidence Cannot Be Obtained, Surrogate Evidence Is Permissible

If DHS cannot obtain direct evidence of an offer, it is required to make a satisfactory showing of that fact.[17] Upon showing that evidence is not obtainable to substantiate an offer by the third country to the asylum applicant, DHS may resort to "non-offer-based" evidence as a surrogate for offer-based evidence at the threshold stage.[18] The court instructs that "[t]he evidence must be of sufficient force to show that the alien's length of residence, intent, and ties in the third country indicate that the third country officially sanctions the alien's indefinite presence."[19] Non–offer-based factors may serve as a proxy for direct evidence of an offer "'if they rise to a sufficient level of clarity and force.'"[20] These factors can include the length of the alien's stay in the third country, the extent of economic and social ties developed by the alien, and the intent of the alien to remain in the third country.[21] Again, it cannot be emphasized enough that evidence of an offer is necessary; if it is not obtainable, DHS must (1) make an initial showing that the evidence cannot be obtained; and (2) provide evidence that the third country officially sanctions the asylum applicant's open-ended presence.

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[9] *Id.* at 6417, quoting *Black's Law Dictionary* 1113 (8th Ed. 1999).

[10] 8 CFR §208.15.

[11] *Maharaj v. Gonzalez*, F.3d 6415 (9th Cir. 2006).

[12] *Id.* at 6417, quoting *Diallo v. Ashcroft*, 381 F.3d 687, 694 n.5.

[13] *Maharaj v. Gonzalez*, F.3d 6420 (9th Cir. 2006).

[14] *See Sall*, 437 F.3d at 235 ("[T]he mere passage of four years, standing alone, does not constitute firm resettlement.").

[15] *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001).

[16] *Diallo*, 381 F.3d at 693.

[17] *Maharaj v. Gonzalez*, F.3d 6416 (9th Cir. 2006).

[18] *Id.* at 6416.

[19] *Id.*

[20] *Id.* at 6413, quoting *Abdille*, at 487 (3d Cir. 2001).

[21] *Id.*,quoting *Abdille* at 487.

BURDEN SHIFTS AND EXCEPTIONS AND CIRCUMSTANCES

If DHS makes a prima facie showing of firm resettlement, the burden then shifts to the asylum applicant "[t]o show that the nature of his stay and ties was too tenuous, or the conditions of his residence too restricted, for him to be firmly resettled."[22] This is essentially a reference to the two exceptions, 8 CFR §§208.15(a) and (b), available to asylum applicants refuting an accusation of firm resettlement.

There are two circumstances where an applicant will not be deemed firmly resettled:

(1) An applicant is not firmly resettled if "entry into the third country was a necessary consequence of flight from persecution, and the applicant remained only as long as necessary to arrange onward travel, and the applicant did not establish significant ties in that country." [23]

These applicants must show that (a) "entry into the country was a necessary consequence of his or her flight from persecution"; (b) "he or she remained in that country only as long as necessary to arrange onward travel"; and (c) "he or she did not establish significant ties in that country."[24]

(2) An applicant is not firmly resettled if "the conditions of residence were so substantially and consciously restricted by the authority of the country of refuge, that he or she was not in fact resettled."[25]

The adjudicator must consider the conditions under which "other residents of the country live" and compare them with living conditions of the asylum applicant.[26]

Millions of refugees flee persecution in their home country and find a home, permanent or not, somewhere else, including in parts of the world where there is considerable political, social, and economic instability. The existence of a vel non offer in a third country does not always provide enough protection to refugees due to the political and social circumstances. The question remains—what degree of national protection in a third country will suffice to establish that the person is no longer protected by the Refugee Convention.

As noted by Robert D. Sloane in *An Offer of Firm Resettlement*, it is not "firm resettlement" if the refugee is unable to "enjoy a level of rights and protections tantamount to, if not identical with, those of citizenship."[27] Factors that the adjudicator should examine include rights to housing, employment, travel, public relief, education, naturalization, and property.[28] The Ninth Circuit held in *Andriasian v. INS* that an ethnic Armenian from Azerbaijan had not firmly resettled in Armenia because he was harassed and threatened there, and accused of being loyal to the Azerbaijanis.[29]

The regulations list factors that the immigration judge should consider in determining whether the latter circumstance applies in excepting an alien from being deemed firmly resettled:

A. the conditions under which other residents of the country live;

B. the type of housing, whether permanent or temporary, made available to the refugee;

C. the types and extent of employment available to the refugee;

D. the extent to which the refugee received permission to hold property; and

E. the extent to which the refugee enjoyed other rights and privileges, such as travel documentation including a right of entry and re-entry, education, public relief, or naturalization, ordinarily available to other residents in the country.[30]

Canada has adopted an interpretation of effective protection that requires comprehensive consideration of all relevant circumstances in third countries. Canadian courts consider the quality and duration of time spent in the third country, and whether the individual can access status determination procedures.[31] In addi-

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[22] *Id*. at 6418.

