

Federal Court



Cour fédérale

**Date: 20160916**

**Dockets: IMM-3456-15  
IMM-3458-15**

**Citation: 2016 FC 1050**

**Ottawa, Ontario, September 16, 2016**

**PRESENT: The Honourable Madam Justice Elliott**

**Docket: IMM-3456-15**

**BETWEEN:**

**ALI MOHAMED ABDI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**Docket: IMM-3458-15**

**AND BETWEEN:**

**OMAR MOHAMED ABDI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

## **JUDGMENT AND REASONS**

### **I. OVERVIEW**

[1] Two Somalian brothers, Ali and Omar, refugees living in South Africa, each applied for permanent residence in Canada on October 5, 2010. They were sponsored by Manitoba Interfaith Immigration Counsel Inc., which has a long history of providing settlement services to newcomers to Winnipeg.

[2] Both Ali and Omar allege they have a constant fear for their personal safety because they are Somalian. They say South Africa is a xenophobic country and as foreign nationals there they are in danger of being killed.

[3] The primary issue in these cases is the meaning of a “durable solution” under s. 139(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. Under s. 139(1) the onus is on a foreign national applying for a permanent resident visa to establish that “there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada”.

[4] The visa officer [Officer] in Pretoria rejected the applications on February 13, 2015, after determining that the evidence from the brothers did not meet this onus. They did not show there was no durable solution in South Africa. As a result, the Officer found they were not members of the Convention refugee abroad class or members of the humanitarian-protected persons abroad class.

[5] Counsel for Ali and Omar submits that the Officer erred by considering out of date country condition documents, not properly assessing the availability of state protection and not

recognizing that foreign refugees in South Africa face a different and higher crime rate than other residents.

[6] The issues are the same in each application, although there is a slight variation in the underlying facts. Ali was shot and stabbed while working in a store that was robbed. Omar has never been physically harmed. The reasons for the decision by the Officer are, for all important purposes, identical.

[7] For the reasons that follow, these applications are dismissed.

[8] To simplify reading, excerpts of the relevant legislation are contained in the Annex attached.

## II. **BACKGROUND**

[9] Ali and Omar arrived in South Africa on August 28, 2010. They were granted formal refugee status in South Africa, which is valid until October 23, 2016. That status gives them the same rights as a South African citizen other than the right to vote. The Officer notes it is the legal equivalent of permanent residence in Canada.

[10] In April 2011, eight months after his application was filed, Ali was attacked one night while working as a shopkeeper. He was shot and stabbed. He suffered head injuries and required treatment at a hospital. The other worker in the shop was killed. Ali said the attackers left the shop believing he was dead. He reported the attack to the police, who assigned a case number but, to the knowledge of Ali, nothing else occurred. However, Ali lost the cell phone that contained the police case number, so he was unable to follow up with the police.

[11] When asked by the Officer to explain why he did not have a durable solution in South Africa, Ali stated that “the people that we live with rob and kill us. I have been physically hurt – I have a big scar on my head they want to kill me – I ran away from where I used to live.”

[12] Omar had never personally been attacked or hurt. In his interview he said he was scared to stay in South Africa because his brother was hurt, the other person was killed and he knows people who were killed because they were Somali. He said if Somalians defend themselves they can be killed for nothing because “here people just shoot”.

[13] When asked by the Officer to explain why he did not have a durable solution in South Africa, Omar stated that “the government gave us permission to stay but we are not in a refugee camp and can work anywhere but while we are waiting to survive we have many problems to face like being killed and threatened, robbed and looted sometimes by individuals. We have friends who are Somalian who have been killed.”

[14] After interviewing each brother, the Officer’s overall conclusion, with which Ali and Omar take issue, was that they had provided no evidence that they were the victims of xenophobic violence rather than victims of the general level of crime that exists in South Africa. They had the right to work and study in South Africa, enjoyed mobility rights and were able to avail themselves of the protection of government agencies.

[15] The Officer also found that although xenophobic attacks occurred in South Africa, the government was taking steps to address the attacks and to protect migrants. As an example, the officer noted the 2010 FIFA World Cup took place without any major incident.

### III. **ISSUES**

[16] The issue is whether the Officer erred in applying Ali and Omar's personal circumstances to the law when concluding they had not shown there was no durable solution in South Africa. The factors to be considered in reviewing the decision include those set out by counsel as issues which are:

1. Did the officer either fail to have regard to or consider perversely:
  - a) relevant country condition information, or
  - b) effectiveness or adequacy of state protection?
2. Is a risk of crime at the same rate as locals a sufficient justification for a durable solution?
3. Was the decision on durable solution reasonable?

### IV. **STANDARD OF REVIEW**

[17] Counsel for Ali and Omar submits the standard of review for a finding that there is a durable solution is correctness. In support, he relies on the Court of Appeal decision in *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 [*Hernandez Febles*]. I note, however, that *Hernandez Febles* dealt with the interpretation of Article 1F(b) of the *United Nations Convention relating to the Status of Refugees*. The Court of Appeal determined, at paragraph 24, that interpretation of an international convention should be as uniform as possible, so correctness should be the standard of review.