[23] 8 CFR §208.15(a).

[24] *Id.*

[25] 8 CFR §208.15(b).

[26] *Id.*

[27] 36 *Geo. Wash. Int'l L. Rev*. 47, 57 (2004).

[28] 8 CFR §208.15(b). *Camposeco-Montejo*, 2004 WL 2072038 * 3 (Guatemalan was not firmly resettled in Mexico because he did not receive an offer of permanent resettlement, and he was restricted to the municipality in which his refugee camp was located, was not allowed to attend Mexican schools, and was threatened with repatriation) (internal quotation marks omitted.).

[29] *Andriasian v. INS*, 180 F.3d 1033, 1043–49 (9th Cir. 1999).

[30] 8 U.S.C. §1208.15(b).

[31] *Williams v. S.S.C.* F.C.T.D. IMM 4244–94 (Reed, June 30, 1995). While this factor is not as significant when the stay is temporary, it does become more important where the stay is longer and/or when the refugee initiated a claim in a third country and abandoned it to file a claim in Canada.

tion, Canadian courts consider the claimant's subjective perception of his or her level of safety, as well as objective factors, including whether the claimant will enjoy genuine protection. Access for refugees to employment, education, and social services such as health care;[32] as well as the location of other family members, language abilities of the claimant,[33] and whether the refugee would be able to settle in the third country are all considered.[34]

EXCEPTION UNDER NORTH KOREAN HUMAN RIGHTS ACT OF 2004[35]

According to findings made by Congress, the "Government of North Korea is a 'dictatorship under the absolute rule of Kim Jong Il' that continues to commit numerous, serious human rights abuses."[36] The human rights violations in North Korea have been widely publicized. The U.S. Commission on International Religious Freedom (USCIRF) asserts that "[the] human rights violations of the Kim Jong Il regime are amongst the most serious worldwide."[37] The oppression and persecution of the North Korean people by Kim Jong Il's regime have caused a number of North Koreans to flee their homeland.

North Koreans were generally precluded from obtaining asylum in the United States because of the interplay conflict between the South Korean Constitution and the firm resettlement rule. Under the South Korean Constitution, "(1) [nationality] in the Republic of Korea is prescribed by law[,] and (2) [it] is the duty of the State to protect citizens residing abroad as prescribed by law."[38] In other words, the South Korean Constitution deems Koreans born in North Korea to be citizens of South Korea. As such, North Koreans who enter South Korea before coming to the United States would usually be precluded from obtaining asylum since the South Korean Constitution provides an "offer of citizenship."

North Korean refugees have never been able to come directly from North Korea to the United States to ask for asylum, nor have they ever been processed for admission to the United States as refugees.[39] Most North Korean refugees travel to South Korea from China with help of professional smugglers. Or they travel to Mongolia, Russia, and countries in Southeast Asia. The majority of North Korean refugees have no intention of remaining in any of those countries because they lack refugee protection. However, their transit often turns into a mandatory stay. The South Korean Constitution clearly asserts that the government in Seoul is the legitimate authority across the entire Korean peninsula. Thus, all inhabitants of North Korea are citizens of the Republic of Korea, and it remains politically impossible to challenge this assumption. Despite the automatic "offer of citizenship" that the South Korean Constitution avails to North Koreans, can these refugees be considered resettled?

In November 2004, President Bush signed the North Korean Human Rights Act (NKHRA) into law, and dramatically changed the way North Korean defectors would be treated under U.S. asylum law. The general purpose of the NKHRA is "to promote respect for and protection of fundamental human rights in North Korea."[40] One of the methods

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[32] *Hamdan v. Canada (M.C.I.)*, F.C.T.D. IMM 1346-96 (Jerome, March 27, 1997).

[33] *El-Naem v. Canada (M.C.I)*, F.C.T.D. IMM 1723-96 (Gibson, Feb. 17, 1997).

[34] *Soueidan v. Canada (M.C.I)*, F.C.T.D. IMM 5770-00 (Blais, Aug. 28, 2001).

[35] North Korean Human Rights Act of 2004, Sec. 3. Findings (Pub. L. No. 108-333, 118 Stat. 1287).

[36] North Korean Human Rights Act of 2004, Sec. 3. Findings.

[37] U.S. Commission on International Religious Freedom (USCIRF) Press Release, North Korea: USCIRF Welcomes North Korea Human Rights Act (Oct. 19, 2004).

[38] South Korean Constitution, Chapter 1, Article 2 [Nationality].

[39] Section 303 of the NKHRA provides that

> the U.S. shall undertake to facilitate the submission of applications by citizens of North Korea seeking protection as refugees. A survey of regional U.S. diplomatic posts gave preliminary indications that governments in the region hosting North Korean refugees (China in particular) would strongly oppose U.S. refugee admissions processing on their territory at this time. Without cooperation of such governments, the multi-step often-lengthy admissions procedures leading to the departure of North Koreans for the United States will not be possible in the region ....
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> Section 301(b)(4) – Number of North Koreans Admitted Into the U.S. in Each of Past Five Years
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> 'In the past five years, no North Koreans were resettled by the U.S. refugee admissions program. According to the Department of Justice, five North Koreans were granted asylum in FY2002, three in FY2003, and one in FY2004 by immigration courts during removal proceedings. These figures do no include decisions under appeal.

[40] North Korean Human Rights Act of 2004, Sec. 4. Purposes.

Congress chose to accomplish this goal is by changing the way North Korean defectors are regarded under U.S. asylum law. Section 302 of the NKHRA reflects this change:

> (a) Purpose – The purpose of this section is to clarify that North Koreans are not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea. It is not intended in any way to prejudice whatever rights to citizenship North Koreans may enjoy under the Constitution of the Republic of Korea, or to apply to former North Korean nationals who have availed themselves of those rights.
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> (b) Treatment of Nationals of North Korea – For purposes of eligibility for refugee status under section 207 of the Immigration and Nationality Act (8 USC 1157), or for asylum under section 208 of such act (8 USC 1158), a national of the Democratic People's Republic of Korea shall not be considered a national of the Republic of Korea.

The U.S. government has been inconsistent in its interpretation of the NKHRA, and two years after the enactment of the statute, the question still remains: Does the NKHRA provide an exception to "firm resettlement" to North Koreans as a class or should it be determined on a case-by-case basis?

The NKHRA clearly states that South Korean citizenship does not disqualify North Koreans from asylum or refugee status in the United States. North Koreans are "not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy under the Constitution of South Korea." For purposes of asylum or refugee status, North Koreans who are nationals of both North and South Korea will be considered solely as nationals of North Korea. This provision is directed at the otherwise universal bar of firm resettlement in INA §208(b)(2)(A)(vi). In essence, the NKHRA provides North Korean refugees another exemption to the regulation defining "firm resettlement."[41]

The Board of Immigration Appeals recently rendered a decision[42] in which it stated that the NKHRA precludes applicants for asylum from North Korea who have "availed themselves of South Korean citizenship" from filing for asylum in the United States. Many IJs have already granted asylum to these types of applicants, finding that the NKHRA does indeed carve out an exception.

In the author's opinion, the Department of State letter referred to in the decision is not based on actual facts but rather on hearsay based on multiple levels of misinformation and should not be relied on by any account. The people who escape from North Korea face a dismal choice: return to certain imprisonment and perhaps death, or acceptance of South Korean protection. In the United States, an immigrant must go through a long and lengthy process to become a citizen, and it is voluntary. There is nothing voluntary about the process being followed in South Korea. Those individuals do not choose to become citizens of South Korea. Many of them plead for refugee status in the United States but are rebuffed at the embassy. In accepting protection of South Korea, they are merely trying to survive what might be a fate worse than death. This author believes that the BIA's interpretation is erroneous and mean-spirited. If in fact the NKHRA is to be interpreted in the manner suggested by the BIA, it would render the legislation completely meaningless, for virtually all North Koreans pass though South Korea before coming to the United States and applying for asylum.

[41] 8 CFR §208.15.

[42] *In re K–R–Y– and K–C–S–*, 24 I&N Dec. 133 (BIA 2007).