[18] It is not necessary to make a fresh determination of the standard of review in this case as it has previously been satisfactorily determined: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62. The standard of review of the meaning of a durable solution is well settled in this court as reasonableness: *Barud v Canada (Citizenship and Immigration)*, 2013 FC 1152 at para 12

[*Barud*]; *Uwamahoro v Canada (Citizenship and Immigration)*, 2016 FC 271 at para 7 and cases cited therein [*Uwamahoro*]. Mr. Justice O'Reilly in *Barud* distinguished *Hernandez Febles* on the basis that the term "durable solution" is not equivalent to the definition of a refugee or of grounds for exclusion such as in *Hernandez Febles*. I agree with his finding that in determining whether a particular applicant has a durable solution in another country, the answer involves a mixed question of fact and law. It requires an assessment of the personal circumstances of the applicants and the country conditions where they reside.

[19] I accept the standard of review in this matter is reasonableness. A decision is reasonable when there is justification, transparency and intelligibility in the decision-making process and the actual decisions falls within a range of possible, acceptable outcomes that are defensible both on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

## V. ANALYSIS

[20] Ali and Omar claim there is no durable solution in South Africa because, as Somalians, their lives are in danger. When asked to explain, both brothers indicated they feared being killed. Their evidence was to the effect that people were killed because they are Somali and neither of them felt safe as a result. They summarized it as "they rob and kill us. There is no protection."

[21] Counsel for Ali and Omar submits the Officer either failed to have regard to or perversely considered the relevant country condition information on the effectiveness or adequacy of state protection. He submits that the risk of crime being generalized cannot be grounds for finding there is a durable solution. He states a refugee who is subject to generalized risk in the country of temporary refuge does not have a durable solution as they are not safe. He also submits there is

ample evidence of xenophobic violence contained in the country condition documentation and the Officer either ignored it or selectively relied on more favourable sections of the reports.

[22] The rejection letter from the High Commission of Canada in Pretoria noted the relevant legislation and set out s. 139(1) of the Regulations. It was noted that each brother had been accepted as a Convention refugee in South Africa with the same rights as a South African citizen with the exception of voting rights. The letter stated that the Officer, who is located in South Africa, was not satisfied that they did not have a durable solution in South Africa. As a result, they did not meet the requirements of the Regulations.

[23] The Global Case Management System notes provide the underlying reasons for the rejection. The notes detail the interview process and the questions canvassed with each brother as well as their answers. The notes show the Officer acknowledged that xenophobic attacks occurred in South Africa during 2008, but that since then South Africa signed the Geneva Convention and its Protocols. In addition, South Africa had become a party to a number of core international human rights treaties and it has tried to implement policies to put them into effect. The Officer referred specifically to the 2011 Special Rapporteur visit to South Africa and the report published thereafter, which noted that improvements were still necessary and made a number of recommendations to the government. The Officer reviewed United Nations High Commissioner for Refugees services for refugees in South Africa and noted that in 2011 the situation was improving. As stated by counsel for the brothers, more recent country condition documents were not referred to by the Officer. The record is not clear as to whether more recent documents were before the officer but, assuming they were, there is a presumption that all such

materials were considered: *Florea v. Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (QL) (CA).

[24] The Officer reviewed the fact that with permanent residence the brothers may eventually apply for citizenship and, although citizenship is difficult to obtain, their current status permitted them to enjoy all the rights of a citizen other than to vote. The officer knew the personal circumstances of the brothers, their marital status (single) and the justifications they each put forward for no durable solution existing in South Africa. The officer reviewed country condition documents and noted there were difficulties but found on a forward-looking basis that efforts were being made to protect migrants and address xenophobic attacks.

[25] Counsel for Ali and Omar points to other, more recent, documents that show there is still a problem for foreign nationals. He also complains that the Officer uses the same boilerplate text, including spelling errors, when reviewing whether there is a durable solution. Counsel says that by doing so there is no personalized assessment and he has failed to consider newer documents showing there are still problems operationalizing state protection. In both *Barud* and *Mahamed v Canada (Citizenship and Immigration)* (17 December 2015), IMM-2646-15 (FC) [*Mahamed*] it was confirmed that a durable solution analysis does not require a finding that there is an existing ability of the state to protect. What was relevant and to be considered were the plans and intentions of the state. I am not persuaded that the Officer came to an unreasonable conclusion in this respect as there are many signs of progress and intentions are continuing even though there are still clearly issues.

[26] While use of boilerplate text in some cases provides sufficient grounds to believe the decision was not personalized, it is acceptable when the boilerplate used addresses historic



documents and actions taken by a country provided that it is clear the decision-maker put their mind to the actual issues and made an independent decision based on the evidence: *Gomez Cordova v. Canada (Citizenship and Immigration)*, 2009 FC 309 at para 24; *Cojocararu v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para 49.

[27] I am satisfied the Officer came to the decision based on the evidence. There is more than one way to consider the evidence. Omar has never been a victim of an attack and he has at best a generalized fear. It was reasonable for the Officer to conclude that Ali was a victim of general crime committed during a robbery that occurred when thieves broke through the shop door at night to gain entry. That determination was not a denial that there are xenophobic conditions. It was a finding that xenophobia was not the only possible cause of the robbery given the level of generalized crime prevalent in South Africa. Such a finding was reasonably open to the Officer on the evidence. The events took place after the application for permanent residence was filed. There was no evidence of prior threats against the shop or against Ali, nor was there evidence of any subsequent violence against Ali.

[28] The Officer conducted an analysis that looked at the personal situation of each of Ali and Omar, as well as the country conditions in South Africa. Noting the onus was on the applicants to show there was no durable solution in South Africa, the Officer reasonably determined the rights they enjoyed were akin to those of a permanent resident in Canada and the harm occasioned was part of a generalized risk. The onus was on each of Ali and Omar to show there was no durable solution in South Africa. Given the evidence, the conclusion that they did not meet the onus was reasonably open to the Officer.

[29] Finally, while counsel for the applicants proposed four questions for certification, I have determined they have either previously been determined (such as the standard of review) or they fall into the same category as in *Mahamed* in that they would not be dispositive of an appeal. It was noted in *Mahamed* that the four questions proposed for certification there were similar to those in *Barud* and *Hussein v Canada (Citizenship and Immigration)* (25 November 2015), IMM-1097-15 (FC). I confirm they are also the same as the questions proposed on behalf of Ali and Omar. I find there is no question suitable for certification.

[30] For the foregoing reasons, the applications are dismissed. There is no serious question of general importance for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. These applications are dismissed.
2. There is no serious question of general importance for certification.

“E. Susan Elliott”

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Judge

ANNEX*Immigration and Refugee Protection Regulations, SOR/2002-227*

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|---|--|
| <p>139 (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that</p>       | <p>139 (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis :</p> |
| <p>(a) the foreign national is outside Canada;</p>  | <p>a) l'étranger se trouve hors du Canada;</p>   |
| <p>(b) the foreign national has submitted an application for a permanent resident visa under this Division in accordance with paragraphs 10(1)(a) to (c) and (2)(c.1) to (d) and sections 140.1 to 140.3;</p> | <p>b) il a fait une demande de visa de résident permanent au titre de la présente section conformément aux alinéas 10(1)a) à c) et (2)c.1) à d) et aux articles 140.1 à 140.3;</p>                                 |
| <p>(c) the foreign national is seeking to come to Canada to establish permanent residence;</p>  | <p>c) il cherche à entrer au Canada pour s'y établir en permanence;</p>  |
| <p>(d) the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely</p>                      | <p>d) aucune possibilité raisonnable de solution durable n'est, à son égard, réalisable dans un délai raisonnable dans un pays autre que le Canada, à savoir :</p>   |
| <p>(i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or</p>   | <p>(i) soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle,</p>   |
| <p>(ii) resettlement or an offer of resettlement in another country;</p>  | <p>(ii) soit la réinstallation ou une offre de réinstallation dans un autre pays;</p>  |
| <p>(e) the foreign national is a member of one of the classes prescribed by this Division;</p>  | <p>e) il fait partie d'une catégorie établie dans la présente section;</p>   |
| <p>(f) one of the following is the case, namely</p>   | <p>f) selon le cas :</p>   |
| <p>(i) the sponsor's sponsorship application for the foreign national and their family members included in the application for protection has been approved under these Regulations,</p>                      | <p>(i) la demande de parrainage du répondant à l'égard de l'étranger et des membres de sa famille visés par la demande de protection a été accueillie au titre du présent règlement,</p>                           |
| <p>(ii) in the case of a member of the</p>  | <p>(ii) s'agissant de l'étranger qui appartient à la</p>   |

Convention refugee abroad class, financial assistance in the form of funds from a governmental resettlement assistance program is available in Canada for the foreign national and their family members included in the application for protection, or

(iii) the foreign national has sufficient financial resources to provide for the lodging, care and maintenance, and for the resettlement in Canada, of themselves and their family members included in the application for protection;

[...]

catégorie des réfugiés au sens de la Convention outre-frontières, une aide financière publique est disponible au Canada, au titre d'un programme d'aide, pour la réinstallation de l'étranger et des membres de sa famille visés par la demande de protection,

(iii) il possède les ressources financières nécessaires pour subvenir à ses besoins et à ceux des membres de sa famille visés par la demande de protection, y compris leur logement et leur réinstallation au Canada;

[...]

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKETS:** IMM-3456-15 AND IMM-3458-15

**STYLE OF CAUSE:** ALI MOHAMED ABDI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**AND DOCKET:** IMM-3458-15

**STYLE OF CAUSE:** OMAR MOHAMED ABDI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** WINNIPEG, MANITOBA

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**DATED:** SEPTEMBER 16, 2016

**APPEARANCES:**

David Matas FOR THE APPLICANTS

Nalini Reddy FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

David Matas FOR THE APPLICANTS  
Barrister and Solicitor  
Winnipeg, Manitoba

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General  
of Canada